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Indiana's Collateral Source Act: Confusing Courts and Undermining the Subrogation Rights of Worker's Compensation Carriers One Interpretation at a Time

Jamie R. Kauther

INDIANA'S COLLATERAL SOURCE ACT: CONFUSING COURTS AND UNDERMINING THE SUBROGATION RIGHTS OF WORKER'S COMPENSATION CARRIERS ONE INTERPRETATION AT A TIME

I. INTRODUCTION

Worker's compensation was developed during the height of the Industrial Revolution to counteract the devastating effects from frequently occurring workplace injuries, and to protect employers from crippling civil judgments.[1] Worker's compensation benefits both injured workers and employers by alleviating the tort system's potential for a financially devastating damages award.[2] In doing so, the system establishes a beneficial trade-off for employees and employers in the event of an on-the-job injury, resulting in decreased litigation costs and improved judicial efficiency.[3]

Every state requires all employees and employers to follow the state's specific worker's compensation requirements.[4] Since worker's compensation imposes limitations on recovery for injured employees, states have allowed injured parties to pursue third-party actions for other damages.[5] To reduce double recovery risks and reimburse carriers, all fifty states now provide carriers with subrogation rights.[6] Essentially, subrogation rights allow a worker's compensation carrier who has extended benefits to an injured employee to stand in the shoes of the employee and be reimbursed by the negligent party for any incurred costs.[7] This stand-in method prevents double recovery by eliminating

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1 *See infra* Part II.A (noting that before the advent of worker's compensation, both the employer and the employee were greatly harmed in the event of a workplace injury).

2 *See infra* Part II.A (discussing that a single civil judgment, even though rare, could financially devastate an employer).

3 *See infra* Part II.A (discussing that the state legislatures wanted a benefits program that was faster than Social Security or Medicare).

4 *See infra* Part II.A (demonstrating that worker's compensation claims must be brought before the Workmen's Compensation Board, which is overseen by the state pursuant to Indiana Code section 22-3-2-6); *see also* IND. CODE ANN. § 22-3-2-6 (West 2005) (discussing the process and function of the Workmen's Compensation Board in Indiana).

5 *See infra* Part II.B (explaining how subrogation allows carriers who supply worker's compensation benefits to injured parties to recoup those losses).

6 *See infra* Part II.B (explaining the statutes' purpose is to prevent double recovery and protect the carriers' interests); *see also infra* notes 27, 31 (explaining the various state subrogation statutes and the priorities they respectively give the interested parties in worker's compensation cases).

7 *See infra* Part II.B (discussing how subrogation operates to reimburse the employer or carrier, whomever is the payer of the worker's compensation benefits).

the risk that the jury's award will include costs already received in worker's compensation benefits.[8]

The rise in health care costs and desire to abolish frivolous lawsuits has triggered a recent tort reform movement, which has a dangerous effect on the subrogation rights of carriers.[9] In response to the movement, states, like Indiana, have changed their collateral source statutes through abrogation.[10] Abrogation allows evidence of certain third-party benefit payments to be introduced at trial.[11] Collateral source abrogation varies across the states and often influences subrogation rights.[12] The main purpose behind abrogation is to prevent meritless lawsuits by eliminating the chance of double recovery by plaintiffs.[13] Some states, like Indiana, have abrogated the collateral source rule for worker's compensation payments.[14] However, the ambiguous language in Indiana's collateral source statute leaves award allocation and jury intent extremely difficult to ascertain.[15] The statute's nebulous language affords plaintiffs double recoveries, undermines the tort reform movement's purpose, and costs Indiana businesses millions in unnecessary litigation expenses and damages.[16]

Part II of this Note details the history and development of worker's compensation law and subrogation rights for carriers.[17] Part II also explains the history of tort reform and its impact on the collateral source rule.[18] Next, Part III analyzes the present problems with the ambiguous

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8 *See infra* Part II.B (clarifying how subrogation prevents double recovery); *see also* Parts II.A.1, II.B.1 (explaining the courts' interpretations of the various subrogation statutes and noting the "strong policy against double recovery" (quoting Freel v. Foster Forbes Glass Co., 449 N.E.2d 1148, 1151 (Ind. Ct. App. 1983)).

9 *See infra* Part II.D (noting that the development of tort reform was to address frivolous lawsuits for medical malpractice).

10 *See infra* Part II.D (explaining the various state approaches to abrogating their collateral source statutes and the purposes for such abrogation).

11 *See infra* Part II.D (discussing the onslaught of abrogation across the nation and the different approaches taken by the various states).

12 *See infra* Part II.D (explaining how there is no consistency across the states in the abrogation of collateral source statutes).

13 *See infra* Part II.B (explaining that the chance of double recovery can entice plaintiffs to file frivolous lawsuits to receive money that would not otherwise be owed to them).

14 *See infra* Part II.D (detailing the states' various approaches to abrogation).

15 *See infra* Part III.B (explaining that the ambiguous language in the collateral source statute undermines the purpose of subrogation).

16 *See infra* Part III (explaining that the interpretations the courts are left to make are often subjective and detrimental to the carriers).

17 *See infra* Part II.A (describing the developments of worker's compensation system and the advent of subrogation rights to further the system's purpose).

18 *See infra* Part II.B (detailing the advent of the tort reform movement in the wake of the healthcare crises and how this movement has impacted the collateral source rule across the country).

language of Indiana's collateral source statute.[19] Finally, Part IV will propose that the Collateral Source Act, if reformed at all in the context of worker's compensation payments, be amended to mandate that benefit payments are included in the damages award.[20] Either a reversion to the common law collateral source rule or the proposed amendment would eliminate the risk of depriving carriers of their statutorily enumerated lien rights, prevent jury confusion, and eradicate the risk of contradicting the Act's own purpose.[21]

II. BACKGROUND

This Part explains the development of worker's compensation law, the tort reform movement, and the drastic effect the recent comingling of the two areas of law has had on the statutorily enumerated rights of worker's compensation carriers. First, Part II.A explores the development and purpose of the worker's compensation system with an analysis of recent trends.[22] Second Part II.B discusses the reasoning employed by various state legislatures when applying subrogation and lien rights. Third, Part II.C details the tort reform movement to abolish the collateral source rule.[23] Part II.C also explains the states' various attempts, both failed and successful, to abolish the rule.[24] Finally, Part II.D explores how these two areas of law have recently begun to overlap and explains how this new phenomenon affects subrogation rights in Indiana.[25] Part II.D further explains other states' approaches in this area with an analysis of the U.S. Supreme Court's recognition of the risks of improper abrogation.[26]

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19 *See infra* Part III (discussing how the courts will have proper direction in deciding worker's compensation subrogation cases only when the intent of the legislature is clear).

20 *See infra* Part IV (noting that the problems facing present and future litigants and the judicial system face can be eliminated with the proposed amendment).

21 *See infra* Part IV (explaining that the proposed amendment would give clear guidance to courts, which is currently lacking).

22 *See infra* Part II.A (describing how cost and claims trends have changed recently due to the current recession).

23 *See infra* Part II.C (explaining that the tort reform movement was initiated to reduce costs and the onslaught of frivolous lawsuits triggered by the rising costs in the health care industry).

24 *See infra* Part II.C (explaining how some of the state's abrogated collateral source statutes have been found unconstitutional).

25 *See infra* Part II.D (detailing how worker's compensation carriers' subrogation rights have been affected by the tort reform movement).

26 *See infra* Part II.D (discussing how the Supreme Court has recommended that procedures be outlined by the states to ensure the juries do not misapply damage awards).

A. History and Development of Worker's Compensation

The deplorable and treacherous working conditions of the nineteenth century climaxed during the peak of the Industrial Revolution.[27] Due to hazardous working conditions, states developed worker's compensation as the solution, with the underlying motivation to protect employers from costly civil judgments and reimburse employees for lost wages and medical expenses.[28] Following England's example, the United States enacted the Federal Employment Compensation Act in 1908, providing disability benefits for federal employees.[29] In 1911, Wisconsin became the first state to develop its own

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[27] GARY L. WICKERT, WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES 1–2 (3d ed. 2007); *see also* MARGARET C. JASPER, WORKERS' COMPENSATION LAW 1–3 (2d ed. 2008) (outlining the development and purpose of the worker's compensation system). Treacherous conditions were experienced by workers in every industry during this time period as explained below:

> [T]he depressing story is almost unchanged from the handloom weaver and framework knitter of the 1830s and 40s to the nailmaker and needlewoman of the 1880s and 1890s. It appears, then, that whether a worker was employed in a textile factory (the most extreme case) or in a small workshop, he suffered a marked deterioration in his life at work—the obvious consequence of the quickening pace of industrialization.

Eric Hopkins, *Working Hours and Conditions During the Industrial Revolution: A Re-Appraisal*, 35 ECON. HIST. REV. 1, 52 (1982).

[28] WICKERT, *supra* note 27, at 1–5. Although civil litigation during the Industrial Revolution favored employers, when the employee did win, there was a good chance it would cause the employer to go bankrupt. *See* RAYMOND HOGLER, EMPLOYMENT RELATIONS IN THE UNITED STATES: LAW, POLICY, AND PRACTICE 80–83 (2004) (explaining why employers supported worker's compensation programs even though employees often lost common law personal injury suits).

[29] 5 U.S.C. §§ 8101–8193 (2006). As the industrial revolution grew, so did the occurrence of workplace injuries, and the present common law rules governing employment could not deal with this sharp rise in injured workers. HOGLER, *supra* note 28, at 83. As these problems arose, U.S. judges and legislatures looked to England, which had developed a similar system to address these issues. *Id.* However, under the English rule, an employee had to prove that the employer's negligence caused the injury, but the rule ultimately codified by the United States did not require negligence to recover. *Id.* at 84.

worker's compensation program.[30] By 1949, all fifty states had established their own programs.[31]

The development of worker's compensation is unique in several respects.[32] First, the worker's compensation systems are developed and run by the states, not the federal government.[33] Second, employers advocated for the development of worker's compensation despite the previously favorable common law remedies.[34] Before the worker's compensation scheme, the courts favored employers and precluded employee recovery because of the employer-employee contractual relationship.[35] Under worker's compensation, injured employees are guaranteed a fixed amount of benefits in exchange for relinquishing their ability to sue the employer.[36]

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30 Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U J. LEGIS. & PUB. POL'Y 663, 706 n.221 (2005); *see* Borgnis v. Falk Co., 133 N.W. 209, 215 (Wis. 1911) (sustaining the state's organic compensation scheme that foreclosed employer common law defenses); Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723, 730 (1992) (noting that many states quickly followed Wisconsin's lead, with "all but eight American states" enacting worker's compensation statutes by the 1920s).

31 JASPER, *supra* note 27, at 2. The author explains that the state statutes vary significantly in their operation, oversight, and benefit provisions. *See generally id.* (reviewing variations in worker's compensation statutes).

32 HOGLER, *supra* note 28, at 80. The author explains several reasons why the system is unique, foremost being that it seems to contradict the best interests of the employer. *Id.* at 80–84.

33 HOGLER, *supra* note 28, at 80. The system of recovery is entirely determined by the respective state and not overseen by the federal government—unlike other forms of disability benefits, such as Medicare and Social Security. *Id.* at 80–85.

34 *Id.* at 80. The Industrial Age was especially hard on employees because of both the deplorable conditions and the employer's usual immunity in the event of a workplace injury. JOHN JUDE MORAN, EMPLOYMENT LAW: NEW CHALLENGES IN THE BUSINESS ENVIRONMENT 455 (3d ed. 2005). The author explains the hardships employees faced:

> During the Industrial Age, many workers labored under the most deplorable conditions, such as the lack of heat, lighting, and ventilation . . . . Workers for the most part assumed the risk of injury. Recovering damages for loss of earnings, medical expenses, and pain and suffering was rare. The employee suffered not only an injury but also the possible loss of his or her job for nonperformance. Coworkers were afraid to testify for fear of employer retaliation. Even worse than that was the courts' allowance of the legal defenses of fellow servant negligence and assumption of risk.

Id.

35 *See* MORAN, *supra* note 34, at 455 (detailing the limited options of recourse for employees during the Industrial Age). Hogler also details how an employer could contract with the employee for immunity in the event of an injury before the development of worker's compensation. HOGLER, *supra* note 28, at 80–90.

36 HOGLER, *supra* note 28, at 80. Essentially, the system works as an insurance program for the employer, as it pays a premium either to the state fund or private insurance carrier, and the insurer decides which claims should be paid at the state-mandated rate. *Id.* at 81.

As the nation's earliest tort reform, worker's compensation replaced tort recovery for workplace injuries.[37] This system provides for a no-fault system of recovery for medical expenses and lost wages for injuries arising in the scope of one's employment.[38] Worker's compensation is designed to quickly compensate for a wide range of injuries, unlike Medicaid, Medicare, or Social Security.[39] The manner in which an injured employee recovers under worker's compensation varies by state, and is defined by the respective state's statute.[40]

Most states, like Indiana, require employers to carry worker's compensation insurance.[41] This mandate makes worker's compensation insurance the largest insurance line in the country.[42] Collectively, the fifty states' worker's compensation systems pay more in support for disabled workers than any other source of support, surpassed only by Social Security.[43] When an injured employee files a successful claim, the benefits are paid by the employer or the employer's insurance carrier, as directed by the Workers' Compensation Board.[44] The states' systems outline methods of recovery and payment schedules for different claims

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37 Ellen S. Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307, 313 (2008) (citing Ishita Sengupta, Virginia Reno & John F. Burton, Jr., *Workers' Compensation: Benefits, Coverage, and Costs, 2005*, 2007 NAT'L ACAD. SOC. INS. 6).

38 HOGLER, *supra* note 28, at 80; *see id.* at 80-81 (explaining that in exchange for worker's compensation benefits, the employer will not be held liable).

39 *See* Pryor, *supra* note 37, at 313 (citing Sengupta, et. al, *supra* note 37, at 6). Unlike Social Security, worker's compensation covers short-term wage loss and partial permanent disabilities; however, similar to Medicaid, it provides compensation for long-term disabilities. *Id.* In 2002, eighty percent of worker's compensation benefits went to permanent injuries or death. *Id.* (citing Sengupta et. al, *supra* note 37, at 7).

40 WICKERT, *supra* note 27, at 1. Some states provide coverage through a Monopolistic State Fund. *Id.* These states include North Dakota, Ohio, Washington, West Virginia, and Wyoming. *Id.* Some states have state-run worker's compensation funds that compete with private carriers including Arizona, California, Colorado, Idaho, Kentucky, Maryland, Minnesota, Montana, New York, Oklahoma, Oregon, Pennsylvania, Texas, and Utah. *Id.* at 1–2.

41 *See generally id.* at 1–15. The states that do not mandate private insurance coverage usually require the employer to pay into the state fund for worker's compensation. *Id.*

42 *Id.* at 2. "The estimated premiums for 2002 were in excess of $60 billion," and the states with the largest premiums are California, Pennsylvania, Illinois, New York, and Texas. *Id.*

43 Rudolph L. Rose, *Insurance Fraud and Workers' Compensation*, *in* CURRENT DEVELOPMENTS IN INSURANCE LAW 2010, at 187, 198 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 811, 2010). The worker's compensation programs in the fifty states, combined with federal programs, paid $56 billion in 2004. *Id.*

44 JASPER, *supra* note 27, at 1–50; *see also* IND. CODE ANN. § 22-3-1-1 (West 2005) (explaining the function of Indiana's state run Workmen's Compensation Board).

in an attempt to streamline the process.[45] Indiana, like most other states, facilitates a unique worker's compensation process to help protect the employer and carrier's interest.[46]

1. Development of Worker's Compensation in Indiana

In Indiana, like in most states, the worker's compensation scheme was created for the employee's benefit—a benefit that the courts have construed liberally.[47] In *Freel v. Foster Forbes Glass Co.*, the appellate court

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[45] IND. CODE ANN. § 22-3-3-7(b) (West 2005). Section 22-3-3-7(b) of the Indiana Code explains the payment schedule deadlines set by the Workmen's Compensation Board and the requirements when case liability is in question. *Id.* The requirements are as follows:

> (b) The first weekly installment of compensation for temporary disability is due fourteen (14) days after the disability begins. Not later than fifteen (15) days from the date that the first installment of compensation is due, the employer or the employer's insurance carrier shall tender to the employee or to the employee's dependents, with all compensation due, a properly prepared compensation agreement in a form prescribed by the [compensation] board. Whenever an employer or the employer's insurance carrier denies or is not able to determine liability to pay compensation or benefits, the employer or the employer's insurance carrier shall notify the workers' compensation board and the employee in writing on a form prescribed by the workers' compensation board not later than thirty (30) days after the employer's knowledge of the claimed injury. If a determination of liability cannot be made within thirty (30) days, the workers' compensation board may approve an additional thirty (30) days upon a written request of the employer or the employer's insurance carrier that sets forth the reasons that the determination could not be made within thirty (30) days and states the facts or circumstances that are necessary to determine liability within the additional thirty (30) days.

Id.

[46] *See supra* note 45 and accompanying text (explaining the Indiana worker's compensation system process). Worker's compensation programs paid $56 billion in benefits in 2004. Rose, *supra* note 43, at 198. The cost to employers for worker's compensation was $87.4 billion, an increase of seven percent. *Id.* In 2003, the National Insurance Crime Bureau estimated worker's compensation fraud losses at $6 billion per year. *Id.*

[47] *See* Mayes v. Second Injury Fund, 888 N.E.2d 773, 777 (Ind. 2008) (describing the liberal interpretation that should be used when considering employee protection under the state's worker's compensation system). In resolving a plausible dispute as to whether the Workmen's Compensation Board's actions constituted approval of a continuation of liability for an injured employee after her third-party settlement, the court concluded that it did because injured employee's benefits should be liberally construed. *Id.*; *see* DePuy, Inc. v. Farmer, 847 N.E.2d 160, 170-71 (Ind. 2006) (providing justifications for a liberal construction); Daugherty v. Indus. Contracting & Erecting, 802 N.E.2d 912, 918-19 (Ind. 2004) (citing to Virginia cases as additional support for a liberal construction); Roberts v. ACandS, Inc., 873 N.E.2d 1055, 1058-59 (Ind. Ct. App. 2007) (explaining that the Act must be construed liberally for the benefit of both parties to achieve the "humane purpose" of the Act).

held that the purpose of Indiana's worker's compensation system is to put the burden of caring for those injured within the scope of their employment on employers and the consumers of that company's products.[48]

In rejecting Freel's argument that Foster Forbes, the employer and insurance carrier, was not entitled to a set-off for benefits already paid, the court based its conclusion on the belief that recognizing a set-off "is consistent with the purposes of the act."[49] Without the credit, the court found that the Freels would not only experience a double recovery for the same injury, but would receive from Foster Forbes more money for the period of disability than could have been earned if there had been no

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[48] Freel v. Foster Forbes Glass Co., 449 N.E.2d 1148, 1151 (Ind. Ct. App. 1983). The plaintiffs in the action were Thomas Freel and the injured employee's dependants, and there was no evidence in the record that his occupational injury caused his death. *Id.* at 1150. In *Freel*, the employer, Foster Forbes, was self-insured for purposes of worker's compensation, and subsequently paid the total temporary disability payments to the defendant, Freel. *Id.* at 1151. The benefits were paid pursuant to a wage continuation plan, but the court reasoned that although the benefits were in effect a contract for payment, this contract did not terminate the employer/insurer's rights to a lien and reimbursement for payments in a third-party action. *Id.* Although Freel argued that the contract brought the payments outside the Workmen's Compensation Board's review, the court denied this argument and found the payments were properly before the court based on section 22-3-3-23(a) of the Indiana Code. *Id.* This code section states as follows:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which . . . were not due and payable when made, may, subject to the approval of the worker's compensation board, be deducted from the amount to be paid as compensation. However, the deduction shall be made from the distal end of the period during which compensation must be paid, except in cases of temporary disability.

IND. CODE ANN. § 22-3-3-23(a) (West 2005).

[49] *Freel*, 449 N.E.2d at 1151. The court explained that such a credit is consistent with the purpose of Indiana's Worker's Compensation Act. *Id.* The court explained that the wage continuation plan should not negate the employer's lien because such a result would go against public policy. *Id.* The court explained this determination as follows:

> An employer who has paid an employee at the time of that employee's greatest need more than he was obligated to pay should not be penalized by being denied full credit for the amount paid above the requirements of the act as against the amount which might subsequently be determined to be due the employee. To do so would inevitably cause employers to be less generous. By limiting the payments the employer can safely make to the amount of temporary total disability the result would be that the employee would lose his full salary at the very moment he needs it most. Such a construction is neither liberal nor one made with a view to the public welfare.

Id. (quoting Cowan v. Sw. Bell Tel. Co., 529 S.W.2d 485, 488 (Mo. Ct. App. 1975)).

injury.[50] Although the decision recognized other purposes of the Indiana Workmen's Compensation Act, the court explicitly stated that the Indiana case law "evince[s] a strong policy against double recovery."[51]

Pursuant to the Indiana Code, worker's compensation is an employee's exclusive remedy for work-related injuries.[52] If there are any issues about the compensability of a claim, all disputes are resolved before the Worker's Compensation Board.[53] Indiana employers and carriers, like those throughout the rest of the nation, have to remain cognizant of the recent increase in worker's compensation litigation, especially as the nation continues to suffer through one of its worst recessions.[54] Due to the recession, employees are more likely than ever to claim worker's compensation benefits, resulting in a dramatic increase in fraudulent claims.[55]

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[50] *Id.* The benefits were paid pursuant to a wage continuation plan created between Freel and Foster Forbes, but the court still found that the plan developed between the parties did not preclude the requirement for lien repayment. *Id.*

[51] *Id.* (citing IND. CODE § 22-3-2-13; IND. CODE § 22-3-3-10; IND. CODE § 22-3-3-23; IND. CODE § 22-3-3-31; Bethlehem Steel Corp. v. Dipolito, 344 N.E.2d 67 (Ind. Ct. App. 1976); Snow Hill Coal Corp. v. Cook, 109 N.E.2d 110 (Ind. Ct. App. 1952); Bebout v. F.L. Mendez & Co., 37 N.E.2d 690 (Ind. Ct. App. 1941)).

[52] IND. CODE ANN. § 22-3-2-6 (West 2005). The code section states:

> The rights and remedies granted to an employee subject to [Indiana Code] 22-3-2 through [Indiana Code] 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, the employee's personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death, except for remedies available under [Indiana Code] 5-2-6.1.

Id.

[53] *Id.* § 22-3-4-5. The statute explains the procedure of compensation disputes as follows:

> (a) If the employer and the injured employee or the injured employee's dependents disagree in regard to the compensation payable under [Indiana Code] 22-3-2 through [Indiana Code] 22-3-6 or, if they have reached such an agreement, which has been signed by them, filed with and approved by the worker's compensation board, and afterward disagree as to the continuance of payments under such agreement, or as to the period for which payments shall be made, or to the amount to be paid, because of a change in conditions since the making of such agreement, either party may then make an application to the board for the determination of the matters in dispute.

Id.

[54] *See* Roberto Ceniceros, *Hard-up Investigators Battle Against Rise in Comp Fraud*, BUS. INS. (Nov. 8, 2009), http://www.businessinsurance.com/article/20091108/ISSUE01/311089974 (explaining that the recession has triggered a wave of frivolous claims); *see also infra* note 58 and accompanying text (describing the rise in frivolous lawsuits including worker's compensation).

[55] *See* Ceniceros, *supra* note 54 (stating that the recession has triggered a rise in fraudulent worker's compensation claims); *infra* Part II.A.2 (examining the effect of the Great Recession on worker's compensation benefits). The increased number of fraudulent

2. Recent Trends in Worker's Compensation: The Recession Effect

The recession has significantly impacted all parties involved in the worker's compensation process, despite procedures designed to streamline the process.[56] Worker's compensation insurance carriers have experienced double-digit premiums and profit losses.[57] Claim frequency decreased in 2009, but fraudulent claims have increased significantly since the beginning of the recession.[58]

Increased fraudulent claims and competition with lower demand has caused worker's compensation carriers to incur steep profit losses.[59] Indemnity claim costs are also a concern for parties to worker's compensation systems, as states are becoming more willing to impose the intervention requirement to guarantee the subrogation rights of carriers.[60] The right to subrogation is important to carriers because of the cost savings; however, this right is not always guaranteed.[61]

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claims can be an indication that employers' ability to cut costs and stay afloat may be weakened, especially since fewer jobs are now available. Ceniceros, *supra* note 54.

[56] Ceniceros, *supra* note 54; *see also infra* note 57 and accompanying text (describing the decline in carriers' profitability).

[57] Joan E. Collier, *Long Recession Hammers Comp Carriers*, PROPERTYCASUALTY360° (Aug. 30, 2010), http://www.propertycasualty360.com/2010/08/30/long-recession-hammers-comp-carriers-. Profitability is declining rapidly for worker's compensation carriers, according to Rober P. Hartwig, president of the Insurance Information Institute. *Id.* "We are earning about 40-to-50 percent less than we were pre-crises . . . ." *Id.* He went on to explain that the demand for worker's compensation coverage has declined in correlation with the rising unemployment rate over the last two years, causing the largest impact to worker's compensation in sixty years. *Id.*

[58] Ceniceros, *supra* note 54; *see also* Stephen J. Klingel, *Wokers' Comp in a Precarious Position*, PROPERTYCASUALTY360° (Aug. 16, 2010), http://www.propertycasualty360.com/2010/08/16/workers-comp-in-a-precarious-position (explaining that claim frequency in 2009 has continued to decline due to a tightened job market). Worker's compensation fraud appears to be rising rapidly, except cases of claimants who take on jobs while also claiming to be disabled, which can be explained by the limited availability of jobs. Ceniceros, *supra* note 54.

[59] Klingel, *supra* note 58. Worker's compensation insurance industry faces several challenges. *Id.*

[60] *See* WICKERT, *supra* note 27, at 33 (listing the states that have imposed an intervention requirement). Arkansas is one such state that has imposed an intervention requirement. ARK. CODE ANN. § 11-9-410(b)(1) (West 2011); *see also* John Garner Meats v. Ault, 828 S.W.2d 866, 867 (Ark. Ct. App. 1992) (interpreting the statute's requirements). Arkansas law requires the carrier to intervene or risk losing its subrogation interest, one of the minority of states to have such a requirement. *See id.* at 867 (interpreting section 11-9-410(b)(1) of the Arkansas Code); *see also* GA. CODE ANN. § 34-9-11.1 (West 2011) (explaining that Georgia law requires intervention by carrier to protect subrogation rights).

[61] *See* Collier, *supra* note 57 (explaining that indemnity costs are finally starting to slow down); *see also* WICKERT, *supra* note 27, at 33 (listing states that have imposed an intervention requirement on carriers).

B. Right to Subrogation for Carriers

"Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer."[62] A carrier's right to subrogation will usually be protected under common law and various states' statutes.[63] Very few areas of law vary more than the area of worker's compensation subrogation.[64] Other than underwriting, subrogation is one of just a few areas in the insurance industry where money is "paid to the carrier rather than by the carrier."[65] All states have some type of third-party liability subrogation act.[66] The Indiana Code "makes the employee in effect a constructive trustee for the employer of that portion of the settlement [or judgment] necessary to fully reimburse the employer for amounts it expended on the employee's behalf under the Act."[67] Some states have reaffirmed this notion that the employee is the carrier's trustee. Courts have found that a claimant and a third-party

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62 John Dwight Ingram, *Priority Between Insurer and Insured in Subrogation Recoveries*, 3 CONN. INS. L.J. 105, 106–07 (1996–1997) (quoting 16 GEORGE J. COUCH, COUCH ON INSURANCE § 61.1 (Ronald A. Anderson & Mark S. Rhodes eds., rev. ed. 1983)).

63 *See* WICKERT, *supra* note 27, at 25–33 (demonstrating the bulk of the fifty states' different subrogation statutes). Each state has its own separate subrogation statute. *Id.* Virginia's subrogation statute is a typical subrogation statute. VA. CODE ANN. § 65.2-309(A) (West 2011). Virginia's subrogation statute reads as follows:

> A) A claim against an employer under this title for injury, occupational disease, or death benefits shall create a lien on behalf of the employer against any verdict or settlement arising from any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury . . . and such employer also shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party.

Id.

64 WICKERT, *supra* note 27, at xxi. "In this age of bad faith litigation, soaring health care provider costs, increased claims and even insurance fraud, subrogation is one of the insurance carrier's most effective tools for maintaining profitability." *Id.* "[A]llocating subrogation recoveries in the context of worker's compensation claims is not only complex, but it also requires an understanding of the intricacies of various state worker's compensation laws which even their own judiciary often do not understand or agree on." *Id.* at 31.

65 *Id.* at xxi. This ability for carriers' to recoup the costs expended in paying for disability benefits helps to keep the premiums charged to employers as low as possible. *Id.*

66 *See id*. at 25–33 (providing each state's respective subrogation statute and its requirements).

67 State v. Mileff, 520 N.E.2d 123, 128 (Ind. Ct. App. 1988). The court explained that a valid lien is created against any person with notice of the lien who subsequently acquires the property subject to it, pursuant to section 22-3-2-13 of the Indiana Code. *Id.*; *see also* IND. CODE ANN. § 22-3-2-13 (West 2005) (describing a carriers' lien).

are liable to the subrogating carrier if they settle a claim without reimbursing a carrier.[68]

The purpose of subrogation statutes, in most instances, is to prevent double recovery by the injured employee from both the compensation carrier and the tortfeasor.[69] Another purpose of subrogation is to ensure that the liable party is not absolved merely because the insured received insurance for her own benefit.[70] In preventing double recovery, courts have found that worker's compensation usually grants carriers first priority in third-party actions.[71] Although all fifty states provide for some form of subrogation for worker's compensation carriers, the specifics and requirements of vindicating those rights vary from state to state. Indiana is one such state that has a long history of recognizing and protecting carriers' subrogation rights.[72]

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[68] WICKERT, *supra* note 27, at 20–30. Texas is an active worker's compensation litigation state and has several court holdings that mandate such notice to carriers, as demonstrated in multiple Texas Supreme Court decisions. *Id.* at 24 (citing Capitol Aggregates, Inc. v. Great Am. Ins. Co., 408 S.W.2d 922, 923 (Tex. 1966); Pan Am. Ins. Co. v. Hi-Plains Haulers, Inc., 350 S.W.2d 644, 647 (Tex. 1961); Forth Worth Lloyds v. Haygood, 246 S.W.2d 865, 869 (Tex. 1952); Prewitt & Sampson v. City of Dallas, 713 S.W.2d 720, 722 (Tex. Ct. App. 1986); Traders & Gen. Ins. Co. v. W. Tex. Utils. Co., 165 S.W.2d 713, 716 (Tex. Comm'n App. 1942)).

[69] Numerous courts have acknowledged the same strong policy consideration. *See, e.g.*, Schneider Nat'l Carriers, Inc. v. Nat'l Emp. Care Sys., Inc., 469 F.3d 654 (7th Cir. 2006); Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 379 (Ind. 2010); Old Republic Ins. Co. v. Ashley, 722 S.W.2d 55, 59 (Ky. Ct. App. 1986).

[70] *See Capitol Aggregates*, 408 S.W.2d at 924 (stating that the purpose of subrogation statutes is to protect the carrier, reduce the insurance burden to employers, and ensure that the ultimate burden is placed on the negligent party that caused the loss or injury in the first place); *see also* Ingram, *supra* note 62, at 107–08 (explaining that the doctrine of subrogation is based on principles of equity).

[71] Smith v. Gary Pub. Transp. Corp., 893 N.E.2d 1137, 1139 (Ind. Ct. App. 2008). The court denied Smith's claim that Gary Public Transportation Corporation ("GPTC") was capable of being sued, concluding that a self-insured employer does not constitute "an other person," and is therefore not eligible for suit under section 22-3-2-13 of the Indiana Code. *Id.* Furthermore, the court went on to find that the "statute also allows an employer or worker's compensation insurer to attach a lien to any damages the injured employee received from the third party. 'The purpose of the statute is to make the employer or its carrier whole and prevent a double recovery by the worker."' *Id.* (quoting Walkup v. Wabash Nat'l Corp., 702 N.E.2d 713, 715 (Ind. 1998)). The court further stipulated that to require GPTC to pay once as an employer and once as an insurer "does not advance the policy of Indiana Code Section 22-3-2-13." *Id.*

[72] *See infra* note 74 and accompanying text (describing Indiana decisions that have strongly disfavored double recovery).

1. Indiana Subrogation

In Indiana, worker's compensation subrogation is governed by section 22-3-2-13 of the Indiana Code.[73] As a myriad of decisions evidence, Indiana strongly disfavors double recovery.[74] The courts have held, "[t]he purpose of the lien is to prevent double recovery on the part of the injured employee."[75] At the same time, the state's statute aims to protect the employer, but not the negligent party.[76]

Unlike most other states, Indiana requires that carriers pay their "pro-rata share of the reasonable and necessary costs and expenses of asserting the third party claim."[77] However, the appellate court has found that payment of those expenses by a carrier does not need to occur until after settlement.[78] The appellate court held that the denial of the

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[73] IND. CODE ANN. § 22-3-2-13 (West 2005). The statute provides that when "judgment is obtained and paid, and accepted . . . then from the amount received by the employee or dependents there shall be paid to the employer or the . . . carrier . . . the amount of compensation paid to the employee or dependents." *Id.*

[74] For examples of Indiana cases disfavoring double recovery, see *Travelers Indem. Co.*, 927 N.E.2d at 379; Mayes v. Second Injury Fund, 888 N.E.2d 773, 778 (Ind. 2008); DePuy, Inc. v. Farmer, 847 N.E.2d 160, 171 (Ind. 2006); Spangler, Jennings & Dougherty P.C. v. Ind. Ins. Co., 729 N.E.2d 117, 124 (Ind. 2000); *Walkup*, 702 N.E.2d at 715; *Smith*, 893 N.E.2d at 1139; Ansert Mech. Contractors, Inc. v. Ansert, 690 N.E.2d 305, 309 (Ind. Ct. App. 1997); Freel v. Foster Forbes Glass Co., 449 N.E.2d 1148, 1151 (Ind. Ct. App. 1983).

[75] *Ansert*, 690 N.E.2d at 309 (citing *Freel*, 449 N.E.2d at 1151).

[76] N.Y. Cent. R.R. Co. v. Milhiser, 106 N.E.2d 453, 457 (Ind. 1952). The court found that the purpose of the Worker's Compensation Act was for repayment of the employer and not for a negligent third-party. *Id.* The court further found that the third-party should be "legally liable for the full amount of damages caused by his negligence." *Id.*

[77] § 22-3-2-13. The statute stipulates the following:

> [I]f the action against the other person is brought by the injured employee or his dependents and judgment is obtained and paid, and accepted or settlement is made with the other person, either with or without suit, then from the amount received by the employee or dependents there shall be paid to the employer or the employer's compensation insurance carrier, subject to its paying its pro-rata share of the reasonable and necessary costs and expenses of asserting the third party claim, the amount of compensation paid to the employee or dependents, plus the medical, surgical, hospital and nurses' services and supplies and burial expenses paid by the employer or the employer's compensation insurance carrier and the liability of the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate, whether or not one (1) or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death.

Id.

[78] Welter v. F.A. Wilhelm Constr., 743 N.E.2d 1255, 1259 (Ind. Ct. App. 2001). In *Welter v. F.A. Wilhelm Construction*, the court held that a carrier had not waived its lien by not

carrier's lien rights would go against the Indiana subrogation statute's "strong policy against an injured employee receiving 'double recovery.'"[79]

Schneider National Carriers, Inc. v. National Employee Care Systems, Inc. concerns lien rights of worker's compensation carriers under Indiana law.[80] In *Schneider*, the injured employee and tortfeasor entered into a settlement agreement for a lesser amount than was paid in worker's compensation benefits without notifying or reimbursing the employer's carrier.[81] The court held in favor of the carrier, stating that to find otherwise would promote improper settlements and leave the carrier with nowhere to turn for the recovery it was owed.[82] Such a result, the

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paying its share of expenses as they were incurred. *Id.* Welter was injured on the job by a third-party, and he subsequently settled his lawsuit after receiving worker's compensation benefits from his employer's various carriers. *Id.* at 1256. The court explained that payment need not be made by the employer because the pro-rata share of expenses could not be determined until after a settlement had been reached. *Id.* at 1259. The court held that the carrier had not waived its subrogation right by not paying "its pro rata share of the costs and expenses as they were being incurred." *Id.* at 1256.

79 *Id.* at 1258. The court affirmed the lower court's grant of summary judgment for the employer's carrier after the carrier intervened to secure its lien right. *Id.* at 1259. The court further explained that "prohibition against double recovery had been a part of worker's compensation law since its inception and remains intact." *Id.* at 1258. The court stipulated that the trial court was correct in its summary judgment ruling for the carrier because it relied "upon the clear and unambiguous language of the statute." *Id.* at 1259. The court further explained that although the legislature never intended to abridge the remedies an employee has against a third-party in tort law, it sought to prevent an injured party from experiencing a double recovery. *Id.* at 1258 (citing Waldridge v. Futurex Indus., Inc., 714 N.E.2d 783, 786 (Ind. Ct. App 1999)).

80 469 F.3d 654, 655 (7th Cir. 2006). In *Schneider*, a truck driver was injured on the job by a third-party tortfeasor and subsequently received worker's compensation benefits. *Id.* at 655. The injured worker sued the tortfeasor's employer to collect damages. *Id.* Initially the carrier sought intervention to secure its subrogation but withdrew after reassurances of lien protection from the parties. *Id.* The court found that joinder in an action against a third-party isn't required, as an "employer may, within ninety (90) days after receipt of notice of suit . . . join in the action upon his motion so that all orders of court after hearing and judgment shall be made for his protection." *Id.* at 658 (quoting IND. CODE § 22-3-2-13, ¶ 8); *see also* Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1309 (Ind. 1998) (discussing joinder in third-party actions).

81 *Schneider*, 469 F.3d at 656. Despite the pre-settlement representations to the carrier by the employee and the third-party that the lien would be protected, the carrier never received its portion. *Id.* While negotiating the settlement with the third-party, the employee provided in their written agreement that he would assume responsibility of the carriers' lien rights and indemnify the tortfeasor. *Id.* The district court, based on the written agreement's indemnity provision, held that the employee was solely responsible to pay the lien. *Id.* at 657. The employee appealed, arguing that the carrier waived its lien right by failing to timely intervene. *Id.* Further, the employee argues that he is under no duty to protect the carrier's interests. *Id.*

82 *Id.* The court held in favor of the carrier, a decision the court found was in furtherance of the purpose and requirements of the state's workers' compensation statute. *Id.* at 659–

court explained, would undermine the purpose of the state's subrogation statute to protect the interests of carriers.[83]

The Seventh Circuit in *Schneider*, applying Indiana worker's compensation law, held that carriers' lien rights "are clearly established."[84] Since the creation of worker's compensation in Indiana, carriers' liens have been given priority in third-party awards.[85] The court held that the statute itself gives worker's compensation carriers lien rights, and "there is nothing in the Indiana statute or its interpretive case law that makes intervention anything other than permissive."[86] A

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60. The court referenced Indiana's subrogation statute to make its ruling. *Id*. The court explained that the statute "requir[ed] the lienholder's approval of any settlement between the injured employee and the third-party tortfeasor." *Id.* at 657. Thus, it was clear by the ruling that to find for the employee, and against the carrier, would be contrary to the court's interpretation of the statute. *Id.* at 658 (citing *Koval*, 693 N.E.2d at 1309). The *Schneider* court specifically explained, "[b]ecause settlement serves as a bar to further recovery against the third-party, without a consent requirement, an employee could settle a lawsuit for an amount well below . . . costs and leave the employer with nowhere to turn for the additional money owed." *Id.* (citation omitted) (quoting *Koval*, 693 N.E.2d at 1309).

83 *Id.* at 659–60. The court concluded the worker's compensation carrier would be left "with nowhere to turn for the additional money owed" undermining the purpose of the state's subrogation statute meant to protect carriers' interests. *Id*. at 658. The court, reiterating the Indiana Supreme Court's interpretation of the subrogation statute's purpose, mandated that "[t]he employer must either give written consent or be 'fully indemnified or protected by court order.'" *Id.* (quoting *Koval*, 693 N.E.2d at 1309).

84 *Id*. at 657. The court explained that by operation of section 22-3-2-13 of the Indiana Code, the carriers' rights "are clearly established." *Id.* The statute provides in pertinent part:

> [T]he injured employee . . . may commence legal proceedings against the other person to recover damages notwithstanding the . . . compensation insurance carrier's payment of . . . compensation . . . . In that case, however, if the action against the other person is brought by the injured employee . . . and . . . settlement is made with the other person, either with or without suit, then from the amount received by the employee . . . there shall be paid to the . . . employer's compensation insurance carrier . . . the amount of compensation paid to the employee . . . .
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> If the injured employee . . . shall agree to receive compensation from . . . the employer's compensation insurance carrier . . . the empoyer's compensation insurance *carrier shall have a lien upon any settlement award* . . . out of which the employee might be compensated from the third party.

IND. CODE ANN. § 22-3-2-13 (West 2005) (emphasis added).

85 *Schneider*, 469 F.3d at 657; Ind. State Highway Comm'n v. White, 291 N.E.2d 550, 552 (Ind. 1973); Welter v. F.A. Wilhelm Constr., 743 N.E.2d 1255, 1258 (Ind. Ct. App. 2001); Dearing v. Perry, 499 N.E.2d 268, 270 (Ind. Ct. App. 1986).

86 *Schneider*, 469 F.3d at 658. The court held that a carrier is a lienholder, rather than a subrogee, and requires notice of a third-party settlement and must give its consent regardless of whether it chooses to intervene in the action. *Id.* at 658–59. Determining that

new development in the determination of lien rights for worker's compensation carriers has been the recent tort reform movement and its effect on the collateral source rule.[87]

C. Tort Reform: Collateral Source Rule

The collateral source rule is both a rule of evidence and a rule of damages.[88] The collateral source rule bars the introduction of evidence of payments at trial if the plaintiff was reimbursed by a collateral source for sustained injuries.[89] It was first adopted in England, where it arose with the dawn of commercial insurance and was adopted by U.S. jurisdictions over 150 years ago.[90] It was first announced by the U.S. Supreme Court in 1854.[91]

A collateral source is any payment "from a source wholly independent of the tort-feasor."[92] The most typical example of a collateral source is health insurance benefits received by a plaintiff, but disability and unemployment benefits such as Medicaid, Medicare, and

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intervention was not required, the court stated that "there is nothing in the Indiana statute or its interpretive case law that makes intervention anything other than permissive; there is no authority for the proposition that intervention is a *necessary prerequisite* to the operation of the statutory lien rights." *Id.* at 658. The court dismissed the employee's argument that the carrier was required to intervene in the action against the third-party to secure its subrogation right. *Id*. at 659.

87 *See infra* Part II.C (discussing the development of the tort reform movement and its effect on the collateral source rule).

88 Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009).

89 *See* Daena A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 799 (1988) ("Under this rule, a defendant must bear the full cost of the injury he caused the plaintiff, regardless of any compensation the plaintiff receives from an independent or 'collateral' source.").

90 Benjet, *supra* note 88, at 210; *see* Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 348 (2008) (detailing the impact of the insurance industry and the strength of the tort reform movement).

91 Propeller Monticello v. Mollison, 58 U.S. 152, 152 (1854). The Court for the first time allowed evidence of insurance payments and held that such payments could not relieve a negligent third-party of liability. *Id*. at 155.

92 Do v. Am. Family Mut. Ins. Co., 779 N.W.2d 853, 859 (Minn. 2010) (emphasis omitted). The court relied on *Black's Law Dictionary*'s definition of collateral source rule:

> Under this rule, if an injured person receives compensation for his injuries from *a source wholly independent of the tort-feasor*, the payment should not be deducted from the damages which he would otherwise collect from the tort-feasor. In other words, a defendant tort-feasor may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, *e.g.* sickness and health insurance.

Id. (quoting BLACK'S LAW DICTIONARY 262 (6th ed. 1990)).

worker's compensation also qualify.[93] Although every state retains the rule in some fashion, recent changes in health care have prompted critiques and calls for reformation of the rule.[94]

Critics of the rule, including those who advocate for tort reform, argue that abolition of the "collateral source rule will both decrease insurance premiums and reduce the number of frivolous lawsuits."[95] Opponents of reform argue that such abrogation will undermine America's tort system and, in accordance with inconclusive empirical studies, will do little to reduce insurance rates.[96] Rule supporters have advanced several arguments in support of its retention.[97] They argue that plaintiffs require larger recoveries to pay contingent attorney fees.[98] The jury will get confused if asked to reduce the damage award by collateral source payments.[99] Additionally, the negligent party should be forced to bear full responsibility for his wrongdoing and any risk of windfall should go to the injured party, not the negligent one.[100] Further, placing the full burden on defendants deters negligent conduct.[101] The "primary argument favoring the rule is that third-party collateral" sources can have a statutorily enumerated subrogation interest in the benefits the plaintiff receives, which offsets any windfall risk.[102] As held by the Supreme Court, the "likelihood of misuse by the jury clearly

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93 *See* Goldsmith, *supra* note 89, at 799–800 (explaining the different areas of benefits).

94 Benjet, *supra* note 88, at 211 (citing Michael K. Beard, *The Impact of Changes in Health Care Provider Reimbursement Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits*, 21 AM. J. TRIAL ADVOC. 453, 458–59 (1998)). "The common law collateral source rule developed during a time when health insurance and publicly provided health benefits did not exist." *Id*. So although there are still prevalent justifications for the rule due to the recent changes in health care, it is increasingly viewed as a windfall for plaintiffs. *Id*.; *see also* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 457 (2006) (describing the advent of the tort reform movement in the United States).

95 Wershbale, *supra* note 90, at 346; *see id*. (explaining that although tort reform was intended to reduce insurance premiums and costs, both remain high while the economy is strained).

96 *See id*. Empirical studies on tort reform effects on insurance rates concluded "without a clear result." *Id.*

97 *See* Benjet, *supra* note 88, at 210 ("Several reasons are advanced to justify the collateral source rule.").

98 *See id*. at 210–11 (citing Beard, *supra* note 94, at 458–59).

99 *Id*. at 210–11.

100 *See* Goldsmith, *supra* note 89, at 801 (citing Burks v. Webb, 99 S.E.2d 629, 636 (Va. 1957).

101 *See* Am. Standard Ins. Co. of Wis. v. Cleveland, 369 N.W.2d 168, 172 (Wis. Ct. App. 1985) (explaining that Wisconsin's collateral source rule is intended to deter negligent conduct by placing the whole burden on the negligent party).

102 Wershbale, *supra* note 90, at 349 (citing Hubbard, *supra* note 94, at 483).

outweighs the value of [collateral source] evidence."[103] Recently, state courts and legislatures have reformed the once common collateral source rule.[104]

D. Collateral Source Statute Reform and Its Abrogation of Subrogation Rights

There are numerous arguments in support of collateral source statute reform, including the following: it allows the injured party to recover twice for the same injury; the American tort system is "the most expensive . . . in the world"; and reform would help to reduce costs.[105] Reform proponents argue that the rule allows plaintiffs to recover a windfall.[106] Since subrogation is rare, "due to the time and expense involved in securing subrogation," reform advocates dispute that the risk of windfall is not actually eliminated.[107]

Of the fifty states and the District of Columbia, forty-two have restricted, in some way, the collateral source rule.[108] In those that have, "there is little uniformity across the jurisdictions as to the manner in which each has modified the collateral source rule."[109] Some states have

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[103] Eichel v. N.Y. Cen. R.R. Co., 375 U.S. 253, 255 (1963). The court held that evidence of collateral payments was properly excluded, explaining that evidence that plaintiff received collateral source "benefits involves a substantial likelihood of prejudicial impact." *Id.*

[104] *See* Wershbale, *supra* note 90, at 346, 351 (explaining that most states have enacted legislation that limits the application of the collateral source rule).

[105] *Id.* at 346–47. *But see* Alexee Deep Conroy, Note, *Lessons Learned from the "Laboratories of Democracy": A Critique of Federal Medical Liability Reform*, 91 CORNELL L. REV. 1159, 1170–71 (2006) (arguing that tort reform has no impact on the healthcare crises, one of the biggest motivators for such reform).

[106] Wershbale, *supra* note 90, at 349. According to the website:

> The concern is that where the fact-finder remains uninformed, or there is no collateral source setoff, a successful plaintiff acquires a windfall, being awarded monetary damages in excess of necessary and reasonable medical costs. Proponents support abolition of the collateral source rule on the grounds that plaintiffs should not be compensated twice for the same injury.

Id. (footnote omitted).

[107] *See id.* (citing Hubbard, *supra* note 94, at 483. Subrogation rights are unenforced due to "difficulty in establishing that a damage award encompasses the particular collateral benefits paid out by the insurer, high administrative costs associated with seeking subrogation, and potential damage to the insurer's reputation." *Id.* at 349–50 (citing CONGR. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (2004), *available at* www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf); *see* Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006); Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374 (Ind. 2010) (showing the strong relationship between the collateral source rule and subrogation rights).

[108] Benjet, *supra* note 88, at 211. Even in jurisdictions where the rule has been applied generally, it is limited in health care liability cases. *Id.*

[109] Wershbale, *supra* note 90, at 351. Some jurisdictions have altered the rule exclusively for medical malpractice cases, others for all personal injury cases, and still others complete

narrow restrictions and modifications that are only applicable to medical malpractice cases.[110] Other states have changed the collateral source rule for all personal injury actions.[111] The states' reform acts face various constitutional challenges and some have been overturned as unconstitutional.[112]

Further, lack of uniformity is the consideration of collateral source evidence by the trier of fact in worker's compensation cases.[113] Some jurisdictions allow for the presentation of collateral source evidence only after the verdict is rendered.[114] Others allow the trier of fact to consider such evidence, but do not mandate it.[115] A few jurisdictions, pursuant to subrogation statutes, will disallow a set-off if a collateral source has a

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abrogation with exceptions for specific areas such as worker's compensation. *Id.* Some jurisdictions allow the evidence at trial, others allow it only if a subrogation interest exists, while some only allow the evidence for post-verdict collateral source reductions. *Id.* at 357.

110 ALA. CODE § 6-5-545 (2011); ARIZ. REV. STAT. ANN. § 12-565 (2003); CAL. CIV. CODE § 3333.1 (West 1997); DEL. CODE ANN. tit. 18, § 6862 (1999); ME. REV. STAT. ANN. tit. 24, § 2906 (2000); MASS. GEN. LAWS ch. 231, § 60G (2000); NEB. REV. STAT. § 44-2819 (2010); OKLA. STAT. tit. 63, § 1-1708.1D (2004); 40 PA. CONS. STAT. ANN. § 1303.508 (West 1999); R.I. GEN. LAWS § 9-19-34.1 (1997); S.D. CODIFIED LAWS § 21-3-12 (2004); UTAH CODE ANN. § 78B-3-405 (LexisNexis 2008); WIS. STAT. § 893.55 (2006).

111 ALASKA STAT. § 09.55.548 (2010); COLO. REV. STAT. § 13-21-111.6 (2005); CONN. GEN. STAT. §§ 52-225a, 52-225b, 52-225c (2005); FLA. STAT. § 768.76 (2011); HAW. REV. STAT. § 663-10 (2011); IDAHO CODE ANN. § 6-1606 (2010); 735 ILL. COMP. STAT. 5/2-1205.1 (2003); IND. CODE ANN. § 34-44-1-2 (West 2011); IOWA CODE § 668.14 (2005); MICH. COMP. LAWS § 600.6303 (2000); MINN. STAT. § 548.36 (2010); MONT. CODE ANN. § 27-1-308 (2011); N.J. STAT. ANN. § 2A:15-97 (West 2000); N.Y. C.P.L.R. LAW § 4545 (McKinney 2007 & Supp 2012); OHIO REV. CODE ANN. § 2315.20 (West 2004 & Supp. 2011); OHIO REV. CODE ANN. § 2323.41 (2004) OR. REV. STAT. § 31.580 (2011); WASH. REV. CODE § 7.70.080 (2007); W. VA. CODE § 55-7B-9a (2008).

112 O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995); Carson v. Maurer, 424 A.2d 825, 835 (N.H. 1980), *overruled on other grounds by*, Cmty. Res. For Justice, Inc., v. City of Manchester, 917 A.2d 707 (N.H. 2007). Tort reforms meet three different constitutional challenges, including the right to trial by jury, due process rights, and separation of powers principles. Wershbale, *supra* note 90, at 346.

113 Freel v. Foster Forbes Glass Co., 449 N.E.2d 1148, 1151 (Ind. Ct. App. 1983).

114 ALASKA STAT. § 09.17.070 (2010); COLO. REV. STAT. § 13-21-111.6 (2005); CONN. GEN. STAT. §§ 52-225a, 52-225c (2005); FLA. STAT. § 768.76 (2011); HAW. REV. STAT § 663-10 (2011); IDAHO CODE ANN. § 6-1606 (2010); 735 ILL. COMP. STAT. 5/2-1205, 5/2-1205.1 (2003); ME. REV. STAT. ANN. tit. 24, § 2906 (2000); MASS. GEN. LAWS ch. 231, § 60G (2000); MICH. COMP. LAWS § 600.6303 (2000); MINN. STAT. § 548.36 (2010); MONT. CODE ANN. § 27-1-308 (2011); NEB. REV. STAT. § 44-2819 (2010); N.J. STAT. ANN. § 2A:15-97 (West 2000); N.Y. C.P.L.R. LAW § 4545 (McKinney 2007 & Supp. 2012); N.D. CENT. CODE § 32-03.2-06 (2010); OR. REV. STAT. § 31.580 (2011); UTAH CODE ANN. § 78B-3-405 (LexisNexis 2008); W. VA. CODE § 55-7B-9a (2008).

115 ALA. CODE § 6-5-545 (2011); IND. CODE ANN. § 34-44-1-2; IOWA CODE § 668.14 (1998); *see also* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 378 (Ind. 2010) (holding that under the Indiana collateral source statute, the jury was allowed to "consider" the obligation to repay a workman's compensation lien, but was not mandated under the jury instruction given).

subrogation right.[116] Some withhold final judgments until determining subrogation rights and whether those rights will be pursued.[117] Given the variations of collateral source rule enactments, this area of law has become less than clear.[118] Indiana is one of the several states that have changed its approach to the collateral source rule.[119]

1. Collateral Source Rule in Indiana

Indiana is one of the jurisdictions that has abrogated the common law collateral source rule.[120] In 1986, the Indiana legislature enacted section 34-44-1-1 through 34-44-1-3 of the Indiana Code, the state's collateral source statute.[121] In Indiana, the collateral source doctrine ensures that a plaintiff's recovery is not reduced due to recovery from other sources, while preventing double liability for the tortfeasor.[122] The statute allows evidence of worker's compensation benefits to be presented to establish proof of the amount of money the plaintiff is legally required to repay.[123] Indiana is one of only fifteen states that

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116 ALASKA STAT. §§ 09.17.070, 09.55.548 (2010); COLO. REV. STAT. § 13-21-111.6 (2005); CONN. GEN. STAT. §§ 52-225a, 52-225c (2005 & Supp. 2011); FLA. STAT. § 768.76 (2011); IDAHO CODE ANN. § 6-1606 (2010); 735 ILL. COMP. STAT. 5/2-1205, 5/2-1205.1 (2003); MASS. GEN. LAWS ch. 231, § 60G (2000); MINN. STAT. § 548.251 (2010); MONT. CODE ANN. § 27-1-308 (2011); NEB. REV. STAT. § 44-2819 (2010); OR. REV. STAT. § 31.580 (2011).

117 HAW. REV. STAT. § 663-10 (2011); ME. REV. STAT. ANN. tit. 24, § 2906 (2000); MICH. COMP. LAWS § 600.6303 (2000).

118 *See* Wershbale, *supra* note 90, at 352 ("[T]he law in this area has become a jurisdiction-specific legal patchwork.").

119 *Id.*

120 Shirley v. Russell, 663 N.E.2d 532, 534 (Ind. 1996). Plaintiff's husband, Shirley, was a public school employee who opted to have extra money taken out of his paycheck to go into his pension account. *Id.* The pension payments went to the widow and plaintiff upon his death. *Id.* The tortfeasors, on appeal, argued that the district court erred when it excluded this "collateral source" evidence at trial because the evidence would have off-set the damage award. *Id.* The court held that although the collateral source rule had been abrogated, enumerated exceptions, such as directly paid insurance benefits, still would be barred from introduction. *Id.* at 534, 536.

121 *See* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 376 (Ind. 2010) (explaining that the stated purposes for the statute were to enable accurate assessment of the party's loss and to prevent double recovery); *see also* IND. CODE ANN. § 34-44-1-1 (West 2011) (stipulating that the evidence should be considered to preserve lien rights).

122 *See* CSX Transp., Inc., v. Gardner, 874 N.E.2d 357, 365 (Ind. Ct. App. 2007) (explaining that a common effect of these characteristics is that the injured party recovers more than necessary to make it whole).

123 IND. CODE ANN. § 34-44-1-2 (West 2011). The statute states: "In a personal injury or wrongful death action, the court shall allow the admission into evidence of . . . (2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received." *Id.*

allows some form of collateral source payment evidence at trial.[124] The statute stipulates that the trier of fact must "consider" collateral source payment evidence, including worker's compensation payments, when determining an award amount.[125]

After the lower courts rendered different interpretations of the statute's language, the Indiana Supreme Court on May 27, 2010, in *Travelers Indemnity Co. of America v. Jarrells*, interpreted the "consider" provision of section 34-44-1-3 of the Indiana Code and its relation to the Worker's Compensation Act's subrogation provision.[126] In 2002, Jerry Jarrells was seriously injured at work, and as a result, his employer's compensation carrier, Travelers Indemnity Company of America, paid him worker's compensation disability benefits.[127] Jarrells brought a third-party claim against the negligent tortfeasor.[128] At the trial, Jarrells testified that "he might have to reimburse Travelers for [worker's compensation] payments."[129] The trial court gave the jury the pattern "Collateral Source Instruction," which stipulated "[i]n determining . . . damages, you must consider . . . [p]ayments for worker's compensation."[130] The trial court rejected Travelers' lien, finding the

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[124] Wershbale, *supra* note 90, at 352–53. "These states include Alabama, Arizona, California, Delaware, Indiana, Iowa, Missouri, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, and Wisconsin." *Id.*

[125] IND. CODE ANN. § 34-44-1-3. The statute reads: "Proof of payments under section 2 of this chapter shall be considered by the trier of fact in arriving at the amount of any award and shall be considered by the court in reviewing awards that are alleged to be excessive." *Id.*; *see Travelers*, 927 N.E.2d at 377 (applying this statute).

[126] *Travelers*, 927 N.E.2d at 376. The trial court denied Travelers' lien, holding that the "requested relief would impose a double setoff on the recovery because the jury had already deducted the worker's compensation benefits from the gross award." *Id.* at 376. The appellate court reversed the trial court's ruling and entered judgment for Travelers. *Id.* The appellate court found that the lien was included in the award amount and was owed to the carrier. *Id.*

[127] *Id.* at 375. The disability payments paid by Travelers to Jarrells consisted of $21,025.91 in disability benefits and $45,109.76 in medical payments, for a total of $66,135.67. *Id.*

[128] *Id.* Jarrells notified Travelers of the third-party action, Travelers informed Jarrells of its lien rights in the amount of $66,135.67, but chose not to intervene. *Id.*

[129] *Id.* at 376; *see id.* at 375–76 (stipulating that "Jarrells presented evidence of the worker's compensation payments" and acknowledged that "he might have to reimburse Travelers").

[130] *Id.* at 377. The pattern "Collateral Source Instruction" used in this case provided the following:

> If you find that Jerry Jarrells is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate Jarrells for damages resulting from the accident in question. In determining the amount of Jarrells' damages, you must consider the following type of collateral source payments:
>
> Payments for worker's compensation.
>
> In determining the amount received by Jarrells from collateral sources, you may consider any amount Jarrells is required to repay to a

award had been set-off already, but the court of appeals reversed, with the Indiana Supreme Court granting a transfer.[131]

The central issue concerned the allocation of damages, specifically whether the jury deducted the amount of worker's compensation benefits that Jarrells received from the total damages figure.[132] The court held that the carrier was not entitled to a statutorily enumerated lien even though the collateral source instruction required the jury to "consider" whether the worker was required to repay any of the collateral source benefits received.[133] The court reasoned that directing the jury to "consider" the benefits makes the instruction less than clear as to how the jury will consider the payments.[134] The court conceded the possibility that the jury had included the amount, but found that this conclusion was "less likely," instead deferring to the trial court to infer the jury's intent.[135] The court further considered lien complexity as a reason the jury may not have deducted the benefits.[136] Uncertainty as to damage allocation has become so paramount that the U.S. Supreme

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> collateral source and the cost to Jarrells of collateral benefits received. Jarrells may not recover more than once for any item of loss sustained.

Id.

131 *Id.* at 376. After Jarrells notified Travelers of his subsequent judgment, he refused to reimburse its worker's compensation lien, claiming the "jury already reduced the award by the amount of the work[ers'] comp[ensation] benefits and the award should not be reduced further after judgment." *Id.*

132 *Id.* at 377. The court explained that the purpose of the statute—to prevent double recovery—assumes that the jury would award a lessor amount after "considering" the worker's compensation benefits. *Id.*

133 *Id.* at 378–79.

134 *Id.* at 378. The court found:

> The jury could have interpreted this instruction in at least two ways. The trial court concluded that the jury deducted the amount of worker's compensation payments from the amount of Jarrells' damages in order to prevent Jarrells from "recover[ing] more than once for any item of loss sustained." The Court of Appeals found that the amount of worker's compensation payments should be included in the jury's value of damages to permit Jarrells to fulfill the obligation to repay.

Id. (alteration in original).

135 *Id.* at 378–79; *see id.* at 379 ("'[T]he trial judge is in the best position to evaluate the evidence and assess whether the jury's verdict is rationally based' in determining whether the jury verdict was excessive." (quoting Murry v. Fairbanks Morse, 610 F.2d 149, 153 (3d Cir. 1979)). The stated purpose of the Collateral Source Act, as "emphasized to the jury," is to prevent double recovery by the injured party; therefore, the court reasoned it was "plausible" that the jury deducted the amount. *Id.* at 379.

136 *Id.* The court explained that the calculation of Travelers' lien was complex and without an instruction to the jury on how to calculate it, the jury could not have determined an amount of set-off. *Id.*

Court recently recognized the risks and recommended methods to minimize potential problems.[137]

2. U.S. Supreme Court's Recognition of the Risks

The U.S. Supreme Court addressed the issue of uncertain damage allocation and the risk of settlement manipulation in *Arkansas Department of Health and Human Services v. Ahlborn*.[138] The Court indicated that states should mandate a post-settlement agreement detailing how the award is stipulated to prevent uncertainty as to collateral source payment allocation in a jury award.[139] Although unwilling to express a view on the matter, the Court left "open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation."[140]

The introduction of collateral source evidence in worker's compensation cases leaves courts confused as to damage allocation because there is not a concrete standard for evidence consideration where subrogation liens are at stake.[141] To eliminate this confusion, some states have found the introduction of collateral source evidence inadmissible.[142] The U.S. Supreme Court has advised that when such

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[137] *See infra* Part II.D.2 (explaining the Supreme Court's decision addressing collateral source payment evidence).

[138] 547 U.S. 268, 288 (2006). The Court explained:

> Even in the absence of such a postsettlement agreement, though, the risk that parties to a tort suit will allocate away the [s]tate's interest can be avoided either by obtaining the [s]tate's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision. For just as there are risks in underestimating the value of readily calculable damages in settlement negotiations, so also is there a countervailing concern that a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others.

Id. (footnote omitted).

[139] *Id.* The Court explained that another option besides a post-settlement stipulation is having the court dictate the interest or obtaining an advance agreement. *Id.* The Court further explained that some states that have such special rules and procedures have been successful at preventing confusion as to the allocation of a damages award. *Id.* at 288 n.18.

[140] *Id.*

[141] *See supra* Part II.D.1 (describing the Indiana Supreme Court's uncertainty as to the jury's intent in the *Travelers* decision); *see also supra* notes 138–40 and accompanying text (describing the U.S. Supreme Court's recommendation that to avoid such uncertainty, procedures should be put in place that the jury can definitively follow); *infra* Part III.A (describing how the court in *Travelers* was unable to definitively ascertain the meaning of "consider" in the Collateral Source Statute, so there was uncertainty as to the jury's intent in the damage allocation).

[142] For examples of states holding evidence of collateral payments inadmissible, see El Paso Field Servs. Mgmt., Inc. v. Lopez, No. 01-07-00999-CV, 2010 WL 2133885, at *5 (Tex.

evidence is introduced, guidelines must be in place to protect against ambiguity and uncertainty.[143] However, as Indiana's Collateral Source Statute is presently written, uncertainty as to damage allocation is inevitable.[144] Part III addresses these problems.[145]

III. INDIANA'S COLLATERAL SOURCE STATUTE MUST BE REVISED TO PROTECT CARRIERS' STATUTORILY ENUMERATED SUBROGATION RIGHTS

This Part's purpose is to demonstrate that Indiana's Collateral Source Statute needs to be revised for three reasons.[146] First, worker's compensation carriers risk losing their statutorily enumerated liens on damage awards when the Collateral Source Statute is applied in third-party actions.[147] Second, the ambiguous language of the Collateral Source Statute risks confusing the jury as to which party bears the burden of proof regarding the allocation of damages.[148] Finally, as written, the Collateral Source Statute contradicts its own purpose by allowing double recovery by injured parties and promotes frivolous litigation.[149]

Ct. App. May 27, 2010); Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 582 (Tex. Ct. App. 1992); Polito v. Holland, 365 S.E.2d 273, 275 (Ga. 1988).

143 *See supra* Part.II.D.2 (suggesting that guidelines should be set for guidance to the jury and to prevent fraudulent settlements or damage allocation uncertainty).

144 *See infra* Part III (explaining the problems facing and arguments for changing Indiana's Collateral Source Statute).

145 *See infra* Part III (discussing the problems with the recent interpretation of the Collateral Source Statute and the Collateral Source Statute itself).

146 *See infra* Part III.B (describing the three problems encountered when the Collateral Source Statute is applied in worker's compensation lien rights actions).

147 *See* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 376 (Ind. 2010) (explaining that under the Collateral Source rule, the employer's worker's compensation carrier was not entitled to its statutorily enumerated lien on the third-party judgment); *see also* Calvin R. Wright, Note, *The Collateral Source Rule in Georgia: A New Method of Equal Protection Analysis Brings a Return to the Old Common Law Rule*, 8 GA. ST. U. L. REV. 835, 843–44 (1992) (explaining that most state legislatures that have abolished the collateral source rule still apply it when subrogation rights are at stake as a protection of those rights).

148 *See* IND. CODE ANN. § 34-44-1-3 (West 2011) (stipulating that such evidence "shall be considered by the trier of fact"). The Indiana Supreme Court found the term "consider" from the statute's language to be ambiguous. *Travelers*, 927 N.E.2d at 378. They were unable to determine what threshold of evidence was required to meet the "considered" requirement of the statute. *Id.* The court further explained that the jury instruction "directing the jury to consider the worker's compensation benefits . . . is less than clear how the jury is to take these payments into consideration." *Id.*

149 *See* Goldsmith, *supra* note 89, at 802 (explaining that the purpose of the Collateral Source Statute is to prevent double recovery); *see also Travelers*, 927 N.E.2d at 377–78 (stipulating that if Travelers had participated in the trial and provided clarity its lien would have been protected).

To fully comprehend the need to revise the Collateral Source Statute, it is imperative to understand the Indiana Supreme Court's decision in *Travelers*.[150] The court for the first time applied the Collateral Source Statute in determining a worker's compensation carrier's lien rights in a third-party action.[151] Thus, Part III.A explains that the root cause of the subrogation issue in Indiana is the ambiguity in the state's partially abrogated collateral source rule and the subsequent application of the rule in the *Travelers* decision.[152] Part III.B explains how the current Collateral Source Statute hinders effective litigation and resolution of worker's compensation disputes.[153] Finally, this Part explains that the Collateral Source Statute's most recent interpretation undermines long-standing precedent and the Statute's own stated purpose.[154]

A. Subrogation Rights Upheaval Catalyst

On May 27, 2010, the Indiana Supreme Court set groundbreaking precedent with its refusal to uphold a worker's compensation carrier's statutorily enumerated post-judgment lien in *Travelers Indemnity Co. of America v. Jarrells*.[155] For the first time in Indiana history, the court used the Collateral Source Statute as the basis for denying a carrier's lien rights.[156] The imposition of the Collateral Source Statute in this way indicates what could become an extremely costly trend.

The *Travelers* decision is a strong indicator of the future of worker's compensation in Indiana and is indicative of what could become a

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150 *See supra* Part II.D.1 (detailing the application of the Collateral Source Act for the first time in a worker's compensation context in the *Travelers* decision). *But see* Shirley v. Russell, 663 N.E.2d 532, 536 (Ind. 1996) (refusing to admit evidence of collateral annuity payments in a wrongful death claim); CSX Transp., Inc. v. Gardner, 874 N.E.2d 357, 375 (Ind. Ct. App. 2007) (refusing to utilize the Collateral Source Act in similar worker's compensation third-party actions). Similarly, lien holders are not required to intervene because the lien is automatically applied. Schneider Nat'l Carriers, Inc., v. Nat'l Emp. Care Sys., Inc., 469 F.3d 654, 661 (7th Cir. 2006).

151 *Travelers*, 927 N.E.2d at 377.

152 *See infra* Part III.B (explaining that the ambiguity leaves the courts and the interested parties with little to no direction on how it should be applied in such situations, and the effect on the liens when applied).

153 *See infra* Part III.B (describing the three problems found in the Collateral Source Rule).

154 *See infra* Part III.B (stipulating there are three main problems caused by the *Travelers* decision); *see also supra* note 123 (showing Indiana's Collateral Source Statute's language).

155 *See supra* Part II.D.1 (discussing the *Travelers* decision and the court's analysis); *see also* Kellie M. Barr & Marisol Sanchez, *Appellate Civil Case Law Update*, RES GESTAE, Sept. 2010, at 27, 30 (explaining the significance of the decision in Indiana).

156 *See generally* Brief of Appellant, Travelers Indem. Co. of Am. v. Jarrells, No. 29A02-0807-CV-669 (Ind. Ct. App. Ct. Nov. 7, 2008), 2008 WL 5150592 (arguing that throughout Indiana's history, intervention has not been required, and lien rights are automatic).

national trend.[157] Tort reform aimed at collateral source rule abolishment has become nationally prevalent over the last twenty-five years.[158] The importance of tort reform is compounded due to worker's compensation's effect on the economy, which makes the *Travelers* decision all the more significant to Indiana employers and employees.[159] This is especially true as our nation struggles to pull itself out of a crippling recession.[160]

Employers are required to pay worker's compensation insurance costs in Indiana.[161] This cost is increasing rapidly as more employees are filing frivolous claims to ensure job security in the present unstable economy.[162] Worker's compensation carriers' costs have increased in Indiana in the wake of lower demand for their product, lower profits, and higher claims.[163] Since employers are legally precluded from

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[157] *See* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 379 (Ind. 2010) (holding that the carrier should have intervened to protect its subrogation right). The court explained that if Travelers would have intervened, it would have "warrant[ed] a new trial." *Id.* at 377. Stipulating further that "a post-trial intervenor, takes the trial as it finds it." *Id*. Many courts will put the insurer's interests first, "reasoning that 'when the statutory language is unambiguous . . . we will not modify or extend the statute.'" Ingram, *supra* note 62, at 115 (quoting McCarter v. Alaska Nat'l Ins. Co., 883 P.2d 986, 990 (Alaska 1994)). Further, many courts, when the subrogation provisions are clear, reject the suggestion that equitable principles should apply, refusing to mandate that the insured have first priority. *Id.*

[158] *See supra* note 105 and accompanying text (describing the reasons advanced by tort reform proponents); *supra* note 106 (explaining the primary argument for tort reform is that third-party collateral sources offset any windfall risks).

[159] *See supra* notes 58–59 and accompanying text (describing the effect worker's compensation has on the economy's ability to recover from a recession). Currently, costs for worker's compensation premiums are rising as fraud claims increase and demand for carriers decreases, this in turn means higher premiums and thus costs for employers. Ceniceros, *supra* note 54, at 1–2.

[160] *Id.* Fraudulent claims became a startling problem at the decline of the economy in 2009, as workers tried to attain job security through the states' worker's compensation systems. *Id.*

[161] IND. CODE ANN. § 22-3-2-13 (West 2005). The amount of money paid out in disability payments is dependant on the type of injury the employee suffers. JAMES W. HUNT & PATRICIA K. STRONGIN, THE LAW OF THE WORKPLACE: RIGHTS OF EMPLOYERS AND EMPLOYEES 115 (1994). The amount of money paid is usually a "percentage of the worker's pre-disability average wages, . . . with limits on the minimum and maximum amount that can be received." *Id.*

[162] *See* Hogler, *supra* note 28, at 85 (explaining that employers pass some of the costs of worker's compensation on to their employees through lower wages and reduced hiring); *see generally* Ceniceros, *supra* note 54, at 12 (describing how carriers are facing a hike in fraudulent claims due to the pressures of an unstable economy).

[163] *See* Hogler, *supra* note 28, at 85 (explaining that the employer must pass on the costs for worker's compensation to consumers of its products); *see also* Klingel, *supra* note 58 (explaining that worker's compensation claim frequency continued to decline in 2009 due

deducting worker's compensation costs from employees' pay, the increased costs of worker's compensation claims must be transferred to consumers.[164] Higher prices for goods and services during a recession only hinder the economy's ability to rebound.

Both increased claims and additional litigation requirements increase costs for employers.[165] The disability payments paid by an employer can be recouped through states' subrogation statutes.[166] This function, however, is severely limited when the carrier's lien rights are no longer automatically protected.[167] The paramount holding in *Travelers* mandates carrier intervention to protect those rights.[168] The Collateral Source Statute in Indiana is meant to contain costs for all parties involved.[169] The collateral source rule was abrogated in response to the tort reform movement to protect employers and prevent double recovery by the plaintiff.[170] The *Travelers* outcome contradicts the purpose of the subrogation and collateral source statutes and dramatically increases

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to a tightened job market over the last few years). Although the number of claims declined, the number of fraudulent claims increased. *Id.*

164 Hogler, *supra* note 28, at 85. Until the economy significantly improves, businesses will be in a precarious position. Klingel, *supra* note 58.

165 *See* Wershbale, *supra* note 90, at 346 (explaining that as the recession lingers, premium costs remain high and litigation costs are on the rise). Higher litigation costs can only hurt employers, not help them during a looming recession.

166 *See* WICKERT, *supra* note 27, at 31 (describing each state's subrogation statute and respective intervention requirements, if any).

167 See *supra* notes 64–66 (describing the hindrance on litigation when attaining lien rights); *see also* Wershbale, *supra* note 90, at 346 (explaining that the reason subrogation rights are unenforced is due to the costs associated with attaining them).

168 *See supra* notes 126–34 and accompanying text (detailing the court's decision indicating intervention may be required). In *Travelers*, the court stipulated that "[i]f Travelers had participated in the trial and objected to the instruction, this ambiguity [in the statute's language] would warrant a new trial." Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 377 (Ind. 2010). The court further found that as a post-judgment intervenor, Travelers was bound to all prior orders and rulings of the case. *Id*. at 379.

169 CSX Transp., Inc., v. Gardner, 874 N.E.2d 357, 365 (Ind. Ct. App. 2007). The court explained that the Collateral Source Act is meant to keep the injured party from receiving a windfall, thus reducing the costs involved. *Id*; *see supra* notes 106, 158 and accompanying text (describing the main reason for the tort reform movement, and that the abrogation of the Collateral Source Act is to reduce costs).

170 IND. CODE ANN. § 34-44-1-1–3 (West 2011). Indiana, like most other states, has abrogated its collateral source rule in response to the widespread tort reform movement; however, unlike most states, through the use of vague language, Indiana's statute fails to ascertain how evidence of collateral source payments should be presented to the fact finder and why such evidence should be considered. *See id.* Proponents of tort reform argue that it will both decrease insurance premiums and frivolous lawsuits. Wershbale, *supra* note 90, at 346. However, as the Supreme Court indicated in *Arkansas Department of Health & Human Services*, the uncertainty of damage allocation can promote settlement manipulation. 547 U.S. 268, 288 (2006).

litigation costs, hindering judicial efficiency.[171] This result appears to undermine the purpose of the statute by imposing the burden of proof solely on the carriers.

Proponents of tort reform argue that abolishing the collateral source rule will alleviate costs by eliminating plaintiff windfalls and reducing the cost of frivolous litigation.[172] Nonetheless, as seen in *Travelers*, the collateral source rule has the reverse outcome in the worker's compensation context.[173] In *Travelers*, the plaintiff arguably got exactly what reform advocates wish to eliminate—a double recovery.[174] This decision has also opened the doors to a landslide of unnecessary judicial litigation and increased business costs.[175]

The purpose of the Indiana subrogation statute is to prevent double recovery by plaintiffs while protecting the employer.[176] Before the *Travelers* decision, courts interpreting Indiana law held that if an injured party agreed to receive benefits from a worker's compensation carrier, that carrier would have a lien upon any settlement award.[177] This is in furtherance of the long held belief that the employer or its carrier should be fully indemnified and protected.[178] The *Travelers* decision does not

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171 *Travelers*, 927 N.E.2d at 379. *But see* Schneider Nat'l Carriers, Inc., v. Nat'l Emp. Care Sys., Inc., 469 F.3d 654, 657 (7th Cir. 2006) (explaining that intervention is not needed for protection of the lien because to hold otherwise would contradict the purpose of the statute).

172 *See supra* notes 104–07 and accompanying text (providing the reasons for the tort reform movement).

173 *Travelers*, 927 N.E.2d at 377–79. The court held for Jarrells because there was uncertainty as to the damage allocation. *Id.* As indicated by the U.S. Supreme Court, damage allocation uncertainty leads to manipulation by the injured party and the third-party tortfeasor. *Ark. Dep't of Health & Human Servs.*, 547 U.S. at 288.

174 *See supra* notes 132–36 and accompanying text (detailing how the court could not ascertain the jury's intent as to the allocation of damages, and concluding that it is possible the plaintiff already received the amount in its award).

175 *See infra* note 187 and accompanying text (explaining that intervention will be required to clear up any allocation uncertainty). Pursuant to the decision and the ambiguity of the statute, as recognized by the court, it is clear that carriers will be required to intervene to preserve their lien rights. *Travelers*, 927 N.E.2d at 379.

176 *See supra* note 74 (citing several Indiana cases that have held a main purpose behind the statute is to prevent double recovery); *see also supra* note 76 and accompanying text (explaining that the statute is not to be construed as a protection for the negligent party, but rather one for the employer/carrier).

177 For examples of pre-*Travelers* decisions, see Schneider Nat'l Carriers, Inc., v. Nat'l Emp. Care Sys., Inc., 469 F.3d 654, 657 (7th Cir. 2006); Smith v. Gary Pub. Transp. Corp., 893 N.E.2d 1137, 1139 (Ind. Ct. App. 2008); State v. Mileff, 520 N.E.2d 123, 128 (Ind. Ct. App. 1988); Freel v. Foster Forbes Glass Co., 449 N.E.2d 1148, 1151 (Ind. Ct. App. 1983).

178 *Schneider*, 469 F.3d at 660. Where the injured employee is successful in its action, the carriers are entitled to a lien without question. *Id.* The court further stated that to accept the argument that intervention is needed "would obliterate a central purpose of the statute,

follow *stare decisis* and contravenes the purpose of worker's compensation by denying the carrier's lien rights.[179] The Indiana Supreme Court explained that when determining a damage award, the jury "may consider" worker's compensation payments.[180] The court held that the parties had not presented enough evidence demonstrating a requirement to pay collateral source payments, and it was unable to determine if the payments had been considered by the jury as mandated by statute.[181] Instead, the court attempted to interpret the meaning of the statute's uncertain language and found it more "plausible" that the payments were "considered" and deducted from the award by the jury.[182]

The Collateral Source Statute's failure to allocate the burden of evidence left the *Travelers* court to infer the jury's intent during award compilation.[183] Although the court had emphasized to the jury that the point of the collateral source rule was to prevent double recovery, its ruling made double recovery possible, if not probable.[184] During trial, the plaintiff made clear that he would have to repay the payments and introduced evidence of the amount owed; however, the court still found it more "plausible" that the jury had deducted the amount previously from the award.[185] This ruling runs contrary to the subrogation statute, which explicitly requires a repayment of any worker's compensation payments in a third-party action.[186]

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which is to establish and protect the reimbursement rights of worker's compensation." *Id.* 659–60.

179 *See supra* note 85 (listing four Indiana cases that upheld subrogation rights). The Indiana Supreme Court has also held that applying the subrogation in a way that protects the carriers' rights helps to rightly hold the negligent party liable for all the damages it has caused. N. Y. Cent. R.R. Co. v. Milhiser, 106 N.E.2d 453, 457 (Ind. 1952).

180 *See Travelers*, 927 N.E.2d at 377 (Ind. 2010) (referencing the pattern jury instruction given that instructed "you may consider any amount Jarrells is required to repay").

181 *Id.* at 378. The court found that "by directing the jury to 'consider' the worker's compensation benefits paid and also to 'consider' the obligation to repay, the instruction is less than clear how the jury is to take these payments into consideration." *Id.*

182 *Id.* at 378–79. Although unable to determine what the jury actually intended, the court found it more "plausible" that the trial court would be able to ascertain the jury's intent than the appellate court. *Id.* Essentially, the court was advancing the policy of making the injured party whole over the stated purpose of the statute—to protect against double recovery. *Id.*

183 *See supra* notes 134–36 (describing the court's attempt to decipher the jury's intent and allocation of damages).

184 *See supra* notes 121, 132 and accompanying text (explaining the court's explanation that the statute's purpose was to prevent double recovery).

185 *See supra* note 129 and accompanying text (detailing how the injured party during trial informed the jury of his obligation to repay the worker's compensation benefits).

186 *See supra* note 84 and accompanying text (noting that the court explained that the Indiana subrogation statute specifically says, "from the amount received by the employee

This revolutionary interpretation by the *Travelers* court means that to protect their lien rights, and to contain costs, carriers will need to intervene in all third-party actions brought by injured workers.[187] This contradicts the subrogation statute, which mandates that from any settlement or judgment, the carrier or employer shall receive "the amount of compensation paid to the employee or dependents."[188]

The subrogation statute subjects any recovery to set-off for the employer's pro-rata share of the expenses incurred in the injured party's action.[189] It is contradictory to off-set the pro-rata share of expenses from the employer's lien while at the same time requiring that the carrier assure enough evidence is presented to reserve its rights.[190] Not only would intervention be contradictory, but also extremely inefficient.[191] As the U.S. Supreme Court indicated in *Alhorn*, a good solution is to set up policies and procedures that outline the allocation of damages.[192] By

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or dependent there shall be paid to the employer or the . . . carrier . . . amount of compensation paid to the employee" (citing IND. CODE ANN. § 22-3-2-13 (West 2005))).

187 *Travelers*, 927 N.E.2d at 379. Carriers only hope that the courts will interpret the "consider" language in the Collateral Source Statute in their favor is to intervene and argue their case in every third-party case brought by an injured employee. *See, e.g.*, *id.*

188 § 22-3-2-13; *see supra* notes 74–76, 79, 82–85 (describing the purpose of Indiana's subrogation statute); *see also* Gary L. Wickert, *The Many Faces of Workers' Compensation Subrogation*, FINDLAW, http://library.findlaw.com/2006/Jul/7/246725.html (last visited Apr. 29, 2012) ("Indiana's [subrogation] statute is "fairly straightforward . . . . [A]ny amount recovered . . . shall be paid to the employer/carrier in satisfaction of [their] . . . subrogation interest.").

189 § 22-3-2-13. The code specifically states that any lien repaid is "subject to [the carrier] paying its pro-rata share of the reasonable and necessary costs and expenses of asserting the third party claim." *Id.* Courts have held that even if the pro-rata share is not paid until the end, the lien is not waived. *E.g.*, Welter v. F.A. Wilhelm Constr., 743 N.E.2d 1255, 1259 (Ind. Ct. App. 2001).

190 *See* Schneider Nat'l Carriers, Inc., v. Nat'l Emp. Care Sys., Inc., 469 F.3d 654, 658–59 (7th Cir. 2006); *Welter*, 743 N.E.2d at 1259 (finding nothing had to be done before the lien should be repaid, holding the carriers' liens are automatic). Establishing an evidence threshold nullifies the pro-rata share set-off of the subrogation statute. *Schneider*, 469 F.3d at 659–60.

191 *See* State v. Mileff, 520 N.E.2d 123, 128 (Ind. Ct. App. 1988) (stipulating that the employer's rights are what is supposed to be protected). The court held that the employee, pursuant to the statute, is made the employer's trustee, and that the employee is responsible for securing the lien rights for the employer. *Id.* By holding that the injured party is the carrier's "trustee," the courts have placed them with the burden of establishing the lien. *Id.* It would be an unnecessary waste of judicial resources and litigation expense to require the carrier to do the same thing that the injured party should already be doing. *Id.*

192 *See* Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 288 (2006) (explaining that failing to allocate leads to settlement manipulation). The Court stipulated that states that have set up "special rules and procedures" for proceeds have circumvented such problems. *Id.* at 288 n.18.

clarifying the language of the statute to mandate damages, the issues from the statute's ambiguity would be eliminated.

B. Collateral Source Statutes' Ambiguity and Travelers Detrimental Interpretation

Through the use of vague language and lack of burden allocation, the Collateral Source Statute leaves courts guessing as to its meaning, as demonstrated in the *Travelers* decision.[193] The *Travelers* court interpreted the statute's language, specifically the "consider[ation]" of evidence, to mean a carrier must meet an uncertain evidence standard.[194] This burdens the judiciary, the subrogation statue, and the economy. This decision has thus caused three problems: (1) it undercuts the purpose of worker's compensation and the subrogation statute; (2) the ambiguous language of the Collateral Source Statute allows for uncertain guess work and unpredictability in the allocation of damage awards; and (3) the Collateral Source Statute's interpretation in *Travelers* undermines the collateral source rule's purpose.[195]

1. Indiana's Collateral Source Statute as Interpreted in *Travelers* Undermines Indiana's Worker's Compensation System

One of the main purposes of Indiana's Worker's Compensation Act is to reduce litigation costs.[196] However, the Indiana Supreme Court in *Travelers* ignored *stare decisis* and concluded that the jury more likely protected the plaintiff's interests, ignoring the stated purpose of protecting against a double recovery.[197] This decision emphasizes a purpose that, although arguably important, is not one of the main purposes advanced by the state's worker's compensation system.[198]

Almost all Indiana courts before the *Travelers* decision had upheld the notion that the employee was essentially the trustee of the

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193 *See* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 377–78 (Ind. 2010) (explaining that the court was uncertain about the jury allocation of damages because of the Collateral Source Act's ambiguous language).

194 *See supra* notes 126–35 and accompanying text (describing the Indiana Supreme Court's interpretation of Indiana subrogation law).

195 *See infra* Part III.B.1–3 (explaining in detail the problems respectively).

196 *See supra* note 77 and accompanying text (quoting Indiana's subrogation statute's language). "The purpose of the Indiana Worker's Compensation Act is to avoid litigation . . . . [S]ections within it evidence a strong policy against allowing a double recovery." WICKERT, *supra* note 27, at 459 (footnotes omitted).

197 *See generally Travelers*, 927 N.E.2d at 379 (finding for the injured party over the carrier's lien rights).

198 *See supra* notes 74–76, 79, 82–85 (describing the main purpose of the subrogation statute).

employer's rights.[199] This protection of employers' interests is justified for several different reasons. First, the employee receives a benefit from the faultless employer to compensate for damages resulting from the incident.[200] It is conducive to public policy to reimburse the employer for an act that it did not contribute in causing.[201] Second, the employer, pursuant to the subrogation statute, must repay its pro-rata share of all litigation expenses for the third-party action, thus eliminating any risk that the injured party would be disadvantaged by bringing the claim.[202]

This long-standing protection is seen in the *Schneider* decision.[203] Reiterating past Indiana court decisions, the *Schneider* court found that the purpose of Indiana's worker's compensation subrogation statute was to protect the employer by providing them with compensation without further litigation.[204] Utilizing past Indiana common law, the *Schneider* court emphasized two key themes: (1) the subrogation statute is meant to eliminate unnecessary litigation; and (2) the central purpose is the protection and reimbursement of the employer.[205] The *Travelers* decision deviates from the clear purpose of Indiana's worker's compensation case law.[206] Although not explicitly saying that intervention is necessary to

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199 *See supra* notes 74–76 and accompanying text (holding that the employer's lien rights were protected in the third-party actions litigated).

200 Hogler, *supra* note 28, at 85–88. In every state, under the specific state's Worker's Compensation Act, workers are entitled to collect from their employer's medical benefits, regardless of the employer's fault. *Id.* The Act sets up procedures and policies with the purpose of eliminating costly litigation for the employer. *Id.*

201 *See* Ingram, *supra* note 62, at 107–08 (explaining it would be against the purpose of subrogation to hold a faultless party responsible). The doctrine of subrogation is based on principles of equity that mandate that the employer be reimbursed for its contribution when faultless. *Id.*

202 *See supra* note 77 and accompanying text (explaining how Indiana is one of the few states that requires the employer/carrier to pay its fair share of all third-party litigation expenses).

203 *See* Schneider Nat'l Carriers, Inc., v. Nat'l Emp. Care Sys., Inc., 469 F.3d 654, 656–58, 660 (7th Cir. 2006) (holding that the carrier's lien rights were not waived because the carrier did not intervene and finding the settlement between the tortfeasor and the claimant invalid for failing to obtain the carrier's consent).

204 *See generally id.* at 658 (stipulating the twin purposes of the statute were to prevent double recovery and assure reimbursement).

205 *Id.*

206 *See* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 379 (Ind. 2010) (refusing to recognize the carrier's lien rights); *see also supra* note 177 and accompanying text (detailing Indiana cases that have interpreted Indiana worker's compensation law and upholding lien rights). The court in *Travelers* undermines these holdings by putting the injured employee's rights first. *Travelers*, 927 N.E.2d at 379. The court itself admits "the possibility that the jury included the amount of worker's compensation payments made to Jarrells in its award based on its assumption that he would have to repay Travelers for those payments." *Id.* at 378. The court goes on to justify its decision by stipulating that this outcome "is less likely" than the possibility that it was already included in the award. *Id.*

protect a lien right, the *Travelers* court still abolishes any hope of an efficient solution to a third-party action. A "successful conclusion" according to past Indiana cases, and their summation in *Schneider*, appeared to be one that was quick and efficient, affording the utmost protection to the employer/carrier liens.[207] The court in *Travelers* aims for the opposite result, explicitly explaining that the ambiguity, and thus the lien, would have been granted to the carrier if it had intervened and clarified the rights for the jury.[208] This is contrary to Indiana's Worker's Compensation Act's purpose and *stare decisis*, which found the lien rights automatic under the subrogation statute.[209] It was Indiana's Collateral Source Statute's ambiguous language that made this divergent decision possible.

2. The Collateral Source Statute in Indiana Is Ambiguous and Unclear

The Indiana Collateral Source Statute uses ambiguous language as to how payment evidence should be used in determining a damages award. During the *Travelers* trial, pursuant to a pattern collateral source jury instruction, the jury was specifically instructed to consider repayment of worker's compensation benefits into its award calculation.[210] The instruction to the jury was based on the statute's language, and yet the court still refused to honor the carrier's lien due to uncertainty.[211]

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[207] *Schneider*, 469 F.3d at 659; *see id.* at 661 (upholding the carrier's lien in accordance with Indiana law).

[208] *See supra* note 157 (stipulating that the lienholder could have protected its rights by intervening, so appearing to establish the intervention requirement for lien protection).

[209] *See supra* notes 74–76 and accompanying text (noting that all previous Indiana court precedents have upheld this protection until the drastic change in *Travelers*, and there was no explanation in the court's decision to explain the drastic change from prior precedent).

[210] *Travelers*, 927 N.E.2d at 377. The pattern jury instruction given stated:

> If you find that Jerry Jarrells is entitled to recover, you shall consider evidence of payment made by some collateral source to compensate Jarrells for damages resulting from the accident in question. In determining the amount of Jarrells' damages, you must consider the following type of collateral source payments:
>
> Payments for worker's compensation.
>
> In determining the amount received by Jarrells from collateral sources, you may consider any amount Jarrells is required to repay to a collateral source and the cost to Jarrells of collateral benefits received. Jarrells may not recover more than once for any item of loss sustained.

Id. (citing INDIANA PATTERN JURY INSTRUCTIONS—CIVIL (MICHIE) 11.07 (2d ed. 2007).

[211] *See supra* note 210 (quoting the language of the jury instruction given).

Providing clarity at trial goes against both active parties' personal interests.[212] Failing to inform the jury benefits both the injured party and the tortfeasor.[213] This switch in interest protection contradicts the purpose of worker's compensation, the tort reform movement, and subrogation statutes.[214] Almost every prior Indiana decision, including *Schneider*, explicitly held that carriers are not required to engage in any sort of litigation to protect their rights; thus, the *Travelers* decision to implicitly hold that they are required to provide clarity—by interjecting into the action itself—is a bad policy and deviates from the purpose of worker's compensation.[215]

The main issue in *Travelers* was the meaning of the word "consider" in the Collateral Source Statute.[216] The court was correct when it said "consider" is an ambiguous term because it can take on several different meanings.[217] Both the Collateral Source Statute and the *Travelers*

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[212] *See supra* note 138 (explaining that the U.S. Supreme Court recognized the risk of settlement manipulation without clarification).

[213] *See supra* notes 137–39 and accompanying text (describing how manipulation is promoted when the allocation of damages is uncertain).

[214] *See supra* Part II (explaining that a primary purpose of these three areas was to prevent double recovery).

[215] *See supra* Part III.A (describing how the interpretation of the Collateral Source Statute's ambiguous language by the *Travelers* decision is an "upheaval" of the statute's purpose).

[216] *See* Travelers Indem. Co. of Am. v. Jarrells, 927 N.E.2d 374, 377–78 (Ind. 2010) (explaining that the jury instruction of the use of the word "consider" could have been interpreted in two different ways: either allocating the lien amount in the damages award or not).

[217] *Id.* It is not a definitive standard that a jury can easily work with, as the statute simply states that "proof of payments . . . shall be considered by the trier of fact in arriving at the amount of any award." *Id.*; IND. CODE ANN. § 34-44-1-1 (West 2011). The court explains:

> If the jury is to consider evidence of collateral source payments such as worker's compensation that the plaintiff is required to repay, the only plausible interpretation of these provisions is that the jury should include the amount of any collateral source payments that the plaintiff is required to repay in its award to the plaintiff. If, however, there is no evidence of an obligation to repay, then the jury should not include the amount of collateral source payments in its award. The defendant, therefore, is benefited by evidence of the collateral source payments, and the plaintiff gets the benefit of proof of obligation to repay.

Travelers, 927 N.E.2d. at 377.

The holding by the court does not make sense when applied to the facts of the trial, because at trial there was evidence that a lien would have to be repaid by Jarrells (the injured party). So evidence was presented, but at no point in its decision does the court indicate how much evidence should have been presented, or how to secure the lien.

decision do little to provide clarity as to how juries should "consider" these payments in the future.[218]

If Indiana's subrogation statute is to operate effectively and guarantee the lien rights of carriers, as it was intended, the Collateral Source Statute must be amended.[219] There are two proposed amendments discussed in Part IV, the first of which would reinstate the common law collateral source rule and remove the abrogation for worker's compensation payments.[220] This option would eliminate any possibility that the jury could misuse the information.[221] The second option would adhere to the U.S. Supreme Court's precedent by mandating that worker's compensation payments are included in the damages award.[222]

IV. CONTRIBUTION

As explained in Part III, Indiana's Collateral Source Act as presently written undermines the purpose of the state's Worker's Compensation Subrogation Act.[223] The Collateral Source Act is meant to eliminate double recovery and reduce the number of frivolous lawsuits, yet its ambiguous language actually encourages them.[224] Furthermore, the Collateral Source Act allows for contradictory interpretations, as seen in the *Travelers* decision.[225] This Note proposes that to solve these problems, the Collateral Source Act must be amended in one of two ways: Either the Act must be amended so that worker's compensation payment evidence is no longer considered by the trier of fact, or the Act must be amended to remove the present ambiguity and mandate that worker's compensation liens are included in the damages award. Both solutions will revive the intention of Indiana's Worker's Compensation

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218 *Id.* at 377–78. The court just stipulates that the jury instruction should not be used again, but nothing in the decision sets out any future standard to be used.

219 *See infra* Part IV.

220 *See infra* Part IV (explaining that if the common law collateral source rule was reapplied to third-party actions, the risk of jury confusion and undermining the subrogation statute would be eliminated).

221 *See infra* Part IV (describing how the payment evidence can easily confuse the jury when introduced).

222 *See supra* Part II.B.4; *see infra* Part IV (describing the U.S. Supreme Court's recommendation—to provide guidelines for juries to follow so uncertainty is removed from the damage award).

223 *See supra* Part III (explaining that the purpose of the Collateral Source Act is to prevent against double recovery, yet the most recent interpretation allows for just that).

224 *See supra* Part III (detailing arguments in support of collateral source rule revision).

225 *See supra* Part II.D (describing various jurisdictions approach to abrogation of the collateral source rule and its impact on carrier subrogation rights).

Subrogation Act and reflect the Collateral Source Act's original purpose of eliminating double recovery.

A. Proposed Amendment to Section 34-44-1-2 of the Indiana Code

The first proposal is to amend the Collateral Source Act to exclude worker's compensation payments entirely. This would remove the present abrogation and revive the common law collateral source rule for the consideration of worker's compensation payments.[226] The amendment would prevent the admittance of any payment evidence related to worker's compensation payments, thus eliminating the need for the court to try to determine the jury's assessment of such evidence.[227] The proposed amended statute follows, with the Author's commentary intertwined:

Proposed Amendment to Indiana Code Section 34-44-1-2:

> In a personal injury or wrongful death action, the court shall allow the admission into evidence of:
>
> (1) proof of collateral source payments other than:
>
> (A) payments of life insurance or other death benefits;
>
> (B) *payments of worker's compensation benefits;*
>
> (C) insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly; or
>
> (C) payments made by:
>
> (i) the state or the United States; or
>
> (ii) any agency, instrumentality, or subdivision of the state or the United States;
>
> That have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;
>
> (2) proof of the amount of money that the plaintiff is required to repay, ~~including~~ *excluding* worker's compensation benefits, as a result of the collateral benefits received; and

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226 *See supra* Part II.D.1 (explaining the common law collateral source rule and its bar on the introduction of third-party payments for injuries incurred).

227 *See supra* Part II.D (discussing the courts' uncertainty in determining the jury's intent as to the allocation of the damages award).

> (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.[228]

Commentary

This proposed amendment to section 34-44-1-2 of the Indiana Code makes the necessary changes to: 1) avoid uncertainty as to the jury's consideration of worker's compensation payment evidence; 2) eliminate any requirement to intervene in third-party actions to guarantee rights for carriers; and 3) revitalize the purpose of Indiana's subrogation statute by once again protecting the worker's compensation carrier's lien rights.

First, as explained previously, the main issue in *Travelers* was the court's admitted inability to determine how the jury considered the lien repayment evidence presented at trial.[229] This proposed amendment would remove that uncertainty and eliminate any unnecessary burden on the jury. Under this approach, the jury would not be weighed down with the complications of worker's compensation law or the complexity of a carrier's lien—it would not even consider these issues.[230]

Second, the elimination of the evidence requirement will make carrier intervention to guarantee rights unnecessary. Due to the illogical precedent set by the *Travelers* decision and its contravention of worker's compensation's purpose, carriers currently have no guarantee that their liens will be protected without costly intervention.[231] This is because no clear standard for lien preservation has been set by the Collateral Source Act or the Indiana Supreme Court.[232] By eliminating the need for the presentation of worker's compensation benefit repayment evidence, the burden on the interested parties, the court system, and the economy will be lifted. Restoration of the common law rule in this area will prevent courts from setting evidentiary standards or thresholds, make claim outcomes more predictable, dramatically reduce litigation expenses, restore judicial efficiency, and save time. Most importantly, the

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228 The proposed amendments are italicized and are the contribution of the Author.

229 *See supra* Part II.D.1 (describing Indiana's approach to collateral source rule abrogation in worker's compensation cases).

230 *See supra* Part II.D.1 (explaining that the court reasoned in *Travelers* that the lien was not included because of the lien's complexity).

231 *See supra* Part II.D.1 (explaining that one of the reasons subrogation is so rare is because of the complexity of determining the carrier's lien amount).

232 *See supra* Part III (demonstrating that the *Travelers* decision failed to set any standard to guarantee a lien for the carrier, and the Act's ambiguous language forecloses the ability to gage a concrete standard).

Collateral Source Act's purpose of reducing unnecessary litigation and expense will be realized.[233]

Third, the restoration of the common law collateral source rule will restore the purpose of Indiana's subrogation statute.[234] The Act is meant to eliminate double recovery, like the Collateral Source Act, while protecting the interests of the carrier.[235] It is vital that the carrier's interests are protected because such protection affects the state's overall economy.[236] Employers in Indiana are required to carry worker's compensation insurance, and when carriers' costs increase, such as through litigation expenses to recover liens, premiums charged to employer businesses increase.[237] Employers in Indiana have already experienced this hike in premiums, a cost that is most certainly transferred to consumers.[238]

B. Proposed Mandate of Worker's Compensation Liens in Damage Awards

Although the previous recommendation to resort back to the common law collateral source rule for worker's compensation payments is arguably the simpler solution, there is another alternative that will achieve the same result. The second proposal is that if the Collateral Source Act is to be reformed at all, it should be rewritten to mandate that worker's compensation payments are included in the damages award. This proposal would still remove all the risky guess work about the allocation of funds, eliminate the need for carriers to intervene to preserve their rights, and lower business and litigation costs, while preserving judicial efficiency. Revision of Indiana's Collateral Source Act section 34-44-2-3 follows:

> *In arriving at the amount of any award the trier of fact:*
> *(1) must include in the award any payments that the plaintiff is statutorily required to repay to any third-parties; and*

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233 *See supra* Part II.D (describing the purposes behind Indiana's Collateral Source Statute, which includes prevention against double recovery).

234 *See infra* Part IV.A (describing how the common law collateral source rule will clear up any discrepancies in award allocation).

235 *See supra* Part II.B (detailing how the subrogation statute is meant to protect the carrier's interests and alleviate costs).

236 *See supra* Part II.A (explaining that worker's compensation insurance, as a multi-billion dollar industry, is the largest insurance line in the nation).

237 *See supra* notes 55–58, 161–64 and accompanying text (explaining the negative effect the increased claims have had on the economy during the recession).

238 *See supra* notes 161–64 and accompanying text (explaining that with no other way to recoup the costs, they get transferred to consumers).

> *(2) other payment evidence not required to be repaid by the plaintiff may be considered by the trier of fact in arriving at the award amount and shall be considered by the court in reviewing award that are alleged to be excessive.*[239]

Commentary

This second proposed amendment appeals to collateral source rule reformers, who worry that without evidence of third-party payments, the plaintiff stands to receive a windfall.[240] This option also gives the jury the "whole picture" as to third-party benefits, allowing them to make a more informed decision and ensuring a more accurate damage award. At the same time, this option protects the lien holder's subrogation rights by mandating that the payments are included in the award. Since more evidence must be presented under this proposal, it may be less judicially efficient, but given that this solution appeals to both sides of the tort reform movement, it may be worth the additional time and effort.

V. CONCLUSION

Worker's compensation insurance is a multi-billion dollar industry in the United States and, as such, is an integral part of Indiana's economy. It is vital to Indiana's economy that the integrity of the worker's compensation system be protected. To ensure such protection, carriers' liens must continue to be judicially recognized and enforced. The Indiana Supreme Court flouted previous case law and undermined the state's worker's compensation system by denying worker's compensation carriers statutorily enumerated lien rights in the *Travelers* decision. This decision was attributed to the Collateral Source Act's ambiguous language, which, as currently written, leaves the door open for double recovery, a phenomenon the Act was meant to prevent.

The ambiguity in Indiana's Collateral Source Statute leads to detrimental results that contradict the statute's purpose of preventing double recovery. To restore this purpose, the ambiguity in Indiana's Collateral Source Act must be replaced with a concrete standard that protects all parties' interests. Either the consideration of worker's compensation payments should be prohibited by returning to the common law collateral source rule for the consideration of such payments or juries should be mandated to include any lien in the

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239 The proposed amendments are italicized and are the contribution of the Author.

240 *See supra* Part II.C (describing the recent tort reform movement, which has grown because of a desire to reduce costs and frivolous lawsuits).

damages award. Both of these solutions would restore the prevention of double recovery, promote judicial efficiency by eliminating the implicit requirement of intervention for lien protection, and reduce business costs. The concrete standards proposed would guide the courts and protect the integrity of Indiana's worker's compensation system while helping to revitalize Indiana's economy, an outcome where everyone benefits.

Jamie R. Kauther[*]

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