

THE COLLATERAL SOURCE RULE: STATUTORY REFORM AND SPECIAL INTERESTS

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Paul Rubin (2005) has addressed the evolution of American tort law from a public choice perspective. In contrast to earlier work in law and economics, which generally regarded tort law norms as efficient (Landes and Posner 1987), Rubin relied on more recent work in the field (Epstein 1988, Rubin and Bailey 1994) that regards tort law as being shaped by the special interests of plaintiff and (perhaps to a somewhat lesser extent) defense attorneys. In addition, Rubin envisioned business interests' influence toward tort reform as enhancing efficiency. He ended his article with a call for additional empirical research on modern American tort law from the public choice perspective and indeed suggested a number of specific items and areas of possible fruitful research. The spirit of Rubin's anticipated research program, as well as many of his specific suggestions, can be applied to our survey research findings concerning statutory reform of the collateral source rule.

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The Collateral Source Rule

The collateral source rule is a normative rule in the common law (i.e., judge-made law) that applies to recoverable losses in tort actions such as personal injury, wrongful death, and medical malpractice. Specifically, the rule prohibits jury members from considering any payments to a plaintiff (victim) other than those made by the defendant tortfeasor (injurer). Under the rule, a victim can recover full damages from a tortfeasor even after the victim has already received full compensation for damages from the victim's own insurer for the very same injurious event (assuming, of course, that the victim had not previously by contract subrogated the rights of recovery from tortfeasors to the insurer in consideration of a lower policy premium).

Richard Posner (2007: 199–200) regards the collateral source rule as being an efficient common law norm. The basic argument is that the appearance of double recovery by the victim is very much beside the point whereas the crucial issue is that the full cost of negligent behavior be imposed on tortfeasors if such persons or firms are to get the correct signal concerning the appropriate (i.e., efficient) level of care to be taken. Matters are seemingly a bit trickier, for example, in a case of workplace-induced injury where the injured party's employer has provided the insurance policy under which recovery has been obtained. Some states specifically exclude double recovery in such a situation. Posner deftly sees through this complication, noting that insurance is part of a compensation package, so that in the absence of employer-provided insurance the worker would have negotiated a higher wage. Thus, the insurance, although employer-provided in appearance, is actually paid for by the employee in the form of a lower wage rate than would otherwise be the case. In Posner's view, therefore, exceptions to the ordinary collateral source rule in the circumstance of employer-provided insurance actually decrease efficiency. Posner concedes that exceptions to the rule for certain public-sector benefits, like monies awarded through workers' compensation programs, suitably establish a governmental right to recovery of public funds without adversely affecting efficiency.

Posner's analysis may appear to be open to criticism. For one thing, as noted elsewhere in Posner (2007: 172), but not in his discussion of the collateral source rule, potential victims frequently have a role to play in accident avoidance and must be given correct signals of what constitutes appropriate precautionary behavior. If there were

to be double recovery under the collateral source rule, then victims might actually induce accidents, the cost of which would then be only half of what a victim could expect to recover from two sources (namely, the tortfeasor and an insurer).

There are three fallacies embedded within this attempt at criticism. First, and most obvious, the logic of the criticism fails if potential victims have already voluntarily (i.e., by contract) provided for subrogation of their rights to recovery to the insurance provider, for then there is only a single recovery by any victim. Second, depending on which variant of negligence law one has in mind, victim recovery may indeed be blocked or reduced in situations in which the victim is willfully, principally, or even just partially at fault. Third, concerning situations in which victims allegedly might take inadequate levels of care, insurance premiums would presumably reflect such possibilities. The moral hazard problem (wherein those insured are induced to behave more recklessly at the margin by virtue of their being insured) may be so severe as to preclude insurance in certain markets. Where insurance is in fact provided, given the insurer must charge a premium sufficient to cover overhead costs, if direct primary recovery from the tortfeasor by the victim is assured then the purchase of insurance represents an actuarially unfair and needless (i.e., avoidable) bet. Consequently, one should not expect victims to purchase insurance for the sake of merely gambling in hopes of a second recovery, at least not if they are risk-neutral or risk-averse individuals. To our knowledge this point has not been previously noted in the literature.

A second type of criticism has been applied to Posnerian logic with respect to the collateral source rule. The criticism grants that the collateral source rule may be efficient, but calls for exceptions to be created to the rule because other sources of inefficiency in tort law result in a general overcompensation of victims, and it may not be possible to alter the other sources of inefficiency (U.S. Congressional Budget Office 2004: 6). By way of example, the reasoning at hand might call attention to the phenomenon of runaway jury awards in a context in which the legislature for some reason has been unwilling or unable to cap damages in tort actions. In such a situation, with logical validity (yet with a measure of uneasiness) one might call for exceptions to the collateral source rule as a “second best” tort reform solution. The application of “second best” argumentation is vexing to the extent that it may leave one not knowing

whether any rule or norm could ever be considered truly efficient on its own merits, because the efficiency properties of a rule would no longer be determined in an otherwise isolated state. Rather, they would always be contextually determined and dependent on the existence and performance of other rules.

Determining whether the collateral source rule is itself efficient (assuming “second best” argumentation does not preclude such a determination) is not really the primary purpose of the analysis here. Suffice it to say that the rule has undergone substantial revision in many (but not all) state legislatures, and empirical studies have emerged that attempt to measure the efficiency consequences of modification of the rule in the states. Weakened versions of the collateral source rule are reported to be associated with (1) increased vehicular accidental deaths, as drivers exhibit marginally less care when they face less than the full costs of the accidents they cause (Rubin and Shepherd 2005), and (2) increased infant mortality (concentrated in the black population), as physicians exercise less care when accountability for full malpractice costs is reduced (Klick and Stratmann 2005).

Rather than exploring the efficiency consequences of statutory modifications of the collateral source rule, we focus attention on documenting and explaining the statutory modifications. We present the detailed results of our survey of statutory laws governing application of the collateral source rule in the states. Amendment of the rule by statute in the states provides a natural setting to apply public choice analysis of tort reform along the lines envisioned by Rubin (2005). The types of statutory revisions of the common law collateral source rule that have occurred lend themselves to categorization as to whether the revision erodes the rule or represents a partial return to the original rule. The statutory exceptions to the rule, and exceptions to the exceptions, can then be thought of as “smoking guns” in that they often can be traced back to the hands of underlying special interests.

In the case of the collateral source rule, reform does not appear to us to follow conveniently a secondary thesis implied in Rubin (2005)—namely, that tort reform is a movement (driven by business interests and sometimes those of medical care providers) away from lawyer-friendly special interest rules and norms toward a more efficient institutional state. We offer as an alternative theory that tort reform in the particular case of modification of the collateral source rule is driven by the relative political clout of various special interests in different times and places—despite the drift from efficiency such

modifications may cause. From the alternative viewpoint, efficiency considerations are of secondary importance in understanding, explaining, or predicting so-called tort reform in the case of the collateral source rule.

Our purpose here is modest. We provide a public choice analysis that links various statutory modifications of the rule's application to underlying special interests that benefit from such modification. Our analysis also takes note of those special interests that benefit from retention of the original rule, or at least partial return to the original given some prior modification of it. We believe our analysis plants the seeds for future empirical testing of the extent to which special interests have actually induced or inhibited statutory modification of the collateral source rule.

We begin our analysis by presenting the most relevant portion of the results of our survey of statutory reform of the collateral source rule. We then describe the special interest influences at play and connect the interest groups to the statutory exceptions (and exceptions to the exceptions) in a way that suggests the foundations of a research design applicable to subsequent empirical testing. Lastly we review several of the specific suggestions contained in Rubin (2005) to demonstrate that our survey results do indeed provide a promising basis for full-blown empirical testing of special interest influence on the collateral source rule. We conclude, in agreement with Rubin (2005), that American tort law appears to have been influenced by special interests, but we dispute the notion that tort reform (at least as it concerns modification of the original collateral source rule) has been a progression toward greater efficiency.

Statutory Modifications of the Collateral Source Rule

We examine the statutes of all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands (henceforth, referred to as “the jurisdictions”) to identify the myriad forms that reform of the collateral source rule has taken. We queried the annotated state codes in Lexis-Nexis Academic Universe for the following terms: collateral source, collateral benefit, collateral payment, collateral source rule, collateral source benefit, third-party payment, tort, civil action, admissible, admissibility, gratuitous, subrogation, insurance, lien, worker's compensation, Medicare, Medicaid, and Social Security. To ensure we had the most recent legislation, the statutes and their

respective titles, chapters, and sections were obtained from the government and legislative websites of each jurisdiction. After thoroughly reviewing these statutes, we categorized the many types of reform to bring cohesion to the sizeable amount of information gathered. A side benefit was that upon completion of the categorization process the entire body of information could be presented in tabular form.

It is appropriate at this juncture to compare our compiled results to Avraham's (2006) impressive database on reform of state tort law. Avraham presents tort law reforms of all types, including those concerning the collateral source rule, by state. He provides a brief summary description of each reform and gives information on the effective date of the reform, whether a jury is permitted to know of the reform, and whether the reform has been deemed constitutional in the courts. In contrast, our compiled results concern only the collateral source rule, not all state-level reforms, and should not be thought of as a subset of Avraham's database. Our results apply to a particular point in time and include two territories (Puerto Rico and Virgin Islands) that do not appear in Avraham's database. Most important, our results organize the prevalent forms of collateral source rule statutory reform across the states into two dozen categories within a half-dozen major types (whereas Avraham presents no such summary classifications). In this article, we describe the categories and give summary statistics on the number of instances of each category across the many jurisdictions.¹

Our organizing principle was to create a distinct category whenever a type of reform was observed in at least two jurisdictions, but not otherwise. Table 1 demonstrates that: (1) there is rich variation in jurisdictional statutes addressing the collateral source rule; (2) some modifications of the rule can be classified without error as benefiting certain special interest groups; and (3) the connection between modifications of the rule and underlying special interests, once coupled with a priori measures of the political influence of interest groups in the various jurisdictions, forms a promising foundation for empirical testing of the kind anticipated by Rubin (2005).²

¹The data may also be presented in disaggregated fashion while still retaining the classifications (see Feeley and Schap 2006), so that each jurisdiction's statutory status is presented per our coding.

²In an unabridged version of Table 1, available from the authors, we provide instances of reforms observed in single jurisdictions and document modifications that appear to be purely procedural. We also provide instances of exceptions to the collateral source rule with respect to crime victim compensation.

TABLE 1
 STATE AND OTHER SELECT JURISDICTIONAL (DC, PR, VI)
 STATUTES ADDRESSING THE COLLATERAL SOURCE RULE

Description	Categories	State Total (includes D.C.)	Territory Total (Puerto Rico & Virgin Islands)
Status of Collateral Source Rule (8/12/2005)	1. (-) Modified.	38	0
	2. (-) Eliminated.	1	1
	3. Neither modified nor eliminated (except perhaps may be altered for crime victim compensation).	12	1
Insurance	1. (-) Insurance payments may be considered.	38	0
	2. (+) Evidence of the cost of obtaining the collateral source payments may be considered.	29	0
	3. (+) Evidence of life insurance collateral source benefits may not be considered.	23	0
	4. (+) Evidence of personally acquired or family provided insurance may not be considered.	14	0
	5. (+) Evidence of employer provided insurance may not be considered.	4	0
	6. (-) The plaintiff may not receive compensation more than once for the same medical expenses.	39	1
	7. (+) Gratuitous benefits provided to the plaintiff may not be considered.	5	0
Medical Malpractice	1. (-) Evidence of collateral source benefits may be introduced for medical malpractice.	21	1
	2. (-) Evidence of collateral source benefits may be introduced only for medical malpractice.	17	0

continued

TABLE 1
STATE AND OTHER SELECT JURISDICTIONAL (DC, PR, VI)
STATUTES ADDRESSING THE COLLATERAL SOURCE RULE

Description	Categories	State Total (includes D.C.)	Territory Total (Puerto Rico, & Virgin Islands)
Award Reductions	1. (-) Reduced for collateral source income that has been received prior to the date of verdict.	12	0
	2. (-) Reduced for collateral source income that has been received prior to the date of the verdict and reduced for collateral source income that is likely to be received in the future.	27	1
Subrogation and Liens	1. (+) Evidence of collateral benefits may not be introduced if the source of such benefits has a right of subrogation against the proceeds of the plaintiff's recovery.	16	0
	2. (+) Evidence of collateral benefits may not be introduced if the source of such benefits has a right to a lien against the proceeds of the plaintiff's recovery.	9	1
	3. (+) If collateral source benefits are introduced, then the source of such benefits may neither recover any amount against the plaintiff nor be subrogated the rights of the plaintiff against a defendant.	6	0
	4. (+) If collateral source benefits are introduced, then plaintiff may introduce evidence that the source of such benefits has the right of subrogation or the right to a lien against the proceeds of the plaintiff's recovery.	3	0

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5. (+)	Regardless of whether collateral source benefits are introduced, no provider of collateral benefits shall recover any amount against the plaintiff as reimbursement for such benefits nor shall such provider be subrogated the rights of the plaintiff against a defendant, unless otherwise expressly permitted to do so by the statute.	2	0
6. (-)	At or before the commencement of an action, the plaintiff must send notice of the pending or potential claim to all persons entitled by contract or by law to either subrogation or a lien against the proceeds of the plaintiff's recovery.	6	0
7. (-)	After the verdict, the plaintiff must send notice of the verdict to all persons entitled by contract or by law to either subrogation or a lien against the proceeds of the plaintiff's recovery.	2	0
1. (-)	Exception to ordinary collateral source rule exists for any federal program (e.g., Social Security, Medicare, Medicaid, etc.).	28	1
2. (-)	Exception to ordinary collateral source rule exists for workers' compensation.	26	1
3. (+)	If a federal program must by law seek subrogation, then the collateral source benefits from that federal program may not be considered.	18	0

NOTES: (-) Indicates that the category erodes the collateral source rule; (+) Indicates that the category provides a partial return to the collateral source rule.

Among the reforms of the collateral source rule are certain modifications of exceptions to the rule. We have classified the reforms as either exceptions to (i.e., erosions of) the original rule or as exceptions to the exceptions (i.e., partial returns to the original rule). The exceptions are identified in Table 1 by way of an intuitive use of minus (-) for erosions of the original rule and plus (+) for partial returns to the original rule. The final column in Table 1 details the number of instances of each particular modification in the various jurisdictions.³

Special Interest Influence on the Collateral Source Rule

Determining how various special interests benefit from the collateral source rule or modification of it is a rather straightforward exercise in public choice. The original rule (without modification) happens to benefit attorneys because it makes the size of tort awards larger than in the absence of the rule. We write “happens to benefit” to adhere to our claim that the rule itself may exist primarily for a reason other than to benefit attorneys, namely for efficiency’s sake. Nevertheless, it is true that both plaintiff and defense attorneys do benefit when the unmodified rule is in place and tort awards are potentially large: plaintiff attorneys because they often receive a percentage of the award; defense attorneys because they are likely to have a more substantial number of billable hours when the stakes involved in the outcome of a case are higher (see Epstein 1988: 313–14, Rubin 2005: 229).

Consider next the interests of insurance companies. Insurers of defendants benefit from modifications of the collateral source rule that preclude recovery under certain circumstances because such modifications reduce the size of awards. Interestingly, the gain is transitory, not ongoing. Insurers will have a one-time gain on all existing policies written in the past with premiums that reflected inherent risk before the change in the law was enacted, because the payoff on those policies will, with the law’s modification, be less than what was actuarially predicted. Over time, however, if purchasers of insurance are well informed and savvy, they will recognize the insurance is less valuable than previously thought, and the premiums charged by insurers will be adjusted downward in response to market forces.

³In our unabridged table, we indicate the specific modifications for each jurisdiction.

Sometimes the interests of competing insurers are pitted directly against one another. McCabe (2005: 3–4) cites an interesting situation that arose in California with the enactment of an exception to the collateral source rule in cases of medical malpractice. The statute eliminated subrogation as a right of insurers in such cases, which had the consequence of shifting a portion of the cost of medical malpractice away from the state's medical malpractice insurers to its health and disability insurers.

Members of the general business community, to the extent they purchase insurance that serves as protection in cases of tort lawsuits brought against them, benefit from erosions to the collateral source rule. If insured, these people and firms will experience the ongoing reduced insurance premiums described earlier. If uninsured, they gain because the expected awards made in tort lawsuits brought against them would be lower than under the unmodified original collateral source rule.

Matters are a bit different for medical care providers. Like members of the general business community, whether insured or not medical care providers benefit from erosions to the rule that lessen the size of tort awards. Beyond that, medical care providers can benefit as a narrow interest group from exceptions to the collateral source rule that are specific to their industry alone.

The coding in Table 1, introduced initially to show exceptions (and exceptions to exceptions) to the collateral source rule, can now be called upon to serve the dual purpose of indicating the special-interest benefits of modifications to the rule. Ignoring for the time being the section that concerns public-sector collateral sources, the items (i.e., modifications) marked by minus (-) signs work against attorneys as a class to the benefit of the business community, particularly insurers, while the other items (i.e., modifications of modifications) marked with a plus (+) sign have exactly the opposite special-interest effects. In addition, note that the exceptions listed with specific reference to cases of medical malpractice also work pointedly to the benefit of medical care providers.

In the case of public-sector collateral sources, erosions of the rule (marked by minus signs) harm attorneys but do not create gains to the business community or its insurers. Such exceptions do not lessen the size of awards paid by tortfeasors; they merely serve to allocate a portion of a given award to repay public funds that provide temporary relief to an injured party. The erosions harm plaintiff

attorneys to the extent that their percentage share of award proceeds applies only to the portion of the award recovered by the victim and not the portion returned to the public-sector. The erosions do work to the benefit of taxpayers generally. According to public choice analysis, however, taxpayers are prototypically an exploited class because taxpayers are too numerous to form an effective narrow special interest group (Olson 1965). Still, there are certainly an abundant number of actual cases in which select taxpayer interests have been represented by lobbying groups, such as when tax-limitation measures have acquired the requisite number of signatures to become referenda. The jurisdictional variation concerning public-sector collateral source modifications presents fertile ground for measuring the linkage between the degree of taxpayer coalescence and its effect on collateral source rule modification. There may also be transitory benefits to private insurance companies arising from public-sector exceptions to the extent that there are policies insuring public-sector fund payouts (if governments do not routinely self-insure).

In the case of collateral source rule modifications outside the public sector, there remains the task of empirically linking (a) the modifications and the interests of the groups specified to (b) the relative political power wielded by those groups in the various jurisdictions. A priori empirical measures of influence would need to be developed based on the relative size or relative income of the interest group within each given jurisdiction. It seems to us that an index of political influence of these interest groups could be constructed, or a series of influence-measuring variables could be defined, and used to test the power of the special interest hypothesis in explaining the actual incidence of statutory exceptions to the collateral source rule (and exceptions to the exceptions).

It may appear odd that our list of relevant interest groups fails to include the victims themselves. The omission of victims is not accidental. Victims do not constitute a viable interest group from a public choice perspective. Victims are very much unlike the doctors, lawyers, and insurers who have relatively small memberships in comparison to the numerous unorganized individuals that they politically exploit. Moreover, they have many reasons going beyond the collateral source rule to sustain the cost of interest-group formation, and they can identify one another at low cost for the purpose of interest-group formation (see Olson 1965). In contrast, potential victims are too numerous to viably exploit another faction. From an

ex ante perspective, those who ultimately become actual victims would confront an event with low probability of occurrence (i.e., an accident) and substantial costs of organizing (e.g., identifying those who will subsequently suffer an accident), so they would as individuals predictably be rationally ignorant concerning the legal content of the collateral source rule and would not have become part of a pre-existing interest group prior to accident. Ex post, actual victims have no ongoing reason for interest group participation once their cases are settled or they win (or lose) their pleadings in court. Given the transitory nature of their interests and the organizing costs they face, actual victims are unlikely to transcend the coalescence problem in any substantial way.

If we are correct that the original collateral source rule promotes efficiency, then the courts must have been acting according to Posnerian logic. But why should judges pursue efficiency? Perhaps because they are civic-minded individuals to begin with and (unlike legislators) are insulated from the contaminating influence of special interests by virtue of lifetime appointments to office. But not all judges are granted lifetime appointments; some are elected and still others are appointed initially and after a period of time must stand for election. Nevertheless, the duration of the election cycle for judges is much longer than that of legislators, which suggests that judges appointed for life are least influenced by special interests, followed by other judges, followed by legislators who are most influenced by special interests. Accordingly, one should expect less statutory modification of the collateral source rule in jurisdictions where judges must stand for election—because the special interests attempting to obtain modification may have already succeeded in obtaining it directly through favorable court rulings by sympathetic jurists. Of course, a better test of this hypothesis would be to see if the courts themselves had indeed modified the collateral source rule in those jurisdictions in which judges stand for election. That information is not readily available at this time since our survey covers only statutory law, not case law.

Rubin's Recommendations

Rubin (2005) presents eight questions and issues that need to be addressed in empirical research on American tort law from a public choice perspective. Six of the eight are especially relevant to our dis-

cussion. We reformulate them to assist us in referencing directly and most clearly how our own work responds to Rubin's call for additional research.

First, how do the relevant interest groups overcome the Olsonian (Olson 1965) problem of coalescence and transcend the free-rider problem? Response: Lobbying groups representing lawyers (Association of Trial Lawyers of America, now renamed American Association for Justice), doctors (American Medical Association), and insurers (National Association of Mutual Insurance Companies) existed before reform of the collateral source rule was contemplated. The American Tort Reform Association, which came into being in 1986, was the creation of two previously existing lobbying organizations: the AMA and the American Council of Engineering Companies.⁴

Second, the role of doctors in tort reform has been insufficiently studied. Response: We suggest a possible direct link between the political influence of medical care providers and the exceptions to the collateral source rule in cases of medical malpractice.

Third, it should be possible to study the effects of campaign contributions and campaign spending in jurisdictions in which judges must stand for election. Response: Our analysis brings to prominence the distinction among appointed judges versus elected judges versus elected legislators in a very pointed way.

Fourth, some states have enacted reform measures and their determinants are worthy of study. Response: Our study does precisely this in a foundational way, but formal empirical testing remains to be done.

Fifth, how do special interests decide which mechanism (the courts or the legislature) to use to gain special favor? Response: The distinctions we made earlier concerning appointed judges versus elected judges versus elected legislators appear especially relevant here.

Sixth, many, but not all legislators are attorneys, raising obvious questions about financial conflict of interest or loyalty to a profession; such questions are worthy of study. Response: We could easily have added in the research design the description of a variable measuring the percentage of legislators in each jurisdiction with law degrees. We would predict the larger the percentage, the less modification of the collateral source rule.

⁴For more on this point, see Feeley and Schap (2006: 4–6). Note also the discussion in the previous section concerning taxpayers and (in contrast) the discussion of accident victims.

The remaining two observations made by Rubin in his call for additional research have to do with the relationship of special interest groups to national political parties and to tort reform bills in the U.S. Senate and House of Representatives. These observations are not especially relevant to a study aimed principally at state-level reforms.

Conclusion

Our perspective and Rubin's both share the notion that special interests have shaped modern American tort law and that those interests can be measured empirically, as can the influence of those interests on legislated outcomes. Thus, it is possible through the lens of public choice to conduct an analysis of the influence of various interest groups on the evolution and reform of modern American tort law.

We differ with Rubin on the relevant starting point for the analysis. To us it appears that judges who are public-spirited and who possess lifetime appointments might indeed discover and implement rules that promote the general welfare by virtue of the impact of the rules on promoting joint-wealth maximization of the parties involved in the disputes. This perspective, of course, is most readily identified with the work of Richard Posner (2007). Our starting point would be to grant that certain common law norms, in fact, are efficient. We count among those norms the collateral source rule and, thus, are rather dismissive of the "second best" argument presented earlier. Rubin (2005: 223) would appear to insist that "no plausible mechanism, Darwinian or otherwise, exists [in common law] for generating that desirable property [of efficiency]." Instead, he apparently would have us take as a reference point the U.S. common law of tort, conceived of as a body of rules concocted to benefit the legal profession, and subsequently ameliorated by competing interest groups who have promoted legislation that improves efficiency.

We do not deny that lawyers have influenced U.S. tort law. Rubin (2005: 234) cites as examples the erosion of the doctrine of privity and the spread of the doctrine of comparative negligence. Our analysis of the collateral source rule, however, casts doubt upon it being a good example of a judicial norm that exists for the sole purpose of lining the pockets of attorneys. Statutory reform of the collateral source rule, however, fashioned as it was by legislators facing short election

cycles and beholden to special interests, does indeed appear to reflect the playing out of competing special interests and presents an excellent opportunity for empirical testing along the lines generally suggested by Rubin and in this article.

Thus, although we may quibble with Rubin on certain details, we readily concur with his call for additional empirical research on American tort law and its reform. We hope we have provided a solid foundation and motivation for further empirical research on tort law from a public choice perspective, especially concerning the collateral source rule.

References

- Avraham, R. (2006) "Database of State Tort Law Reforms (dstlr, 2nd)." Northwestern University Law and Economics Research Paper No. 06–08. (Available from the Social Science Research Network Electronic Paper Collection.)
- Epstein, R. A. (1988) "The Political Economy of Product Liability Reform." *American Economic Review* 78 (2): 311–15.
- Feeley, A., and Schap, D. (2006) "(Much) More on the Collateral Source Rule." Paper presented at the Eastern Economic Association Meetings, Philadelphia.
- Klick, J., and Stratmann, T. (2005) "Does Medical Malpractice Reform Help States Retain Physicians and Does It Matter?" Working Paper (November). (Available from the Social Science Research Network Electronic Paper Collection.)
- Landes, W. M., and Posner, R.A. (1987) *The Economic Structure of Tort Law*. Cambridge, Mass: Harvard University Press.
- McCabe, M. C. (2005) "The Economics of Collateral Sources." Paper presented at the Eastern Economic Association Meetings, New York.
- Olson, M. (1965) *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, Mass: Harvard University Press.
- Posner, R. A. (2007) *Economic Analysis of Law*. 7th ed. New York: Aspen Publishers.
- Rubin, P. H. (2005) "Public Choice and Tort Reform." *Public Choice* 124 (1–2): 223–36.
- Rubin, P. H., and Bailey, M. J. (1994) "The Role of Lawyers in Changing the Law." *Journal of Legal Studies* 23 (2): 807–31.
- Rubin, P. H., and Shepherd, J. M. (2005) "Tort Reform and

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Accidental Deaths.” Emory Law and Economics Research Paper 05–17. (Available from the Social Science Research Network Electronic Paper Collection.)

U.S. Congressional Budget Office (2004) *The Effects of Tort Reform: Evidence from the States*. Washington: U.S. Congressional Budget Office.