

COLLATERAL SOURCE RULE IN JONES ACT CASES.

The Collateral Source Rule Precludes Employer Setting-off medical benefits from a fringe benefits package provided to its seafaring employees against an award of economic (special) damage for the reasonable cost of medical care necessarily provided to an injured mariner in the course of treatment for injury or illness sustain in the scope and course of *Jones Act* employment. A recent appellate opinion on point supports this conclusion. In *Johnson v. Cenac Towing Inc.*, 544 F.3d 296 (5th Cir. 2008), the court extensively discussed case law. Most of what follows is quoted from that opinion. Counsel desiring to make use of this analysis, should cite to the original language I the opinion.

The collateral source rule bars a tortfeasor from reducing the damages it owes to a plaintiff “by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor.” *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994); *Phillips v. Western Co. of North America*, 953 F.2d 923, 929 (5th Cir. 1992) (“[T]he collateral source rule . . . generally denies to a tortfeasor a reduction in its liability by any amounts the plaintiff receives from a source collateral to, or independent of, the tortfeasor.”).⁵

One purpose of the collateral source rule is to ensure that tortfeasors bear the costs of their own conduct. See *id.*, at 1244 n.21. Properly understood, however, the “rule also prevents tortfeasors from paying twice for the same injury—a result that would achieve both overdeterrence [sic] and overcompensation.” *Ibid.* Another purpose of the collateral source rule is to protect plaintiffs who have the “foresight to obtain insurance.” *Phillips v. Western Co. of North America*, supra, 953 F.2d at 930. See also *Davis v. Odeco, Inc*, supra, 3d at 1244 n.21. “If tortfeasors could set off compensation available to plaintiffs through collateral sources, then plaintiffs who pay their own insurance premiums would suffer a net loss because they would derive no benefit from any premiums paid.” *Ibid.*

“Additionally, such plaintiffs might be left exposed to other misfortunes once their insurance coverage was depleted by the tortfeasors’ negligence.” *Ibid.*, citing *Phillips*, supra, 953 F.2d at 930.

In most cases, identifying whether a source of compensation is independent of a tortfeasor is “not a difficult task.” *Id.*, 953 F.2d at 929.

For example, insurance policies and other forms of protection purchased by a plaintiff cannot reduce a damage award, because the tortfeasor has no connection with these types of benefits. *Id.* at 930-31. But when an employer –tortfeasor funds a benefit plan, like the group health insurance plan at issue here, “the justifications for denying a setoff become less compelling.” *Id.* at 931.

Generally, however, when an employee has bargained for a fringe benefit like health or life insurance as additional consideration for employment, “compensation received by the employee under that fringe benefit should not be deducted from damages awarded to the employee as a result of the employer’s negligence.” *Davis*, supra, at 1244. Since the employee is “already contractually entitled to that benefit, allowing the employer to deduct such compensation would

both undercompensate [sic] the employee and provide the employer with an undeserved windfall.” *Ibid.* To evaluate whether a benefit derives from a collateral source, we “ordinarily assess” whether that benefit is in the nature of a fringe benefit or deferred compensation or instead reflects a tortfeasor’s effort to indemnify itself against potential legal liability. See, *ibid.*; *Phillips*, supra, at 932.

Phillips listed some factors that may assist courts in distinguishing between fringe benefits and benefits intended to respond to legal liability. Those factors are (1) whether the employee contributes to the benefit plan; (2) whether the benefit plan stems from a collective bargaining agreement; (3) whether the plan covers both work-related and non-work-related injuries; (4) whether payments under the plan correlate with the employee’s length of service; and (5) whether the plan contains specific language requiring benefits received under the plan to be set-off against a judgment adverse to the tortfeasor. *Phillips*, supra, at 932, citing *Allen v. Exxon Shipping Co.*, 639 F. Supp. 1545, 1548 (D. Me. 1986)). In addition to finding these factors relevant, we have stated that the ultimate “inquiry remains whether the tortfeasor established the plan as a prophylactic measure against liability.” *Davis*, supra, at 1245.

The *Phillips* factors seem to point toward a finding that the Blue Cross payments were not a collateral source. Johnson did not bargain with Cenac for a fringe benefit that covered work-related injuries. Instead, Cenac established and fully funded the Blue Cross health insurance plan to cover only non-work-related injuries. The plan did not arise from a collective bargaining agreement, and it was not related to an employee’s length of service. Thus, Johnson was not “contractually entitled” to the payments that Blue Cross made to cover the medical expenses arising from his injury. In this case, allowing Cenac to deduct such medical payments from his recovery would neither undercompensate Johnson nor provide Cenac with an undeserved windfall. To the contrary, providing Cenac a set-off would achieve one of the purposes of the collateral source rule: preventing a tortfeasor from paying twice for the same injury.

Davis, however, constrains us to hold that the insurance payments were from a collateral source. There, a seaman sued his employer under the *Jones Act* for exposing him to chemicals that allegedly caused him to develop an extremely rare disease. *Davis*, supra, at 1240. Before filing suit, the seaman received medical and disability benefits from a group insurance plan that was established and largely funded by his employer to compensate employees only for non-work-related injuries and illnesses. *Id.* While recognizing that the case presented a close question, and that several *Phillips* factors weighed against collateral source status, this court concluded that the plan’s “exclusive application to nonwork-related injuries [was] strong evidence that [the employer] did not establish the [p]lan to reduce its own legal liability.” *Davis*, supra, at 1245 (emphasis in original). The opinion noted that because the defendant “would not ordinarily be liable for nonwork-related injuries of its employees,” the plan applied only under circumstances in which it was “unlikely to be found liable for the injuries or illnesses of its employees.” *Ibid.* Thus, the plan “. . . [was] closely akin to a fringe benefit—part-and-parcel of its employees’ compensation package.” *Ibid.*

The court acknowledged that including medical expenses as part of the damage award after the employer had already paid Davis's insurance premiums appeared to constitute double payment in "contravention of a fundamental policy underlying the collateral source rule." *Davis*, supra, at 1245 n.31.

Nevertheless, "refusing to deduct benefit payments from the plaintiff-employee's damage award does not make the employer pay twice—any more than refusing to set off [the] employee's salary would make the employer pay twice." *Id.* This explanation, unfortunately, ignores that Davis was not entitled to receive any benefits from the particular plan for work-related injuries. While offering no direct solace to the employer, the court opined that ultimately the seaman might not be paid twice for his injury: The insurance company might, as a subroger, have the right to recover from Davis the benefits it erroneously paid. *Ibid.* Under *Davis*, the plan's exclusive coverage of non-work related injuries is the dispositive factor in determining that the plan is a collateral source. Even though Johnson was not contractually entitled to the benefits he received from the carrier, and Cenac entirely paid his premiums for the plan, we are required to affirm the district court's ruling that the insurance payments are a collateral source that cannot be set off against Johnson's damage award.⁶

Under the terms of the insurance plan, however, if the insurer extends benefits for a work-related injury and the employee's "injury or illness is found to be compensable under law," then Johnson or Cenac (as the tortfeasor) "must reimburse" the carrier for the benefits extended. Additionally, the plan entitles the insurer to recover any payment made in error to an employee for non-covered services. If the carrier were to seek reimbursement from Cenac for the benefits extended to Johnson, Cenac would be placed in the position of paying three times for Johnson's injury. That result certainly cannot be justified under the collateral source rule. In such an event, Johnson must hold Cenac harmless for reimbursement demanded by the insurer against Cenac.