

DISABILITY RETIREMENT INCOME AND THE COLLATERAL SOURCE RULE

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A. THE PERMANENTLY DISABLED PLAINTIFF

A serious injury to a plaintiff who was previously employed may result in their being permanently or indefinitely disabled.

When this occurs, the plaintiff will most likely seek some sort of collateral disability income, be it Social Security disability or possibly some sort of disability retirement income available from their employer. The latter feature is especially prevalent in the benefits package of certain employees who have been working for a governmental employer.

B. THE COLLATERAL SOURCE RULE IN GENERAL

It has long been the rule in this state that the a plaintiff’s receipt of compensation for their injuries independent of the tortfeasor is not relevant, is prejudicial if presented before the trier of fact, and should therefore be excluded under Evidence Code § 352 and what is commonly referred to as the Collateral Source Rule (aka “CSR”). *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2Cal.3d 1, 84 Cal.Rptr. 173, 465 P2d 61.

As a general rule, evidence of collateral benefits expended to compensate for lost time from employment is a matter that is expressly within the ambit of the CSR, and is therefore inadmissible. *Smock v. State of California* (2006) 138 Cal.App.4th 883, 887-888, 41 Cal.Rptr.3d 857, 859-860.

Smock dealt with a situation wherein the injured plaintiff (a lawyer) was still being compensated by his employer during his time off work, and which the *Smock* decision held to be a collateral source. The decision quoted a wide range of various collateral source benefits that were held to fall within the protection of the CSR, including medical insurance benefits, social security and pension benefits, fidelity bond proceeds, gratuitous medical services, home care for a child provided by parents, nursing services provided by a spouse, and wages paid by an employer. *Smock, supra*, at 138 Cal.App.4th 886-887.

The *Smock* decision is also notable for its thorough discussion of the policy reasons underlying the CSR (at 138 Cal.App.4th 886-887), and for noting that although there have been criticisms of the rule on the basis that the plaintiff may obtain a windfall or double recovery, that the policy considerations underlying the rule overcame such concerns. *Smock, supra*, at 138 Cal.App.4th 887.

While the plaintiff in *Smock* was receiving gratuitous payments from his employer during his period of convalescence when he wasn't actually working, the decision also noted that it makes no difference if the collateral source payments are made gratuitously or from some other obligation: "Under California law, it makes no difference." *Smock, supra*, at 138 Cal.App.4th 887.

It is at this section of *Smock* wherein the decision favorably cites the case of *Rotolo Chevrolet v. Superior Court* (2003) 105 Cal.App.4th 242, 129 Cal.Rptr.2d 283.

C. THE *ROTOLO* DECISION: ANOMALY OR PITFALL FOR THE PLAINTIFF RECEIVING DISABILITY RETIREMENT INCOME

Despite its generally favorable comments on the applicability of the CSR, the *Rotolo* decision took an abrupt detour therefrom given the unique facts before it.

The plaintiff in *Rotolo* was receiving disability retirement income from his employer, and was also seeking damages for loss of future retirement benefits. The defendant argued that the CSR should not be applicable to such a situation.

The *Rotolo* court was concerned that application of the CSR in such circumstances would allow the plaintiff to obtain a double recovery, as the plaintiff in the fact scenario before it would end up receiving double retirement income by virtue of his injury if the CSR would operate to preclude evidence of the disability retirement income. *Rotolo Chevrolet, supra*, at 105 Cal.App.4th 247.

In adjudicating that the CSR did not apply to the facts of the case, it was expressly noted in the decision that "[we] concede that no controlling, or even persuasive authority supports our conclusion, but on the other hand none contradicts it." *Rotolo Chevrolet, supra*, at 105 Cal.App.4th 247. In other words, *Rotolo* was not relying on legal precedent, rather, it was modifying the CSR to deal with the specific facts of the case before it and thereby prevent a "double recovery".

Although the plaintiff in *Rotolo* was receiving disability retirement income while he was making a claim for loss of future retirement benefits, there was no subrogation claim by his employer for the payment of those benefits referenced in the facts of the decision.

As noted previously, *Rotolo* was cited favorably in the *Smock* decision, but that citation dealt with those portions of the *Rotolo* opinion's general approval of the CSR, and not with its fact specific situation of a plaintiff receiving disability retirement income while simultaneously seeking damages for loss of future retirement benefits and income.

D. DISTINGUISHING *ROTOLO*

If your client is permanently disabled and receiving disability retirement income from his/her employer, then the first line of distinguishment would be to argue that a double recovery as envisioned by the *Rotolo* decision cannot occur, IF there is a lienholder claimant seeking reimbursement of those benefits via a valid subrogation claim.

If subrogation for disability retirement benefits is being asserted by the plaintiff's employer in the third party action, then an additional point of distinguishment would be to raise the fact that the subrogation claim is not subject to the common fund doctrine, at least if the lienholder is making such a contention.

The common fund doctrine is the primary legal argument that most plaintiff attorneys use in compromising a subrogation claim, and whereby the subrogation claimant must reduce the amount of the claim by the pro rata share of legal fees and costs expended by the plaintiff in obtaining a "common fund" that benefits all concerned.

Most subrogation claimants, other than one arising under ERISA, will not argue this point and will promptly reduce their claim by at least a third off or more, depending on the circumstances of the case.

However, subrogation claims arising from certain public entity medical providers and/or public entity employers may not be subject to the common fund doctrine, at least if the claim arises under statute and the statute is silent as to the applicability of the common fund doctrine.

The argument by the subrogation claimant in those circumstances will be that had the legislature intended the common fund doctrine to apply to a public entity's recovery statute, then it would have otherwise expressly provided for it, and the absence of such language compels a conclusion that the common fund doctrine does not apply unless it is so provided for. *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 124, 48 Cal.Rptr.2d 42, 53.

Sweet dealt with a county medical provider asserting a lien under Government Code sec. 23004.1. But such language is also contained in some statutes providing for subrogation to public entity employers, i.e., see Education Code secs. 24500 - 24505, and which provides for subrogation to school boards for their provision to employees of disability retirement benefits, and wherein not only is the common fund doctrine not mentioned at all, but the compromise of the subrogation lien is expressly reserved to the school board in its sole discretion, a concept that is quite contrary to the principles inherent in the common fund doctrine. See Education Code sec. 24503.

If subrogation is not being asserted by the plaintiff's employer, then the distinguishment argument becomes more problematic.

The plaintiff should contend that the *Rotolo* decision is an anomaly in the decisions construing the CSR, in that no authority is cited in the decision for its deviation from the CSR, and the decision admits as much. Decisions upholding the CSR are plentiful, and any discussion of the rule tends to expound that the public policy considerations behind the CSR outweigh any danger that the plaintiff may receive a windfall. See *Smock, supra*, at 138 Cal.App.4th 859.

The *Rotolo* decision is now over 14 years old, and this attorney has found only three reported decisions, including *Smock*, wherein *Rotolo* has been cited as precedent.

Both of those other two decisions were simply citing *Rotolo*'s generalized approval of the

CSR, and did not discuss the facts specific to the *Rotolo* decision.

Neither of those two other cases dealt with a situation of a plaintiff receiving disability retirement income while seeking damages for loss of future retirement benefits and income. See *Mize-Kurzman v. Marin Community College District* (2012) 212 Cal.App.4th 832, 872-873, 136 Cal.Rptr.3d 259 [this was a wrongful termination case, and wherein *Rotolo* was cited for the proposition that pension benefits received from an employer are subject to the Collateral Source Rule]; and *Conservatorship of McQueen* (2011) 193 Cal.App.4th 495, 506, 122 Cal.Rptr.3d 580 [a conservatorship case wherein the conservatee's receipt of SSI benefits was held to be subject to the Collateral Source Rule].

The last quoted case is also notable for its discussion (and again relying on *Rotolo*) that consideration of the application of the CSR requires that "the rule bends to the needs of equity and fairness". *Conservatorship of McQueen, supra*, at 193 Cal.App.4th 506, and quoting from *Rotolo Chevrolet* at 105 Cal.App.4th 249, fn. 8.

E. CONCLUSION

Absent the presence of a subrogation claim, the plaintiff receiving disability retirement income who is also seeking loss of retirement benefits as damages can therefore only argue that *Rotolo* is an anomaly in the law and it is therefore questionable precedent. As *Rotolo* is valid precedent on its face, this is the sort of argument that may find its ultimate consideration in a court of appeals, depending on how the trial judge rules on any motion in limine on the subject.

The plaintiff receiving disability retirement benefits who is also seeking past or future economic damages for loss of retirement benefits should therefore always bring a motion in limine on the point to prevent the defendant from introducing evidence, argument, or testimony regarding the plaintiff's application for and/or receipt of disability retirement benefits.