# MONEY FOR NOTHING? UNCONDITIONAL PAYMENTS AND UNJUST ENRICHMENT IN JACKMAN V. JEWEL LAKE VILLA ONE

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#### ABSTRACT

In Jackman v. Jewel Lake Villa One the Alaska Supreme Court decided that pre-litigation payments made for insurance purposes by the defendant must be credited to the entire measure of damages, including the percentage attributed to the plaintiff, unless specific qualifying language is included with the payment. This ruling creates an inequitable distribution of damages whereby the defendant shares credit for payments made on the defendant's behalf with the plaintiff, causing offers of judgment made under Rule 68 of the Alaska Rules of Civil Procedure to become disassociated from actual liability. The proposition by the court that pre-litigation payments made by a liability insurer would be made on a basis other than the potential fault of the insured defies both common sense and the profit motive of insurance companies. The solution to this problem lies in the court's constitutional power to establish rules of procedure making clear that pre-litigation payments should be credited to the party on whose behalf the payments were made. In the meantime, insurers should protect themselves by qualifying any such payments on the basis of potential fault.

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### I. INTRODUCTION

In *Jackman v. Jewel Lake Villa One*,<sup>1</sup> the Alaska Supreme Court confronted the question of whether or not a defendant should receive full credit for pre-litigation payments made to the plaintiff by the defendant's insurer when determining whether the plaintiff beat a subsequent defense offer of judgment under Rule 68(b) of the Alaska Rules of Civil Procedure. The majority found that although the defendant's Rule 68 offer of judgment unambiguously constituted an additional sum, it must be credited against the entire measure of damages, including that percentage attributed to the plaintiff, unless the prior payment was accompanied by specific qualifying language.<sup>2</sup> The result is that, for Rule 68(b) purposes, both the offeror and offeree are credited with the prior payment to the extent of their own contributory fault.

The Alaska Supreme Court made no apparent move to change the traditional common law rule that a defendant is entitled to offset prior payments made to the plaintiff against a *judgment* subsequently entered against her.<sup>3</sup> The result is a dichotomy in the application of pre-litigation

<sup>1. 170</sup> P.3d 173 (Alaska 2007).

<sup>2.</sup> Id. at 179-80.

<sup>3.</sup> See RESTATEMENT (SECOND) OF TORTS § 920A, cmt. a (1979). Indeed, two weeks after the Alaska Supreme Court decided Jackman, it confirmed this principle in Turner v. Anchorage, 171 P.3d 180 (Alaska 2007). In Turner, the court held that "[u]nder the common law a tort award may be offset by any amount previously paid by a defendant (or its insurer) towards its tort liability," and that the principle "includes payments made to a plaintiff's subrogated insurer." Id. at 188 (citing Chenega Corp. v. Exxon Corp., 991 P.2d 769, 791 (Alaska 1999) (payment to

payments by the defendant's insurer, depending upon whether the trial court is calculating the judgment to which the plaintiff is entitled or if the plaintiff recovered more than the defendant's Rule 68 offer of judgment. In creating this dichotomy, the *Jackman* Court failed to consider the very nature of the insurance agreement under which prior payments are made and answered equitable objections with unsatisfying legal formalism. Moreover, the court's rule creates additional equitable concerns not addressed by either the majority or Justice Carpeneti's concurring opinion.

This Comment argues that the *Jackman* rule for allocating prior payments under Rule 68(b) is unsound and should be abrogated through the court's constitutional rule-making power<sup>4</sup> to conform to the common law rule for applying prior payments to judgments against the payor. In the meantime, this Comment discusses methods by which civil defendants and their insurers can protect their interests in light of the rule in *Jackman*.

#### II. JACKMAN AND THE BUSINESS OF INSURANCE

#### A. The Decision

Jackman v. Jewel Lake Villa One arose out of a slip and fall on an icy staircase in the plaintiff's apartment building.<sup>5</sup> Ms. Jackman's injuries required medical treatment, and Jewel Lake Villa's insurer paid approximately \$3500 to reimburse the plaintiff for these expenses.<sup>6</sup> Ms. Jackman subsequently sued Jewel Lake Villa, alleging that the building owner's failure to remove the ice was negligent and sought \$75,000 in damages.<sup>7</sup>

Before trial, Jewel Lake Villa made an "offer of judgment" of \$1400 to Ms. Jackman.<sup>8</sup> Under Alaska Rule of Civil Procedure 68, either party may make an offer of judgment up to ten days before trial;<sup>9</sup> if the Rule 68 offer is

plaintiff); Brinkerhoff v. Swearingen Aviation Corp., 663 P.2d 937, 942 (Alaska 1983) (payment to subrogated insurer)).

- 4. Alaska Const. art. IV, § 15.
- 5. 170 P.3d at 175.
- 6. *Id*.
- 7. Id.
- R Id
- 9. Alaska R. Civ. P. 68 (2007) provides, in relevant part:
- (a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not

not accepted and the other side does not obtain a result at trial that is a specified percentage better than the Rule 68 offer, the offeree must pay a heightened portion of the offeror's attorney's fees.<sup>10</sup>

After trial, the jury found total damages to Ms. Jackman of approximately \$7100.\(^{11}\) The jury found Ms. Jackman to be comparatively negligent, and assessed her 49% of the fault for the accident. Jewel Lake Villa's portion of fault, 51%, therefore resulted in liability of approximately \$3650.\(^{12}\) Jewel Lake Villa moved for attorney's fees. It argued that its insurer had already paid \$3500, and that this amount should be set off against the verdict, leaving approximately \$900 (including pre-judgment interest and attorney's fees under a different rule).\(^{13}\) Ms. Jackman had therefore not "beaten" Jewel Lake Villa's \$1400 offer of judgment, entitling Jewel Lake Villa to attorney's fees under Rule 68.

be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

- (b) If the judgment finally rendered by the court is at least 5 percent less favorable to the offeree than the offer, or, if there are multiple defendants, at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Civil Rules and shall pay reasonable actual attorney's fees incurred by the offeror from the date the offer was made as follows . . . .
- 10. ALASKA R. CIV. P. 68(b) establishes a scale of percentages for attorney's fee awards under the Rule, depending on the timing of the offer:
  - if the offer was served no later than 60 days after the date established in the pretrial order for initial disclosures required by Civil Rule 26, the offeree shall pay 75 percent of the offeror's reasonable actual attorney's fees;
  - (2) if the offer was served more than 60 days after the date established in the pretrial order for initial disclosures required by Civil Rule 26 but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney's fees;
  - (3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney's fees.
  - 11. Jackman, 170 P.3d at 175.
  - 12. Id.
  - 13. See id. at 175-76.

Ms. Jackman appealed the superior court's attorney's fee award to Jewel Lake Villa. <sup>14</sup> The Alaska Supreme Court reversed, holding that for the purposes of determining whether Ms. Jackman beat its offer of judgment under Rule 68(b), Jewel Lake Villa was not entitled to offset its insurer's \$3500 payment against the portion of damages for which the jury determined it was liable. <sup>15</sup> Instead, the court held that Jewel Lake Villa's payment must be offset against the total amount of damages without regard to the jury's allocation of fault between the parties. <sup>16</sup>

The majority began by holding that the only reasonable interpretation of Jewel Lake Villa's offer of judgment was that it was a "new money" offer—an offer to pay \$1400 in addition to the \$3500 that its insurer had already paid.<sup>17</sup> The majority then turned to the "more difficult problem" of whether to deduct the earlier payment from (1) the jury's entire measure of damages or (2) the measure of damages apportioned by the jury to Jewel Lake Villa.<sup>18</sup>

The majority found no evidence that Jewel Lake Villa's insurer's \$3500 payment constituted a liability payment or that it was based on the fault of Jewel Lake Villa. Instead, the court concluded that the "insurer appears to have unconditionally reimbursed [the plaintiff] for her medical expenses: there is no indication of any reservations or restrictions suggesting that the reimbursements were paid as compensation for [the insured's] potential share of the fault. In majority brushed aside concerns that crediting the insurer's payment against the total damages rather than Jewel Lake Villa's portion thereof would result in Jewel Lake Villa paying for more than its fair share of the damages, or that it would allow a double recovery for the plaintiff. The majority concluded that these arguments "mistakenly assume that an insurer's unconditional advance payments of medical expenses must necessarily be payments based on fault.

[W]hen a defendant seeking Rule 68 fees claims an offset for medical expenses paid to the plaintiff without reservation or restriction before suit was filed, the advance payments must be

<sup>14.</sup> Id. at 176-77.

<sup>15.</sup> See id. at 179-80.

<sup>16.</sup> Id.

<sup>17.</sup> Id. at 177-78.

<sup>18.</sup> Id. at 178.

<sup>19.</sup> *Id.* at 179.

<sup>20.</sup> Id. at 178.

<sup>21.</sup> See id. at 179.

<sup>22.</sup> Id.

deducted from the total award of damages to establish the final judgment's comparative value unless the defendant shows that the payments actually compensated the plaintiff for liability based on the defendant's fault.<sup>23</sup>

Justice Carpeneti, concurring only in the result, took issue with the majority's distinction between partial payments made by an insurer based on its insured's fault and those made apparently without condition.<sup>24</sup> He noted that the proposition that a liability insurer would make a payment on a basis other than the potential fault of its insured defied common sense.<sup>25</sup> He also noted that this rule was in conflict with the common law rule that a defendant should be credited fully with payments made to the plaintiff and frustrated Alaska public policy of settling disputes and encouraging early payment to injured parties.<sup>26</sup>

Justice Carpeneti, however, would have held for the plaintiff on the grounds that Jewel Lake Villa's offer of judgment was ambiguous as to the treatment of the prior payment and must therefore be construed against Jewel Lake Villa.<sup>27</sup> The majority squarely rejected this contention as precluded by its precedent.<sup>28</sup>

### B. Unconditional Insurance Payments and Unjust Enrichment

1. The nature of insurance and the fiction of the "unconditional payment." The Jackman majority's holding that Jewel Lake Villa was not entitled to offset its insurer's payment against its own adjudged liability is based on its conclusion that the insurer paid Ms. Jackman's medical expenses on an "unconditional" basis, rather than as the result of any fault on the part of its insured.<sup>29</sup> Justice Carpeneti's concurrence correctly indicted this conclusion as contrary to common sense.<sup>30</sup> However, while the concurrence's appeal to common sense is correct, it requires greater elucidation.

24. Id. at 181 (Carpeneti, J., concurring).

<sup>23.</sup> Id.

<sup>25.</sup> *Id.* (Carpeneti, J., concurring) ("It defies common sense because there is no reason to think that the defendant's insurer was making payments to the insured plaintiff for any reason *other* than to cover its insured's potential fault.").

<sup>26.</sup> Id. (Carpeneti, J., concurring).

<sup>27.</sup> Id. at 180–81 (Carpeneti, J., concurring).

<sup>28.</sup> Id. at 177–78 (citing Rules v. Sturn, 661 P.2d 615 (Alaska 1983)).

<sup>29.</sup> Id. at 178.

<sup>30.</sup> See id. at 181 (Carpeneti, J., concurring).

The reasoning underlying the concurrence's appeal to common sense lies in the very nature of the insurance business and the insurance contract. Insurers contract with their insured to assume certain risks. These risks may include damage to the insured's own property or the costs of medical treatment for the insured. In the case of liability insurance, which was at issue in *Jackman*, the risk is that the insured will become legally obligated to pay as a result of an unintentionally inflicted injury to another person or damage to the property of another.<sup>31</sup> A typical insuring agreement in a Commercial General Liability Policy might read as follows: "[The insurer] will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' . . . . "<sup>32</sup>

Thus, when the insured is alleged to have injured a third party in a manner covered by the policy, the insurer must defend the lawsuit filed by the third party against the insured and pay the insured's liability up to the insurance policy limits.<sup>33</sup> In short, there is no reason for a liability insurer to make any payment to a third party, such as Ms. Jackman, who was allegedly injured through the negligence of its insured, except on account of the insured's potential fault.<sup>34</sup> Indeed, one commentator has noted that

Moreover, the PIP cases cited by the majority do not necessarily involve payments made on behalf of the defendant at all. See Norman v. Farrow, 880 So.2d 557, 558–59 (Fla. 2004) (suit by driver of one car against driver of car who rearended her); Hickenbottom v. Schmidt, 626 P.2d 726 (Colo. Ct. App. 1981). Each motor vehicle owner must carry PIP insurance, which applies to herself and the

<sup>31.</sup> The reason the concurrence appeals to common sense is because most Alaskans have at least one form of liability insurance. Section 28.22.011 of the Alaska Statutes requires all drivers to maintain liability insurance with statutorily designated minimum liability limits. See Alaska Stat. § 28.22.101 (2006). Ubiquitous pitches by cavemen, geckos, and Dennis Haysbert remind us of the availability of this insurance and its associated services.

<sup>32.</sup> Måkarka v. Great Am. Ins. Co., 14 P.3d 964, 967 (Alaska 2000) (internal quotation marks omitted).

<sup>33.</sup> See id. at 969 ("[W]here 'vagaries [of] law and fact' are sufficient to create the potential that an insured will incur covered liability, the insurer must defend.").

<sup>34.</sup> The basic obligations of a liability insurer and a Personal Injury Protection (PIP) carrier make the majority's analogy to the treatment of PIP benefits in final judgment calculations inapposite. As noted above, liability insurers must make payments to third parties depending upon the liability of their own assureds. PIP carriers, in contrast, pay benefits to the assured upon injury, without regard to the assured's fault. Thus, in stark contrast with payments by a liability insurer, PIP payments are, by definition, without respect to fault. *See, e.g.*, Mulcahy v. Farmers Ins. Co., 95 P.3d 313, 315 n.1 (Wash. 2004) ("PIP coverage is a form of first party nofault benefits. First party benefits are paid to the insured. In contrast, third party benefits, such as those provided under liability coverage, are paid to someone other than the insured. No-fault benefits are payable regardless of whether the insured is at fault for the damages and injuries sustained.").

offers to pay medical expenses are "often made by the defendant's insurance company in an effort to reduce damages wherein the injured plaintiff cannot afford the necessary treatment."<sup>35</sup>

To accept the concurrence's common sense appeal, one need not assume that insurance companies are unwilling or reluctant to pay sums justly owed. The very facts of the Jackman case suggest precisely the opposite—long before the case went to trial, Jewel Lake Villa's insurer paid Ms. Jackman's medical expenses, which proved to be quite near the amount that Jewel Lake Villa was adjudged to owe.<sup>36</sup> However, liability charged insurers not charities with distributing "unconditionally" or without regard to their insured's fault or liability.<sup>37</sup> Nor would it be socially beneficial if insurance companies operated as charities: their revenue is driven in large part by premiums, which would necessarily increase if payments without regard to the insured's fault became the norm. Furthermore, insurance companies have a duty to their shareholders to make prudent business decisions in the best interests of the corporation, interests that include making money.<sup>38</sup> It is unlikely that any such policy of "unconditional" payment is consistent with this profit motive.

passengers in her car. Thus, in many instances PIP benefits are paid by the injured party's own insurer rather than by the insurer of the potentially at-fault driver. (The exception would be where a passenger sues the driver of the vehicle in which she was riding for personal injury.)

- 35. 3 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE 162 (3d ed. 1997) (quoting Graham, Evidence: Text, Rules, Illustrations and Problems 374 (2d ed. 1988)).
- 36. The insurer paid Ms. Jackman \$3474 in medical expenses, while the jury adjudged Jewel Lake Villa's liability for its proportionate share of the fault at \$3645.09, a difference of \$171.09. Jackman v. Jewel Lake Villa One, 170 P.3d 173, 175 (Alaska 2007).
  - 37. Cf. id.
- 38. A corporation itself does not owe a fiduciary duty to its shareholders. Meidinger v. Koniag, Inc., 31 P.3d 77, 87 (Alaska 2001). However, shareholders invest in a corporation, including insurance companies, in the hope of making a profit, and the corporation's directors and officers—those who make and implement its policy—have fiduciary duties to the shareholders. See Alaska Stat. § 10.06.450(b) (2006) ("A director shall perform the duties of a director, including duties as a member of a committee of the board on which the director may serve, in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances."); Alaska Stat. § 10.06.483(e) (2006) ("An officer shall perform the duties of the office in good faith and with that degree of care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances.").

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2. Choosing between forfeiture and unjust enrichment models in determining the allocation. The Jackman majority held that applying Jewel Lake Villa's insurer's prior payment to the entire measure of damages, that is, the portion of damages attributable to Ms. Jackman as well as the portion attributable to Jewel Lake Villa, would not result in either Jewel Lake Villa paying more than its fair share or in double recovery for Ms. Jackman.<sup>39</sup> As noted above, the majority concluded that these concerns "mistakenly assume that an insurer's unconditional advance payments of medical expenses must necessarily be payments based on fault," and that without additional evidence that the insurer's payments were based on fault, the payments would not be allocable to the insured's share of the damages.<sup>40</sup>

The majority's response is based on a legal "forfeiture" model for determining allocation and does not address the equitable concerns implicated by the prior payment. Recall that the majority held that the result would be different if the prior payment had included evidence that it was based on Jewel Lake Villa's fault.<sup>41</sup> Under a forfeiture model, unless certain legal formalities are observed, the defendant forfeits the right to credit for any prior payments.<sup>42</sup> This criticism is not intended to be a

<sup>39.</sup> Jackman, 170 P.3d at 179.

<sup>40.</sup> Id.

<sup>41.</sup> Id.

<sup>42.</sup> The forfeiture model is, in reality, a consequence of a stringent application of the formalist method of contract interpretation. See Alan Schwartz and Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE L.J. 541, 569 n.53 (2003) ("Willistonian formalism rests on two basic claims: (1) that contract terms can be interpreted according to their plain meanings, and (2) that written terms have priority over unwritten expressions of agreement."). An analysis of Jackman under contract theory is appropriate because a Rule 68 offer of judgment is an invitation to contract. If the offer is accepted, a contract is formed; Rule 68 provides certain consequences if the offer is not accepted. See Alaska R. Civ. P. 68 (2007). Indeed, formalist models of contract have once again come into vogue. See Blake D. Morant, The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context, 2006 MICH. St. L. REV. 925, 929 (noting "the resurgence of formalism as a dominant postulate of contract law"). However, one of the celebrated virtues of formalist rules is that they maximize the value of the relationships between contracting parties and reduce transaction costs by allowing the parties to speak a very specialized language. See Richard A. Epstein, The Not So Minimum Content of Natural Law, 25 Oxford J. LEGAL STUD. 219, 251 (2005) ("In principle, the object of the law (think only of the role of formalism in contracts) is to reduce the transaction costs so as to unlock the potential sources of gain that come from the redeployment of assets, both human and material."); see generally Robert E. Scott, The Case for Formalism in Relational Contract, 94 Nw. U. L. REV. 847 (2000). It is unclear whether the rule announced in *Jackman* actually advances these objectives.

broadside against legal formalism; indeed, in some circumstances, formal legal requirements serve important functions. For example, the act of signing a contract or memorandum can serve evidentiary functions, by allowing later courts to determine whether a party assented to the terms of a purported contract,<sup>43</sup> and signaling functions, by ensuring that the party signing a document understands the import of her signature and her legal rights under the document,<sup>44</sup> which may increase contracting efficiency.<sup>45</sup>

However, these justifications for a formalistic approach do not appear to be present here. Because generally accepted common law establishes that a defendant is entitled to credit for previous payments against any

First, it actually requires that more, rather than less, effort be put into exchanges of money and correspondence between the parties. Second, it imposes these extra costs *ex ante*—that is, before the Rule 68 offer to contract has been contemplated. As discussed below in Part IV, another default rule would provide the same result, but without imposing the same transaction costs (in the form of additional precontractual conditions). Indeed, the costs imposed by the rule set forth in *Jackman* may be so high that, even at the outset of the litigation, a defendant whose insurer advanced partial payments to the plaintiff might be effectively precluded from making a meaningful Rule 68 offer. This result defeats the substantial public policy—settlement—that justifies Rule 68.

43. See Liimatta v. Vest, 45 P.3d 310, 320 (Alaska 2002) ("[A party's] signature is evidence of an unequivocal acceptance and an intent to be bound."). As one commentator expresses the rule in the context of consumer contracts:

Under the duty-to-read rule, if a consumer signs a form contract, the law has traditionally stated that it is reasonable for the merchant to conclude that the consumer has thereby given her assent to the deal. The usual formulation of the principle is that one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature.

Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 245–46 (2007) (internal footnote and quotation omitted).

- 44. For example, California requires absentee voters who are permitted to vote by fax to sign a waiver that provides:
  - I, [insert name], acknowledge that by returning my voted ballot by facsimile transmission I have waived my right to have my ballot kept secret. Nevertheless, I understand that, as with any absent voter, my signature, whether on this oath of voter form or my identification envelope, will be permanently separated from my voted ballot to maintain its secrecy at the outset of the tabulation process and thereafter.
- R. Michael Alvarez, Thad E. Hall, & Brian F. Roberts, *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem, 34* FORDHAM URB. L.J. 935, 983–84 (2007) (quoting CAL. ELEC. CODE § 3103.5 (West 2004)).
- 45. See Scott, supra note 42, at 854 (suggesting that formal adherence to established rules promotes stability and facilitates the creation of "standardized terms that parties can use thereafter in signaling their intentions").

adverse judgment ultimately entered against her,<sup>46</sup> and the Alaska Supreme Court's previous holding in *Rules v. Sturn* established that when any subsequent Rule 68 offer of judgment is for new money unrelated to the prior payment,<sup>47</sup> additional evidence regarding the effect of the payment is unnecessary. Nor is there an apparent need to notify the injured party of the legal effect of the payment comparable to notice requirements, such as those required by the Truth in Lending Act (TILA).<sup>48</sup> In the absence of such a justification, the majority's formalist response to Jewel Lake Villa's equitable argument missed the mark.

In contrast to the legal formalism invoked by the majority, concerns about overpayment by the defendant and double recovery by the plaintiff implicate equitable considerations. The basic principles are encapsulated in Alaska's fault allocation statute.<sup>49</sup> Under Alaska law, a defendant is only liable for the amount of damages attributable to her fault,<sup>50</sup> and a plaintiff is only entitled to recover damages to the extent she is not at fault.<sup>51</sup> Any additional recovery would result in unjust enrichment to the plaintiff, who would be indemnified by another for damage that she caused to her own interests.

Applying non-conforming prior payments to the total, pre-allocation measure of damages reduces the portion of damages attributable to each party. The *Jackman* Rule thus gifts a credit for Rule 68(b) purposes to the plaintiff in accordance with the percentage of her comparative fault.<sup>52</sup>

<sup>46.</sup> See RESTATEMENT (SECOND) OF TORTS § 920A cmt. a (1979).

<sup>47.</sup> See 661 P.2d 615, 616 (Alaska 1983).

<sup>48.</sup> See 15 U.S.C. §§ 1601–15 (2000). Many of the Truth in Lending Act's notice requirements are codified at 12 C.F.R. § 226 (2008), known as Regulation Z.

<sup>49.</sup> See Alaska Stat. § 09.17.080 (2006).

<sup>50.</sup> Alaska Stat. § 09.17.060 (2006).

<sup>51.</sup> Id.

<sup>52.</sup> See Jackman v. Jewel Lake Villa One, 170 P.3d 173, 180 (Alaska 2007). Moreover, the Jackman Court's ruling leaves unclear the issue of whether a codefendant would be entitled to "credit" for the non-conforming payment for purposes of its own Rule 68 offer. Under Jackman, the non-conforming Rule 68 offer reduces the total amount of damages for the purpose of Rule 68(b) calculations, see Jackman, 170 P.3d at 180, which effectively provides a credit for Rule 68(b) purposes for any party found to be at fault in the case. Jackman demonstrates that the plaintiff benefits from this reduction in the sum of damages; the court's rationale—that the payment at issue was not necessarily and specifically based on the fault of Jewel Lake Villa, Jackman, 170 P.3d at 178—suggests that all parties adjudged to be at fault are entitled to share in the windfall in proportion with their fault. As explained above, the at-fault co-defendant would derive a greater benefit from the nonconforming payment as her fault increased. This result, which could mean the difference between a plaintiff beating or not beating the co-defendant's Rule 68 offer and paying hefty attorney's fees to which the co-defendant would not

When calculating whether Ms. Jackman beat Jewel Lake Villa's Rule 68 offer, she received credit for forty-nine percent of the prior payment made by Jewel Lake Villa's insurer. Perversely, under the rule in *Jackman*, the plaintiff is entitled to credit for an increasing portion of the prior payment as her comparative negligence increases. The plaintiff's windfall also increases as the size of the pre-litigation payment increases. Thus, the *Jackman* rule penalizes the defendant who made the greatest pre-litigation payments but who has the smallest amount of actual fault for the plaintiff's injuries.

# III. DISASSOCIATING THE RULE 68(B) CALCULATIONS FROM DETERMINING JUDGMENT

The *Jackman* majority appeared to limit the ruling to the Rule 68(b) context and does not purport to state a rule of general applicability for allocating payments made to a plaintiff by an insurer on behalf of a defendant. The majority also recognized that Ms. Jackman "had no right to recover these [previously paid] medical expenses again as part of the jury's award; nor did she have any legitimate basis for including those payments in calculating her awards of prejudgment interest, costs, and attorney's fees."<sup>54</sup>

Justice Carpeneti's concurrence identified the tension between the majority's approach and the traditional common law rule that all prior payments by or on behalf of a defendant are to be credited to the defendant when and if liability is ultimately imposed.<sup>55</sup> Unfortunately, the concurrence did not elucidate this rule in any detail, and the majority did not address the concurrence on this point.

There are different results for the Rule 68(b) calculation and the actual liability calculation under the common law rule and the *Jackman* rule. The common law approach is typified by the trial court's calculations: The trial court multiplied the entire measure of damages (about \$7100) by Jewel

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otherwise be entitled, while depriving the payor-defendant of attorney's fees under Rule 68, is anomalous, to say the least. However, the anomaly serves only to point out the inequity of applying prior payments to *any* party other than the one on whose behalf the payment was made.

<sup>53.</sup> In contrast to Ms. Jackman, who was adjudged 49% at fault for her own injuries, a plaintiff ultimately found to be only 10% at fault for her injuries only receives credit under Rule 68(b) for 10% of the credit for the defendant's insurer's non-complying prior payment.

<sup>54.</sup> Jackman, 170 P.3d at 178.

<sup>55.</sup> Id. at 181 (Carpeneti, J., concurring).

Lake Villa's potential fault (51%) to determine Jewel Lake Villa's total liability (about \$3600).<sup>56</sup> It then subtracted the prior payments (about \$3500) from that amount (resulting in liability of about \$200) and added prejudgment interest, costs, and attorney's fees, for total liability of about \$900.<sup>57</sup> Because this was less than Jewel Lake Villa's unaccepted \$1400 offer of judgment, it found that Jewel Lake Villa was entitled to attorney's fees under Rule 68.<sup>58</sup>

In contrast, the *Jackman* Court subtracted the prior payment (\$3500) from the total damages (approximately \$7200, for damages of about \$3700), multiplied that amount by Jewel Lake Villa's comparative fault (51%), for estimated liability of approximately \$1900, which did not yet include attorney's fees and costs. Because this amount was more favorable than Jewel Lake Villa's offer of judgment, Jewel Lake Villa was not entitled to Rule 68 attorney's fees.<sup>59</sup>

This dichotomy is anomalous. Rule 68 is inextricably intertwined with the plaintiff's actual recovery, and the rule governing the application of prior payments should reflect this connection. No persuasive reason exists why the Rule 68(b) calculation should be any different from what the plaintiff actually recovered. The solution is to overrule *Jackman*, aligning application of prior payments for Rule 68(b) purposes with the traditional, well-reasoned, and equitable common law rule.

# IV. ESTABLISHING A DEFAULT RULE AND THE NEED TO CLARIFY

Justice Carpeneti's concurrence is correct that an unambiguous offer of judgment under Rule 68 is the key. However, as the majority recognized, it is difficult to conclude that Jewel Lake Villa's Rule 68 offer was ambiguous. To borrow from the insurance policy context, ambiguity exists when the document in question is subject to two reasonable interpretations. <sup>60</sup> In light of the Alaska Supreme Court's prior decision in *Rules*, the only reasonable

<sup>56.</sup> Id. at 175-76.

<sup>57.</sup> Id.

<sup>58.</sup> *Id.* at 176–77. Jewel Lake Villa's attorney's fee award came to approximately \$25,000. *Id.* at 177.

<sup>59.</sup> See id. at 180 n.17 (Carpeneti, J., concurring).

<sup>60.</sup> See Dugan v. Atlanta Cas. Cos., 113 P.3d 652, 655 (Alaska 2005) ("It is well settled that in situations in which reasonable interpretation favors the insurer, and any other would be strained and tenuous, no compulsion exists to torture or twist the language of the contract." (internal quotation marks omitted)).

interpretation of Jewel Lake Villa's offer was that it was for "new money"—money in addition to the \$3500 in prior payments.<sup>61</sup>

However, even without the Rules decision, an interpretation in which Jewel Lake Villa's \$1400 Rule 68 offer included the prior \$3500 payment is unreasonable. Such an "offer" would allow Ms. Jackman to dismiss her claims against Jewel Lake Villa in exchange for less than Jewel Lake Villa had already paid her. This arrangement would appear to involve a payment from Ms. Jackman to Jewel Lake Villa of approximately \$2100. A Rule 68 offer that implicitly contemplated payment by the plaintiff to the defendant would be highly unusual, and any offer contemplating such a term could be expected to say so explicitly. A practical consideration of the mechanics by which Jewel Lake Villa's hypothetical proposal—to resolve the claims against it with a payment from Ms. Jackman in its own favor demonstrate that the offer was necessarily for "new money." To the extent that Jewel Lake Villa desired to recover pre-litigation medical payments to Ms. Jackman, it would have had to file a counterclaim against her under Rule 13 of the Alaska Rules of Civil Procedure for reimbursement.<sup>62</sup> Jewel Lake Villa would then have had to serve a separate Rule 68 offer of judgment on Ms. Jackman for an amount that it would take in satisfaction of that claim, while simultaneously serving a Rule 68 offer of judgment for a de minimis amount with respect to Ms. Jackman's claim against it.

Indeed, the rule announced in *Jackman* may generate increased uncertainty regarding the treatment of any given pre-litigation payment for purposes of Rule 68(b). While the majority held that in order to receive credit on prior payments for Rule 68(b) purposes there must be accompanying evidence that the payment was based on the insured's fault,<sup>63</sup> the opinion was silent as to the quantum or method of proof required. The concurrence's suggested notification—"based on [the insured's] potential fault for the accident"<sup>64</sup>—is based on language in the majority opinion and is likely sufficient, but is not controlling. Rather than forcing attorneys and insurance professionals—and eventually plaintiffs in receipt of partial payments and subsequent offers of judgment—to speculate as to the sufficiency of the notifications in partial payments to injured parties, the *Jackman* Court should have established a clear and

<sup>61.</sup> See Rules v. Sturn, 661 P.2d 615, 617–18 (Alaska 1983) (holding that where terms of Rule 68 offer are silent as to prior payments, offer may be construed to be for an amount in addition to any previous payments).

<sup>62.</sup> Alaska R. Civ. P. 13 (2007).

<sup>63.</sup> Jackman, 170 P.3d. at 179.

<sup>64.</sup> See id. at 182 (Carpeneti, J., concurring) (internal quotation marks omitted).

easily applied default rule for the allocation of prior payments. To avoid confusion and address the equitable concerns described above, the rule of application of prior payments in the Rule 68(b) context should be in line with the rule for application to the actual judgment.

Indeed, *Jackman* presented an ideal case for establishing a default application rule for prior payments in the Rule 68(b) context. As noted above, *Jackman* involved an unambiguous Rule 68 offer for "new money," even without controlling precedent, so the court could have announced a rule of application of prior payments to the portion of damages allocated to the defendant without unreasonably surprising either party. However, the court may correct this oversight through its constitutional power to establish rules for procedure in the judicial system.<sup>65</sup>

Such a rule-based "fix" would not be difficult, and could be accomplished by adding the italicized language to the existing text of Alaska Rule of Civil Procedure 68(a):

At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, which shall be in addition to any sums paid by or on behalf of the party on account of the claim it is defending, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.66

Alaska Rule of Civil Procedure 68(b) would then be amended to include the italicized language below:

If the judgment finally rendered by the court is at least 5 percent less favorable to the offeree than the sum of the offer plus any previous payments made by or on behalf of the party on account of the claim it is defending, or, if there are multiple defendants, at least 10

<sup>65.</sup> Alaska Const. art. IV, § 15.

<sup>66.</sup> Alaska R. Civ. P. 68(a) (italicized portion appended).

percent less favorable to the offeree than the sum of the offer and any previous payments made by or on behalf of the party on account of the claim it is defending, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Civil Rules and shall pay reasonable actual attorney's fees incurred by the offeror from the date the offer was made as follows....<sup>67</sup>

The above-described changes to Rule 68 would provide clarity and uniformity in the application of prior payments between Rule 68 calculations and the calculation of any judgment against the party defending a claim. Moreover, this rule would eliminate potential ambiguity over whether any Rule 68 offer was for "new money" or includes previous payments, codifying in more visible form the holding of *Rules v. Sturn.*<sup>68</sup> Indeed, the other key holding of *Rules*—the irrevocability of Rule 68 offers of judgment—has since been codified.<sup>69</sup>

#### V. CONSIDERATIONS FOR PRACTICE

Under *Jackman*, insurers should take steps to protect their interests when making payments in situations other than obtaining a complete release of their insureds. $^{70}$ 

All payments made prior to final resolution of the controversy through settlement or judgment should contain the qualification that they are based on the fault or potential fault of the insured. Justice Carpeneti's concurrence, borrowing language from the majority opinion, suggested that all such payments should be accompanied by a notice that such payment is made "based on [the insured's] potential fault for the accident" or an equivalent qualification that will provide sufficient evidence that the payment is not "unconditional." Because this disclaimer was suggested

<sup>67.</sup> Alaska R. Civ. P. 68(b) (italicized portion appended).

<sup>68. 661</sup> P.2d 615, 618 (Alaska 1983) ("It is a mystery why... if the appellants intended all along to offset the advance payments they had made, they did not actually figure the offset into the numbers while forming their offer.").

<sup>69.</sup> See Alaska R. Civ. P. 68(a) ("The offer may not be revoked in the 10 day period following service of the offer.").

<sup>70.</sup> The discussion in this, or any other section of this Comment, is not personalized legal advice, nor is it intended to replace the advice of legal counsel. The author recommends consulting with an attorney regarding the proper procedure for protecting one's own rights or the rights of one's insured when making a pre-litigation payment to a potential claimant.

<sup>71.</sup> Jackman v. Jewel Lake Villa One, 170 P.3d 173, 182 (Alaska 2007) (Carpeneti, J., concurring) (internal quotation marks omitted).

only in the concurrence, it is not controlling; therefore, the majority, which unfortunately failed to provide an example of an adequate notice, may reject this language as insufficient. However, based on its endorsement by a member of the Alaska Supreme Court, who was quoting the majority, the court is likely to hold the above-quoted notice sufficient.

When including a disclaimer or qualification as contemplated by the *Jackman* Court, however, insurers should be careful not to make an inadvertent admission of liability. Alaska Rule of Evidence 409 provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."<sup>72</sup> The Commentary states that this Rule:

[D]oes not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature and where protecting such statements would not encourage the approved behavior. A party can offer to pay medical expenses without making statements as to liability.<sup>73</sup>

Contrary to the Commentary, the rule announced in *Jackman* does require the insurer to make statements at least touching on liability when making advance medical payments if the insurer is to retain its rights under Rule 68(b).<sup>74</sup> Alternatively, the Alaska Supreme Court could, and should, exclude such statements under Alaska Rule of Evidence 408 (offers of compromise) or 403 (evidence who's prejudicial effect outweighs probative value).

It would be a cruel paradox indeed if a party were required to admit fault, or for an insurer to be required to generate admissible evidence of its insured's liability, in order to receive credit for pre-litigation payments to the plaintiff. As a practical matter, a liability insurer may be unlikely to make partial payments on a third-party claim where the insured is not at fault or liability is not contested, and the adverse affect on subsequent litigation over the amount of damages might be minimal. However, the insurer may have other strategic reasons for making the payment, or

<sup>72.</sup> Alaska R. Evid. 409.

<sup>73.</sup> Alaska R. Evid. 409 cmt.

<sup>74.</sup> See supra Part IV.

subsequent information may come to light casting doubt upon the insured's previously assumed fault, in which case the insured/defendant would have to explain away its purported admission. In light of the concerns about liability admissions present in the concurrence's formulation of the required notice, therefore, an insurer should make as minimal a statement as possible about its insured's potential fault. Rather than trying to improve upon the sample notice provided in Justice Carpeneti's concurrence,<sup>75</sup> therefore, this Comment recommends using that notice only. While the court would be ill positioned to construe its own language as an inadvertent admission of liability, further or more elaborate statements might not be afforded the same protection.<sup>76</sup>

#### VI. CONCLUSION

The default application of prior payments to the full measure of damages, rather than to the portion of liability allocated to the defendant, for the purposes of Rule 68(b), ignores the fundamental nature of the liability insurance business, creates the potential for unjust enrichment, and elevates an unjustified formalism over sound equitable considerations. Moreover, there appears to be no persuasive reason to treat calculations under Rule 68(b) differently from the calculation of the actual judgment. A simple reform under the Alaska Supreme Court's constitutional rule-making power would correct this unsound rule. Until such a correction is made, insurers and self-insured defendants would do well to protect their interests by including a carefully drafted and appropriate notice in all payments to plaintiffs or potential plaintiffs that do not result in a full release.

<sup>75.</sup> Jackman, 170 P.3d at 182 (Carpeneti, J., concurring).

<sup>76.</sup> Indeed, the requirement that insurers and potential defendants walk this fine line between protecting their interests and admitting liability while making pre-litigation payments to a (then-potential) plaintiff is yet another indication that the *Jackman* rule is unsound. The danger to insurers and their insureds now inherent in making pre-litigation payments to potential plaintiffs increases the cost of this activity, which has been identified as a public policy of the state. *See* ALASKA R. EVID. 409 cmt. ("Prompt payment of medical and other expenses is encouraged and the humanitarian nature of the payment or offer is highlighted."); *Jackman*, 170 P.3d at 182 (Carpeneti, J., concurring). Moreover, insurers might rationally conclude that the inclusion of language suggesting fault on the part of the insured might encourage the then-potential plaintiff to file suit, which would also discourage prelitigation payments of medical or other expenses, thus frustrating the above-described public policy.