

# Medicaid Recovery for All?: Iowa’s Controversial Managed Care Organization and the State’s Abrogation of the Collateral Source Rule

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*ABSTRACT: While the collateral source rule has deep roots in state, common law jurisprudence—certain states have declined to uphold it. This is the case in Iowa, where the state partially abrogated the collateral source rule in medical malpractice cases. Under Iowa Code Section 147.136, if a patient is injured by a negligent health care provider and their insurance covers their medical expenses, that patient cannot personally recover those medical expenses if they are covered by a private insurer but can recover if they are covered by Medicaid. In 2016, Iowa adopted the managed care organization model—privatizing the state’s Medicaid program. Iowa Code Section 147.136 accounts for private insurers and Medicaid but fails to account for managed care organizations. This Note argues that the law should be amended to include managed care organizations.*

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## INTRODUCTION

When the typical Iowan considers managed care organizations, one thing likely comes to mind: controversy. In 2016, Iowa adopted the managed care model, which privatizes the state’s Medicaid Program.<sup>1</sup> The managed care model is “organized to manage [the] cost, utilization, and quality” of health care.<sup>2</sup> Under a managed care model, “state Medicaid agencies and managed care organizations” contract to “provide[] for the delivery of Medicaid health

1. Hollie Knepper & Rachel Droze, *Iowa State Auditor: Health Care Providers Aren’t Happy with Privatized Medicaid*, WE ARE IOWA (July 27, 2020, 7:50 PM), <https://www.weareiowa.com/article/news/local/iowa-medicaid-survey-report-state-auditor-rob-sand-managed-care-organizations-mcos/524-8b88f9a2-7fd2-451b-8249-fa12580e8fed> [<https://perma.cc/K5UW-Y2SU>].

2. *Managed Care*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/managed-care/in dex.html> [<https://perma.cc/ZF4R-M5DE>].

benefits and additional services.”<sup>3</sup> In other words, under such a scheme, states provide public health care services (Medicaid) through private entities (managed care organizations).<sup>4</sup> At the outset, Iowa’s then-Governor, Terry Branstad, claimed that the managed care organization model would make public health care in Iowa more accessible, higher quality, and more affordable.<sup>5</sup> A few years later, the results of this endeavor are up for debate. Some claim that the program has “provide[d] patients with better care while saving the state money.”<sup>6</sup> Health care providers, on the other hand, claim that the use of managed care organizations has had a “negative[] impact[] [on] patient care,” and overall they “aren’t happy with privatized Medicaid.”<sup>7</sup> After over five years of the managed care model’s implementation in Iowa,<sup>8</sup> the time has come to consider its practicality.

One area where Iowa’s managed care has faltered is the state’s abrogation of the collateral source rule in medical malpractice actions.<sup>9</sup> Iowa Code Section 147.136 defines a patient’s ability to recover medical expenses incurred when injured by a negligent health care provider that have been covered by outside sources.<sup>10</sup> Iowa Code Section 147.136 provides that such a patient cannot recover those medical expenses paid “by insurance, . . . governmental, employment, . . . service benefit programs or from any other source,” but, that a patient can recover those medical expenses if they are paid by a “medical assistance program under chapter 249A,” or “[t]he assets of the claimant or of the members of the claimant’s immediate family.”<sup>11</sup> Under the managed care model, a managed care organization acts as an intermediary for the state Medicaid program,<sup>12</sup> making it unclear if a managed care organization is a “medical assistance program” or “insurance.”<sup>13</sup> This ambiguity means that managed care organizations are not accounted for in Iowa Code Section 147.136.

Iowa Code Section 147.136 was originally enacted in 2008,<sup>14</sup> and the managed care model was adopted in Iowa in 2016.<sup>15</sup> Thus, when enacting

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3. *Id.*

4. *See id.*

5. Knepper & Droze, *supra* note 1 (“[I]n 2016[,] . . . then[-]Gov[ernor] [Terry] Branstad said that [the managed care organization model] would decrease costs, improve access[,] and improve quality . . . .” (fifth alteration in original)).

6. *Id.*

7. *Id.*

8. *Id.*

9. IOWA CODE § 147.136 (2022).

10. *See id.*

11. *Id.*

12. Knepper & Droze, *supra* note 1.

13. § 147.136.

14. *Id.*

15. *See* Knepper & Droze, *supra* note 1.

Iowa Code Section 147.136,<sup>16</sup> the Iowa Legislature was not considering managed care organizations.<sup>17</sup> Iowa Code Section 147.136 was amended in 2011 to include the Medicaid exception,<sup>18</sup> and the Iowa Legislature failed to account for managed care organizations in making this amendment.<sup>19</sup> As the managed care organization model continues to grow throughout Iowa,<sup>20</sup> it is necessary to include managed care organizations in Iowa Code Section 147.136. Beyond legal consistency, this gap in Iowa law could cause further harm to individuals covered by Medicaid and under the care of a managed care organization. For such a plaintiff, they will have to deal with their medical malpractice claim on the merits *and* their ability to personally recover under Iowa Code Section 147.136. This is an additional, unnecessary stressor on one already dealing with the repercussions of a medical malpractice injury.

Overall, this Note argues that managed care organizations need to be directly accounted for in Iowa Code Section 147.136.<sup>21</sup> The state legislature should amend the statutory provision to include managed care organizations. The recommended revisions include: (1) abrogating the collateral source rule in medical malpractice cases as to managed care organizations by incorporating managed care organizations into the first provision of Iowa Code Section 147.136<sup>22</sup>; or (2) maintaining the collateral source rule in medical malpractice cases as to managed care organizations by adding a new section to the second provision of Iowa Code Section 147.136.<sup>23</sup> In the alternative, the state legislature could (1) maintain the collateral source rule in medical malpractice cases as to managed care organizations by incorporating managed care organizations into the “medical assistance” exception of the second provision of Iowa Code Section 147.136<sup>24</sup>; (2) maintain the collateral source rule in medical malpractice cases as to managed care organizations by adding a provision to Iowa Code Chapter 249A stating that managed care

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16. § 147.136.

17. See Knepper & Droze, *supra* note 1.

18. § 147.136. On June 30, 2011, Iowa Code Section 147.136 was amended to include the “medical assistance” exception. See IOWA CODE § 147.136 (2012), a past version of the statute. On March 17, 2020, Iowa Code Section 147.136 was amended only to include more kinds of health care providers. See IOWA CODE § 147.136 (2022), the current version of the statute.

19. § 147.136.

20. See Natalie Krebs, *Iowa Medicaid Officials to Seek Another Medicaid Managed Care Organization*, IOWA PUB. RADIO (July 8, 2021, 2:18 PM), <https://www.iowapublicradio.org/state-government-news/2021-07-08/iowa-medicaid-officials-to-seek-another-medicaid-managed-care-organization> [<https://perma.cc/Q9WP-XVEZ>]; Michaela Ramm, *Five Years of Managed Care in Iowa: State Says Medicaid Has Stabilized but Patients Disagree*, THE GAZETTE (May 12, 2021, 6:01 PM), <https://www.thegazette.com/health-care-medicine/five-years-of-managed-care-in-iowa-state-says-medicaid-has-stablized-but-patients-disagree> [<https://perma.cc/WDL8-FBJE>].

21. See § 147.136.

22. See § 147.136(1); see *infra* Section IV.A.1.

23. See § 147.136(2); see *infra* Section IV.A.2.

24. See § 147.136(2); see *infra* Section IV.A.2.

organizations are considered medical assistance programs<sup>25</sup>; or (3) maintain the collateral source rule in medical malpractice cases as to managed care organizations by adding a section to the definitions provision of Iowa Code Chapter 249A<sup>26</sup> stating that managed care organizations are considered medical assistance programs.<sup>27</sup>

To illustrate the problem that this Note conceptualizes, picture this: An individual is covered by Medicaid, rather than a private insurer and is under the direct care of a managed care organization network. This person goes in for a routine surgery and leaves with injuries caused by medical malpractice committed while the surgery was being performed. On the merits, it has been found that their injuries were directly caused by the provider's negligence. The costs that this individual incurred due to this injury have been covered by their insurance, but their ability to personally recover is unknown.<sup>28</sup> Iowa law makes clear that an individual covered by a private insurer is unable to recover, and that one covered by Medicaid is able to recover—but what about those under a managed care organization?

### I. THE COLLATERAL SOURCE RULE

An injured person may assume that they are able to financially recover against one who harms them—whether insurance covers their medical costs or not. The state common law collateral source rule legally affirms such an assumption.<sup>29</sup> The rule “prohibits both the reduction of a recovery by payments from collateral sources and the introduction of evidence of such payments.”<sup>30</sup> In other words, the collateral source rule deals with personal injury cases where a third, “collateral,” party has covered the plaintiff's costs.<sup>31</sup> In such a situation, the collateral source rule permits that plaintiff to personally recover those same costs in a court proceeding against the tortfeasor, and it prevents evidence of the collateral payment from being admissible in court.<sup>32</sup>

25. See IOWA CODE § 249A.2(8) (2022); see *infra* Section IV.B.

26. See § 249A.2; see *infra* Section IV.B.

27. See § 249A.2(7)–(8).

28. On the surface, an individual's ability to personally recover, after their costs have been covered by their insurer, may seem unimportant. But, the collateral source rule, as discussed further below, is a common-law doctrine that has historically allowed this explicitly. The idea behind this rule, which has been abrogated in Iowa in this context, “is that money a victim receives from another source [should] not reduce the damages owed by a negligent party.” Michael P. Fleming, *How Does the Collateral Source Rule Affect Personal Injury Cases*, FLEMING L. (Oct. 18, 2018), <https://flemingattorneys.com/collateral-source> [<https://perma.cc/M526-TWUX>]; see also discussion *infra* Part I (discussing the collateral source rule in more detail).

29. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210–11 (2009).

30. *Id.* at 210.

31. *Id.*

32. *Id.*

This Note focuses on portion of the collateral source rule that “prohibits . . . the reduction of recovery by payments from collateral sources”<sup>33</sup> or, in other words, the aspect of the collateral source rule that allows a plaintiff to personally recover the costs of their injuries that a collateral source indemnifies.<sup>34</sup>

The justifications for the collateral source rule include benefitting the injured plaintiff rather than the party who injured them, avoiding confusing the jury with information about collateral payments, and allowing insurers to be reimbursed through subrogation.<sup>35</sup> The rationale bolstering the collateral source rule is that a tortfeasor still has a duty to make the party they injured whole even if the injured party may have received compensation from a collateral source.<sup>36</sup>

Even with this basis, some states do not maintain the collateral source rule in its traditional form.<sup>37</sup> While “the collateral source rule is firmly embedded . . . [in] American jurisprudence,”<sup>38</sup> there has been some movement to modify this common law rule through state legislation.<sup>39</sup> In some states the collateral source rule has been repealed, nullified, or abolished.<sup>40</sup> Over forty states have statutes in place that limit this common law rule in some way.<sup>41</sup>

33. *Id.*

34. *Id.*

35. *Id.* at 210–11. “Subrogation” is “[t]he substitution of one thing for another . . . with respect to rights, claims, or securities.” *Subrogation*, THE L. DICTIONARY, <https://thelawdictionary.org/subrogation> [<https://perma.cc/QE77-YSB9>]. “Subrogation denotes the putting [of] a third person who has paid a debt in the place of the creditor to whom he has paid it.” *Id.* Thus, subrogation allows an insurer to seek reimbursement from the insured. *See id.*

36. *Heine v. Allen Mem'l Hosp. Corp.*, 549 N.W.2d 821, 823–24 (Iowa 1996); *see also Nieman v. Heil Co.*, 471 N.W.2d 790, 791 (Iowa 1991) (“Payments to an injured plaintiff from a collateral source do not ordinarily reduce the amount otherwise owed by a defendant whose negligence proximately caused the injury.”).

37. *See generally* Benjet, *supra* note 29 (describing the status of the collateral source rule in each state).

38. *Dedmon v. Steelman*, 535 S.W.3d 431, 445 (Tenn. 2017); *see* Benjet, *supra* note 29, at 211; *see* Paula Hearn Moore, Robert L. Hearn & Parker Cashdollar, *Applying the Collateral Source Rule to Government Mandated Programs*, 15 J. LEGAL ECON. 31, 45 (2009); *see* Guillermo Gabriel Zorogastua, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 463–64 (2007).

39. *See generally* Benjet *supra* note 29 (explaining the current status of the collateral source rule in each state); THE HARMONIE GRP. / NEXT GENERATION, 50 STATE COLLATERAL SOURCE RULE OVERVIEW, <https://www.harmonie.org/file/Litigation%20Best%20Practices/Collateral%20Source%20Rule%202016.pdf> [<https://perma.cc/5ZLM-NDFR>] (explaining the root of the collateral source rule in each state and how it is applied).

40. *Abrogation*, THE L. DICTIONARY, <https://thelawdictionary.org/abrogation> [<https://perma.cc/5GAS-3Y9g>]; *Abrogate*, THE L. DICTIONARY, <https://thelawdictionary.org/abrogate> [<https://perma.cc/XT8Q-HUET>].

41. *See Dedmon*, 535 S.W.3d at 445; Benjet, *supra* note 29, at 211 (“Of the fifty States and the District of Columbia, forty-two jurisdictions have enacted and retained some form of statute that restricts the collateral source rule. . . . [C]ollateral source damages are often limited in health care liability cases as part of broader tort-reform legislation.”); *see* Moore, et al., *supra* note 38, at

For example, Alaska reduces amounts granted in a verdict by the amount a plaintiff has or will receive from a collateral source that does not have a right to reimbursement.<sup>42</sup> Additionally, Indiana allows admission of evidence of “collateral source payments” that have been made on a plaintiff’s behalf and the amount the plaintiff will be required to repay, and it requires that the jury take this evidence into consideration when calculating the plaintiff’s reward.<sup>43</sup> Finally, Tennessee has limited the collateral source rule, but only in “health care liability lawsuits.”<sup>44</sup> These are just a few examples of how state jurisdictions treat the collateral source rule differently.<sup>45</sup>

## II. THE COLLATERAL SOURCE RULE IN IOWA

Iowa has restricted the collateral source rule in two ways.<sup>46</sup> Iowa Code Section 668.14 deals with personal injury cases and rejects “the common-law collateral source rule as it applies to comparative fault cases.”<sup>47</sup> Iowa Code Section 147.136 only deals with medical malpractice cases and “abrogates the collateral source rule with respect to certain medical malpractice actions.”<sup>48</sup> Meaning that under Iowa Code Section 147.136, Iowans are unable to recover monetary losses resulting from medical injuries when those costs are indemnified by certain sources.<sup>49</sup> Iowa Code Section 668.14 provides that:

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant’s immediate family.
2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and

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45 (“Out of the fifty (50) states, forty-four (44) states have taken legislative steps to minimize the effects of the collateral source rule.”).

42. Benjet, *supra* note 29, at 213; ALASKA STAT. § 09.17.070 (2022).

43. Benjet, *supra* note 29, at 220; IND. CODE ANN. § 34-44-1-2 (West 2022); *Id.* § 34-44-1-3.

44. *Dedmon*, 535 S.W.3d at 445; *Newton v. Cox*, 878 S.W.2d 105, 107 (Tenn. 1994); TENN. CODE § 29-26-119 (2021).

45. See discussion *supra* Part I.

46. Benjet, *supra* note 29, at 220.

47. *Id.*; see IOWA CODE § 668.14 (2022).

48. Benjet, *supra* note 29, at 221; see IOWA CODE § 147.136.

49. See Benjet, *supra* note 29, at 221; § 147.136.

as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

4. This section does not apply to actions governed by section 147.136.<sup>50</sup>

As described above, in comparative fault personal injury cases, Iowa law allows evidence to be admitted that demonstrates “previous . . . or future” payments to cover “necessary medical care, rehabilitation services, and custodial care,” unless those payments were made by “a state or federal program” or the “assets of the claimant or the members of the claimant’s immediate family.”<sup>51</sup>

#### A. IOWA’S ABROGATION OF THE COLLATERAL SOURCE RULE

Iowa has done away with the collateral source rule in “*actions for damages for personal injury against physicians and other identified health care provider*” through Iowa Code Section 147.136.<sup>52</sup> The main body of the statute provides:

1. Except as otherwise provided in subsection 2, in an action for damages for personal injury against a physician and surgeon, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse licensed to practice that profession in this state, or against a hospital licensed for operation in this state, based on the alleged negligence of the practitioner in the practice of the profession or occupation, or upon the alleged negligence of the hospital in patient care, in which liability is admitted or established, the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury, including but not limited to the cost of reasonable and necessary medical care, rehabilitation services, and custodial care, and the loss of services and loss of earned income, to the extent that those losses are replaced or are indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source.<sup>53</sup>

In Iowa, if a patient is harmed by a negligent health care provider and their medical expenses are covered “by governmental, employment, or service benefit programs or from any other source,” that patient cannot personally

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50. IOWA CODE § 668.14.

51. *Id.* § 668.14(1).

52. *Heine v. Allen Mem’l Hosp. Corp.*, 549 N.W.2d 821, 824 (Iowa 1996); IOWA CODE § 147.136.

53. § 147.136(1).

recover those medical expenses from the negligent health care provider.<sup>54</sup> Thus, Iowa law rejects the aspect of the collateral source rule that would allow a patient to recover such medical expenses.<sup>55</sup>

When enacting Iowa Code Section 147.136 in 1975, the Iowa Legislature was concerned with “the high cost and impending unavailability of medical malpractice insurance,” and they intended “to provide ‘an interim solution to the impending unavailability of medical malpractice insurance.’”<sup>56</sup> Ideally, the statute would “reduce the size of medical malpractice judgments and make medical malpractice insurance more affordable” and “ensure access to affordable health care for individuals.”<sup>57</sup>

While Iowa Code Section 147.136 largely does away with the collateral source rule in certain medical malpractice cases, there are exceptions to the general rule dependent on the collateral source.<sup>58</sup> In addition to the main body of the statute listed above, the second prong of Iowa Code Section 147.136 provides that the statute does “not bar recovery of economic losses replaced or indemnified by . . . [b]enefits received under the medical assistance program under chapter 249A” or “[t]he assets of the claimant or of the members of the claimant’s immediate family.”<sup>59</sup> So, under the second provision, there are two exceptions to Iowa’s general abrogation of the collateral source rule in medical malpractice cases—when the collateral source covering the plaintiff’s losses is a “medical assistance program under chapter 249A” and when the collateral source covering the plaintiff’s losses is their own assets or that of the plaintiff’s immediate family.<sup>60</sup>

The medical assistance exception applies to losses indemnified by Medicaid and can be found in Iowa Code Chapter 249A, also known as the Medical Assistance Act.<sup>61</sup> The Medical Assistance Act uses the phrases “medical assistance” and “Medicaid” interchangeably.<sup>62</sup> On multiple occasions, the Medical Assistance Act provides that “medical assistance” and “Medicaid” have the same definition under the statute.<sup>63</sup> In other words, the medical assistance

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54. *Id.*; Benjet, *supra* note 29, at 220–21.

55. *See* § 147.136; Benjet, *supra* note 29, at 220–21.

56. *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 558 (Iowa 1980) (quoting S. 66-239, 1st Sess. (Iowa 1975)).

57. Tyler J. Ernst, Note, *Who Should Bear the Burden? ERISA Preemption and Its Impact on Compensation Received by Individuals Injured as a Result of Medical Malpractice in Iowa*, 64 *DRAKE L. REV.* 535, 540–41 (2016); *see* H.F. 803, 66th Gen. Assemb., Reg. Sess., § 1 (Iowa 1975).

58. *See* § 147.136.

59. *Id.* § 147.136(2).

60. *Id.*

61. *See id.* § 147.136; IOWA CODE § 249A.1.

62. *See* §§ 249A.2(7)–(8).

63. *See, e.g., id.* § 249A.2(7) (providing that “‘Medical assistance’ or ‘Medicaid’ means payment of all or part of the costs of the care and services made in accordance with Tit. XIX of the federal Social Security Act and authorized pursuant to this chapter”); *id.* § 249A.2(8) (provides that

exception found in Iowa Code Section 147.136(2)(a) applies to plaintiffs covered by Medicaid.<sup>64</sup>

Reading these statutes together, when a patient is harmed by a negligent health care provider and their insurer covers their medical expenses, Iowa Code Section 147.136 nullifies the collateral source rule—preventing that patient from recovering such expenses from the provider—if the plaintiff is covered by a private insurer and maintains the collateral source rule if the plaintiff is covered by Medicaid.<sup>65</sup> In such a situation, Iowa Code Section 147.136 allows a Medicaid plaintiff to recover the medical expenses from a negligent health care provider, but does not allow a plaintiff covered by a private insurer to do the same.<sup>66</sup>

Through Iowa Code Section 147.136, the Iowa legislature has cut off a plaintiff's ability to recover from a provider if a private insurer has covered those costs.<sup>67</sup> Iowa Code Section 147.136 accounts for costs covered by private insurers, government benefits, employment benefits, service benefits, Medicaid, the plaintiff's assets, and the plaintiff's family member's assets.<sup>68</sup> However, the statute has forgotten those covered by a managed care organization—an ever-growing and critical group of people in Iowa.<sup>69</sup>

#### B. MANAGED CARE ORGANIZATIONS IN IOWA

Managed care is an umbrella term, encompassing many different efforts to provide a patient with more affordable health care, and is defined as “a healthcare plan or system that seeks to control medical costs by contracting with a network of providers.”<sup>70</sup> Further, “[a] managed care organization . . . is a health care company or health plan that is focused on managed care as a model to limit costs, while keeping the quality of care high.”<sup>71</sup> There are a variety of managed care plans offering different services.<sup>72</sup>

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“‘Medical assistance program’ or ‘Medicaid program’ means the program established under this chapter to provide medical assistance”).

64. See *id.* §§ 249A.2(7)–(8); *id.* § 147.136(2)(a).

65. See *id.* § 147.136.

66. See *id.*

67. See *id.*

68. See *id.*

69. See Notice of Intent to Release a Request for Proposal, Iowa Dep't of Hum. Servs. 1 (May 14, 2021), <https://bidopportunities.iowa.gov/Home/GetBidOpportunityDocument/bo233d80-932d-4f96-a869-60d67e629283> [<https://perma.cc/P3ZL-RUZP>]; Krebs, *supra* note 20 (referencing IOWA DEP'T OF HUM. SERVS., MANAGED CARE ORGANIZATION (MCO) REPORT: SFY 2021, QUARTER 3 PERFORMANCE DATA (June 2021), [https://dhs.iowa.gov/sites/default/files/SFY21\\_Q3\\_Report.pdf?070620211337](https://dhs.iowa.gov/sites/default/files/SFY21_Q3_Report.pdf?070620211337) [<https://perma.cc/KB6T-X7QS>]).

70. *Managed Care*, DICTIONARY.COM (2022), <https://www.dictionary.com/browse/managed-care> [<https://perma.cc/PqJU-QSFJ>].

71. *What Is Managed Care?*, CIGNA (2022), <https://www.cigna.com/individuals-families/understanding-insurance/what-is-managed-care> [<https://perma.cc/3GGA-SW5L>].

72. See *id.*

A Health Maintenance Organization (“HMO”) costs the least but is also the least flexible managed care plan—requiring patients to see providers within the network.<sup>73</sup> A Preferred Provider Organization (“PPO”) is more flexible but comes at a higher cost—allowing patients to see a provider “in- or out-of-network.”<sup>74</sup> A Point of Service Plan (“POS”) falls somewhere between the previously listed managed care plans—allowing patients to see providers “in- or out-of-network” but sometimes requiring patients to see their primary care providers to “manage [their] care and provide [them] with referrals.”<sup>75</sup> Finally, an Exclusive Provider Organization (“EPO”) falls somewhere between the first two managed care plans, and the cost is typically higher than an HMO and lower than a PPO—allowing patients to sometimes see providers outside of the network but “often requir[ing]” patients to see providers in the network to remain covered.<sup>76</sup>

Iowa Medicaid frequently contracts with such managed care organizations to provide health care services to those that it covers.<sup>77</sup> As of 2021, Iowans covered by Medicaid and “enrolled in . . . SSI, Long Term Care (nursing home)[,] Home and Community Based Waivers (includes Elderly Waiver)[, and] Medicaid for Employed People with Disabilities (MEPD)” are a part of a managed care organization.<sup>78</sup> Such Iowans can choose one of two managed care organizations: Amerigroup Iowa, Inc. or Iowa Total Care.<sup>79</sup> Over 700,000 Iowans are covered by Iowa’s Medicaid program, and in turn, a large portion of those Iowans are under the care of a managed care organization.<sup>80</sup>

73. *See id.* (“Health Maintenance Organization (HMO) manages care by requiring you to see network providers, usually for a much lower monthly premium. HMOs also often require you to see a [primary care provider] before going elsewhere, and do not cover you to see providers outside the network. . . . HMOs cost less, but offer less flexibility.”).

74. *See id.* (“Preferred Provider Organization (PPO) gives you the option to see any doctor you like, in- or out-of-network. . . . There may be no requirements to get referrals from a [primary care provider], either. . . . For this flexibility, your costs are usually higher.”).

75. *See id.* (“Point of Service (POS) plans are a hybrid of HMOs and PPOs. You get the flexibility to see in- or out-of-network doctors like a PPO, but your share of the costs will be higher. Like an HMO, you may be required to see a [primary care provider] to manage your care and provide you with referrals. Goal of a POS is similar—offer you options, while still managing to keep costs low.”).

76. *See id.* (“Exclusive Provider Organization (EPO) plans also combine features of HMOs and PPOs. Like a PPO, you may not be required to see a [primary care provider] or get a referral, but like an HMO you are often required to see in-network doctors to be covered. Cost for an EPO plan is usually higher than an HMO, but less than a PPO.”).

77. *See* SHIP, MEDICARE AND IOWA MEDICAID MANAGED CARE 1 (May 2021), [https://ship.iowa.gov/sites/default/files/2020-04/0080\\_MC\\_Medicaid\\_Managed\\_Care.pdf](https://ship.iowa.gov/sites/default/files/2020-04/0080_MC_Medicaid_Managed_Care.pdf) [<https://perma.cc/LKV3-N5F5>].

78. *Id.*

79. *Id.*; *see* Amerigroup Iowa, Inc.: *Focused on Your Health*, AMERIGROUP (2021), <https://www.myamerigroup.com/ia/iowa-home.html> [<https://perma.cc/RBA4-NCAY>]; *Get Health Insurance in Iowa with Total Care*, IOWA TOTAL CARE (2022), <https://www.iowatotalcare.com> [<https://perma.cc/FB79-M56Y>].

80. Krebs, *supra* note 20.

The managed care model has been employed in Iowa for five years,<sup>81</sup> and the privatization of Medicaid has been highly controversial in the state.<sup>82</sup> Opponents of the program, such as Jenn Wolff, a disability advocate, have stated that “Iowans were made more vulnerable by privatization.”<sup>83</sup> Health care providers in Iowa have complained of low reimbursement, similar to objections expressed before the managed care model was adopted.<sup>84</sup> Additional voices have complained that under the managed care model “Medicaid members, particularly those who require long-term supports, struggle to obtain the care they need.”<sup>85</sup> Rob Sand, Iowa State Auditor, released a report in 2021 that investigated managed care organization cases from 2013 to 2019.<sup>86</sup> He “found a massive increase in illegal denials of care by managed care organizations” and stated that “[w]hat this means is that privatized Medicaid is less likely to treat Iowans in accordance with the law.”<sup>87</sup>

In response, Elizabeth Matney, Iowa Medicaid Director, has said that Sand’s report is “incorrect and flawed.”<sup>88</sup> Additionally, regarding general complaints, Kelly Garcia, the director of Iowa’s Department of Human Services, has stated that the managed care model has stabilized Medicaid in Iowa.<sup>89</sup> Garcia further stated that “the program is in a better place even than what it was a year ago,” and the state has “seen a signal from DHS that we have a focus on holding our managed-care organizations accountable.”<sup>90</sup> Clearly, opinions on the managed care organization model are quite strong and vary greatly.

Despite the controversy, this Medicaid managed care model is an ever-growing practice in Iowa.<sup>91</sup> Iowa is currently in the process of seeking additional managed care organizations to join the state’s network.<sup>92</sup> In May of 2021, the Iowa Department of Human Services began official discussions relating to soliciting applications for such managed care organizations.<sup>93</sup> According to Iowa Public Radio, Iowa’s Medicaid Director, Elizabeth Matney, stated that

81. Ramm, *supra* note 20.

82. *Id.*

83. *Id.* Jenn Wolff is not only a disability advocate but is also a force “behind the #UpgradeMedicaid Incentive.” *Id.*

84. *Id.*

85. *Id.*

86. See Associated Press, *Auditor: Iowa’s Privatized Medicaid Illegally Denies Care*, U.S. NEWS (Oct. 20, 2021, 6:26 PM), <https://www.usnews.com/news/health-news/articles/2021-10-20/auditor-iowas-privatized-medicaid-illegally-denies-care> [<https://perma.cc/5HCD-Y7Z9>].

87. *Id.*

88. *Id.*

89. Ramm, *supra* note 20. Garcia came to Iowa from Texas in 2019. She strongly defends that the “managed care model” has been steadily improving in her time in Iowa. *Id.*

90. *Id.*

91. See Notice of Intent to Release a Request for Proposal, *supra* note 69, at 1; Krebs, *supra* note 20.

92. Notice of Intent to Release a Request for Proposal, *supra* note 69, at 1; see also Krebs, *supra* note 20.

93. Notice of Intent to Release a Request for Proposal, *supra* note 69, at 1.

the Department will be seeking bids in late 2021, and “Amerigroup’s contract ends in 2023, and Iowa Total Care’s contract ends in 2025.”<sup>94</sup> According to the Department’s “intent to release a request for proposal notice letter,” Iowa Medicaid is willing to obtain four contracts with managed care organizations, and the plan in place would have the managed care organizations contracted beginning operation in the summer of 2023.<sup>95</sup>

In sum, in 2023, Iowa could have up to six managed care organizations operating in the state,<sup>96</sup> demonstrating that managed care organizations are growing and becoming prevalent in Iowa.<sup>97</sup> This indicates that the proportion of the 700,000 Iowans covered by Medicaid<sup>98</sup> and under the care of a managed care organization will likely continue to grow. As more Iowans fall under a managed care organization, more will be left in the gap of Iowa Code Section 147.136.<sup>99</sup>

### III. THE GAPS LEFT IN IOWA CODE SECTION 147.136

Iowa Code Section 147.136 fails to account for managed care organizations, which cover a growing number of Iowans.<sup>100</sup> The first provision of Iowa Code Section 147.136 accounts for plaintiffs covered by a private insurer, and the second provision of Iowa Code Section 147.136 accounts for plaintiffs covered by Medicaid—but the statute fails to directly account for those covered by a managed care organization.<sup>101</sup> While Iowans under the care of a managed care organization are enrolled in Medicaid, in this situation, Medicaid has been privatized.<sup>102</sup> Thus, it is unclear whether plaintiffs enrolled in Medicaid, but under the care of a managed care organization, fall under the first provision of Iowa Code Section 147.136, as plaintiffs covered by private insurers, or the second provision of Iowa Code Section 147.136, as plaintiffs covered by Medicaid.<sup>103</sup> As the privatization of Iowa Medicaid through managed care organizations continues to become even more prevalent through 2023, the gap between the first and second provision of Iowa Code Section 147.136 in this regard will only continue to grow.<sup>104</sup>

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94. Krebs, *supra* note 20.

95. *Id.*; Notice of Intent to Release a Request for Proposal, *supra* note 69, at 1.

96. Iowa Total Care’s current MCO contract will still be in effect in 2023; if Amerigroup’s MCO contract is renewed in 2023 and the Iowa Department of Human Services does in fact choose to contract with four new MCOs, Iowa will have six MCOs in 2023. Krebs, *supra* note 20; Notice of Intent to Release a Request for Proposal, *supra* note 69, at 1.

97. Krebs, *supra* note 20; Notice of Intent to Release a Request for Proposal, *supra* note 69, at 1.

98. Krebs, *supra* note 20.

99. See IOWA CODE § 147.136.

100. See *id.*; Krebs, *supra* note 20.

101. See § 147.136.

102. See Ramm, *supra* note 20.

103. See *id.*; § 147.136.

104. See Ramm, *supra* note 20; § 147.136.

When a patient in Iowa is injured by a negligent health care provider and their medical expenses are covered by a private insurer, that plaintiff *cannot* recover those medical expenses from the provider who injured them; when the medical expenses are covered by Medicaid, that plaintiff *can* recover those medical expenses from the provider who injured them; when a patient is enrolled in Medicaid and under the care of a managed care organization, it is unclear if they can recover.<sup>105</sup> A person covered by a private insurer can easily identify that they are covered by the first provision of Iowa Code Section 147.136.<sup>106</sup> But, on the other hand, one under the care of a managed care organization cannot easily identify that they are covered by Medicaid and thus the second provision of Iowa Code Section 147.136.<sup>107</sup> Rather, they may know that they are enrolled in Medicaid and under the care of Amerigroup Iowa or Iowa Total Care<sup>108</sup> but not whether they are covered by the first or second provision of Iowa Code Section 147.136.<sup>109</sup>

As previously mentioned, this gap in the law poses a problem because it creates instability for those under the care of a managed care organization as the law does not make clear whether they can recover.<sup>110</sup>

Critically, someone dealing with Iowa Code Section 147.136 is a plaintiff who has faced a personal injury at the hands of a health care provider.<sup>111</sup> If someone is a plaintiff in a medical malpractice suit, they are already under the stress of determining and litigating the personal injury case itself—the gap in this statute requires those under the care of a managed care organization to additionally be concerned with their ability to recover under Iowa Code Section 147.136.<sup>112</sup> Such a plaintiff is already vulnerable, and determining whether they can recover under Iowa Code Section 147.136 is an unnecessary stressor, particularly when considering a statute that is decidedly clear regarding nearly all other groups of plaintiffs.<sup>113</sup>

Iowa Code Section 147.136 must be amended to account for managed care organizations. The structure of Iowa Code Section 147.136 makes clear that the Iowa legislature intended that all major collateral sources would be accounted for in the statute. Traditional methods of statutory interpretation do not resolve the issue as to whether managed care organizations should fall

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105. See § 147.136.

106. See *id.* § 147.136(1).

107. See *id.* § 147.136(2).

108. SHIP, *supra* note 77; see *Amerigroup Iowa, Inc.: Focused on Your Health*, *supra* note 79.

109. See § 147.136.

110. *Id.*

111. See *id.* § 147.136(1).

112. See *id.*

113. See *id.*; Richard P. Console, Jr., *4 Worst Medical Malpractice Cases Ever*, 11 NAT'L L. REV. 84 (Mar. 25, 2021), <https://www.natlawreview.com/article/4-worst-medical-malpractice-cases-ever> [<https://perma.cc/gSC9-ELNE>] (telling the stories of individuals who have endured personal injuries in medical malpractice cases); see *supra* Section II.A.

under the first or second provision of Iowa Code Section 147.136. There are public policy reasons for ensuring all major collateral sources are covered under Iowa Code Section 147.136.

A. *IOWA'S ADOPTION OF, AND AMENDMENTS TO, THE MANAGED CARE ORGANIZATION MODEL*

The Iowa Legislature has not substantively amended Iowa Code Section 147.136 since the adoption of the managed care organization model in Iowa.<sup>114</sup> Iowa adopted the managed care model and began privatizing Medicaid in 2016.<sup>115</sup> Iowa Code Section 147.136 was amended in 2011 to include the “medical assistance” exception.<sup>116</sup> Thus, the managed care model emerged in Iowa after medical assistance programs were included in Iowa Code Section 147.136.<sup>117</sup> Consequently, the Iowa Legislature was not considering managed care organizations the last time it substantively amended Iowa Code Section 147.136. Now that the state of Iowa has adopted the managed care organization model,<sup>118</sup> the Iowa Legislature should make substantive amendments to Iowa Code Section 147.136.

B. *CATEGORIES OF COLLATERAL SOURCES UNDER IOWA CODE SECTION 147.136*

As the managed care organization model is now adopted in Iowa, there is a major collateral source not accounted for in Iowa Code Section 147.136.<sup>119</sup> The structure of Iowa Code Section 147.136 makes it clear that all types of collateral sources were to be included in the statute.<sup>120</sup> The first provision includes private insurers and “governmental, employment, or service benefit programs,”<sup>121</sup> and the second provision includes Medicaid and personal or familial assets.<sup>122</sup> The different types of collateral sources are clearly identified and slotted into their respective sections of the statute.<sup>123</sup> When Iowa Code Section 147.136 was amended in 2011 to include the “medical assistance” exception,<sup>124</sup> one would be strained to find a collateral source that is not listed

114. Iowa Code Section 147.136 has been amended twice since 2008: Thus, it has existed in three different forms. While the statute exists in 2021 in a different form than it did in 2008, it has remained mostly the same—the only substantive difference being that the “medical assistance” exception was added in 2011. *See* § 147.136(2)(a).

115. Ramm, *supra* note 20.

116. § 147.136(2)(a).

117. *See id.* On June 30, 2011, Iowa Code Section 147.136 was amended to include the “medical assistance” exception. *Id.*; Knepper & Droze, *supra* note 1 (describing that “in 2016 . . . [Iowa] switched to a managed care organization . . . model”).

118. *See* Ramm, *supra* note 20; § 147.136.

119. *See* § 147.136.

120. *See id.*

121. *Id.* § 147.136(1).

122. *Id.* § 147.136(2)(b).

123. *See id.* § 147.136(2).

124. *See id.* § 147.136(2)(a).

in the statute. This, of course, rings true until the privatization of Iowa Medicaid through the managed care organization model in 2016,<sup>125</sup> which added another player to the equation.

C. STATUTORY INTERPRETATIONS OF IOWA CODE SECTION 147.136

Traditional methods of statutory interpretation do not provide an answer to this issue. As Iowa Code Section 147.136 currently stands, it is unclear if managed care organizations should fall under the first or second provision—that is, whether the collateral source rule should be maintained or not regarding managed care organizations.<sup>126</sup> There are many issues in understanding how managed care organizations should fit into the phrases “insurance” and “or from any other source”<sup>127</sup> at the end of the first provision, and “[b]enefits . . . under chapter 249A”<sup>128</sup> in the second provision. As discussed fully below, canons of statutory interpretation, such as the plain meaning rule, *expressio unius est exclusio alterius*,<sup>129</sup> and *noscitur a sociis*<sup>130</sup> do not clearly demonstrate how managed care organizations should be understood to fit into the statute.<sup>131</sup> As traditional methods of statutory interpretation do not provide an answer, the legislature should amend Iowa Code Section 147.136<sup>132</sup> to account for managed care organizations.

125. See Knepper & Droze, *supra* note 1; § 147.136.

126. See § 147.136.

127. See *id.* § 147.136(1).

128. See *id.* § 147.136(2)(a).

129. *Expressio unius est exclusio alterius* is “a principle in statutory construction [that provides that] when one or more things of a class are expressly mentioned[,] others of the same class are excluded.” *Expressio Unius Est Exclusio Alterius*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius> [<https://perma.cc/3L9B-Y47X>].

130. *Noscitur a sociis* is “a doctrine or rule of construction [that provides that] the meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context.” *Noscitur a Sociis*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/legal/noscitur%20a%20sociis> [<https://perma.cc/4MP2-7FC5>].

131. Iowa courts commonly employ the plain meaning rule, *expressio unius est exclusio alterius* and *noscitur a sociis* in interpreting statutes. See *State v. Caskey*, 539 N.W.2d 176, 177 (Iowa 1995) (“When a statute’s terms are unambiguous and its meaning plain, there is no need to apply principles of statutory construction. We need only look at the plain and rational meaning of the precise language.” (citations omitted)); *State v. Bond*, 493 N.W.2d 826, 828 (Iowa 1992); *Am. Asbestos v. E. Iowa Cmty. Coll.*, 463 N.W.2d 56, 58 (Iowa 1990); *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)); *Wright v. State Bd. of Eng’g Exam’rs*, 250 N.W.2d 412, 413 (Iowa 1977); *State v. Bauer*, 20 N.W.2d 431, 432 (Iowa 1945).

132. § 147.136.

### 1. What Is the “Plain Meaning” of Managed Care Organizations?

While there are many methods of interpreting a statute,<sup>133</sup> Iowa courts begin by examining the plain meaning of the language in the statute.<sup>134</sup> If the meaning of the language is unambiguous and plain, Iowa courts will apply that meaning and not engage in further statutory interpretation.<sup>135</sup> Iowa courts use dictionary definitions to determine the plain meaning of the language in the statute.<sup>136</sup> The first provision of Iowa Code Section 147.136 states that the collateral source rule is partially abrogated in medical malpractice actions as to payments made “by insurance,” “governmental, employment, [and] service benefit programs or from any other source.”<sup>137</sup> The second provision of Iowa Code Section 147.136 states that the collateral source rule is maintained in regard to “[b]enefits received under the medical assistance program under chapter 249A.”<sup>138</sup>

It is unclear whether a managed care organization should be considered “insurance” or a “medical assistance program.” Insurance is defined as “coverage by contract in which one party agrees to indemnify or reimburse another for loss that occurs under the terms of the contract.”<sup>139</sup> Iowa Code Section 249A.2 provides that “[m]edical assistance program’ or ‘Medicaid program’ means the program established under this chapter to provide medical assistance.”<sup>140</sup> Managed care organizations are private groups that “contract[] . . . [with] state Medicaid agencies” to deliver “Medicaid health benefits.”<sup>141</sup> Further, managed care organizations are considered to be “a type of health insurance.”<sup>142</sup> In Iowa, the managed care organization “model creates a middleman for the Medicaid program.”<sup>143</sup> The plain meaning of these terms does not provide an answer regarding managed care organizations. It is accepted that managed

133. See *infra* Sections III.C.2–3.

134. See *Caskey*, 539 N.W.2d at 177 (Iowa 1995) (“When a statute’s terms are unambiguous and its meaning plain, there is no need to apply principles of statutory construction. We need only look at the plain and rational meaning of the precise language.” (citations omitted)); *Bond*, 493 N.W.2d at 828; *Am. Asbestos*, 463 N.W.2d at 58.

135. *Caskey*, 539 N.W.2d at 177; *Bond*, 493 N.W.2d at 828; *Am. Asbestos*, 463 N.W.2d at 58.

136. See *ABC Disposal Sys., Inc. v. Dep’t of Nat. Res.*, 681 N.W.2d 596, 603 (Iowa 2004) (utilizing the dictionary definition of “facility” to determine the plain meaning of the term).

137. § 147.136(1).

138. *Id.* § 147.136(2).

139. *Insurance*, DICTIONARY.COM (2022), <https://www.dictionary.com/browse/insurance> [<https://perma.cc/HJ4K-LKKW>].

140. See IOWA CODE § 249A.2.

141. *Managed Care*, *supra* note 2.

142. *Managed Care*, MEDLINEPLUS (Aug. 30, 2019), <https://medlineplus.gov/managedcare.html> [<https://perma.cc/9H4L-7GYC>]; *Managed Care Organization*, LUMEN (2022), <https://courses.lumenlearning.com/atd-clinton-hsm111/chapter/managed-care-organization> [<https://perma.cc/9XGY-HMPP>].

143. *Knepper & Droze*, *supra* note 1.

care organizations are providing health insurance services.<sup>144</sup> However, they also seem to be an extension of Iowa Medicaid, creating a categorical gap not accounted for in Iowa Code Chapter 249A.<sup>145</sup> Overall, the plain meaning provides minimal guidance in this analysis.

2. Using “*Expressio Unius Est Exclusio Alterius*,” Should Managed Care Organizations Be Excluded?

Another tool of statutory interpretation is *expressio unius est exclusio alterius*, which means that “the express mention of one thing implies the exclusion of others not so mentioned.”<sup>146</sup> When a statute enumerates a list, Iowa courts use this canon to help discern its meaning.<sup>147</sup> Thus, when a statute lists a class of things, Iowa courts will assume that anything not mentioned in that list is not included under that statute.<sup>148</sup> The first provision of Iowa Code Section 147.136 enumerates “insurance, . . . governmental, employment, or service benefit programs or from any other source,” and the second provision enumerates “[b]enefits . . . under the medical assistance program,” and “the assets of the claimant or . . . [their] immediate family.”<sup>149</sup>

If *expressio unius* is strictly applied, there could be an argument that as managed care organizations are not enumerated in the statute, they fall under the catchall “or from any other source.”<sup>150</sup> But, as discussed above—in Iowa, managed care organizations function as an extension of Medicaid, so there seems to be tension as to whether they fall under the medical assistance exception in the second provision.<sup>151</sup> While managed care organizations are not enumerated in Iowa Code Chapter 249A as a type of medical assistance, it seems difficult to say that they are not providing medical assistance when functioning as an intermediary between Medicaid and the consumer.<sup>152</sup> Overall, managed care organizations are not enumerated in Iowa Code Section 147.136, and using the canon of *expressio unius* it could be argued that because the legislature did not specifically mention managed care organizations, they belong under the catchall after the first provision. On the other hand, it could be argued that managed care organizations act as an intermediary between Iowa Medicaid and the consumer<sup>153</sup> and are providing the benefits

144. *Managed Care*, *supra* note 142; *Managed Care Organization*, *supra* note 142.

145. Knepper & Droze, *supra* note 1; *see* IOWA CODE, ch. 249A.

146. *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)).

147. *See id.*

148. *See id.*

149. § 147.136.

150. *Id.*

151. Knepper & Droze, *supra* note 1; *see* § 147.136(2).

152. *See* § 249A.2.

153. Knepper & Droze, *supra* note 1.

enumerated in provision two—thus, not excluded from the statute at all. Overall, *expressio unius* provides only slightly more guidance in this analysis.

3. Using “*Noscitur a Sociis*,” Are Managed Care Organizations More Like “Insurance” or a “Medical Assistance Program”?

Finally, in addition to the methods of statutory interpretation previously discussed,<sup>154</sup> if a statute enumerates a list, Iowa courts examine it using the canon of *noscitur a sociis*, which requires that “the meaning of a word is ascertained in the light of the meaning of the words with which it is associated.”<sup>155</sup> Thus, when the meaning of one of the terms enumerated in a statute is at issue, Iowa courts will define it in relation to the other terms enumerated in the statute.<sup>156</sup> The main focus of *noscitur a sociis* is interpreting terms consistently with the words around them.<sup>157</sup>

This canon cannot be directly applied to this situation because managed care organizations are not enumerated anywhere in Iowa Code Section 147.136.<sup>158</sup> But, the ideals driving *noscitur a sociis* can be used to consider whether managed care organizations are more like insurance or “[b]enefits . . . under the medical assistance program.”<sup>159</sup> As discussed in the plain meaning section,<sup>160</sup> there is not a clear answer to this issue.

While managed care organizations are “a type of health insurance,”<sup>161</sup> making them like insurance, they are also a “middleman for the Medicaid program,”<sup>162</sup> making them like a medical assistance program. As a managed care organization is like both items enumerated in Iowa Code Section 147.136,<sup>163</sup> *noscitur a sociis* does not provide a clear method for resolving this issue.

4. The Results of the Statutory Interpretation of Iowa Code Section 147.136

A literal analysis of Section 147.136’s current text would lead to absurd, inconsistent, and unjust results. Iowa courts rarely apply the “absurdity doctrine,”

154. See *supra* Sections II.C.1–2.

155. *Wright v. State Bd. of Eng’g Exam’rs.*, 250 N.W.2d 412, 413 (Iowa 1977); see *State v. Bauer*, 20 N.W.2d 431, 432 (Iowa 1945).

156. See *Wright*, 250 N.W.2d at 413; *Bauer*, 20 N.W.2d at 432.

157. See *Wright*, 250 N.W.2d at 413; *Bauer*, 20 N.W.2d at 432.

158. See IOWA CODE § 147.136.

159. See *id.*

160. See *supra* Section II.C.1.

161. *Managed Care*, *supra* note 142; *Managed Care Organization*, *supra* note 142.

162. *Knepper & Droze*, *supra* note 1.

163. See § 147.136 (allowing for indemnification by insurance and not “bar[ring] recovery of economic losses [of] . . . [b]enefits received under . . . medical assistance program[s]”).

but it is another mechanism for interpreting statutes.<sup>164</sup> The Iowa Supreme Court has stated that “the true absurdity doctrine [permits] . . . a court [to] decline[] to follow the literal terms of the statute to avoid absurd results.”<sup>165</sup> The Court has compared “absurdity” with being “‘an ‘unreasonable’ . . . or ‘unworkable’ or ‘unjust’ or ‘unlikely’ result clearly inconsistent with the purposes and policies of the act in question.”<sup>166</sup>

There is no sensible way to incorporate managed care organizations into the statute as it currently stands. Managed care organizations are not enumerated in Section 147.136; thus, a literal analysis would put them under the catchall at the end of the first provision, abrogating the collateral source rule.<sup>167</sup> But, following these “literal terms”<sup>168</sup> would lead to an unjust and inconsistent result. While managed care organizations are not specifically enumerated in the medical assistance exception in the second provision of Iowa Code Section 147.136,<sup>169</sup> managed care organizations deliver Medicaid’s services to the consumer.<sup>170</sup> Thus, a person under the care of a managed care organization is still ultimately covered by Medicaid.<sup>171</sup> It is not logically consistent to suggest that the collateral source rule should be maintained for Medicaid<sup>172</sup> but that it should be abandoned for the organizations serving as the “middleman for the Medicaid program” and the consumer when both consumers are under Medicaid’s umbrella.<sup>173</sup> Such an interpretation is unjust to the individual covered by Medicaid but under the care of a managed care organization because such individual qualified for Medicaid at the outset and should be treated as such. Overall, interpreting Iowa Code Section 147.136 based on its literal terms would lead to absurd, unjust, and inconsistent results.

There is no fair way to interpret the relationship between managed care organizations and Iowa Code Section 147.136. Managed care organizations cannot be read to fall under the exception to Iowa Code Section 147.136 because they are not enumerated in “chapter 249A” and are not “assets of the

164. *Brakke v. Iowa Dep’t of Nat. Res.*, 897 N.W.2d 522, 539–40 (Iowa 2017) (quoting *Sherwin-Williams Co. v. Iowa Dep’t of Revenue*, 789 N.W.2d 417, 427 (Iowa 2010)) (“[T]he absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.”).

165. *Id.* at 534.

166. *Id.* (quoting 5 NORMAN J. SINGER & SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45:12 (7th ed. rev. 2014)).

167. *See* § 147.136.

168. *Brakke*, 897 N.W.2d at 534.

169. *See* § 147.136(2).

170. *See* Knepper & Droze, *supra* note 1 (describing the “managed care organization . . . model,” as “creat[ing] a middleman for the Medicaid program”).

171. *See id.*

172. *See* § 147.136(2).

173. Knepper & Droze, *supra* note 1.

claimant or of [their] . . . family.”<sup>174</sup> But, it is unjust and inconsistent to suggest that managed care organizations should fall under the main body of the statute because those under the care of a managed care organization are under the umbrella of Medicaid, which is a “medical assistance program under Chapter 249A.”<sup>175</sup> Analyzing Iowa Code Section 147.136 under the lens of the plain meaning rule, the canon of *expressio unius est exclusio alterius*, the canon of *noscitur a sociis*, and the absurdity doctrine demonstrates that the statute must be amended to include managed care organizations because there is no workable way to incorporate managed care organizations into the statute as it currently stands.<sup>176</sup>

D. *THE NEED FOR ONE TO BE ABLE TO EASILY IDENTIFY THEIR ABILITY TO RECOVER UNDER IOWA CODE SECTION 147.136*

Public policy supports amending Iowa Code Section 147.136 to include managed care organizations. It is important to emphasize the people to which Iowa Code Section 147.136 applies—those who have been physically harmed by a negligent health care provider.<sup>177</sup> Thus, Iowans who are looking to Iowa Code Section 147.136 for answers are people facing physical injuries caused by a health care provider.<sup>178</sup> Being the victim of medical malpractice is a traumatic experience.<sup>179</sup>

Many individuals share a common story: They went to the hospital for what seemed to be a routine event and left in a worse condition.<sup>180</sup> Such patients recount experiences such as going to the hospital for “surgery on [their] ankle” and leaving with “a potentially deadly bacterial infection that required seven more operations to save [their] leg and nearly five years [to] recover[.]”<sup>181</sup> Victims have further faced procedures performed on the wrong portion of their body, such as “operat[ing] on the wrong side of [their] brain[] three separate times” and having “the wrong leg” amputated.<sup>182</sup> These are very

174. See § 147.136(2); *id.*, ch. 249A.

175. See *id.* § 147.136(2)(a); *id.* ch. 249A.

176. See *supra* Section II.C.

177. § 147.136(1).

178. See *id.*

179. See generally Marshall Allen & Olga Pierce, *Ten Patient Stories: When Attorneys Refused My Medical Malpractice Case*, PROPUBLICA (Jan. 9, 2014, 11:57 AM), <https://www.propublica.org/article/ten-patient-stories-when-attorneys-refused-my-medical-malpractice-case> [<https://perma.cc/2EQ5-3LWV>] (recounting the struggles such injured parties face while seeking an attorney); Console Jr., *supra* note 113 (telling the stories of victims of the “[w]orst [m]edical [m]alpractice [c]ases [e]ver”).

180. See Console Jr., *supra* note 113; Allen & Pierce, *supra* note 179; *Lost Wages and Medical Malpractice*, GILMAN & BEDIGIAN, LLC (2022), <https://www.gilmanbedigian.com/lost-wages-malpractice> [<https://perma.cc/NQ28-3WUS>].

181. Allen & Pierce, *supra* note 179.

182. Console Jr., *supra* note 113.

traumatic experiences and are not totally uncommon.<sup>183</sup> In fact, it is estimated that “25,000 to 120,000 . . . deaths [are] caused by medical malpractice each year.”<sup>184</sup>

If an Iowan facing such medical malpractice issues is covered by a managed care organization, they not only have to deal with their injury and litigating the merits of their case, but they also must determine whether they can recover under Iowa Code Section 147.136.<sup>185</sup> This is an additional stressor someone in this situation should not have to face. Medical malpractice cases are already difficult for a plaintiff to win—“5% . . . of patients who are victims of [medical] malpractice receive . . . a negotiated settlement of the claim,” and “1/10 of 1% . . . of patients . . . win a trial verdict in their favor.”<sup>186</sup> Thus, such a plaintiff’s efforts and resources should be expended on the merits of their case, not their ability to recover under Iowa Code Section 147.136.<sup>187</sup>

Those covered by a private insurer can easily determine that they cannot recover from the negligent health care provider who injured them, and those covered by Medicaid can easily determine that they can recover from such a health care provider.<sup>188</sup> Iowa Code Section 147.136 is decidedly clear on one’s ability to recover regarding nearly all collateral sources.<sup>189</sup> Thus, Iowans covered by managed care organizations should be able to easily determine if they can recover or not as well and not be forced to litigate the matter.

One may argue that Iowans under the care of a managed care organization can determine through an attorney if they are able to recover in this situation. But there is no developed case law on this issue—forcing one in this position to litigate the matter. As discussed above, the plaintiff has low odds of winning or recovery in a medical malpractice suit.<sup>190</sup> Further, such a plaintiff could be left with limited resources because they are “unable to work” or are “fired or replaced.”<sup>191</sup> Thus, such a plaintiff should be able to expend their potentially limited resources<sup>192</sup> on the merits of their case, rather than on litigating Iowa Code Section 147.136.

All in all, Iowa Code Section 147.136 must be amended to account for managed care organizations. Iowa Code Section 147.136 has not been substantively amended since Iowa adopted the managed care organization

183. CIV. JUST. RES. GRP., MEDICAL MALPRACTICE . . . BY THE NUMBERS 1, <https://centerjrd.org/cjrg/Numbers.pdf> [<https://perma.cc/83P9JWAK>].

184. *Id.*

185. *See* IOWA CODE § 147.136.

186. CIV. JUST. RES. GRP., *supra* note 183, at 1.

187. *See id.*; § 147.136.

188. *See* § 147.136.

189. *See id.*

190. *See* CIV. JUST. RES. GRP., *supra* note 183, at 1.

191. *Lost Wages and Medical Malpractice*, *supra* note 180.

192. *See id.*

model.<sup>193</sup> The structure of Iowa Code Section 147.136 demonstrates that all major collateral sources are meant to be accounted for under the statute,<sup>194</sup> traditional methods of statutory interpretation do not provide a method for working managed care organizations into Iowa Code Section 147.136 as it currently exists,<sup>195</sup> and public policy supports directly including managed care organizations in Iowa Code Section 147.136.<sup>196</sup>

#### IV. FILLING THE GAPS IN IOWA CODE SECTION 147.136

Iowa Code Section 147.136 does not account for managed care organizations.<sup>197</sup> This creates instability for Iowans under the care of a managed care organization. This issue of ambiguity will only worsen as managed care organizations become more prevalent in Iowa.<sup>198</sup> To solve this issue, the Iowa state legislature should amend Iowa Code Section 147.136 to incorporate managed care organizations into sections one or two. Alternatively, the Iowa Legislature could amend the Medical Assistance Act to account for managed care organizations.

##### A. AMENDING IOWA CODE SECTION 147.136

The Iowa state legislature could include managed care organizations in Iowa Code Section 147.136 in three ways—by amending section one, section two (a), or by adding a new subsection to section two.<sup>199</sup> By amending section one, the Iowa Legislature can ensure that patients covered by a managed care organization *cannot* recover medical expenses covered by their managed care organization.<sup>200</sup> By amending section two, the Iowa Legislature can ensure that patients covered by a managed care organization *can* recover medical expenses covered by their managed care organization.<sup>201</sup>

##### 1. Including Managed Care Organizations in the First Provision of Iowa Code Section 147.136

If the Iowa legislature wishes to abrogate the collateral source as to medical expenses covered by managed care organizations in medical malpractice cases, they could do so in the following way:

193. See § 147.136. On June 30, 2011, Iowa Code Section 147.136 was amended to include the “medical assistance” exception. *Id.*; Knepper & Droze, *supra* note 1 (describing that “in 2016, [Iowa] switched to a managed care organization . . . model”).

194. See *supra* Section III.B.

195. See *supra* Section III.C.

196. See *supra* Section III.D.

197. See § 147.136.

198. See Notice of Intent to Release a Request for Proposal, *supra* note 69 (demonstrating that Iowa Medicaid is looking to add more managed care organizations to their network).

199. See § 147.136.

200. See *id.* § 147.136(1).

201. See *id.* § 147.136(2).

1. Except as otherwise provided in subsection 2, in an action for damages for personal injury against a physician and surgeon, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse licensed to practice that profession in this state, or against a hospital licensed for operation in this state, based on the alleged negligence of the practitioner in the practice of the profession or occupation, or upon the alleged negligence of the hospital in patient care, in which liability is admitted or established, the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury, including but not limited to the cost of reasonable and necessary medical care, rehabilitation services, and custodial care, and the loss of services and loss of earned income, to the extent that those losses are replaced or are indemnified by insurance, [**a managed care organization contracting with a medical assistance program under chapter 249A,**] or by governmental, employment, or service benefit programs or from any other source.<sup>202</sup>

While this amendment solves the ambiguity issue, it would leave those under the care of a managed care organization without the ability to recover, which is unfair, because those under the care of a managed care organization are ultimately enrolled in Medicaid, which is exempted under section two.<sup>203</sup>

2. To Maintain the Collateral Source Rule for Managed Care Organizations, Managed Care Organizations Can Be Included in the Second Provision of Iowa Code Section 147.136.

If the Iowa Legislature wishes to maintain the collateral source rule as to medical expenses covered by managed care organizations in medical malpractice cases, they could amend Iowa Code Section 147.136 in one of the following ways.

First, the Iowa Legislature could include managed care organizations in the Medicaid exception:

2. This section shall not bar recovery of economic losses replaced or indemnified by any of the following:

(a) Benefits received under the medical assistance program under chapter 249A, [**or by a managed care organization contracting with a medical assistance program under chapter 249A.**]

(b) . . . <sup>204</sup>

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202. See *id.* § 147.136.

203. See *id.* § 147.136; Knepper & Droze, *supra* note 1.

204. See *id.* § 147.136(2).

Or the Iowa Legislature could create a managed care organization exception:

2. This section shall not bar recovery of economic losses replaced or indemnified by any of the following:

(a) Benefits received under the medical assistance program under chapter 249A.

(b) The assets of the claimant or of the members of the claimant's immediate family.<sup>205</sup>

**(c) Benefits received from a managed care organization contracting with a medical assistance program under chapter 249A.**

Incorporating managed care organizations into section (2) is the most preferable outcome. This clarifies where managed care organizations fall under the statute and allows those covered by a managed care organization and Medicaid the same ability to recover under the statute. As managed care organizations function as an intermediary between the consumer and Medicaid, the fairest outcome is to treat consumers of both equally under the statute.<sup>206</sup> Further, the latter option, carving out an exception for managed care organizations, is preferable. This option provides greater clarity and fits with the style of the text of the original statute as it gives each collateral source its own subsection.<sup>207</sup>

#### B. AMENDING IOWA CODE CHAPTER 249A

Alternatively, if the Iowa Legislature wishes to identify managed care organizations as an extension of Medicaid, they can amend the Medical Assistance Act in one of two ways.<sup>208</sup> First, they can add a section that clearly identifies managed care organizations as medical assistance for the purposes of the Medical Assistance Act in the following way:

##### 249A.3B Medical assistance—managed care organizations

Those under the care of a managed care organization that have contracted with Iowa Medicaid are deemed to be receiving medical assistance and are under the care of a medical assistance program for the purposes of Iowa Code Chapter 249A.<sup>209</sup>

Second, the Iowa Legislature can add a provision to the definition section of the Medical Assistance Act of Iowa Code Section 249A.2 stating that managed care organizations provide medical assistance in the following way:

205. *Id.* § 147.136(2).

206. Knepper & Droze, *supra* note 1.

207. *See id.* § 147.136.

208. *See* IOWA CODE, ch. 249A.

209. *See id.*

### 249A.2 Definitions

15. For the purposes of Iowa Code Chapter 249A,<sup>210</sup> a managed care organization that has contracted with Iowa Medicaid and is providing services to recipients of Iowa Medicaid is deemed to provide medical assistance and the recipients are deemed to be under the care of a medical assistance program.

This would not be the most efficient way to solve this issue and is thus less preferable.

It seems a more pointed solution to amend Iowa Code Section 147.136 rather than Iowa Code Chapter 249A as the statutory issue at hand lies directly within Section 147.136, because that is the statute that directly abrogates the collateral source rule, and Chapter 249A is ancillary to the issue at hand. While this statute references back to Iowa Code Chapter 249A, Iowa Code Chapter 249A reaches far beyond Iowa Code Section 147.136 and provides a statutory base for much of Iowa's public health care laws.<sup>211</sup> All of the potential solutions discussed above incorporate managed care organizations into Iowa Code Section 147.136 and ultimately solve this statutory issue, but amending Iowa Code Chapter 249A could have further, unanticipated effects because it changes the classification of managed care organizations in regards to all Iowa law, rather than just Iowa Code Section 147.136.

Overall, the Iowa legislature should include managed care organizations in section two of the statute. This is the most fair and reasonable outcome considering the facts, and stakes, at hand. While managed care organizations are controversial in Iowa,<sup>212</sup> there is no indication that their usage will slow down.<sup>213</sup> As of 2021, new managed care organizations were submitting applications to join Iowa's network, which has been deemed "the state's Medicaid overhaul."<sup>214</sup> As these organizations persist, it is necessary to amend the law.

210. See *id.* § 249A.2.

211. See *id.* ch. 249A.

212. See Tony Leys, *UnitedHealthcare, Iowa Medicaid Leaders Blame Each Other for Breakdown Affecting 425,000*, DES MOINES REG. (Apr. 1, 2019, 6:27 PM), <https://www.desmoinesregister.com/story/news/politics/2019/04/01/health-care-iowa-medicare-privatization-unitedhealthcare-disabled-kim-reynolds-providers-insurance/3332973002> [<https://perma.cc/2NQ9-HRET>]; *Iowa Switches to Controversial Medicaid Managed Care Program Today*, KHN (Apr. 1, 2016), <https://khn.org/morning-breakout/iowa-switches-to-controversial-medicare-managed-care-program-today> [<https://perma.cc/8BFB-MMVS>]; Ed. Bd., *Iowa's Medicaid Managed Care Disaster*, PNHP (Dec. 22, 2016), <https://pnhp.org/news/iowas-medicare-managed-care-disaster> [<https://perma.cc/H88F-5CF2>].

213. See Krebs, *supra* note 20.

214. Jacob Fisher, *CareSource Eyes Expansion into Iowa, Secures Office Space in Des Moines*, DAYTON BUS. J. (Sept. 29, 2021), <https://www.bizjournals.com/dayton/news/2021/09/29/caresource-eyes-expansion-into-iowa.html> [<https://perma.cc/69KZ-5G2P>]; see Krebs, *supra* note 20.

## CONCLUSION

Iowa's abrogation of the collateral source rule in medical malpractice cases is unique,<sup>215</sup> and the state's use of managed care organizations is controversial.<sup>216</sup> Iowans under the care of a managed care organization need to know where they stand. As the law currently exists, plaintiffs in vulnerable positions are not able to determine whether they can recover from the provider who injured them. Iowa Code Section 147.136 fails to provide an answer.<sup>217</sup> As a result, the Iowa Legislature should amend the statute.

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215. See IOWA CODE § 147.136.

216. Knepper & Droze, *supra* note 1.

217. See § 147.136.