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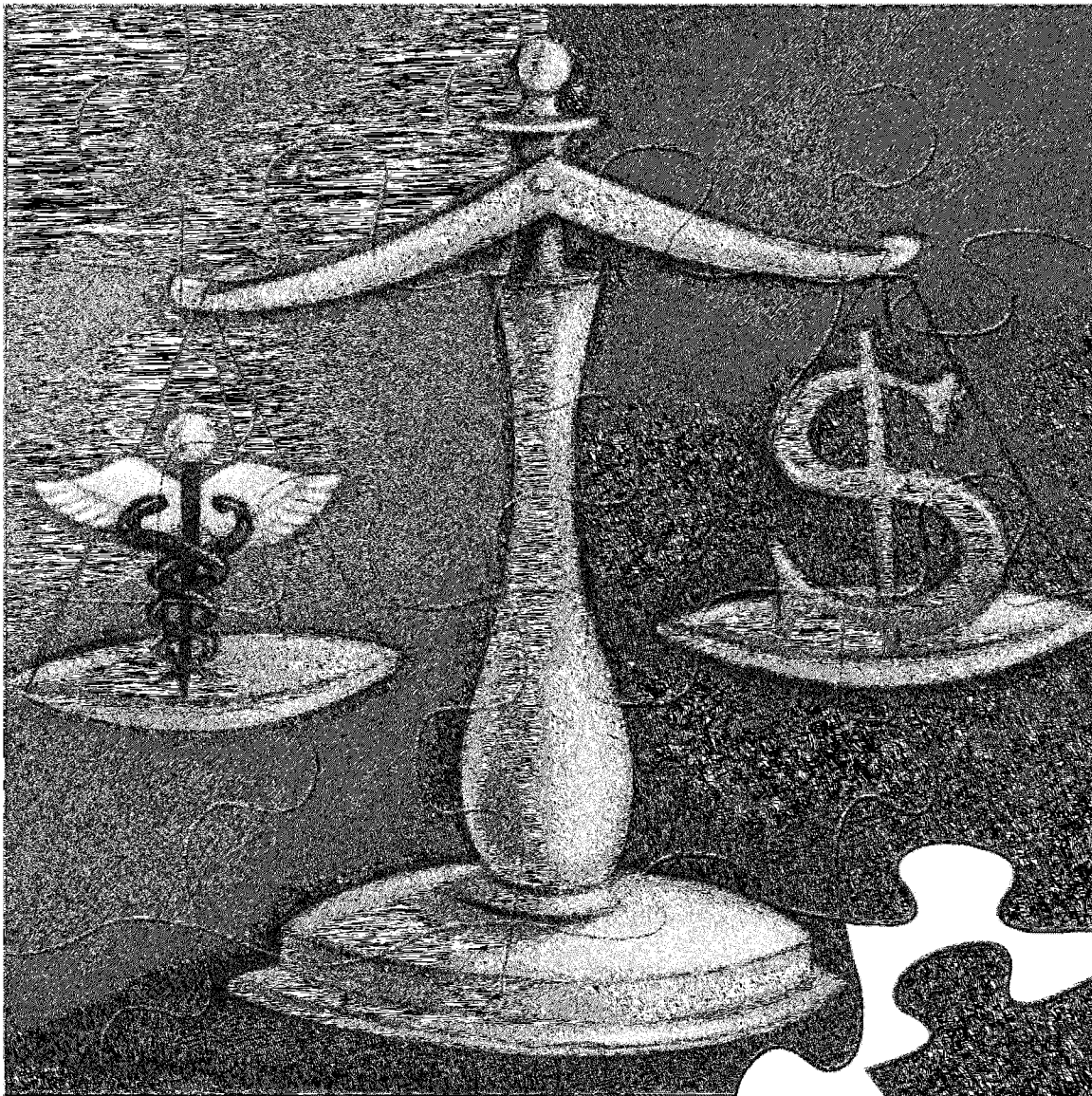
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# PAID OR INCURRED



## *An Enigma Shrouded in a Puzzle*

BY JUDGE RANDY WILSON

Every day, district courts throughout Texas try personal injury lawsuits where plaintiffs seek recovery of medical bills. By statute, plaintiffs are entitled to recover only medical bills that were “actually paid or incurred.” Unfortunately, district judges and lawyers are provided virtually no guidance on the meaning of this phrase and how to apply it.



In 2003, the 78th Legislature passed House Bill 4, intended to be a comprehensive tort reform bill addressing many issues affecting the civil court system.<sup>1</sup> Embedded in H.B. 4 was a provision titled “Evidence Relating to Amount of Economic Damages,” which provides simply:

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.<sup>2</sup>

This single sentence has thrown Texas tort law into chaos as lawyers and courts struggle to apply it.

The problem can arise in many contexts but is most often seen with contractual billing reductions between the health care provider and the insurer. For example, a doctor may agree to charge Blue Cross Blue Shield insurers a reduced amount in order to be an “in-plan provider.” A simple example will illustrate the problem. Suppose a plaintiff visits a doctor who charges as follows:

Doctor visit	\$100
(less co-pay)	\$20
(less amount insurer will pay)	\$50
Written off by doctor	
pursuant to contract with	
insurance company	\$30

Everyone agrees that a plaintiff can recover the co-pay and the insurance reimbursement. The question is whether the \$30 reduction is “paid or incurred” within the meaning of Texas Civil Practice and Remedies Code Section 41.0105.<sup>3</sup>

**The Collateral Source Rule.** The collateral source rule has long been a fixture of Texas law. The theory behind the rule is that a wrongdoer should not have the benefit of insurance independently procured by the injured party, and to which the wrongdoer was not privy.<sup>4</sup> The collateral source rule is both a rule of evidence and a rule limiting damages.<sup>5</sup> The rule precludes a tortfeasor from obtaining the benefit of, or even mentioning, payments to the injured party from sources other than the tortfeasor.<sup>6</sup> A wrongdoer may not offset his liability by insurance benefits independently procured by the injured party.<sup>7</sup> Unquestionably, in the absence of Section 41.0105, the contractual insurance reduction illustrated above would be covered by the rule and the injured party would be entitled to receive the full \$100 as medical damages.

**Confusion Surrounding Section 41.0105.** Personal injury plaintiffs argue that Section 41.0105 merely codified existing law and did nothing to abrogate the collateral source rule. Thus, plaintiffs maintain they get to present evidence of and recover as damages the full \$100 doctor bill. As a fallback, some plaintiffs suggest that, as a minimum, they can present evidence of the \$100 bill, and the jury is allowed to award

\$100, but the court, in fashioning the judgment, can reduce the award to \$70 and thus eliminate the contractual reduction. Plaintiffs, of course, frequently argue to juries that pain and suffering damages should be awarded as a multiple of medical bills. The greater the medical bills plaintiffs can present to the jury, the greater the pain and suffering.

Defendants, on the other hand, argue that the only evidence that is admissible, and the most that plaintiffs can recover, is the amount that has been “actually paid or incurred,” i.e., \$70.

**Statutory Construction.** The first step of statutory construction begins with the words themselves.<sup>8</sup> The language of Section 41.0105 supports the defendants’ position that the Legislature intended to restrict recovery of medical expenses in some way. First, Section 41.0105 is clearly a “limitation.” The statute begins: “In addition to any other limitation ...”<sup>9</sup> The plaintiffs’ argument that Section 41.0105 is merely a codification of existing law doesn’t square with the fact that the provision is a limitation.

Second, the use of the word “incurred” is significant. While plaintiffs may acknowledge that the insurance discount was not “paid,” plaintiffs insist that “paid or incurred” is disjunctive. Thus, as the plaintiffs argue, when a patient first visits the doc-


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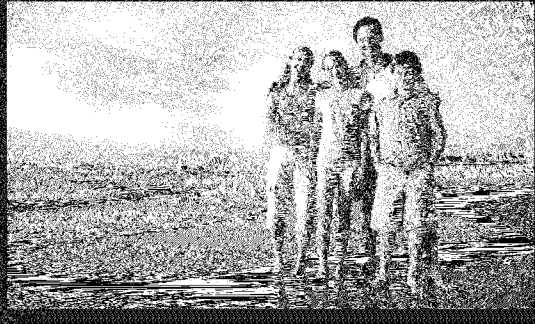
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tor, he “incurs” the full \$100 bill. The fact that the doctor may subsequently reduce the bill to \$70 because of a contract with the insurer does not negate the fact that the full \$100 bill was incurred. Unfortunately, the plaintiffs’ argument again does not square with the language of the statute. The statute uses the word “incurred” twice, and the second time it is modified by “actually.” As one court diagramed the issue, actually incurred has to mean something less than merely incurred.<sup>10</sup> However, in a different context, the Texas Supreme Court ruled that a plaintiff “actually incurred” the full amount of the hospital charge in question, even though it was eventually paid on his behalf by Medicare.<sup>11</sup>

**Legislative History.** Consultation of legislative history is tricky. While the Code Construction Act authorizes review of legislative history whether or not the statute is considered ambiguous,<sup>12</sup> the Supreme Court has said that overreliance on legislative history should be avoided where a statute’s language is clear.<sup>13</sup> “If the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae.”<sup>14</sup>

The legislative history of Section 41.0105 is complex. Originally introduced as part of H.B. 3 and H.B. 4 by State Rep. Joe Nixon (R-Houston),<sup>15</sup> the “paid or incurred” provision was part of a comprehensive tort reform package. Indeed, the final package of legislation was enacted “to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society.”<sup>16</sup>

The “paid or incurred” provision went through several iterations as it made its way through the Legislature. It initially was limited to medical or health care claims.<sup>17</sup> More significantly, however, the initial bill expressly abrogated the collateral source rule with respect to Medicare, Medicaid, workers’ compensation, state or federal disability benefits, and private health insurance benefits.<sup>18</sup> The version that passed the full House, however, did not contain this collateral source provision.<sup>19</sup> The Senate then expanded the coverage of the provision to all personal injury claims.<sup>20</sup> The Senate State Affairs Committee proposed the addition of a collateral source provision into the act similar to a prior House version, but this addition did not sur-

vive final Senate debate.<sup>21</sup> Thus, while both legislative houses considered the addition of a collateral source rule, the final versions passed by both bodies did not contain such a provision.

Gov. Rick Perry signed this final version on June 11, 2003.<sup>22</sup> In 2007, the Legislature attempted to amend Section 41.0105 to apply only to a health care liability claim and noted that the section does not apply to a claim for future medical or health care expenses. Gov. Perry vetoed this amendment on June 15, 2007.<sup>23</sup> The governor’s veto message makes it clear that he supports the defendants’ interpretation of Section 41.0105. The governor stated:

This bill would permit an individual in a personal injury lawsuit (other than a medical malpractice claim) to recover more money for medical expenses than actually was or will be paid. This would be done by allowing a person to submit bills that are higher than those actually paid to health care providers. For example, if this bill became law, an individual who was billed \$20,000 by a hospital, but whose insurance company negotiated the bill down to an actual amount paid of \$12,000, could still submit the original \$20,000 bill to the jury as if their insurance company actually paid that amount. This would deceive the jury as to the true amount of actual medical damages.<sup>24</sup>

**Case Law.** There are precious few cases that discuss the interpretation of Section 41.0105. The leading case is *Mills v. Fletcher*, which held that a plaintiff cannot recover medical bills that have been adjusted or written off.<sup>25</sup> There, the jury awarded the plaintiff \$1,551 in past medical expenses. The defendant argued that the medical expenses should have been reduced because the medical providers accepted lesser amounts from the plaintiff’s health insurers, thereby “writing off” the balance due to the plaintiff.<sup>26</sup> The court found that the beginning language of Section 41.0105 (“In addition to any other limitation . . .”) manifested an intent by the Legislature that “actually incurred” had to be a limitation of expenses beyond those medical expenses that were merely “incurred.”<sup>27</sup> A federal district court in Houston concluded that the *Mills* opinion “is a reasonable interpretation of the statute and will follow [it] in this regard.”<sup>28</sup>

Other courts, however, have determined that the trial court should introduce the full, gross amount of medical bills into evidence and reduce the plaintiff’s recovery to the amount actually paid or incurred after the verdict. In *Gore v. Faye*,<sup>29</sup> the trial court admitted the full undiscounted medical bills and redacted insurer payments and contractual adjustments.<sup>30</sup> The trial court decided to reduce any possible award to the plaintiff post-verdict.<sup>31</sup> The Amarillo court of appeals determined that while the limitation of damages prescribed by Section 41.0105 is “mandatory,” the statute contains no procedural direction for its application at trial. The appellate court concluded that introduction of discounted medical bills would present a “significant departure from existing trial practice in Texas.”<sup>32</sup>

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“Without a more explicit statutory provision or guidance from our supreme court, we see no abuse of discretion in the trial court’s decision to apply section 41.0105 post-verdict.”<sup>33</sup>

Finally, in a different context, in *Daughters of Charity Health Servs. v. Linnstaedter*,<sup>34</sup> the Supreme Court observed that recovery of “the full medical charges billed by the hospital rather than the reduced amount paid by [the] compensation carrier” would be a “windfall.”<sup>35</sup> The Court further noted that any inability of an insured to recover unreimbursed medical bills “has since been codified” by Section 41.0105.<sup>36</sup> While not directly on point, *Daughters of Charity* certainly hints that the Supreme Court will not accept plaintiffs’ primary argument that Section 41.0105 merely codified and made no change to existing law.

The bottom line of the cases thus far can be summarized as follows:

- (1) There is little or no support for plaintiffs’ primary position that Section 41.0105 merely codified existing law and plaintiffs are entitled to recover the full amount of gross medical bills.
- (2) The courts are split on whether to apply Section 41.0105 with respect to admission of evidence and only admit evidence of the medical bills after contractual insurance reductions, or whether to admit the gross bills and apply Section 41.0105 post-verdict.

**So How Is a Case To Be Tried?** Trial judges throughout Texas are struggling with the application of Section 41.0105. Courts and lawyers don’t know what evidence to admit and how to apply Section 41.0105. There are several approaches.

- *Do nothing different.* Plaintiffs still urge, and some trial courts agree, that Section 41.0105 made no change to the law. These courts introduce into evidence only the full, undiscounted medical bills and enter judgments on that amount. This approach appears contrary to Section 41.0105 and the cases.
- *Apply Section 41.0105 post-verdict.* Under this approach, the full undiscounted medical bills are admitted into evidence and any verdict for the plaintiff is reduced at the entry of judgment stage. This approach is fraught with peril. Suppose there are multiple health care providers whose full bills total \$100,000, and the “actually paid or incurred” amount is \$60,000. Under the post-verdict approach, the trial court would admit evidence of past bills of \$100,000, but would reduce the judgment to \$60,000 if the plaintiff prevailed. The problem with this approach is what happens if the jury awards \$80,000? The court doesn’t know whether the jury determined that some providers weren’t necessary, whether some bills were too high, whether all the bills were too high, or what. There’s no way rationally to reduce the award post-verdict. This is precisely the dilemma that faced the trial court in *Gore v. Faye*; there the trial judge threw up his

hands and simply awarded the full, undiscounted amount.<sup>37</sup>

- *The parties agree on a percentage reduction post-verdict.* Some parties agree to apply Section 41.0105 post-verdict and to reduce any jury award by a percentage. For example, in the hypothetical above, with \$100,000 in gross bills and \$60,000 in net bills, the parties agree to reduce any jury award of medical bills by 60 percent. The approach certainly solves the *Gore v. Faye* problem. However, it can only be implemented by agreement of the parties.
- *Apply Section 41.0105 post-verdict, but inquire about each medical provider in the court’s charge.* Some trial courts admit into evidence the gross, undiscounted bills, but try to solve the *Gore v. Faye* problem by asking about the reasonableness and necessity of each medical provider in the court’s charge. Thus, if the plaintiff visited 20 doctors and hospitals, there would be 20 lines for the jury to fill in. This approach has some advantages, but doesn’t necessarily solve every problem. The advantage of this approach is that it doesn’t disturb the collateral source rule as it relates to the evidence, i.e., the jury will still hear only evidence of the full, undiscounted bills. There are two disadvantages with this approach. First, the procedure is cumbersome if the plaintiff visited numerous doctors, hospitals, labs, or pharmacies. Second, the jury could still create a problem if it awards less than the full amount for any single provider since there undoubtedly would be multiple visits and charges for each provider. The trial judge would still be in a quandary as to whether and how much to reduce the judgment with respect to that particular provider.
- *Apply Section 41.0105 in evidence.* Ultimately, this is the only approach that makes sense. Under this approach, the trial court only admits the discounted bills, i.e., what was “actually paid or incurred.” Care has to be taken, however, not to admit any reference to insurance in the medical bills. There are two ways to handle it. One alternative is to carefully redact the bills. Any reference to a payment

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by an insurance company would be redacted to simply reflect “payment.” Any contractual adjustment would simply read “adjustment” or “discount.” This approach, however, leaves the suggestion of insurance, even with the most careful of redaction. A second approach would be to admit a summary exhibit of the medical bills. The parties could prepare a one-page summary that gives the bottom line total for each provider, after all discounts and reductions. These approaches protect the plaintiff by obscuring any reference to insurance, but enable the trial court to apply Section 41.0105.

**Unresolved Issues.** In addition to confusion surrounding different ways to deal with Section 41.0105, there are a couple of issues that the appellate courts have not come close to addressing. Yet lawyers and trial courts must grapple with these issues daily.

- *What evidence is sufficient?* An unresolved question is the sufficiency of the evidence to show that a plaintiff has not paid or incurred the charge in question. If the bill simply reflects a “discount,” is that sufficient to show that the plaintiff has not paid or incurred the charge? Most trial courts think not. Defendants are actively subpoenaing health care providers and eliciting precise testimony of what the gross bill was, the amount of any contractual discount, and verifying that the plaintiff is not responsible and will never have to pay the discounted amount. However, no court has discussed this issue.
- *Burden of proof.* Finally, another unresolved question is who has the burden of proof to gather and prove the “paid or incurred” amount. Is the plaintiff required to gather and introduce the net bills, or must the defendant? If the plaintiff introduces only the gross, undiscounted bills, can the defendant merely object that the plaintiff has not introduced competent evidence under Section 41.0105, or must the defendant introduce such evidence? Again, no courts have addressed this question.

**Conclusion.** Although Section 41.0105 has been the law of Texas for five years, trial courts continue to struggle with the application of the statute. Judges and lawyers simply don’t know what the statute means or how to apply it. This judge hopes that a case will present itself to the Supreme Court so this enigma shrouded in a puzzle can be resolved.

## Notes

1. The Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204 (2003 Tex. Gen. Laws).
2. Tex. Civ. Prac. & Rem. Code Ann. §41.0105 (Vernon 2008).
3. While the example above relates to private insurance benefits, §41.0105 can equally arise as a result of Medicare or Medicaid reductions or any other partial payment and reduction of the bills.
4. *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980), cert. denied, 449 U.S. 1015 (1980); *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434 (Tex. 1972); *Texas & Pacific Ry. Co. v. Levi & Bro.*, 59 Tex. 674 (Tex. 1883).

5. *Taylor v. American Fabritech*, 132 S.W.3d 613, 626 (Tex. App. — Houston [14th Dist.] 2004, pet. denied).
6. *Id.*; *Exxon Corp. v. Shutlesworth*, 800 S.W.2d 902, 907–08 (Tex. App. — Houston [14th Dist.] 1990, no writ) (evidence regarding workers’ compensation benefits was properly excluded by trial court).
7. *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999).
8. *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) (“ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on”).
9. Tex. Civ. Prac. & Rem. Code Ann. §41.0105 (Vernon 2008).
10. *Mills v. Fletcher*, 229 S.W.3d 765, 768 (Tex. App. — San Antonio 2007, no pet.).
11. *Black*, 478 S.W.2d at 434. See also *Texarkana Mem’l Hosp., Inc. v. Murdock*, 903 S.W.2d 868, 871 (Tex. App. — Texarkana 1995), *rev’d on other grounds*, 946 S.W.2d 836 (Tex. 1997).
12. Tex. Gov’t Code Ann. §311.023
13. *Alex Sheshunoff*, 209 S.W.3d at 652 n.4.
14. *Id.*
15. Jim M. Perdue, Jr., “Maybe It Depends On What Your Definition of ‘Or’ Is? A Holistic Approach to Texas Civil Practice and Remedies Code §41.0105, The Collateral Source Rule, and Legislative History,” 38 *Tex. Tech. L. Rev.* 241, 254–55 (2006).
16. House Comm. On State Affairs, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003), available <http://www.legis.state.tx.us/dodocs/78R/analysis/pdf/HB00004S.pdf>.
17. Perdue, *supra* note 15, at 255.
18. *Id.* at 256.
19. *Id.* at 257.
20. *Id.* at 258.
21. *Id.* at 260–61.
22. <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2003-06-11.3016>. The Governor’s Office press release also made it clear that H.B. 4 was designed to reduce tort damages.
23. [http://www.governor.state.tx.us/divisions/press/bills/veto\\_statements/message-hb3281](http://www.governor.state.tx.us/divisions/press/bills/veto_statements/message-hb3281).
24. *Id.*
25. *Mills*, 229 S.W.3d 765.
26. *Id.* at 767.
27. *Id.* at 768. The *Fletcher* court further found that §41.0105 was not unconstitutional under substantive due process, the open courts provision, and vagueness.
28. *Goryeus v. Murphy Exploration & Prod. Co.*, 2007 WL 2274400 (S.D. Tex. 2007).
29. 253 S.W.3d 785 (Tex. App. — Amarillo 2008, no pet.).
30. *Id.* at 787.
31. Because the jury awarded less in medical bills than the total amount of charges presented by the evidence, the trial court was unable to reduce the verdict and therefore signed a judgment for the full amount awarded by the jury. Curiously, the defendant did not appeal the trial court’s determination not to apply an offset. *Id.* at 788.
32. *Id.*
33. *Id.* at 790; see also *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 488–89 (Tex. App. — Amarillo 2006, no pet.) (noting that the trial court reduced the amount of plaintiff’s recovery post-verdict).
34. 226 S.W.3d 409 (Tex. 2007).
35. *Id.* at 412.
36. *Id.* at 412 n.22.
37. See note 31.

## RANDY WILSON

is judge of the 157th District Court of Harris County.