Recovery of medical expenses in Texas

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In health care liability claims, and in most personal injury claims for that matter, medical expenses related to the care and treatment of the injury alleged by the claimant often constitute a significant portion of the damages that might be recovered at trial. For this reason, it is important to understand exactly what medical expenses are recoverable. In Texas, recoverable medical expenses were addressed in the 2003 tort reform legislation. The new statute, Section 41.0105 of the Texas Civil Practice and Remedies Code, changes the way in which courts and juries are to evaluate this element of damages.

Prior to September 1, 2003, the effective date of Section 41.0105, in the event of a verdict in favor of the claimant, juries were asked to determine the amount of reasonable expenses of necessary medical care that the claimant required as a result of the injury or occurrence in question (1). Under this scheme, plaintiffs would generally file a copy of the billing records from their treating health care providers, along with an affidavit from each health care provider stating the total amount of charges for the services provided and indicating that the medical services provided and the charges for such services were reasonable and necessary. The actual amount that the health care providers were paid for the services was not an issue. In this framework, the touchstone issues were the amount of the charges, that the charges were "reasonable," and that the charges were for "necessary" medical services.

Effective September 1, 2003, under Section 41.0105, plaintiffs are entitled to recover only medical expenses "actually paid or incurred" (2). Thus, while the fees at issue must still be reasonable and necessary, the focus is now not on the total amount of the charges but on the amount of those charges that were "actually paid or incurred" by the claimant. Since the amount actually paid is often easy to determine from review of the health care provider's billing records, the true matter at issue is the amount of the total medical expenses "incurred" by the claimant. In determining what expenses were "incurred," the issue is whether or not "discounts" such as Medicaid/Medicare "write-offs" and/or managed care contractual "adjustments" constitute medical expenses incurred by the claimant. These discounts often constitute a significant percentage of the total amount billed.

Since the new statutory provision has been in place for just over 3 years, it is not surprising that no case law specifically interprets application of Section 41.0105 of the Texas Civil Practice and Remedies Code on this issue. There is, however, Texas case law that interprets the meaning of the term "incurred." From as far back as 1918, Texas courts have consistently interpreted the term "incurred" to mean the creation of a legal obligation to pay (3). The question should be whether or not the claimant ever had a "legal obligation to pay" the health care provider the write-off or adjustment deducted from that provider's charges.

Under the third-party payer agreements we are familiar with, patients are not responsible or obligated to pay such adjustments. Since the patient was never obligated to pay the health care provider those portions of the total charges for medical services, they were not medical expenses that the patient incurred and, therefore, should not be damages that could potentially be recovered in a lawsuit. Obviously, the exact nature or wording of the contract between the health care provider and the third-party payer will likely determine the outcome of this question.

The question about whether or not medical expenses have been incurred is often of even greater significance when the claimant is covered by Medicaid or Medicare. The write-offs on medical billing taken by these entities are often greater than those taken by private third-party payers. In addition, as opposed to a relatively simple review of a contract between a health care provider and a third-party payer, evaluation of this question requires consultation with and review of state and federal statutory provisions about these programs.

The Medicaid program is jointly funded by the federal and state governments. Medicaid providers agree with the US government that they will accept reimbursement for services provided to Medicaid recipients on a nonnegotiable flat-fee basis. Specifically, Medicaid providers are reimbursed for their services based on a prospective, preset payment schedule based on the cost of services. Medicaid providers agree to accept Medicaid's flat fee as full and final payment for the medical services they provide (4). Medicaid providers further agree to not charge

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Medicaid recipients for services (4). Under the Medicaid program, providers are prohibited by federal law from seeking reimbursement from Medicaid recipients (5). In fact, charging or requiring Medicaid recipients to pay for medical services is both a federal and Texas felony (6). The Medicare program differs slightly, primarily based on the fact that it is funded by payroll deductions and for this reason has been considered by courts as a form of "insurance" (7).

While the question of whether or not patients "incur" Medicaid/Medicare "write-offs" is one of first impression for Texas courts, other jurisdictions have examined this issue. In the context of Medicaid, most jurisdictions have found that Medicaid write-offs are not an incurred expense (8). It is interesting to note that in jurisdictions where claimants are entitled to recover such write-offs, the reason cited is either a different statutory standard or a ruling that the "collateral source" rule prevents defendants from receiving any "benefit" from any write-offs (9).

The collateral source rule is a legal doctrine that holds that a defendant should not get the benefit of payment arrangements that might eliminate or reduce a claimant's out-of-pocket expenses (10). Defendants contend, however, that this rule is not relevant to interpretation of the Texas statute. As set forth in Section 41.0105, the only inquiry is whether or not the claimant incurred the expenses. Under Texas law, the goal of statutory construction "is to give effect to the Legislature's intent as expressed in the language of the statute" (11). Since there is nothing in the language of Section 41.0105 that mentions collateral source issues, any evaluation about who paid or was responsible to pay such expenses is not relevant or appropriate. The only issue is whether or not the expenses were incurred, not the reasons behind why such expenses may not have been incurred.

If the collateral source is going to be addressed by the court, there are some fine points that need to be understood and addressed. There are really two questions to answer:

1. Do write-offs accepted by health care providers constitute a collateral source?
2. Are write-offs a collateral source when they pertain to health care services provided to a claimant by the alleged tortfeasor(s), as opposed to third-party health care providers?

To answer these questions one must evaluate the purposes of actual damage awards and the underpinnings of the collateral source rule.

The purpose of an award of actual damages is to compensate a claimant for actual losses caused by the tortfeasor (12). Medical expenses are an element of actual damages (13). The purpose of any award for actual damages, including recovery of medical expenses, is not to impose a penalty on the defendant (14). If the actual damages awarded place the claimant in a position better than his position prior to the injury, reversal of the judgment on damages is indicated (15).

Based on the above concepts, under Texas law a claimant's recovery is limited to no more than the amount required for full satisfaction of his damages. This concept has been referred to as the "one satisfaction rule" (16). An exception to the one satisfaction rule is the collateral source rule. The theory behind the collateral source rule is that a wrongdoer should not receive the benefit of payments made by insurance independently procured by the injured party and to which the wrongdoer was not privy (17). The collateral source rule prevents a defendant from presenting evidence about or obtaining an offset for funds received by the plaintiff from a collateral source, that is, someone other than the defendant (18).

Assuming that evaluation of the collateral source rule is appropriate (in answer to question 1 above), while no published Texas court has squarely addressed this issue (19), it appears that a close review of the statute, Texas law on actual damages, and Texas law on collateral source support a position that write-offs are not subject to the collateral source rule because they do not constitute "payments" or "funds" provided on behalf of the claimant. This position is also supported by the fact that most jurisdictions hold that Medicaid/Medicare write-offs are not a collateral source (20). Some courts, however, have distinguished between Medicaid and Medicare, citing that Medicare is an "insurance program" "financed by compulsory payroll taxes" and thereby holding that as with private insurance benefits, the collateral source rule applies (7).

In evaluating question 2 on applicability of the collateral source rule (whether it applies to write-offs on defendants' services), the supreme courts of Kansas and Pennsylvania have addressed this exact situation and specifically held that when the write-off at issue applies to services the defendant provided to the plaintiff, the collateral source rule does not apply (21). In holding that the collateral source rule does not apply, these courts noted the following:

- Allowing claimants to receive these services at no cost and then awarding claimants the written-off amounts would do more than make the claimants whole; it would provide them a windfall.
- No collateral source "paid" defendants the written-off amounts.
- Since the defendants already paid the "loss" in some way, they should not be required to pay again.
- The written-off amounts were costs incurred by the defendants, not by a collateral source.
- The written-off amounts were "illusory" medical expenses (21).

These same policy reasons cited by the supreme courts of both Kansas and Pennsylvania support a ruling by Texas courts based on Texas law. Write-off amounts are not actual damages suffered by the claimant, since any write-off is not a loss caused by the tortfeasor (12). In fact, if a claimant recovers these "expenses" at trial, contrary to the Texas policy, the defendant would be penalized for a loss not incurred, and the claimant would obtain a windfall. This is not proper under well-established Texas law (12, 14).

The legislative intent of the Texas statute also supports this interpretation and application of the statute. The stated intent behind enactment of this new statutory provision for limitation on the recovery of past medical or health care expenses was to "limit the recovery of past medical expenses to what

a plaintiff would actually have to repay from any judgment awarded to the claimant" (22). Further, the rationale for this legislation is explained as follows. In many cases, the medical expenses of a claimant or decedent are paid by Medicare or a third-party payer. Medicare or the third-party payer typically would have contracted with the health care provider, reducing rates of reimbursement from amounts actually billed or charged. In the course of litigation, the plaintiff would obtain the original bills in admissible form, with the custodian of records having signed that the billing amounts were reasonable and the medical services necessary, even though those were not the amounts reimbursed or the amounts that would be subject to any subrogation interest. Section 41.0105 makes clear that when medical and health care expenses are recovered, they are limited to the amount paid or incurred (22).

When combined with the language from the statute itself, it is patently clear that under the statute claimants are not entitled to recover write-offs, whether by Medicaid, Medicare, or a private third-party payer like a health insurance carrier. Since such phantom "expenses" are not amounts that a claimant would "actually have to repay" out of any judgment and are not subject to any subrogation interest, they are not recoverable.

After reading this analysis of issues involved in interpretation of this statute, it should come as no surprise that many courts and lawyers view the statute as poorly drafted, and, as a result, it has been inconsistently applied by Texas trial courts. Two cases have made their way to Texas courts of appeals (23). In both matters, initial briefing was submitted at the end of 2006. Thus, later this year we may have an opportunity to review and evaluate the appellate courts' first impression and interpretation. In the meantime, the Texas state legislature is also addressing this issue. Phil King of Parker, Texas, originally submitted House Bill 3281 seeking repeal of Section 41.0105 of the Texas Civil Practice and Remedies Code. Recently, due to an agreed compromise submitted by Byron Cook of Navarro, Texas, now C.S.H.B. 3281 reflects that Section 41.0105 is not to be repealed, but its applicability is limited to health care liability claims and only to past expenses. It does not apply to future medical or health care expenses. As of the time of this writing, C.S.H.B. 3281 is in the Texas House Calendars Committee awaiting floor consideration. As such, in 2007 we may not only have appellate court interpretation of this statute, but we may also have a new statute to untangle.

1. See Texas Pattern Jury Charges—Malpractice, Premises & Products, PJC 80.2, Comment at 190 (2002).
2. Tex Civ Prac & Rem Code, §41.0105 (Vernon's 2006).
3. See *Vansteen Marine Supply Inc v Twin City Fire Ins Co,* 93 SW3d 516, 519–520 (Tex App—Houston [14th Dist] 2002, *writ denied*); *Keever v Finlan,* 988 SW2d 300, 308 (Tex App—Dallas 1999, *writ dismissed*); *Beasley v Peters,* 870 SW2d 191, 195 (Tex App—Amarillo 1994, *no writ*); *Schutze v Dabney,* 204 SW2d 342, 344 (Ct Civ App—Austin 1918), rev'd on other grounds 228 SW 176 (Tex Com App 1921).
4. 42 CFR, §447.15.
5. 42 USC, §1320a–7b(d); 42 CFR, 447.15.
6. 42 USC, §1320a–7(d)(1) & (2)(B); Tex Human Resources Code, §36.002; Texas Penal Code, §35A.02.
7. See *Bozeman v State,* 879 S2d 692, 20–22 (La 2004); *Rose v Via Christi,* 78 P3d 798 (Kan 2003). See also *Hodge v Middletown Hosp Assoc,* 581 NE2d 529 (Ohio 1991).
8. See *Ward-Conde v Smith,* 19 FSupp2d 539, 542 (ED Va 1998) (plaintiff neither "paid" for Medicaid write-offs, nor did Plaintiff "become legally obligated to pay them"); *McAmis v Wallace,* 980 FSupp 181, 184–185 (WD Va 1997) ("Plaintiff did not incur the written-off amounts" by Medicaid); *Rose v Via Christi Health System Inc,* 113 P3d 241, 248 (Kan 2005) (Medicare write-off "reflected a cost incurred" by the defendant health care provider, not plaintiff); *Dyet v McKinley,* 81 P3d 1236, 1239 (Idaho 2003) (plaintiff did not "incur" the write-off amount); *Moorehead v Crozier Chester Medical Center,* 765 A2d 786, 788, 790–791 (Pa 2001) ("Plaintiff never was and never will be legally obligated to pay" write-off amount); *Cooperative Leasing Inc v Johnson,* 872 So2d 956, 960 (Fla App 2d Dist 2004) ("appropriate measure of compensatory damages for past medical expenses when a Plaintiff has received Medicare benefits does not include the difference between the amount that the Medicare providers agree to accept and the total amount of the plaintiff's medical bills. The trial court should have granted the appellants' motion in limine"); *Kastick v U-Haul Co of Western Michigan,* 740 NYS2d 167, 169 (App Div 4th Dept 2002) ("Plaintiff has incurred no liability" for Medicare write-off); *Terrell v Nanda,* 759 So2d 1026, 1031 (La App 2d Cir 2000) ("As a Medicaid patient, the medical expenses incurred by Mr. Taylor were those paid by Medicaid. There was no liability on the part of Mr. Taylor and there is no liability on the part of plaintiffs for expenses above those paid by Medicaid").
9. See *Lindholm v Hassan,* 369 FSupp2d 1104, 1106–1111 (DS Dak 2005) (Medicare write-off not admissible under collateral source rule; amount paid by Medicare not admissible to determine the "reasonable value" of medical services); *Baptist Healthcare Systems Inc v Miller,* 177 SW3d 676, 682–684 (Ky 2005) (Medicare write-offs subject to collateral source rule); *Bynum v Magno,* 101 P3d 1149, 1158–1161 (Haw 2004) (standard is "reasonable value" of medical services, recovery not limited to amount actually paid by Medicare/Medicaid); *Haselden v Davis,* 579 SE2d 293, 294–295 (SC 2003) (both the amount billed and the amount paid by Medicaid were relevant to establish the "reasonable value" of medical services and recovery not limited to the amount paid by Medicaid); *Loncar v Gray,* 28 P3d 928, 932–934 (Alaska 2001) (Medicaid/Medicare benefits subject to collateral source rule but understate statute post-verdict deduction for amounts claimant not obligated to repay insurer); *Brandon HMA Inc v Bradshaw,* 809 So2d 611, 618–620 (Ark 2001) (Medicaid write-offs subject to collateral source rule); *Mikulay v The Dial Corporation,* 1990 WL 57530 (Minn App) (not reported in NW2d) (under Minnesota statute Medicare write-off properly deducted from medical expense award).
10. See *Texas & Pacific Ry Co v Levi & Bro,* 59 Tex 674, 676 (1883); *City of Fort Worth v Barlow,* 313 SW2d 906, 911 (Tex App—Fort Worth 1958, *writ ref'd nre*); *Century Papers Inc v Perrino,* 551 SW2d 507, 511 (Tex Civ App—Texarkana 1977, *writ ref'd nre*).
11. *Horizon/CMS Healthcare Corp v Auld,* 34 SW3d 887, 892 (Tex 2000).
12. See *Torrington Co v Stutzman,* 46 SW3d 829, 848 (Tex 2000); *Celanese Ltd v Chemical Waste Management,* 75 SW3d 593, 598 (Tex App—Dallas 2002, *pet denied*); *Press v Davis,* 118 SW2d 982, 993 (Tex Civ App—Fort Worth 1938), modified on other grounds sub nom, *Quinn v Davis,* 140 SW2d 438 (Tex 1940).
13. *Young v Howell,* 236 SW2d 247, 248 (Tex Civ App—Texarkana 1951, *no writ*).
14. See *Press v Davis,* 118 SW2d 982, 993 (Tex Civ App—Fort Worth 1938), modified on other grounds sub nom, *Quinn v Davis,* 140 SW2d 438 (Tex 1940).
15. See *Burlington-Rock Island R Co v Newsome,* 239 SW2d 734, 736 (Tex Civ App—Waco 1951, *no writ*).
16. See *Bradshaw v Baylor University,* 84 SW2d 703, 705 (Tex 1935); *TL James & Co Inc v Statham,* 558 SW2d 865, 868 (Tex 1977).
17. *Brown v American Transfer & Storage Co,* 601 SW2d 931, 934 (Tex 1980); *Texas & Pacific Ry Co v Levi & Bro,* 59 Tex 674 (Tex 1883).

18. See *Mid-Century Ins Co v Kidd,* 997 SW2d 265, 274 (Tex 1999); *Taylor v American Fabritech, Inc,* 132 SW3d 613, 626 (Tex App—Houston [14th Dist] 2004, *pet denied*).
19. But see *Wong v Graham,* 2001 WL 123932 (Tex App—Austin) (not reported in SW3d) (collateral source rule applied to Medicare write-offs under predecessor statue).
20. See *Ward-Conde,* 19 FSupp at 542; *McAmis,* 980 FSupp at 184–185; *Rose,* 113 P3d at 248; *Bozeman v State,* 879 So2d 692, 705 (La 2004); *Moorehead,* 765 A2d at 791; *Terrell,* 759 So2d at 1030–1031.
21. *Rose,* 113 P2d at 248; *Moorehead,* 765 A2d at 791. But see *Haselden,* 579 SE2d at 485 (defendant may not argue that the "reasonable" value of services provided to the plaintiff was the amount paid by Medicaid).
22. Hull MS, Cooper RB, Bailey CW, Wilcox DP, Gadberry GJ, Wallach MD. House Bill 4 and Proposition 12: an analysis with legislative history. Part three, detailed analysis of the medical liability reforms. *Texas Tech Law Review* 2005;36(Suppl):169–318.
23. *Mills v Fletcher,* Cause No. 04-06-00345, In the Fourth Court of Appeals at San Antonio, Texas, Appeal from County Court at Law No. 2, Bexar County, Texas; *Gore v Faye,* Cause No. 07-06-00218-CV, In the Seventh Court of Appeals at Lubbock, Texas, Appeal from 99th District Court of Lubbock County, Texas.