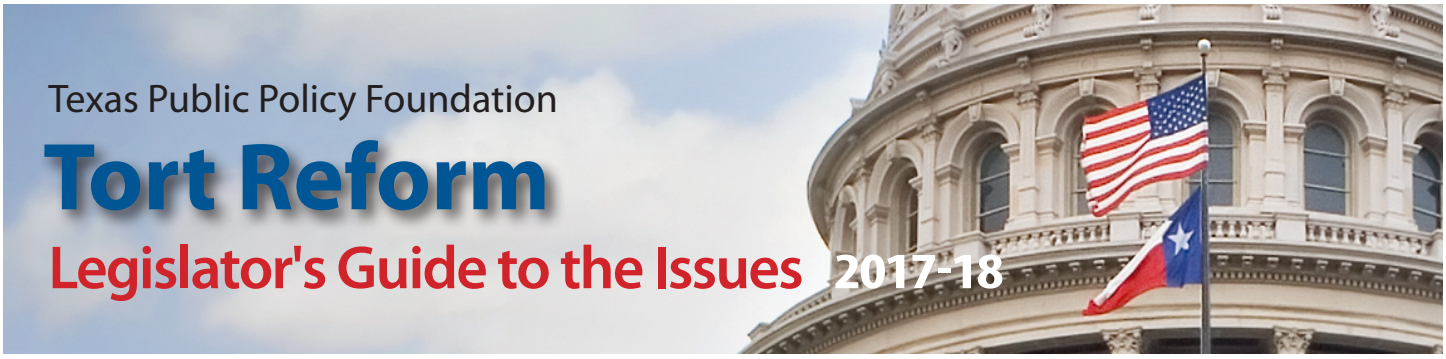

Paid or Incurred

The Issue

Limiting medical and health care expense recovery in a civil action to the amount actually paid or incurred, by or on behalf of the claimant, was one of the significant civil justice reforms passed in 2003. Prior to 2003, plaintiffs were allowed to recover the full billed amount, including the "phantom" charges that were never paid because the bills were reduced—a common practice in medical care.

However, the 81st Legislature introduced a pair of bills aimed at allowing a plaintiff to recover the entire billed amount, whether or not the amount was actually incurred or intended to be paid. In other words, the proposed legislation would have required taxpayers to reimburse phantom medical expenses in personal injury lawsuits that were never paid.

Under Section 41.0105 of the Texas Civil Practice and Remedies Code, plaintiffs are entitled to recover only medical expenses "actually paid or incurred." Thus, not only must the fees at issue be reasonable and necessary to be recovered, they must also have been actually paid or incurred by the plaintiff—not just billed. In determining what expenses were incurred, the issue is whether or not "discounts" such as "write-offs" and/or contractual "adjustments" constitute medical expenses "incurred" by the plaintiff.

Medical billing is unique to other types of billing. Medical providers commonly bill patients at higher rates than what is actually paid or owed by the patient. The charges are never fully paid, and amount to a "markup" within the health care industry. The reasoning is that doctors often agree with insurers to reduce the cost of procedures in exchange for being an "in-plan provider." The full billing amount is used for negotiation with doctors and insurance providers, and is never intended to be fully paid.

The legislation proposed in the 81st Legislature applied only to recovery for medical expenses, so it creates a double standard whereby lawsuits regarding medical care would be subject to greater damage awards while other kinds of suits would still be restricted by the "paid or incurred" limitation in the Act.

If plaintiffs are allowed to recover damages for medical costs they did not actually incur, settlements would be inflated and windfall damage awards would result. Businesses and health care providers would pass those additional litigation costs on to consumers, patients, and taxpayers. Unraveling Texas' successful tort reform measures would be done at the expense of patients, medical providers, and taxpayers.

The Facts

- The Texas Supreme Court has ruled that medical expenses are incurred at the time the services are rendered to the patient. *Black's Law Dictionary* defines the term "incurred" to mean "when one suffers or brings on oneself a liability or expense."
- Section 41.0105 of the Texas Civil Practice and Remedies Code has been interpreted to "trump" the Collateral Source Rule in that it allows the court to look at evidence to determine what has actually been paid or incurred in medical or health care expense recovery cases.
- This interpretation has become accepted as good legal precedent. In *Mills v. Fletcher*, the 4th Court of Appeals found that plaintiffs cannot recover medical bills that have been adjusted or written off. A federal district court in Houston agreed, holding that the Mills opinion "is a reasonable interpretation of the statute and [we] will follow [it]." The "paid or incurred" provision assures that plaintiffs recover actual out-of-pocket medical expenses.

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- In 2012, The Texas Supreme Court accepted the lower courts' interpretation that Section 41.0105 "limits recovery, and consequently the evidence at trial, to expenses that the provider has a legal right to be paid." In other words, a claimant may not recover or introduce evidence of medical bills that the provider later writes off.

Recommendation

The "paid or incurred" provision in the Act should remain intact. Unraveling Texas' successful tort reform measures would be done at the expense of patients, medical providers, and taxpayers.

Resources

Texas Civil Practices & Remedies Code, §41.0105.

Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2012).

Garza de Escabedo v. Haygood, 283 S.W.3d 3 (Tex. App.—Tyler 2009).

Mills v. Fletcher, 229 S.W. 3d 765 (Tex. App.—San Antonio 2007).

Goryews v. Murphy Exploration & Production Co., 2007 WL 2274400 (S. D. Tex. 2007).

Black's Law Dictionary, p. 782 (8th ed. 2004).

Black v. American Bankers Ins. Co., 478 S.W. 2d 434 (Tex. 1972).

2009 Legislative Session Summary, Texas Civil Justice League, 2009 Session.