

HOW MUCH ARE YOU WORTH?: WHY THE TEXAS SUPREME COURT TOOK TORT REFORM *TOO FAR* IN LIMITING THE ADMISSIBILITY OF CERTAIN MEDICAL EXPENSES DURING TRIAL

Comment

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I. HOW MUCH IS A PLAINTIFF WORTH AFTER THE *HAYGOOD* DECISION?

The Texas Supreme Court has spoken, and one question resonates among citizens and attorneys affected by this recent and potentially devastating decision: How much is a plaintiff worth after *Haygood v. Garza de Escabedo*?¹ Tort reform has swept our nation, and courts have been responding to and interpreting the recent legislation laid out in House Bill 4 in 2003.² What began as a reform to “overhaul[] the manner in which health care liability claimants may recover damages from physicians and other health care providers for injuries and death proximately caused by professional malpractice” ultimately created a new and controversial standard for recoverable medical expenses.³ Texas Civil Practice and Remedies Code § 41.0105—a part of the “Ten Gallon Tort Reform”—has become a hotly debated issue, often referred to as the “paid or incurred” statute.⁴ This provision states, “In addition to any

1. See *Haygood v. Garza de Escabedo*, 356 S.W.3d 390 (Tex. 2011).

2. HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S. (2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf#navpanes=0>.

3. D. Michael Wallach & J. Wade Birdwell, *House Bill 4 After Five Years - A Defense Perspective*, 44 THE ADVOC. 53, 53-55 (2008).

4. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2011); see also *Tate v. Hernandez*, 280 S.W.3d 534, 536 (Tex. App.—Amarillo 2009, no pet.) (noting the enactment of similar “paid or incurred” statutes nationwide); Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform*

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.”⁵ The Texas Supreme Court’s recent decision in *Haygood v. Garza de Escabedo* will drastically change civil trials in Texas.⁶

Overall, this decision takes a position on the plain meaning of the statutory language in § 41.0105; however, the court’s application of § 41.0105 will have serious implications on personal injury lawsuits that will spawn numerous procedural complexities for practitioners and will impact both how the jury receives information and what the resulting damage award might be.⁷ Procedural safeguards may become necessary in order to avoid biased treatment, which will likely occur, as between insured and uninsured claimants.⁸ Further, should the legislature forgo amending the language to clarify evidentiary expectations under this rule, attorneys should closely review the changes associated with § 41.0105 compliance and the many roadblocks they may face as a result.⁹ The rule does, in fact, limit damages; however, in order to avoid confusion or bias, the limitation may serve the system better if imposed post-verdict, as the dissent in *Haygood* suggests.¹⁰

Initially, this Comment outlines the history of tort reform, the enactment of House Bill 4, and the initial rumblings surrounding § 41.0105—the paid-or-incurred statute.¹¹ Part III will describe the interpretive battle between Texas courts and their failed attempt to apply the statute consistently. Next, Part IV will address the history and final Texas Supreme Court decision in *Haygood v. Garza de Escabedo*—the seminal case and center of the fiery debate on this issue. Accordingly, Part V will raise the procedural complexities and outline the practical consequences of the Texas Supreme Court’s position on this statute—a matter extremely relevant to all litigants and practitioners in future cases involving personal injury or medical malpractice claims. Finally, Part VI offers both a procedural solution for the statute’s application and various ways the legislature should clarify the ambiguous language of § 41.0105. Part VII

in Texas, 44 THE ADVOC. 9, 15 (2008) (noting a reference made by the *Wall Street Journal* based on the passage of the new House Bill 4).

5. CIV. PRAC. & REM. § 41.0105.

6. See *Haygood*, 356 S.W.3d at 391.

7. See *id.* at 396; see also Brief of Amicus Curiae The Texas Trial Lawyers Ass’n in Support of Motion for Rehearing at 2, *Haygood v. Garza de Escabedo*, 356 S.W.3d 390 (Tex. 2011) (No. 09-0377) [hereinafter Brief for TTLA].

8. See Brief for TTLA, *supra* note 7, at 10; April Y. Quiñones, Comment, *Texas Civil Practice & Remedies Code § 41.0105: A Time for Clarification*, 42 ST. MARY’S L.J. 551, 587 (2011); see also Gisela D. Triana-Doyal, *Another Take on “Actually Paid or Incurred,”* 72 TEX. B.J. 16, 20 (2009).

9. See *Mills v. Fletcher*, 229 S.W.3d 765, 769 (Tex. App.—San Antonio 2007, no pet.) (Stone, J., dissenting). One practitioner notes, “[A]fter the [c]ourt issued its opinion in [the *Haygood*] case, trial judges around the state have expressed utter confusion as to how to procedurally implement § 41.0105.” Brief for TTLA, *supra* note 7, at 2.

10. See *Haygood*, 356 S.W.2d at 405 (Lehrmann, J., dissenting).

11. See discussion *infra* Part II.

will conclude that, absent action from the legislature, neither the claimants nor the defendants in these types of cases will ultimately receive the just result they deserve, and the system will remain unbalanced.

II. SECTION 41.0105: A HISTORICAL FOUNDATION

A. *The Early Rumblings of Lawsuit Reform in Texas*

*“All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”*¹²

Texas has long recognized the value of the right of access to the legal system—guaranteeing its citizens a “remedy of due law” against wrongdoers.¹³ The American justice system aims to fairly compensate those parties who are injured and to guard the rights of parties who have done no wrong.¹⁴ The “open courts” provision in the Texas Constitution, amended in 1876, also provides a means for the Texas Supreme Court to judicially craft various types of noneconomic damages, such as pain and suffering, in addition to compensatory damages for injured parties.¹⁵ While the initial focus was providing justice for injured citizens, personal injury cases became the source of a hotly debated movement for lawsuit reform beginning almost forty years ago.¹⁶

A dramatic increase in medical malpractice suits spawned a new era for litigation in Texas, and “by the 1970[s], Texans were being sued with greater frequency and ferocity.”¹⁷ As a result of this “litigation boom,” professionals across Texas—including lawyers, medical practitioners, accountants, and various other professionals—immediately sought relief through malpractice insurance.¹⁸ Physicians were the initial target, and the “[i]ncreased exposure to

12. TEX. CONST. art. I, § 13. This provision is significant because it affords the Texas Supreme Court the authority to create noneconomic damages in addition to compensatory damages—an issue central to tort reform and monetary caps on a claimant’s recovery. *See id.*

13. *See id.*

14. *See* Nixon, *supra* note 4, at 9.

15. *See* TEX. CONST. art. I, § 13; *see also* Nixon, *supra* note 4, at 20 n.5 (listing examples of noneconomic damages such as “physical pain and mental anguish (1885), physical impairment (1901), disfigurement (1948), loss of spousal consortium (1978), parental loss of a child’s consortium (1983), and a child’s loss of parental consortium (1990)”).

16. *See* Nixon, *supra* note 4, at 9-10.

17. *Id.* at 9. The Governor of Texas, Rick Perry, declared this increase in medical malpractice suits a “state-wide crisis.” *Id.* at 10; *cf.* Wallach & Birdwell, *supra* note 3, at 53-55.

18. Nixon, *supra* note 4, at 9. While many professionals rarely kept malpractice protection prior to the 1970s, today “it is the rare exception where an accountant, lawyer, engineer, architect, contractor, officer or director of a corporation, counselor or consultant does not carry some type of errors and omission liability coverage.” *Id.*

liability . . . [and] increased demands for insurance, coupled with contingent fee awards, created increased opportunities for litigants, which [led] to increases in insurance premiums.”¹⁹ Texas quickly became a “popular national venue” for filing personal injury lawsuits, including medical malpractice suits, because of its unpredictable rulings and verdicts.²⁰ Consequently, tension slowly built among citizens, political organizations, and the legislature to alleviate the litigation boom that had tort costs soaring to unprecedented sums.²¹ For example, between 1989 and 1999—ten short years—the average noneconomic damages increased by \$1.18 million dollars.²²

*“In medical malpractice, Governor Rick Perry declared it a state-wide crisis.”*²³

In the late 1970s, the Governor appointed a commission led by the former dean of The University of Texas School of Law, W. Page Keeton, to suggest solutions to the medical malpractice crisis.²⁴ The legislature expressed concern about this crisis that “stung hospitals and physicians in the form of increased medical professional liability rates, which are determined, in part, by the number of health care liability claims filed.”²⁵ Further, the Keeton Commission observed that the ferocity of malpractice lawsuits in Texas was drastically limiting access to healthcare.²⁶ And in 1977, the legislature passed the first noteworthy tort reform law—Article 4590i of the Texas Revised Civil Statutes.²⁷

Under Article 4590i, a claim subject to its provisions faced a special statute of limitations for minors and a concrete limitation on total civil liability damages of \$500,000.²⁸ Although other states had approved various caps on

19. *Id.*

20. *See id.* at 14.

21. HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S., at 1 (2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf#navpanes=0>; see also Nixon, *supra* note 4, at 10 (stating that “[i]n 1989, the average non-economic award in a medical malpractice case was \$220,000, [and] by 1999 the average non-economic award in a medical malpractice case was \$1.4 million”). “The Growth of U.S. tort costs have exceeded the Gross Domestic Product (GDP) by 2-3 percentage points in the past 50 years.” *Facts About Tort Liability and Its Impact On Consumers*, AM. TORT REFORM ASS’N, <http://web.archive.org/web/20100731070852> (last visited Oct. 6, 2012).

22. *See* Nixon, *supra* note 4, at 10.

23. *Id.*

24. *See* David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 3 (2007).

25. *See* Jonathan D. Nowlin, Comment, *Scalpel, Please: Why the Definition of “Health Care Liability Claim” in Chapter 74 of the Civil Practice and Remedies Code Is Not as Clean-Cut As It Could Be*, 43 TEX. TECH L. REV. 1247, 1251 (2011).

26. *See* Nixon, *supra* note 4, at 10.

27. Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039 (former TEX. REV. CIV. STATS. ANN. art. 4590i, § 103(a)(4)), repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

28. *See id.*; Nowlin, *supra* note 25, at 1252.

medical malpractice damages at that time, the Supreme Court of Texas rejected the legislature's attempt to limit medical damages, holding that the act was unconstitutional because it violated the open courts provision.²⁹ Consequently, "[p]ressure from citizens' groups against what they perceived to be an overly litigious environment began to mount. Political pressure was created in legislative and judicial races regardless of party affiliation, and 'tort reform' became a major political issue."³⁰ The next major tort reform action would not occur until 2003 with the enactment of House Bill 4.³¹

B. House Bill 4: The Launch of Lawsuit Reform

*"Ten Gallon Tort Reform"*³²

In 2003, the legislature enacted House Bill 4 (H.B. 4), soon to become "the longest debated law in the history of the State."³³ H.B. 4, the House Committee explained, "provides for various corrective measures that will help bring more balance to the Texas civil justice system, reduce the costs of litigation, and help restore litigation to it[s] proper role in our society."³⁴ In what commentators have referred to as a "model bill," the legislature addressed an unwieldy amount of issues and statutory law changes seeking to extinguish the perceived litigation crisis.³⁵

In an effort to alleviate the burden on Texas courts, the legislature passed various tort reform bills to address the following issues: "non-meritorious lawsuits, a general increase in jury awards, a disproportionate increase in awards for non-economic damages, unreasonable pressure to settle defensible claims[,] and other procedural aspects of our current court system that are patently unbalanced."³⁶ The changes were meant to provide "a cap on non-economic damages for medical liability claims, provisions for payment of future damages as accrued, limitations on plaintiff attorney contingency fee contracts, cost-shifting of litigation costs in some cases, and class action reforms."³⁷

What began as a reform to restore the manner in which claimants may recover damages from physicians and other providers for injuries and death

29. See *Lucas v. United States*, 757 S.W.2d 687, 689-90 (Tex. 1988) (stating the cap on damages was "unconstitutional as applied to catastrophically damaged malpractice victims seeking a 'remedy by due course of law'").

30. Nixon, *supra* note 4, at 10.

31. See HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S., at 3 (2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf#navpanes=0>.

32. See Nixon, *supra* note 4, at 15 (noting a reference made by the Wall Street Journal based on the passage of the new House Bill 4—the comprehensive tort reform).

33. *Id.* at 14.

34. BILL ANALYSIS, Tex. H.B. 4.

35. See Nixon, *supra* note 4, at 15.

36. BILL ANALYSIS, Tex. H.B. 4.

37. *Id.*

proximately caused by professional malpractice ultimately created a new and controversial standard for recoverable medical expenses.³⁸ The new standard, set out in § 41.0105 of the Texas Civil Practice and Remedies Code, produced confusion regarding the impact this section should have on future litigation and ultimately ignited an interpretive battle between Texas courts.³⁹

C. Section 41.0105: A New Standard for Health Care Expenses

“An Enigma Shrouded in a Puzzle”⁴⁰

Within the comprehensive tort reform package in H.B. 4, a new standard, “Evidence Relating to Amount of Economic Damages,” was born in § 41.0105 of the Texas Civil Practice and Remedies Code.⁴¹ This provision states, “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.”⁴² Courts and practitioners often refer to this statute by its popular name, the “paid-or-incurred” statute.⁴³ In light of this new limitation, Texas courts continuously faced interpretive issues regarding the ambiguities existing within the plain language of the statute, as well as the reconciliation of the effects of the limitation with the traditional collateral source rule.⁴⁴

1. Dissecting the Plain Language of the Statute

Jim Perdue, a Texas trial lawyer, proffered an extensive breakdown to decipher the meaning behind § 41.0105 in light of its statutory construction.⁴⁵ The relevant breakdown included five parts: “(1) [i]n addition to any other limitation under law, . . . (2) [r]ecovery of medical or health care expenses incurred, . . . (3) [i]s limited to the amount, . . . (4) [a]ctually paid or incurred, . . . [and] (5) [b]y or on behalf of the claimant.”⁴⁶ Perdue concluded that the use of “or”—a disjunctive modifier—in parts (4) and

38. See Wallach & Birdwell, *supra* note 3, at 53-55.

39. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2011); Wallach & Birdwell, *supra* note 3, at 53-55.

40. Randy Wilson, *Paid or Incurred: An Enigma Shrouded in a Puzzle*, 71 TEX. B.J. 812 (2008).

41. CIV. PRAC. & REM. § 41.0105.

42. *Id.*

43. See *Tate v. Hernandez*, 280 S.W.3d 534, 536 (Tex. App.—Amarillo 2009, no pet.).

44. See Blake Hamm, Comment, *A Dysfunctional Statute and Its “Plain Meaning” Kill Off the Collateral Source Rule in Texas*, 51 S. TEX. L. REV. 229, 243 (2009).

45. See 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, 243 (2006).

46. *Id.* at 243-44 (quoting CIV. PRAC. & REM. § 41.0105).

(5) unquestionably creates four permutations.⁴⁷ Based on this finding, the language would indicate a reading as follows: “[R]ecovery of medical or health care expenses incurred is limited to the amount’ (1) actually paid by the claimant, (2) paid on behalf of the claimant, (3) incurred by the claimant, and (4) incurred on behalf of the claimant.”⁴⁸ By this reading, it followed that “paid” and “incurred” have different meanings; thus, incurred would represent costs charged, regardless of actual payment—including medical bills that a collateral source, not the plaintiff, ultimately covers.⁴⁹ Perdue concluded, and some Texas courts have agreed, that the statutory language permits all medical bills to be admitted as evidence during trial and mandates application of the limit—not as an evidentiary preclusion—but as a post-verdict cap on damages.⁵⁰ But some courts have rejected this interpretation, contending that “actually” modifies both “paid” and “incurred.”⁵¹ By contrast, this reasoning yields a different result—namely, that only what the plaintiff ultimately pays is relevant to recovery, and evidence to that effect should be admissible during trial.⁵² Significantly, although this provision clearly limits medical expenses in some way, the question remained how to apply this limit during trial.⁵³

2. Does § 41.0105 Trump Tradition?: The Collateral Source Rule

Historically, in personal injury cases, Texas courts have excluded evidence based on a plaintiff’s insurance benefits—applying the collateral source rule—as a safeguard for plaintiffs.⁵⁴ The collateral source rule states that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”⁵⁵ These collateral benefits “do not have the effect of reducing the recovery against the defendant,” albeit, “[t]he injured party’s net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double

47. *Id.* at 244.

48. *Id.*

49. *See id.* at 243-44. *But see* Nixon, *supra* note 4, at 15 (noting the limit only allows for evidence of what is *actually* paid or will be paid).

50. *See, e.g.,* Gore v. Faye, 253 S.W.3d 785 (Tex. App.—Amarillo 2008, no pet.) (holding that write-offs and adjustments made to medical bills should be applied post-verdict, and evidence of collateral source benefits remains inadmissible); Perdue, *supra* note 45, at 267-69.

51. *See, e.g.,* Mills v. Fletcher, 229 S.W.3d 765, 768 (Tex. App.—San Antonio 2007, no pet.). In *Mills*, the appellate court concluded that “‘actually incurred’ refers to the ‘smaller circle’ of expenses incurred after an adjustment of the healthcare provider’s bill.” *Id.*

52. *Id.*

53. Wallach & Birdwell, *supra* note 3, at 55.

54. *See* Graves v. Poe, 118 S.W.2d 969, 970 (Tex. Civ. App.—El Paso 1938, writ dismissed). This rule has been a traditional and long-standing principal in Texas trial practice. *See* Gore, 253 S.W.3d at 790. “As to damages, the rule prevents tortfeasors from gaining an advantage because an innocent party purchased insurance.” Hamm, *supra* note 44, at 230.

55. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).

compensation for a part of the plaintiff's injury."⁵⁶ Under this rule, juries used billing records and affidavits from health care providers and submitted these documents as evidence during trial to determine what medical expenses were "reasonable" and "necessary," without mention of collateral source benefits.⁵⁷ One Texas court of appeals, in its analysis, explained that because defendants should not benefit from an insured plaintiff's prudence in obtaining insurance, "due to a lack of privity, a jury should not hear evidence of the insurance when they deliberate."⁵⁸

Although the purpose of this rule was to prevent an unfair windfall for defendants, critics admonished this approach as "tolerat[ing] exaggerated and phantom medical expenses—expenses that would never actually be paid by anyone."⁵⁹ Further, critics of the scheme also claimed this method ultimately resulted in unreasonably inflated, noneconomic damage awards.⁶⁰ "[W]hile both legislative houses considered the addition of a collateral source rule, the final versions passed by both bodies did not contain such a provision," leaving a significant amount of ambiguity as to the provision's application.⁶¹ Governor Rick Perry declared this bill did not effectually abrogate the collateral source rule; however, courts across Texas struggled with uniformly applying § 41.0105 during trial.⁶²

III. THE TEXAS BATTLE

A. *The Growing Problem of Interpretation: A Split Circuit*

Although virtually all Texas courts have agreed that § 41.0105 effectively limits medical expenses recovered, Texas courts and attorneys have struggled with reconciling the traditional collateral source rule with the new limitation, as well as the evidentiary impact, of § 41.0105.⁶³

56. *Id.* § 920A(2) cmt. b.

57. See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS, *PJC 80.2* cmt., at 190 (2002 ed.); Russell G. Thornton, *Recovery of Medical Expenses in Texas*, 20 BAYLOR UNIV. MED. CENTER PROC. 315, 316-18 (2007).

58. Hamm, *supra* note 44, at 231; accord *Gore*, 253 S.W.3d at 790. The lack of privity is an issue because collateral source payments are generally made as a result of a pre-existing agreement in which the defendant had no involvement; thus, "[t]he rule endorses the equitable principal that if anyone should receive the benefit of a windfall from the existence of a collateral source, it should be the injured plaintiff, not the guilty defendant." See Quiñones, *supra* note 8, at 558.

59. See Nixon, *supra* note 4, at 15.

60. See *id.*

61. Wilson, *supra* note 40, at 814.

62. H. RESEARCH ORG., FOCUS REP. No. 80-6, 80th Leg., R.S., at 65 (2007), available at <http://www.hro.house.state.tx.us/pdf/focus/veto80-6.pdf> (noting Governor Perry's statement, "Proponents of this bill argue it would reverse the 'collateral source rule' . . . This is not true. Nothing in Section 41.0105 allows a defendant to introduce this evidence or hinders an individual's ability to recover the amount of the medical bills paid by their insurance company").

63. Wallach & Birdwell, *supra* note 3, at 55.

In *Daughters of Charity Health Services v. Linnstaedter*, the Texas Supreme Court noted, in an ancillary matter, that recovery of “the full medical charges billed by the hospital rather than the reduced amount paid by their compensation carrier[s]” would constitute a “windfall” for the plaintiff.⁶⁴ Some commentators have claimed this language supports the application of § 41.0105 as a change to the common law collateral source rule, while others contend this language was merely dictum and not applicable outside the highly structured facts of the *Daughters of Charity* case.⁶⁵ Prior to the year 2011, with no guidance on point by the Texas Supreme Court, the Texas courts of appeal inconsistently applied § 41.0105 and, further, disagreed regarding how evidence should be presented to a jury to implement the legislature’s intent.⁶⁶

1. Evidence of Nonrecoverable Costs Is Irrelevant: The Collateral Source Rule Is Dead!

In *Mills v. Fletcher*, the first case attempting to interpret this new provision, the San Antonio Court of Appeals held that § 41.0105 essentially abrogated the collateral source rule and that nonrecoverable costs—insurance write-offs and adjustments—were irrelevant and, thus, inadmissible as evidence.⁶⁷ In the personal injury suit against Mills, the jury awarded the plaintiff past medical expenses.⁶⁸ On appeal, Mills challenged the jury’s award and argued that the amount awarded should be reduced because it included “written-off or adjusted” medical expenses, which were never “actually paid [n]or actually incurred by or on behalf of [the plaintiff]” because the plaintiff had utilized his private medical insurance to cover the costs.⁶⁹ The court agreed that this result would contradict the plain language of the statute.⁷⁰

64. *Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 412 (Tex. 2007).

65. *Compare* Wilson, *supra* note 40, at 815 (noting that “*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”), *with* Triana-Doyal, *supra* note 8, at 20 n.3 (claiming the Supreme Court’s observation was “strictly *obiter dicta*, and its application in that workers’ compensation case should not be dispositive”).

66. *See* discussion *infra* Part III.A.1-2. In 2011, the Texas Supreme Court revealed its position on the application of § 41.0105 in *Haygood v. Garza de Escabedo*. *See* *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 405-06 (Tex. 2011).

67. *See* *Mills v. Fletcher*, 229 S.W.3d 765, 769 (Tex. App.—San Antonio 2007, no pet.).

68. *See id.* at 767.

69. *Id.*

70. *See id.* at 769. The court, in dissecting the grammatical structure of the statute, stated the following: In referring to “incurred” the second time, the Legislature chose to modify “incurred” with the word “actually.” As such, “incurred” must mean something different than “actually incurred.” And, the word “actually” modifying “incurred,” as well as the phrase “[i]n addition to any other limitation under law,” shows an intent by the Legislature to limit expenses simply “incurred.” Thus, in construing this statute, we believe that “medical or healthcare expenses incurred” refers to the “big circle” of medical or healthcare expenses incurred at the time of the initial visit with the healthcare provider, while, as applied to the facts presented here, “actually incurred” refers to the “smaller circle” of expenses incurred after an adjustment of the healthcare provider’s bill.

Accordingly, the court held that § 41.0105 prevents claimants from recovering amounts “written off” by a healthcare provider.⁷¹

Other Texas appellate courts have also reached similar conclusions.⁷² Proponents for this interpretation cite to valuation issues, which arise in estimating “reasonable” medical costs.⁷³ The main problem lies with hospital prices, which should reflect the cost of care provided but instead are driven by extraneous factors such as the reimbursement rates for federal programs—namely, Medicaid or Medicare.⁷⁴ Thus, many defendants have urged that § 41.0105 actually wipes out the common law collateral source rule and levels the playing field for parties in personal injury suits.⁷⁵

2. Evidence of Reasonable and Necessary Expenses: We Will Allow It!

Before the Texas Supreme Court provided any guidance on this issue, the majority of courts in Texas continued to adhere to the traditional collateral source rule and applied § 41.0105 post-verdict.⁷⁶ While defendants contend this interpretation provides an inaccurate reflection of the rule, plaintiffs’ attorneys maintain “gross medical bills are incurred by the plaintiff, making gross medical bills recoverable with the Collateral Source Rule intact.”⁷⁷

In *Irving Holdings, Inc. v. Brown*, the Dallas Court of Appeals held that courts should apply—notably, post-verdict—comparative negligence reductions in recovery *before* applying § 41.0105.⁷⁸ The court observed that an alternative application would violate the collateral source rule, resulting in an unfair reduction in liability for defendants.⁷⁹ Similarly, in *Gore v. Faye*, the Amarillo

Id. at 768 (alteration in original).

71. See *id.* at 769. In this case, “copies of bills from Fletcher’s health care providers, show[ed] the adjustments made and the resulting balance of ‘\$0.00.’ . . . [and] these exhibits were sufficient. Zero means zero—Fletcher no longer owe[d] any money to his health care providers.” *Id.* at 767 n.1.

72. See, e.g., *Progressive Cnty. Mut. Ins. Co. v. Delgado*, 335 S.W.3d 689, 692 (Tex. App.—Amarillo 2011, no pet.) (holding that “the plain language of § 41.0105 provides that medical expenses subsequently written off by a health care provider do not constitute medical expenses actually incurred by the claimant or on his behalf where neither the claimant nor anyone acting on his behalf will ultimately be liable for paying those expenses”).

73. See Keith T. Peters, *What Have We Here? The Need for Transparent Pricing and Quality Information in Health Care: Creation of an SEC for Health Care*, 10 J. HEALTH CARE L. & POL’Y 363, 363 (2007).

74. See *id.* at 366.

75. See R. Talmadge Hammock, *The Changing World of Medical Malpractice/Personal Injury Law*, 70 TEX. B.J. 51, 51 (2007). “The distinction is important. If a defendant gets the benefit of reduced medical bills, it reduces the value of the case.” *Id.*

76. See *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied); *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481-82 (Tex. App.—Eastland 2009, no pet.); *Gore v. Faye*, 253 S.W.3d 785, 789-90 (Tex. App.—Amarillo 2008, no pet.).

77. See Hammock, *supra* note 75, at 51.

78. See *Irving Holdings*, 274 S.W.3d at 931.

79. See *id.* at 932 (noting that following the defendant’s application would allow the defendant to receive the benefit of the plaintiff’s workers’ compensation policy). The order in which §§ 33.012(a) and 41.0105 are

Court of Appeals admitted the full amount of reasonable and necessary medical costs, regardless of write-offs and adjustments, and elected to reduce recovery post-verdict.⁸⁰ On appeal, the court determined that allowing the jury to consider evidence of reduced medical bills would be “a significant departure from existing trial practice in Texas.”⁸¹ Though some Texas appellate courts conceded to parts of the reasoning in the *Mills* case, the longstanding collateral source rule created hesitation among numerous courts in admitting insurance benefits as evidence for the jury to consider.⁸²

B. Mounting Concern for Plaintiffs and Jury Awards

Scholarly commentary indicates a concern with the abrogation of the collateral source rule and how it would adversely affect the determination of noncompensatory damages.⁸³ In fact, multiple states, other than Texas, have noted the problem with limiting evidence to the amounts actually paid (paid previously or required to pay in the future) by the injured party.⁸⁴ The problem lies with the ultimate result: evidence of this limited amount may provide an unrealistic benchmark for juries to determine both the serious nature of the injury and the noneconomic damages—pain and suffering or mental anguish.⁸⁵

For instance, the Supreme Court of Wisconsin held that the manner in which different plaintiffs’ medical expenses happen to be financed should not substantially affect how liability is imposed upon similarly situated defendants; the collateral source rule is in place to prevent this practical problem.⁸⁶ Moreover, although admitting evidence of adjusted expenses without reference to the third-party source may seem like a reasonable solution, the South Carolina Supreme Court held that “this argument ignores the reality that unexplained, the compromised payments would in fact confuse the jury. Conversely, any attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source.”⁸⁷ Fear

applied, under the facts in *Irving*, have a significant impact on resulting damages. *See id.* at 928-29. Applying § 41.0105 first would yield a considerably different outcome—first, the court would reduce damages to \$45,429.95 (the amount defendants argued was “actually paid or incurred”), and then, with the application of § 33.012(a), the amount would be cut in half. *See id.* at 929. Thus, the plaintiff would have been ultimately awarded \$22,714.97, rather than \$44,500. *See id.*

80. *Gore*, 253 S.W.3d at 790.

81. *Id.*

82. *See, e.g., Matbon, Inc. v. Gries*, 288 S.W.3d 471, 480-81 (Tex. App.—Eastland 2009, no pet.) (holding that although the court ultimately upheld the collateral source rule, it raised legitimate concerns with evaluating the medical bills post-verdict).

83. Hamm, *supra* note 44, at 255.

84. *See, e.g., Wills v. Foster*, 892 N.E.2d 1018, 1031 (Ill. 2008); *Covington v. George*, 597 S.E.2d 142, 144 (S.C. 2004); *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 14 (Wis. 2007).

85. *See Wills*, 892 N.E.2d at 1031; *Covington*, 597 S.E.2d at 144; *Leitinger*, 736 N.W.2d at 14.

86. *See Leitinger*, 736 N.W.2d at 14.

87. *See Covington*, 597 S.E.2d at 144.

developed among Texas citizens that the courts—admitting evidence relating to collateral source payments in order to prove medical expenses actually incurred—may change the way in which juries resolve noneconomic damages and punitive damages.⁸⁸ Aside from the controversy surrounding the statute's effect on other damages, commentators suggested the increased likelihood that less privileged plaintiffs, who purchase medical insurance at a premium, may receive inferior representation because of the vast majority of personal injury attorneys who rely upon contingency fees.⁸⁹

IV. THE SUPREME COURT WEIGHS IN: *HAYGOOD V. GARZA DE ESCABEDO*

As Texas courts and attorneys continued to battle with the application and evidentiary impact of § 41.0105, and because the Texas Supreme Court's brief dictum on the matter in the *Daughters of Charity* case was ancillary in nature, Texas needed the Texas Supreme Court's guidance.⁹⁰ The Texas Supreme Court finally addressed the interpretive inconsistencies of § 41.0105 in the landmark decision of *Haygood v. Garza de Escabedo*.⁹¹

A. *The Trial Court: 217th Judicial District Court*

As a result of injuries following an automobile accident, Aaron Haygood filed suit against Margarita Garza de Escabedo in the 217th Judicial District Court, Angelina County.⁹² The evidence presented, which related to damages sought, was solely based upon both the testimony of Haygood's physicians and his medical billing records.⁹³ Much of the evidence showed that these bills had been subject to various adjustments and write-offs.⁹⁴ Buttressed by the enactment of § 41.0105, the defendant attempted to exclude—in a pre-trial motion—"any evidence or testimony of any amount of medical or health care bills in excess of the amount actually paid or incurred by or on behalf of [Haygood]."⁹⁵ Escabedo contended that the evidence showing the total amounts of billing expenses was not an accurate reflection of the *actual* damages; thus, that evidence was both irrelevant and inadmissible during trial.⁹⁶

88. Hamm, *supra* note 44, at 257.

89. *Id.*

90. See *Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 412 (Tex. 2007) (noting that the recovery of "full medical charges billed by the hospital rather than the reduced amount paid by their compensation carrier[s]" would constitute a "windfall" for the plaintiff); Wallach & Birdwell, *supra* note 3, at 55.

91. See *Haygood v. Garza de Escabedo*, 356 S.W.3d 390 (Tex. 2011).

92. See *Garza de Escabedo v. Haygood*, 283 S.W.3d 3, 4-5 (Tex. App.—Tyler 2009), *aff'd sub nom.* *Haygood v. Garza de Escabedo*, 356 S.W.3d 390 (Tex. 2011).

93. *Garza de Escabedo*, 283 S.W.3d at 5.

94. *Id.*

95. *Id.* at 4-5 (quoting Pl.'s Motion to Exclude (alteration in original)).

96. *Id.* at 5.

In response, Haygood moved to exclude evidence relating to those offsets and any other collateral source, and the trial court granted Haygood's motion prior to the trial.⁹⁷

Accordingly, the court permitted Haygood to present evidence regarding the totality of his medical bills and did not allow any evidence regarding adjustments made thereafter.⁹⁸ Of the total \$110,069.12 in medical bills, Medicare paid \$14,482.02, and Haygood's medical providers wrote off \$82,294.69, leaving Haygood personally liable for the remainder—a mere \$13,292.41.⁹⁹ The jury, however, having only been presented with evidence of the total, found Escabedo negligent and awarded Haygood with past medical bills for the total amount of \$110,069.12.¹⁰⁰ The trial court subsequently signed a judgment awarding the full amount presented at trial.¹⁰¹

B. The Appellate Court: Garza de Escabedo v. Haygood

De Escabedo appealed to the Twelfth District Court of Appeals.¹⁰² On appeal, she argued that the evidence submitted was insufficient under the new measure of damages in § 41.0105, and the appellate court agreed.¹⁰³

Relying on the interpretation of § 41.0105 in *Matbon, Inc. v. Gries*, the court noted that the medical bills, adjusted through write-offs, did not represent the bills that were *actually* incurred or the portion of the damages the claimant would ultimately be liable for paying.¹⁰⁴ Moreover, in its analysis the court attacked not only the amount awarded in damages but also the evidentiary component as well.¹⁰⁵ Its analysis to the title of the section showed that § 41.0105 “not only limits the amount of damages recoverable, but also affects the relevance of evidence offered to prove damages.”¹⁰⁶

The court held such evidence—evidence relating to write-offs or adjustments—should be admissible at trial to reflect the accurate amount of damages, and the court suggested a remitter for \$82,294.69—the undisputed amount of the providers' write-offs.¹⁰⁷ Haygood did not accept the remitter.¹⁰⁸ The case was then remanded for a new trial, and subsequently, the Texas

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 6.

102. *Id.* at 6-7.

103. *See id.*

104. *See id.* at 7; *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 482 (Tex. App.—Eastland 2009, no pet.).

105. *See Garza de Escabedo*, 283 S.W.3d at 7.

106. *See id.* at 6-7. The court looked to the title of § 41.0105: “Evidence Relating to Amount of Economic Damages.” *Id.*

107. *See id.* at 8.

108. *See Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 392 (Tex. 2011).

Supreme Court took notice.¹⁰⁹ This particular decision is noteworthy for two reasons: (1) this interpretation indicates the collateral source rule may no longer be applicable and (2) the Texas Supreme Court granted Haygood's petition for review—finally offering clarification for this hotly debated rule.¹¹⁰

C. *The Supreme Court of Texas: Haygood v. Garza de Escabedo*

1. *Discussing Collateral Sources in Conjunction with § 41.0105*

In granting Haygood's petition for review, the court began its opinion with a discussion considering the backdrop of § 41.0105 and the common law collateral source rule.¹¹¹ The court noted the growing problem of outside influences affecting the list rates that hospitals charge.¹¹² Specifically, some courts permitted evidence at trial of inflated list rates, which are generally supported by providers' testimony as *reasonable*, even though these rates could be up to four times the amount for which the claimant is liable.¹¹³ Although the collateral source rule prohibits any reduction in a defendant's liability due to benefits the plaintiff receives from a medical provider or outside source (a collateral source), the court disagreed with Haygood's contention that evidence of adjustments in the claimant's medical bills necessitated by a medical provider are inadmissible under this rule.¹¹⁴ Instead, the court stated that "[a]n adjustment in the amount of those charges to arrive at the amount owed is a benefit to the insurer, one [that] it obtains from the provider for itself, not for the insured."¹¹⁵ Moreover, the court suggested that even if there was an adverse effect on the claimant, any difference in liability is at most indirect and is not substantially related to or determined by the amount of the adjustments made; thus, the adjusted amount does not become a windfall for the tortfeasor.¹¹⁶ In fact, it would constitute an unfair windfall for the claimant, as the court indicated in the *Daughters of Charity* case.¹¹⁷ In that case, when the defendant had been sued for the entire amount of medical charges, the court suggested

109. *Id.*

110. *See Garza de Escabedo*, 283 S.W.3d at 7; Quiñones, *supra* note 8, at 567-68.

111. *See Haygood*, 356 S.W.3d at 392-95.

112. *See id.* List rates are medical expenses "initially incurred" by the claimant, excluding subsequent adjustments, or simply the full amount billed by health care providers for the services rendered. Perdue, *supra* note 45, at 248-49. The court indicated the hospitals are overstating expenses in order to guard against large adjustments and write-offs, when in fact patients rarely pay the full list rate. *Haygood*, 356 S.W.3d at 393. This is because they "feel financial pressure to set their 'full charges' . . . as high as possible, because the higher the 'full charge' the greater the reimbursement amount the hospital receives since reimbursement rates are often set as a percentage of the hospital's 'full charge.'" *Id.*

113. *See Haygood*, 356 S.W.3d at 394.

114. *See id.* at 394-96.

115. *Id.* at 395.

116. *See Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W. 3d 409, 412 (Tex. 2007).

117. *See Haygood*, 356 S.W.3d at 396.

that “a recovery of medical expenses in that amount would be a windfall; as the hospital had no claim for these [adjusted] amounts against the patients, they in turn had no claim for them against Jones.”¹¹⁸ In light of its comments in *Daughters of Charity* and the codification of § 41.0105, the court determined that the collateral source rule does not permit recovery of medical expenses the claimant’s provider is not authorized to charge—seemingly indicating the longstanding collateral source rule still remains intact.¹¹⁹

2. *The Majority Interprets the Plain Language of the Statute*

After its consideration of the collateral source issue, the court turned to the statutory language of § 41.0105.¹²⁰ Haygood contended that a claimant incurs the full amount of medical charges when treated, regardless of subsequent write-offs, adjustments, or insurance coverage.¹²¹ Again, the court rejected this contention and suggested the grammatical controversy—whether “actually” modifies paid, or incurred, or both within the statute—is “meaningless tautology.”¹²² The court took the following view:

An amount “actually paid” unquestionably means one for which payment has been made. And it is reasonable to read “actually” as also modifying “incurred”, referring to expenses that are to be paid, not merely included in an invoice and then adjusted by required credits. Thus, “actually paid and incurred,” means expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid.¹²³

The court distinguished Haygood’s situation from that in *Black v. American Bankers Insurance Co.*¹²⁴ There, Medicare paid, in part, the claimant’s medical bill.¹²⁵ But contrary to *Haygood*, the policy covered only charges *actually* incurred, and the court found that there was an implied contract between the hospital and the claimant, which would have held the claimant liable for such charges if Medicare had not covered them.¹²⁶ In *Haygood*, a majority of Haygood’s bills were adjusted with credits required from the provider, while in *Black* the full bill was actually paid—albeit not

118. *See id.*

119. *See id.* at 395-96.

120. *See id.* at 396.

121. *See id.*

122. *See id.*

123. *See id.* at 396-97 (footnote omitted).

124. *See id.* at 397 (citing *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434, 438 (1972)).

125. *See Black*, 478 S.W.2d at 435-36.

126. *See id.* at 437.

entirely by the claimant.¹²⁷ Therefore, in *Haygood*, such an application would produce an unjust “windfall” for the claimant.¹²⁸

On the other hand, Haygood contended that even if the court found that § 41.0105 precluded recovery of the expenses at issue, evidence regarding those expenses should be admissible.¹²⁹ The argument centered on whether to allow evidence of nonrecoverable economic damages in order for the jury to consider that evidence while setting noneconomic damages.¹³⁰ The concern laid with “limiting the evidence to amounts that have been or must be paid” because this could produce “an unfairly low benchmark with which to gauge the seriousness of the plaintiff’s injuries and awarding non-economic damages, such as for physical pain and mental anguish.”¹³¹ The court rejected this line of reasoning and found that such evidence should be excluded because the confusion likely to result, if admitted, substantially outweighed any relevance that may subsist.¹³² Because “[e]vidence which is not relevant is inadmissible,” and this necessarily involves evidence of noncompensable damages, Haygood was “not entitled to recover medical charges that a provider is not entitled to be paid, [and] evidence of such charges is irrelevant to the issue of damages.”¹³³

Finally, the court held this interpretation was not inconsistent with existing statutes—particularly § 18.001 and § 41.012 of the Texas Civil Practice and Remedies Code—as Haygood contended.¹³⁴ Section 41.012 requires a jury instruction for exemplary damages; an instruction regarding the limit on recovery, however, is only appropriate if the full amounts charged, as well as evidence of amounts paid or to be paid, were submitted to the jury.¹³⁵ Because the state legislature was silent as to a particular jury instruction on this issue and because the jury must determine which expenses are necessary for recovery, the court found that the jury was meant to consider only such evidence relevant to recovery.¹³⁶ With regard to § 18.001 in conjunction with § 41.0105, the court explained that § 18.001 merely acts as a vehicle to resolve disputes concerning reasonable and necessary expenses but does not address

127. Compare *Haygood*, 356 S.W.3d at 397 (describing how most of the bills were adjusted with credits), with *Black* 478 S.W.2d at 438 (stating that the bill was paid in full).

128. See *Haygood*, 356 S.W.3d at 397.

129. See *id.* at 398.

130. See *id.*

131. See *id.*

132. See *id.*

133. See *id.*

134. See *id.* at 399; TEX. CIV. PRAC. & REM. CODE ANN. §§ 18.001, 41.012 (West 2011).

135. CIV. PRAC. & REM. § 41.012; see *Haygood*, 356 S.W.3d at 399. Section 41.012 states, “In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011.” CIV. PRAC. & REM. § 41.012.

136. See *Haygood*, 356 S.W.3d at 399. The court considered two possible interpretations based on the absence of a statutorily required jury instruction: (1) the legislature intended juries should not be provided with only evidence relevant to recovery, or (2) the legislature intended juries should be provided with only evidence relevant to recovery. See *id.* at 402-03 (Lehrmann, J., dissenting).

whether unpaid expenses even fall under this category of reasonable and necessary expenses at all.¹³⁷

3. *The Dissent*

Justice Lehrmann, writing for the dissent, “disagree[d] with the [c]ourt’s conclusion that the Legislature intended to prohibit the introduction of evidence of amounts that are written off and never paid, as they represent collateral source benefits.”¹³⁸ In the dissent, she maintained that although it is clear § 41.0105 limits recovery, it does so without disrupting the long-recognized evidentiary preclusion of collateral source benefits.¹³⁹ While the collateral source rule is a recovery rule to a certain extent, it also has an evidentiary quality that prohibits a defendant from introducing these collateral sources.¹⁴⁰ The dissent suggested that write-offs or adjusted amounts—although never paid—are collateral benefits because this reduction would not exist if the claimant had not taken the initiative to obtain insurance coverage.¹⁴¹

The dissent also discussed how the plain language of the statute failed to support the court’s ultimate application of § 41.0105.¹⁴² In support of that reasoning, Justice Lehrman asserted, “[H]ad the Legislature intended to abrogate even a portion of the rule’s evidentiary component, it would have explicitly done so in the text of the statute.”¹⁴³ Moreover, she pointed to the legislative history, which showed several amendments to H.B. 4 stripping any language relating to the abrogation of the collateral source rule—namely, the evidentiary attribute—from the final version passed.¹⁴⁴

Contrary to the court’s view, the dissent supported its conclusion with other sections of the code and stated that “[i]f the Legislature intended that evidence of reasonable and necessary damages would no longer be admissible, it likely would have excluded medical services from [§] 18.001,” as well as amended § 41.012—directing “that the jury be instructed with regard to [§] 41.0105.”¹⁴⁵ Moreover, and as a matter of policy, the court’s interpretation produces inequities for plaintiffs because it would “deliver insupportably divergent results” between insured and uninsured plaintiffs; thus, to the extent to which medical charges influence a jury’s perception of noneconomic

137. *See id.* at 397-98.

138. *See id.* at 400 (Lehrmann, J., dissenting).

139. *See id.*

140. *See id.* at 401. Under the common law, a tortfeasor was not entitled to a liability offset for proceeds procured as a result of the injured party’s independently bargained-for agreement with an insurance company or any other source of benefits. *See id.*

141. *See id.*

142. *See id.* at 402.

143. *See id.* at 403.

144. *See id.*

145. *Id.* at 404.

damages, the uninsured plaintiff may receive substantially greater non-economic awards than a plaintiff who bought insurance—even if bills and injuries were identical.¹⁴⁶ This likely manifestation of such skewed perceptions is significant because a jury's perception regarding the severity a plaintiff's injury factors into legal and factual sufficiency considerations for mental anguish damages.¹⁴⁷

The dissent, in its conclusion, expressly approved of applying § 41.0105 as a limit on recovery post-verdict—a more flexible method that does not restrict the amount of damages the jury can award.¹⁴⁸ Under this scheme, the dissent suggested a procedure in which the jury determines damages and provides a verdict, followed by the trial court's enforcement of the statutory limitations in preparation for the final judgment—imitating a method successfully implemented by other jurisdictions.¹⁴⁹

The majority attacked the dissent's justification—analagizing monetary caps imposed in other statutes—for shifting the burden of proof to the defendant.¹⁵⁰ Contrary to the dissent's position, the court suggested that “imposing a monetary cap never requires the court to resolve a disputed fact; limiting the recovery of expenses to those actually paid often does.”¹⁵¹ Because a dispute may exist regarding necessary expenses for the plaintiff's injury and there may be contradicting views on which, if any, of the providers' charges are reasonable, instituting this limit post-verdict would be administratively impractical.¹⁵² The court explained its reasoning as follows:

If the jury awards less than the total of all charges, the trial court may have no way of knowing which charges the jury found reasonable and which it did not. In all these situations, a requirement that the trial court resolve disputed facts in determining the damages to be awarded violates the constitutional right to trial by jury. “In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended; . . . a just and reasonable result is intended; [and] a result feasible of execution is intended”¹⁵³

146. *See id.* at 400.

147. *See id.* at 405.

148. *See id.* at 406.

149. *See id.* “This post-verdict mechanism, though cumbersome, has been used by a number of California courts for over twenty years, and the case law does not reflect any pervasive problems with the process.” *Id.*

150. *See id.* at 399.

151. *Id.*

152. *See id.*

153. *Id.* (quoting TEX. GOV'T CODE ANN. § 311.021 (West 1985)) (alterations in original).

According to the court's majority, the dissent's interpretation of § 41.0105 conflicts with the legislature's intent and fails the three presumptions of statutory construction listed above.¹⁵⁴

D. How Other States Are Handling This Issue

1. Is House Bill 4 Unique to Texas?

H.B. 4 is not an original set of procedural theories unique to the State of Texas.¹⁵⁵ Instead, the various aspects of the bill reflect characteristics from other jurisdictions and federal sources of law.¹⁵⁶ Notably, California's Medical Injury Compensation Reform Act (MICRA) served as the most influential piece of legislation as Texas formulated numerous reforms found in H.B. 4.¹⁵⁷

In the 1990s, California encountered a lawsuit frenzy—similar to the crisis Texas experienced in the 1970s—which threatened both inflated insurance premiums and restricted access to insurance coverage for medical professionals.¹⁵⁸ As a result, California enacted a series of reforms that would soon become the framework for discussions surrounding the passage of H.B. 4 in Texas.¹⁵⁹ Specifically, the MICRA completely disposed of the collateral source rule, the statute reading in relevant part:

In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, *he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury* Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.¹⁶⁰

California received praise for the positive results the system recognized after the passage of the MICRA.¹⁶¹ Scholarly commentary has noted that

154. *See id.*

155. *See* Nixon, *supra* note 4, at 20.

156. *See id.* at 15-19, 21 n.13 ("For example, medical malpractice reforms were based on California's MICRA legislation of 1975. Offer of settlement: Federal Rule 68 and Alaska; product liability: Kansas; successor liability: Pennsylvania. The bill was only unique in that so much reform was written into one bill and the provisions were more carefully drawn than those of most states.")

157. *See* Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History* (pt. 1), 36 TEX. TECH L. REV. 1, 32 (2005).

158. *See id.*

159. *See id.*

160. CAL. CIV. CODE ANN. § 3333.1(a) (West 2011) (emphasis added).

161. *See* Hull, *supra* note 157, at 34; *accord* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, TEX. H.B. 4, 78th Leg., R.S., at 1 (2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf#navpanes=0>. Although there is significant debate as to the source of California's success, the statistics show the system has effectively attacked many of the insurance related issues associated with

“California’s reforms are an example of twenty-five years of solid experience and a solution guaranteeing the stability needed to allow the medical community to optimize patients’ access to health care.”¹⁶² In Texas, supporters of the reform considered it “the nation’s most comprehensive set of medical malpractice revision initiatives. It has had a significant impact on premium rates in California, where increases have occurred at about one-quarter the pace of the rest of the nation.”¹⁶³

While many of the provisions of the California Act made their way into the final drafts of H.B. 4, ultimately Texas excluded the portion of the act that explicitly abrogated the common law collateral source rule.¹⁶⁴ The initial drafts indicated a large evidentiary shift away from the long-standing Texas collateral source rule and were analogous to the California legislation; but, the fine tuning of H.B. 4 produced a more diminished version of the evidentiary reform—excluding any explicit statement abrogating the common law collateral source rule in Texas.¹⁶⁵

Although the court suggested the collateral source rule remained intact after the *Haygood* decision, the holding effectively achieved the same result as the California statute, though indirectly.¹⁶⁶ As applied, this case sets a clear interpretive precedent—the claimant is not entitled to recover medical expenses that the health care provider is not allowed to charge.¹⁶⁷ The jury may be aware of the presence of insurance benefits or adjustments, but the court is careful to articulate that any difference in liability is at most indirect and not determined by the amount of the adjustments made.¹⁶⁸ Simply stated, the amount recoverable and the admissible evidence merely reflect the cost to the claimant post-write-offs and adjustments made to the total medical expenses.¹⁶⁹ Thus, the Texas Supreme Court has declined to explicitly abrogate the collateral source rule, unlike the approach in the model legislation codified in California’s MICRA.¹⁷⁰ Rather, the court defined the scope of the collateral source—the rule no longer includes amounts, subject write-offs, or adjustments that the claimant is not ultimately liable for or that will be paid for on the claimant’s

medical malpractice. See Hull, *supra* note 157, at 1 (“Premiums in California have risen by 167% over the past twenty-five years (1976-2001) while those in the rest of the country have increased by 505%.”).

162. Hull, *supra* note 157, at 36.

163. Brief of Appellee-Respondent, *Rivera v. Compton*, No. 08-11-00279-CV, 2012 WL 6725879 (Tex. App.—El Paso May 23, 2012, pet. filed), 2012 WL 2420805, at *14.

164. See Hull, *supra* note 157, at 32.

165. See *id.*; see also CAL. CIV. CODE § 3333.1.

166. Compare *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 396 (Tex. 2011) (side-stepping the collateral source rule by limiting the rule’s scope of protection), with CAL. CIV. CODE § 3333.1 (achieving the same result through explicitly abrogating the collateral source rule in this context).

167. See *Haygood*, 356 S.W.3d at 396-97.

168. See *id.*

169. See *id.*

170. Compare *id.* (limiting the scope of the collateral source rule’s protection), with CAL. CIV. CODE § 3333.1(1) (explicitly abrogating the collateral source rule).

behalf.¹⁷¹ Other courts have subsequently addressed this issue, and the decisions vary from state to state.¹⁷²

2. *The Majority: Write-Offs Not Incurred by Claimant*

It is useful to examine how other courts with similar statutory schemes as Texas have viewed the application of the collateral source rule in the context of various write-offs and adjustments such as Medicare or Medicaid.¹⁷³ A majority of jurisdictions, in examining Medicare write-offs (one of the many adjustments made to medical expenses before the final bill is issued to the claimant or the claimant's health care provider), have found these adjustments are *not incurred* by the claimant.¹⁷⁴

In *Moorhead v. Crozier Chester Medical Center*, the Pennsylvania Supreme Court held that a Medicare allowance was not protected under the collateral source rule because the claimant was never responsible for paying that write-off amount.¹⁷⁵ In that case, the plaintiff was injured while she was a patient at the hospital, and she subsequently filed a malpractice claim against the hospital in connection to the treatment she received as a result.¹⁷⁶ Under this particular set of facts, the health care provider acted as the defendant, who also provided treatment after the injury.¹⁷⁷ The services rendered were estimated at \$108,668.31, and Medicare allowance and insurance covered \$12,167.40 of that cost.¹⁷⁸ The healthcare provider accepted the \$12,167.40 as full payment and consequently was unable to recover "the difference of the cost of its services and the Medicare allowance (i.e.,) \$96,500.91) from Appellant or from any other source."¹⁷⁹ The claimant would never be held responsible for more than the satisfaction amount; thus, the \$96,500.91 neither was recoverable as compensation nor did the amount fall within the scope of the collateral source rule.¹⁸⁰

Various other jurisdictions also follow this line of reasoning, and those courts have held that the adjustments do not represent a cost incurred by the claimant but, instead, if included in compensatory damages, would create an

171. See *Haygood*, 356 S.W.3d at 396.

172. See generally Thornton, *supra* note 57, at 315-18 (analyzing the jurisdictional differences and reasoning behind various applications of the collateral source doctrine).

173. See *id.*

174. See *id.* at 316. In the context of Medicaid, most jurisdictions have found that Medicaid write-offs are not an incurred expense. See *id.*

175. See *Moorhead v. Crozier Chester Med. Ctr.*, 765 A.2d 786, 790 (Pa. Commw. Ct. 2001), *abrogated* by *Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008).

176. See *id.* at 787.

177. See *id.*

178. *Id.* at 788.

179. *Id.*

180. *Id.*

unjust windfall and double recovery for the claimant.¹⁸¹ Some general points used in support of limiting the collateral source rule's application are as follows:

[(1)] 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[.]; (2) n]o collateral source "paid" defendants the written-off amounts[; (3) s]ince the defendants already paid the "loss" in some way, they should not be required to pay again[; (4) t]he written-off amounts were costs incurred by the defendants, not by a collateral source[; and (5) t]he written-off amounts were "illusory" medical expenses.¹⁸²

Similarly, in *Haygood*, the Texas Supreme Court reasoned that an adjustment in the total amount owed, due to various federal programs or otherwise, cannot be considered payments provided primarily on behalf of the claimant.¹⁸³ Rather, these adjustments—which healthcare providers routinely make for the insurers—act as a benefit to the insurer, not the claimant, although the claimant may indirectly benefit by the reduction in total charges in the long run.¹⁸⁴ This supports the court's adherence to the collateral source rule yet sidesteps the traditional application of the rule and delineates when the court will decline to afford protection for "illusory costs," which the claimant would never be required to pay to anyone.¹⁸⁵

3. *The Minority: Write-Offs Incurred by Claimant*

On the other hand, some jurisdictions allow a claimant to recover the full amount of medical expenses—the full amount initially charged including write-offs and adjustments.¹⁸⁶ One scholarly commentator noted, however, that in these other "jurisdictions where claimants are entitled to recover such write-

181. See, e.g., *Candler Hosp. v. Dent*, 491 S.E.2d 868, 870 (Ga. 1997) (stating that the claimant "cannot receive in judgment again what has already been paid by the defendant or on the defendant's behalf by an insurer"); *Dyet v. McKinley*, 81 P.3d 1236, 1239 (Idaho 2003) (holding the claimant had not *incurred* the amount of write-offs applied), *abrogated by* *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 265 P.3d 502 (Idaho 2011); *Rose v. Via Christi Health Sys., Inc.*, 113 P.3d 241, 246 (Kan. 2005) (holding the collateral source rule does not protect the "illusory 'charge'" of Medicare write-offs because the adjustments were not incurred by neither the provider nor the claimant (quoting *Moorhead*, 765 A.2d at 791)); *Ward-Conde v. Smith*, 19 F. Supp. 2d 539, 542 (E.D. Va. 1998) (holding that the "defendants are protected against plaintiff's windfall by permitting plaintiff only to present to the jury those expenses for which she is legally obligated" to pay and what the claimant actually incurred).

182. Thornton, *supra* note 57, at 316.

183. See *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 395 (Tex. 2011).

184. See *id.*; see also Thornton, *supra* note 57, at 315 (explaining the adjustments made by healthcare providers).

185. See *Haygood*, 356 S.W.3d at 396-97; *Rose*, 113 P.3d at 248.

186. See Thornton, *supra* note 57, at 316.

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.¹⁸⁷

In 2005, the Supreme Court of Kentucky held that the collateral source rule does in fact cover Medicare benefits, just as the rule covers other forms of insurance.¹⁸⁸ Consequently, the court indicated that in a malpractice claim it would be inappropriate to reduce the claimant’s recovery by the amount covered by insurance when the claimant or third party was responsible for premiums on that coverage.¹⁸⁹ It noted various reasons for including the adjustments in the final recovery:

First, the wrongdoer should not receive a benefit by being relieved of payment for damages because the injured party had the foresight to obtain insurance. Second, as between the injured party and the tortfeasor, any so-called windfall by allowing a double recovery should accrue to the less culpable injured party rather than relieving the tortfeasor of full responsibility for his wrongdoing. Third, unless the tortfeasor is required to pay the full extent of the damages caused, the deterrent purposes of tort liability will be undermined.¹⁹⁰

The court not only praised the claimant for having the foresight to obtain coverage but also considered it “absurd” that the defendant may receive any benefit from a contract between Medicare and the health care provider because the tortfeasor was not a party to this agreement.¹⁹¹ As a result, the court explicitly cited to the application of the collateral source rule in order to exclude evidence of the Medicare write-offs and allowances from the jury’s consideration.¹⁹² This point of view contrasts with the holdings in jurisdictions like Texas and Pennsylvania, which do not consider these adjustments within the scope of the collateral source rule and find it more equitable to limit

187. *Id.*

188. *See Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005).

189. *See id.*

190. *Id.* at 683 (quoting *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky. App. 2005)).

191. *See id.* The Texas Supreme Court explained the concept of privity in 1883 as follows:

The insurer and the defendant are not joint tort-feasors or joint debtors so as to make the payment or satisfaction by the former operate to the benefit of the latter; nor is there any legal privity between the defendant and the insurer so as to give the former the right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff at his expense, and to the procurement of which the defendant was in no way contributory. . . . It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant’s use and benefit.

Tex. & Pac. Ry. Co. v. Levi & Bro., 59 Tex. 674, 676 (1883) (quoting *Harding v. Town of Townshend*, 43 Vt. 536, 538 (1871)).

192. *See Baptist Healthcare*, 177 S.W.3d at 684.

recovery to the actual amount the claimant is legally responsible for paying.¹⁹³ Additionally, both the Alaska and Arkansas Supreme Courts have issued similar decisions, holding that Medicare and Medicaid benefits implicate the collateral source rule and, correspondingly, are inadmissible as evidence to the jury.¹⁹⁴

Comparatively, the Texas Supreme Court disagrees that the collateral source rule is implicated when the write-offs benefit the insurer rather than the claimant.¹⁹⁵ By this reasoning, both Texas trial judges and attorneys face a taxing future in attempting to decipher the implications the *Haygood* decision raises.¹⁹⁶ In light of the jurisdictional differences discussed above, it may be necessary to carefully consider the way other jurisdictions, handling this issue similarly to Texas, manage the issues that arise in applying the decision from henceforward.

V. THE BIG PICTURE: WHY THE TEXAS APPROACH COULD DAMAGE TEXAS TRIAL PRACTICE

The court's decision in *Haygood* threatens procedural complexities at every turn.¹⁹⁷ As evidenced in numerous commentaries and briefings by various attorney associations, Texas trial courts have expressed utter confusion by the procedural implications this case presents.¹⁹⁸ The decision not only leaves several unanswered questions but also seemingly contradicts the very purpose of existing law and trial practice.¹⁹⁹

193. Compare *id.* (holding collateral source rule prevents evidence of write-offs and adjustments to the jury), with *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 790 (Pa. Commw. Ct. 2001), *abrogated by Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008) (holding that Medicare allowances were not protected under the collateral source rule because the claimant was never responsible for paying that write-off amount), and *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 395 (Tex. 2011) (holding various adjustments by healthcare providers for the insurers act as a benefit to the insurer, not the claimant and thus evidence is permitted to reflect the actual costs incurred).

194. See *Loncar v. Gray*, 28 P.3d 928, 932-34 (Alaska 2001); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 618-20 (Miss. 2001), *abrogated by Univ. of Miss. Med. Ctr. v. Lanier*, No. 2011-CA-00163-SCT, 2012 WL 3031276, at *5 (Miss. July 26, 2012).

195. See *Haygood*, 356 S.W.3d at 400.

196. See *id.*

197. See *id.*; accord Brief for TTLA, *supra* note 7, at 13.

198. See, e.g., Brief for TTLA, *supra* note 7, at 2; Robert W. Painter, *Paid or Incurred, Post-Haygood v. Escabedo*, 49 HOUS. LAW., September/October 2011, at 45-46 (“Trial lawyers on both sides of the docket are wrestling with how *Haygood* will change day to day practice.”).

199. See, e.g., Brief for TTLA, *supra* note 7, at 13; Painter, *supra* note 198, at 46 (“Trial lawyers on both sides of the docket are wrestling with how *Haygood* will change day to day practice . . .”).

A. *The Aftermath: The Potentially Devastating Effects of Haygood v. Garza de Escabedo*

1. *Potential Bias Against Claimants*

The court's interpretation of § 41.0105 triggers an insurmountable gap between the treatment of uninsured individuals and individuals with insurance coverage.²⁰⁰ Because the jury is required to provide a verdict based on the *reasonable* expenses, and because the court's decision limits those expenses to what was *actually* paid or incurred, it follows that testimony concerning the *reasonable* expenses will be substantially different as between insured and uninsured claimants.²⁰¹

The motion for rehearing submitted to the court by the Texas Trial Lawyer's Association logs this difference as noteworthy for two reasons.²⁰² First, a health care provider could testify that a reduced bill—due to adjustments made from insurance—is reasonable and, likewise, suggest another bill submitted for a much greater amount is due to no subsequent adjustments from insurance payments also reasonable.²⁰³ Second, identical service providers could render *reasonable* expenses that reflect two divergent amounts.²⁰⁴ The questions become, How does the court avoid this apparent bias between insured and uninsured claimants, and is the standard of *reasonableness* no longer based on the value of the services but rather the “insurability of the patient”?²⁰⁵ Various courts have dealt with problems related to the estimates for reasonable expenses differing between claimants for similar services.²⁰⁶ But, although those courts have upheld these estimates if the difference could not be characterized as “egregious,” the difference in cost here is related to the claimant's insurance status, not on the margin of error existing with expert testimony across unique cases.²⁰⁷ In this context, the court's holding creates a roadblock for attorneys in providing the correct testimony in support of what expenses are *reasonable*.²⁰⁸

200. See Quiñones, *supra* note 8, at 587; Brief for TTLA, *supra* note 7, at 9; see also Triana-Doyal, *supra* note 8, at 20 (emphasizing why the collateral source rule acts as an important incentive in protecting claimants).

201. See *Haygood*, 356 S.W.3d at 391.

202. Brief for TTLA, *supra* note 7, at 9-10.

203. *Id.*

204. *Id.*

205. See *id.*

206. See Peters, *supra* note 73, at 367.

207. See, e.g., *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110-11 (1st Cir. 1989) (holding that negotiations to lower costs did not violate the Sherman Act, “unless the prices are ‘predatory’ or below incremental cost—even if the insurer is assumed to have monopoly power in the relevant market”); Peters, *supra* note 73, at 367.

208. See Brief for TTLA, *supra* note 7, at 9-10; Painter, *supra* note 198, at 46.

Though the collateral source rule remains intact, under the analysis in *Haygood*, the court's decision not to extend the rule's protective qualities to certain write-offs and adjustments—not directly on behalf of the claimant—may indicate a claimant's indirect insurance benefits are shifted to the defendant.²⁰⁹ For example, an insured claimant may have experienced an analogous injury to an uninsured claimant; however, because of the new evidentiary impact of § 41.0105, the compensatory damages will vary.²¹⁰ Therefore, the benchmark in regards to noneconomic damages will likely influence jury verdicts to that effect.²¹¹ One scholarly commentator has even predicted this effect may discourage the use of insurance coverage.²¹²

2. *The Adverse Impact on Jury Awards*

The *Haygood* decision will cause jury verdicts to suffer, stemming from the complexities inherent in calculating damages as well as inaccuracies when applied to future cases.²¹³ Oftentimes, the amount of damages awarded constitutes both a benchmark for noneconomic damages and a means to calculate future damages.²¹⁴ Accordingly, if those sums are not indicative of the services actually rendered and are subject to change, this poses a problem for juries calculating these damages—directly impacting judicial efficiency and case management in Texas courts.²¹⁵

Inaccuracy threatens jury verdicts in cases in which medical bills for past services are not finalized or completely adjusted at the time of trial.²¹⁶ As common practice, health care providers and insurance carriers take many months to generate, review, process, and pay bills associated with medical services.²¹⁷ Many times, the bills are subject to post-judgment adjustments.²¹⁸ This uncovers a series of problems when determining the amount “incurred” by the claimant.²¹⁹ Justice Stone's dissent in the *Mills* case posed several questions as to this complication.²²⁰ “At what point does a court decide the

209. See Quiñones, *supra* note 8, at 587.

210. See *id.*

211. See *id.*

212. See *id.*

213. See *Mills v. Fletcher*, 229 S.W.3d 765, 772 (Tex. App.—San Antonio 2007, no pet.) (Stone, J., dissenting); Brief for TTLA, *supra* note 7, at 2.

214. See *Wills v. Foster*, 892 N.E.2d 1018, 1031 (Ill. 2008); *Covington v. George*, 597 S.E.2d 142, 144 (S.C. 2004); *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 14 (Wis. 2007); accord discussion *supra* Part III.B.

215. See *Mills*, 229 S.W.3d at 772 (Stone, J., dissenting).

216. See Price L. Johnson et al., *Personal Torts*, 61 SMU L. REV. 1013, 1021 (2008).

217. See *id.*

218. See *Progressive Cnty. Mut. Ins. Co. v. Delgado*, 335 S.W.3d 689, 691 (Tex. App.—Amarillo 2011, pet. denied); *Mills*, 229 S.W.3d at 768; accord Brief for TTLA, *supra* note 7, at 3-4.

219. See *Mills*, 229 S.W.3d at 768; accord Brief for TTLA, *supra* note 7, at 3-4. “Because the medical billing process does not neatly fit within litigation schedules, there are considerable problems related to proving the recoverable amount of medical expenses at the time of trial.” Brief for TTLA, *supra* note 7, at 4.

220. See *Mills*, 229 S.W.3d at 772 (Stone, J. dissenting).

bills have been incurred?”²²¹ Furthermore, “[w]hat happens when there is a dispute regarding the amounts due or the extent of coverage” or “if adjustments are made after litigation is initiated or concluded?”²²² Absent statutory language in § 41.0105 to clarify this issue and absent the court addressing this issue in its *Haygood* decision, the problem is this: the amount the jury awards—a “moving target”—could reflect less than the ultimate amount the claimant will owe on the final bill.²²³ In other words, the claimant would not recover enough, under the verdict, to pay off his or her expenses.²²⁴ This seems to contradict the main purpose of recovery—to compensate the plaintiff for wrongdoers’ actions and to make that plaintiff whole.²²⁵

Moreover, the amount the jury awards ultimately hinges upon the jury’s point of view regarding the relationship between medical expenses and the severity of the injury.²²⁶ By limiting evidence to medical expenses *actually incurred*, the court created a disconnect that will adversely impact the methods by which a jury calculates other related damages.²²⁷ For example, § 41.008 of the Texas Civil Practice & Remedies Code provides in relevant part:

§ 41.008. Limitation on Amount of Recovery

•••

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

- (1)(A) two times the amount of economic damages; plus
- (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or
- (2) \$200,000.²²⁸

This statute uses economic damages as part of the formula to calculate the exemplary damage cap.²²⁹ Significantly, this triggers both a bias between similarly situated claimants who have varying insurance coverage and unclear standards for calculating the relevant damages carved out for punishable conduct.²³⁰ If one claimant has coverage under various federal programs for

221. *See id.*

222. *See id.*

223. *See id.*; accord Brief for TTLA, *supra* note 7, at 3-4.

224. *See* Brief for TTLA, *supra* note 7, at 4.

225. *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 391 (Tex. 2011) (noting, as a universal principle, that compensatory damages are meant to make the victim *whole* for any losses caused from the tortfeasor’s culpable conduct).

226. *See Mills*, 229 S.W.3d at 772 (Stone, J., dissenting).

227. *See id.*

228. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 2011).

229. *See id.*

230. *See Haygood*, 356 S.W.3d at 405 (Lehrmann, J., dissenting) (“[T]he extent of the plaintiff’s medical charges may affect the jury’s calculation of non-economic damages [because] an uninsured plaintiff . . . may

medical expenses, the result is drastically lower exemplary damages, as contrasted with an uninsured claimant receiving the benefit of a larger award due to a higher initial benchmark (incurred expenses) plugged into the formula stated above.²³¹ This problem will persist among claimants until the court provides further clarification or a solution regarding this issue.²³² Until then, it is possible that precisely the same punishable conduct would yield considerably different measures of culpability as measured in dollars.²³³

Apart from the exemplary damage conflict, juries will face ambiguities in calculating future medical damages.²³⁴ The adjusted medical bills and subsequent write-offs imposed on those bills are not at all indicative of a plaintiff's future medical expenses.²³⁵ One scholarly commentator noted,

This is particularly troublesome given that there is no assurance that the plaintiff will be covered by insurance in the future, can afford insurance in the future, or that the plaintiff will not have lost insurance coverage due to the severity of the injuries which now prevent the plaintiff from working or obtaining insurance in the future.²³⁶

Thus, the question remains, Does § 41.0105 apply to future damages?²³⁷

All of the above-mentioned issues have left litigators and courts to wrestle with the consequences of the *Haygood* decision, devoid of any clarifying guidance from the Texas Supreme Court.²³⁸ Accordingly, litigators will be compelled to consider alternative litigation strategies in light of the *Haygood* decision.²³⁹

3. *Changing Litigation Strategies in Light of the Texas Supreme Court's Ruling*

While the majority opinion in the *Haygood* decision contends the holding would not uproot other sections of the code, there are multiple procedural

be awarded significantly higher non-economic damages . . . even though they were billed the exact same amount for . . . medical care to treat the exact same injuries.”).

231. *See id.*

232. *See id.* at 400 (noting that “one consequence of the [c]ourt’s decision is that juries may deliver insupportably divergent results as between those plaintiffs who are insured and those who are not”).

233. *See id.* at 405.

234. *See* Brief for TTLA, *supra* note 7, at 11-12.

235. *See id.*

236. *Id.* at 12.

237. *See* H. RESEARCH ORG., FOCUS REP. No. 80-6, 80th Leg., R.S., at 65 (2007), available at <http://www.hro.house.state.tx.us/pdf/focus/veto80-6.pdf> (noting Governor Perry’s veto statement suggesting that the exclusion of future damages from § 41.0105 “[o]n its own . . . would have been acceptable”).

238. *See* Painter, *supra* note 198, at 46 (stating “[t]rial lawyers on both sides of the docket are wrestling with how *Haygood* will change day to day practice”).

239. *See id.*

glitches to iron out with respect to coordinating § 41.0105 with various other sections relating to medical damages.²⁴⁰ Specifically, the court speaks to § 18.001 affidavits.²⁴¹ Attorneys must offer evidence and testimony in regards to appropriate damages in compliance with this new interpretation of § 41.0105.²⁴² Accordingly, litigators may struggle with the applicability of § 18.001 affidavits and how to effectively present evidence of disputed damage amounts under the “reasonable” standard when, according to a claimant’s insurance status, it may result in divergent amounts.²⁴³

Does § 18.001 still apply to medical expenses? Absent a response from the legislature, the “reasonable” standard presumably remains intact.²⁴⁴ Further, statutory construction dictates § 41.0105 is presumed in accordance with existing statutes (such as § 18.001).²⁴⁵ Consequently, attorneys must decipher how, if at all, affidavits proving reasonable charges may be used in situations in which § 41.0105 evidentiary limits apply.²⁴⁶ These affidavits may simply be insufficient to establish damages under the *Haygood* opinion unless the affidavits are limited to only *relevant evidence*—recoverable medical expenses²⁴⁷—and not the broad umbrella of “reasonable” damages that would have been acceptable pre-*Haygood*.²⁴⁸

This procedural quandary, even if § 18.001 may be used in accordance with the *Haygood* opinion—admitting only those damages the health care provider is legally entitled to—also creates a problem with allowing record keepers to act as an affidavit signatory or witness.²⁴⁹ It is a typical situation to

240. See *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 404-05 (Tex. 2011) (Lehrmann, J., dissenting).

241. See TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (West 2011). Section 18.001 provides in relevant part:

(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

Id.

242. See *Haygood*, 356 S.W.3d at 394-94; Brief for TTLA, *supra* note 7, at 5, 8-10.

243. See Brief for TTLA, *supra* note 7, at 13.

244. See *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990) (stating that “[a] legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both”).

245. See *id.* (stating that “[a] statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it”).

246. See § 18.001.

247. See *Painter*, *supra* note 198, at 46. (“Recoverable medical expenses” are those that the health care provider has the right to collect.”).

248. See *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 397-400; Brief for TTLA, *supra* note 7, at 7-8; *Painter*, *supra* note 198, at 45.

249. See § 18.001(c). That section states,

(c) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or

have a records custodian provide testimony as to the reasonableness of list prices; however, what now?²⁵⁰ If under § 41.0105 the only admissible evidence is that which is *actually* paid or incurred on behalf of the claimant, record custodians may not be competent to testify as to this prescribed amount—the legal entitlement as per agreement between the health care provider and the insurer.²⁵¹ Testimony directly from the health care providers may be necessary, although this also presents contradictory reports between insured and uninsured claimants.²⁵² The majority in *Haygood* suggested that “[t]he statute does not establish that billed charges are reasonable and necessary; on the contrary, it expressly contemplates that the issue can be controverted by affidavit, which could aver that only the amount actually paid was reasonable.”²⁵³ By this reasoning, if a defendant were to submit an affidavit to this effect, it certainly would raise the issue of collateral sources in order to prove amounts actually incurred by the plaintiff or actually paid on behalf of the claimant by insurance.²⁵⁴ Thus, this is contrary to the court’s contention that the collateral source remains to exclude such collateral source payments from the jury’s consideration.²⁵⁵ The logistical problems that exist call for procedural clarification by the court or legislative action to alleviate the harsh results that may occur in various situations.²⁵⁶

(B) the person in charge of records showing the service provided and charge made; and
(3) include an itemized statement of the service and charge.

Id.

250. *Haygood*, 356 S.W.3d at 394 (stating that “proof of reasonableness com[es] from testimony by the provider, or more often, by affidavit of the provider or the provider’s records custodian as permitted by section 18.001 of the Texas Civil Practice and Remedies Code”).

251. See Brief for TTLA, *supra* note 7, at 8-9.

252. See discussion *supra* Part V.A.1.

253. *Haygood*, 356 S.W.3d at 397-98.

254. In California, for example, a plaintiff may bring forward evidence when the amount incurred is in dispute. See CAL. CIV. CODE § 3333.1(a) (West 2011) (“Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.”).

255. See *Haygood*, 356 S.W.3d at 400 (“Of course, the collateral source rule continues to apply to such expenses, and the jury should not be told that they will be covered in whole or in part by insurance. Nor should the jury be told that a health care provider adjusted its charges because of insurance.”). See generally Brief for TTLA, *supra* note 7, at 6 (explaining the depth and application of the collateral source rule). But see Respondent’s Response to Brief of Amicus Curiae the Texas Trial Lawyers Association at 2, *Haygood*, 356 S.W.3d 390 (No. 09-0377) [hereinafter Response to TTLA’s Brief] (“If the Collateral Source Rule does not apply to medical expense write-offs, then the Court need not concern itself with the rule.”).

256. See Response to TTLA’s Brief, *supra* note 255, at 7-8. Even Respondent acknowledges that harsh results occurring in the aftermath of the *Haygood* decision may call for legislative relief. See *id.* (“The fact that a statute, interpreted as intended, can lead to harsh results in individual cases does not permit courts to ignore the plain meaning of the statute In any case, it is not the Court’s job to resolve this issue. TTLA’s arguments are matters for the legislature to weigh in the legislative process.”).

B. *Does the Haygood Decision Align with the Purpose of the Rule?*

While Texas courts have agreed that § 41.0105 limits medical expenses recovered, does the recent interpretation in the *Haygood* decision implicate more than just a limit on recovery, and further, does that application align with the purpose of the rule?²⁵⁷

1. *Limit on Recovery or New Evidentiary Rule?*

The Texas Supreme Court has made it clear that § 41.0105 limits a claimant's recovery; but, the holding also indirectly conflicts with other evidentiary rules and principles.²⁵⁸ The problem here is whether or not the plaintiff has the ability to introduce insurance issues at trial to identify various expenses.²⁵⁹ The court indicates evidence of insurance should be kept completely out of the jury's purview.²⁶⁰ This reasoning follows the traditional collateral source rule; however, what is the result when the coverage is in dispute or controverted by affidavit under § 18.001?²⁶¹

In order to provide the jury with an accurate depiction of the incurred expenses, the claimant may find it necessary to provide information of insurance coverage.²⁶² As nothing in the Texas Rules of Evidence or the collateral source rule prevents the plaintiff from waiving this protection, the court seems to imply a new evidentiary rule—that all evidence of insurance, regardless of the party offering that evidence, is inadmissible on relevancy grounds.²⁶³ This application is counterintuitive to the plain language of the statute, which seeks to “limit recovery” to avoid unjust windfalls rather than creating evidentiary obstacle courses for claimants to dodge during trial—namely, the claimant's ability to offer evidence of his or her own health

257. See Wallach & Birdwell, *supra* note 3, at 55.

258. See *Haygood*, 356 S.W.3d at 398.

259. See, e.g., Brief for TTLA, *supra* note 7, at 6 (noting that “[i]f the plaintiff wants to offer evidence of collateral source insurance payments, neither the Texas Rules of Evidence nor any other rule prohibits the introduction of such evidence”).

260. See *Haygood*, 356 S.W.3d at 398.

261. See *id.* at 395, 300; TEX. CIV. PRAC. & REM. CODE ANN. § 18.001 (West 2011).

262. See, e.g., *Pierre v. Swearingen*, 331 S.W.3d 150, 155 (Tex. App.—Dallas 2011, no pet.). In that case,

The only evidence in the record showing [claimant's] past medical expenses [was] the computer-generated billing records of her medical providers along with the affidavits of record keepers . . . [B]illing records of medical providers utilize unique systems of accounting codes that are not necessarily self-explanatory. Although the bills submitted by [claimant] appear to have been ‘adjusted’ in some manner, it is unclear exactly what amounts were paid by [the claimant] or someone on her behalf and what amounts were written off.

Id. (citations omitted). In a situation in which the claimant is seeking to prove more or less was covered by insurance or written off, evidence relating to insurance necessarily becomes an issue. *Id.*

263. See *Haygood*, 356 S.W.3d at 398; see also Brief for TTLA, *supra* note 7, at 6 (arguing the relevance of matters relating to insurance for evidentiary purposes).

insurance.²⁶⁴ Alongside clarifying the language of § 41.0105 to prevent an unjust windfall, the court also generated countless practical hurdles for a plaintiff to litigate his or her case, which seems contradictory from the court's original purpose; to correct a perceived inequity as between a claimant and the tortfeasor.²⁶⁵

2. Correct Interpretation or Breeding Ground for Inconsistency?

The *Haygood* decision cleared the path with regard to the plain language of § 41.0105; however, that clarification left litigants and courts with no guidance on how to proceed with discovery and presentation of evidence in compliance with the current rules.²⁶⁶ This interpretation may not be the only remedy needed here; a response from the legislature is necessary to fulfill the provision's purpose—to restrict recovery—and clear the practical issues stemming from the *Haygood* decision.²⁶⁷

The purpose of this rule was not to create another realm of issues—posed above as inaccuracy in calculations, bias between uninsured and insured claimants, and evidentiary ambiguities—but instead to equalize the playing field for claimants and defendants alike.²⁶⁸ In Justice Stone's strong dissent in the *Mills* case, she noted that § 41.0105's silence as to these questions is evidence that the statute was “not intended to spawn these issues.”²⁶⁹ The court has spoken; now, it is the legislature that must act.²⁷⁰

VI. LOOKING AHEAD: A CALL FOR CHANGE

The Texas Supreme Court has spoken, and the debate continues: What was the legislature's intended purpose for § 41.0105?²⁷¹ Whereas the language

264. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2011).

265. See *Haygood*, 356 S.W.3d at 395-97.

266. See *id.*

267. See *id.* at 400 (Lehrmann, J., dissenting) (stating that “[i]t is not the prerogative of the Court to second-guess the Legislature's policy choices”).

268. See *Mills v. Fletcher*, 229 S.W.3d 765, 772 (Tex. App.—San Antonio 2007, no pet.) (Stone, J., dissenting); see also HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 4, 78th Leg., R.S., at 1 (2003), available at <http://www.capitol.state.tx.us/tlodocs/78R/analysis/pdf/HB00004H.pdf#navpanes=0> (“In summary, C.S.H.B. 4 provides for various corrective measures that will help bring more balance to the Texas civil justice system.”).

269. *Mills*, 229 S.W.3d at 772. “Justice Stone . . . noted that health care providers often take months to generate medical bills, . . . [and] health insurance carriers . . . take the several additional months to review, process, and pay the bills.” See Johnson et al., *supra* note 216, at 1021. Further, Justice Stone uncovered the following issues associated with § 41.0105: “[A]t what point is a court to determine when the bills have been incurred? . . . What happens when there is a dispute regarding the amounts due or the extent of coverage? . . . [and] what if adjustments are made after litigation is initiated or concluded?” See *id.* (quoting *Mills*, 229 S.W.3d at 772).

270. *Haygood*, 356 S.W.3d at 400 (Lehrmann, J., dissenting).

271. See Painter, *supra* note 198, at 46.

of the statute permits endless confusion, the *Haygood* decision does not extend any solace to those individuals litigating these types of cases.²⁷² The real decision lies with the legislature to revise the language in § 41.0105 to reflect an equitable result and effectuate the legislature's true intent.²⁷³

A. An Equitable Solution

Post-verdict application of § 41.0105 was common prior to the *Haygood* decision, and it worked.²⁷⁴ Critics of the post-verdict application remain distrustful of this method because it purportedly shifts the power to determine the amount of damages from the jury to the judge.²⁷⁵ This concern need not override the practical benefits and just results of the post-verdict mechanism.²⁷⁶

A review of analogous limitations on a claimant's recovery and how those caps are administered indicates § 41.0105 should also be applied in the same manner: post-verdict.²⁷⁷ The dissent in *Haygood* had the right idea—the trial court *should* limit a plaintiff's recovery in compliance with § 41.0105—however, the trial court should handle the adjustments after the jury verdict.²⁷⁸ The common evidentiary practice would subsist and the purpose of the statute would be fulfilled.²⁷⁹ The dissent offers a logical process:

Under that procedure, the defendant would include with any post-verdict motion any evidence of discounts, credits, and write offs, as well as amounts actually paid by the patient and third parties. The trial court then would have the opportunity to evaluate the evidence, and if need be, reform the jury's verdict to reflect past medical expenses that were billed to the claimant, amounts actually paid, and amounts written off by the provider and never paid.²⁸⁰

272. See, e.g., Brief for TTLA, *supra* note 7, at 13.

273. See Response to TTLA's Brief, *supra* note 255, at 8 (“In any case, it is not the Court's job to resolve this issue. TTLA's arguments are matters for the legislature to weigh in the legislative process.”).

274. See, e.g., *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied); *Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481-82 (Tex. App.—Eastland 2009, no pet.). “[T]he majority of the courts that have written on this subject . . . favor a post-verdict approach.” Triana-Doyal, *supra* note 8, at 16.

275. See *Haygood*, 356 S.W.3d at 400 (Lehrmann, J., dissenting).

276. See *id.*; see also Quiñones, *supra* note 8, at 593 (“Not until the verdict is issued, and before the trial court has rendered judgment, could the defendant argue that section 41.0105 requires a limitation on the plaintiff's recovery. This practice fosters the collateral-source rule and is judicially efficient.” (citations omitted)).

277. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(e)(1) (West 2011) (mandating an instruction to prohibit juries from considering statutory caps when awarding damages).

278. See *Haygood*, 356 S.W.3d at 400 (Lehrmann, J., dissenting).

279. See Quiñones, *supra* note 8, at 593 (noting that a post-verdict application would save other complexities and “Texas trial practice [would] remain the same”).

280. *Haygood*, 356 S.W.3d at 406.

If the legislature chooses to take action and clarify the language in § 41.0105, it should take into consideration aligning the application of this provision with those preceding it and seeking to accomplish the same result—to restrict the recovery a plaintiff receives.²⁸¹

Critics have admonished this scheme as limiting the jury's power; however, this concern is easily disposed of through careful construction of jury charges.²⁸² An argument against a post-verdict application is that this method entitles the trial court to make decisions the jury is charged with.²⁸³ Nevertheless, the jury actually maintains the right to determine reasonable and necessary medical expenses, and the trial court merely applies the statutory cap just as it does with other statutory limits.²⁸⁴ It does not infringe upon the defendant's right to jury trial; rather, it supports a fair application that creates a windfall neither for the plaintiff nor for the defendant.²⁸⁵

Issues associated with a jury placing more or less credibility on different entities will not subject the court to an overwhelming burden.²⁸⁶ Instead, this method simply places the task of differentiating between bills charged by the medical care providers and applying the cap based on the actual, *paid-or-incurred* expenses.²⁸⁷ Moreover, this does not change all that much; when awarding damages, the courts will continue to inform the jury to not consider statutory caps administered by law.²⁸⁸ This method will remain consistent with the “actually incurred” language without disrupting longstanding Texas trial practice.²⁸⁹

281. See, e.g., *Gore v. Faye*, 253 S.W.3d 785, 789 (Tex. App.—Amarillo 2008, no pet.) (stating that “unlike other provisions of chapter 41, section 41.0105 contains no procedural direction for its application at trial” and offering § 41.008 as an example, which mandates separate determinations of economic and other compensatory damages and prohibits counsel or the court from telling the jury of these provisions).

282. See *Haygood*, 356 S.W.3d at 406.

283. See *id.*; see also *Wilson*, *supra* note 40, at 815 (noting that if applied post-verdict, “[t]he trial judge would still be in a quandary as to whether and how much to reduce the judgment with respect to that particular provider”).

284. See *Haygood*, 356 S.W.3d at 406.

285. See *id.* at 399 (“But imposing a monetary cap never requires the court to resolve a disputed fact; limiting the recovery of expenses to those actually paid often does.”); *id.* at 406.

286. See *id.*

287. See *id.* For example, if

a claimant receives treatment from two providers, one of whom has a contractual agreement with the hospital and one of whom does not[, then] the jury is permitted to hear evidence of the total amount billed by both providers, . . . but the jury awards the plaintiff less than that amount. . . . [This] can be accounted for through the submission of carefully tailored jury questions.

Id.

288. See *id.* (“When the Legislature enacted liability caps on a plaintiff’s recovery in wrongful death and survival suits in health care liability claims, it also required the following jury instruction: ‘Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.’” (quoting TEX. R. EVID. 402)).

289. *Triana-Doyal*, *supra* note 8, at 20.

B. Language of the Statute: Amendments Would Alleviate the Chaos

Previous legislative sessions have indicated a desire for clarification.²⁹⁰ Even if the statute is not applied post-verdict, amendments to § 41.0105 would relieve the confusion associated with the section's practical applications.²⁹¹ In 2007, Senate Bill 3281 passed both houses, but the Governor ultimately vetoed it.²⁹² The Governor indicated that the second provision “correctly restates that Texas’ tort reform law d[id] not prevent a person in a lawsuit from recovering damages for future medical bills caused by their injury. On its own, this provision would have been acceptable.”²⁹³ Accordingly, the legislature should maintain the limitation that § 41.0105 does not apply to a claim for future medical or health care expenses.²⁹⁴

In excluding future damages from the statute, the jury is allowed to consider evidence of reasonable and necessary medical expenses.²⁹⁵ This is important for two reasons: (1) it eliminates miscalculations associated with using “incurred” expenses as a benchmark for future expenses and (2) it takes into account any status change a plaintiff endures after trial, including insurance coverage and eligibility for federal assistance programs.²⁹⁶

Additionally, a simple amendment in the title of the provision would reflect a more accurate depiction of the statute's intended result.²⁹⁷ For example, eliminating any reference to evidence in the title would solve the evidentiary chaos the Texas courts now face—for example, *Recovery of Medical or Health Care Expenses Incurred*.²⁹⁸ As noted in *Haygood*, the title

290. See, e.g., H. RESEARCH ORG., FOCUS REP. No. 80-6, 80th Leg., R.S., at 65 (2007), available at <http://www.hro.house.state.tx.us/pdf/focus/veto80-6.pdf>.

291. *Id.*

292. *Id.* The proposed legislation read, in relevant part,

Sec. 41.0105. EVIDENCE RELATING TO AMOUNT OF ECONOMIC DAMAGES.

(a) 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.

(b) This section only applies to a health care liability claim under Chapter 74.

(c) This section does not apply to a claim for future medical or health care expenses.

Tex. H.B. 3281, 80th Leg., R.S. (as vetoed by the Governor July 9, 2007), available at <http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/HB03281F.pdf> (last visited Oct. 6, 2012).

293. See, e.g., H. RESEARCH ORG., FOCUS REP. No. 80-6.

294. See generally *id.* (indicating that exclusion of future damages from the statute is an appropriate amendment).

295. *Haygood v. Garza de Escabedo*, 356 S.W.3d 390, 398 (Tex. 2011) (“Evidence which is not relevant is inadmissible.” This includes evidence of a claim of damages that are not compensable. Since a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages.”).

296. See discussion *supra* Part V.A.2.

297. See *Haygood*, 356 S.W.3d at 406.

298. See *Garza de Escabedo v. Haygood*, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009), *aff’d sub nom.* *Haygood v. Garza de Escabedo*, 356 S.W. 3d 390 (Tex. 2011) (pointing to the title of the statute and stating that “not only limits the amount of damages recoverable, but also affects the relevance of evidence to prove damages”).

of § 41.0105 was a significant factor in the court's decision to administer an evidentiary limit alongside the cap on recovery.²⁹⁹

The statute would also benefit from supplementary instructions to mirror other comparable recovery caps—including an instruction similar to the following:

(e) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors:

(1) "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law."³⁰⁰

With clarification as such, courts would have no choice but to adhere to the traditional collateral source rule, the reasonable and necessary standard, and common litigation and evidentiary practices that have long been a part of the Texas litigation process.³⁰¹ This would necessarily involve a post-verdict application and still enforce the limitation on recovery—avoiding an unfair windfall for either party.³⁰²

VII. CONCLUSION

What started as an overhaul on justice created an obstacle course for litigants in personal injury cases.³⁰³ Section 41.0105 has become a breeding ground for debate, and even after clarification, the statute continues to stump practitioners and judges handling these matters day-to-day.³⁰⁴

The good news is that there are two options: (1) shift the limit on recovery to post-verdict or (2) amend the statutory language to better clarify its intended purpose.³⁰⁵ The Texas Supreme Court exercised its power to interpret the statutory language; however, even when the legislature could have made a better policy choice, it is not "an absurdity to construe [the] clear statutory language to mean what it says."³⁰⁶ That leaves the responsibility with the legislature to clarify this statute.³⁰⁷

Facing new evidentiary limits, bias between insured and non-insured claimants, calculation quandaries, and procedural complexities, claimants will

299. *See id.*

300. TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(e)(1) (West 2011).

301. *See Franka v. Velasquez*, 332 S.W.3d 367, 393 (Tex. 2011) ("Statutory language should not be read as pointless if it is reasonably susceptible of another construction.")

302. *See Haygood*, 356 S.W.3d at 399 (Lehrmann, J., dissenting).

303. *See Wallach & Birdwell*, *supra* note 3, at 53-55.

304. *See discussion supra* Part V.B.2.

305. *See discussion supra* Part VI.

306. *Tex. Lottery Comm'n v. First State Bank of Dequeen*, 325 S.W.3d 628, 638 (Tex. 2010).

307. *See id.*

unmistakably consider one question: How much am I worth? The Texas Supreme Court has taken tort reform too far, and the *Haygood* decision does not result in equalizing the playing field between claimants and defendants; rather, it spawns a new era of litigation practice and creates a barrier to the judicial path to recovery.³⁰⁸ Without action by the legislature, neither claimants nor defendants will receive the just result they deserve, and the system will again create an imbalanced scheme.³⁰⁹

308. See discussion *supra* Part V.

309. See discussion *supra* Part V.