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ARTICLE

X-FACTORING: WHY THE TEXAS SUPREME COURT SHOULD REVISIT ITS EXAMINATION OF PAID OR INCURRED MEDICAL EXPENSES

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I. INTRODUCTION

"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 on behalf of the claimant."[1]

The solitary sentence above, which is the entirety of section 41.0105 of the Texas Civil Practice and Remedies Code, has wreaked havoc among personal-injury practitioners and the courts considering their cases since it went into effect on September 1, 2003. In that time, many practitioners and academics have written articles that debate the meaning of the statute and its effect on litigation.[2] In 2011, the Texas Supreme Court stepped in, ostensibly to silence the debate about interpreting section 41.0105, with its detailed opinion in *Haygood v. De Escabedo*.[3] Unfortunately, *Haygood* raised as many questions as it answered, and in its wake, practitioners and academics have again extensively debated the language of section 41.0105 and its intended effect.[4]

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1. TEX. CIV. PRAC. & REM. CODE § 41.0105 (West 2016).

2. *See* April Y. Quiñones, Comment, *Texas Civil Practice & Remedies Code § 41.0105: A Time for Clarification*, 42 ST. MARY'S L.J. 551, 593 (2011) (noting unclear and conflicting Texas case law on section 41.0105 has created confusion and inequity for personal injury claimants); *see also* Blake Hamm, Comment, *A Dysfunctional Statute and Its "Plain Meaning" Kill Off the Collateral Source Rule in Texas*, 51 S. TEX. L. REV. 229, 257 (2009) ("[A]s interpreted, [Section 41.0105] also represents a limit to general economic damages that could have far reaching consequences for Texas's tort system."); 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, 269 (2006) ("Courts must apply a full legislative analysis so that the fairness of the collateral source rule is preserved in Texas law . . . . In doing so, a more reasonable and moderate interpretation is readily available for Texas Civil Practice and Remedies Code Section 41.0105.").

3. Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2011).

4. *See* Seth Burt, Note and Comment, *No Medical Insurance? Hey That's Good for Plaintiffs: A Defendant's Analysis of* Haygood v. Escabedo, 66 BAYLOR L. REV. 425, 446 (2014) ("*Haygood* held open the door to drastically disparate recoveries among plaintiffs based on his or her insurance coverage. When confronted with an uninsured plaintiff, defendants must be aware of the convoluted and complicated medical billing practices to construct a valid and persuasive unreasonableness argument."); *see also* Jamee Cotton, Comment, *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*, 45 TEX. TECH L. REV. 565, 602 (2013) ("Without action by the legislature, neither claimants nor defendants will receive the just

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The present article will add nothing substantive to that debate. Rather, this Article is intended as an objective look at a related issue that was not before the Texas Supreme Court in *Haygood*—medical factoring—and the ways it will likely affect personal-injury litigation across Texas. To date, only one intermediate court of appeals has taken up the issue of medical factoring under *Haygood*, and this Article will examine that court's opinion before giving a brief overview of related cases in other appellate courts. The Article will end with a call to the Texas Supreme Court to take up this important question of state law.

II. SETTING THE SCENE

To understand the issues surrounding medical factoring and its effect on personal-injury practice, a summary of *Haygood* and a primer on the practice of factoring in general and medical factoring in particular is necessary.

A. Haygood v. De Escabedo

"Accordingly, we hold that section 41.0105 limits a claimant's recovery of medical expenses to those which have been or must be paid by or for the claimant."[5]

As mentioned above, practitioners and academics have written prolifically on the meaning and effect of the Texas Supreme Court's decision in *Haygood*.[6] For our purposes, then, a brief summary is all that is required.

Aaron Glenn Haygood was injured when the car he was driving collided with a minivan driven by Margarita Garza de Escabedo.[7] Twelve medical providers billed Haygood a total of $110,069.12 for treatment that included surgeries on his neck and shoulder.[8] Because Haygood was covered by Medicare Part B, his medical providers adjusted his bills downward to $27,739.43, the cost that Medicare determined to be reasonable.[9] At the

result they deserve, and the system will again create an imbalanced scheme."); Robert W. Painter, *Paid or Incurred, Post*-Haygood v. Escabedo, HOUS. LAW., Sept.–Oct. 2011, at 45, 46, https://issuu.com/leosur/docs/thl_sepoct_2011/1 (discussing how the impact of *Haygood* has left trial lawyers on either side to contemplate how their daily practice will be affected).

5. Haygood v. De Escabedo, 356 S.W.3d 390, 398 (Tex. 2011).

6. *See* Burt, *supra* note 4, at 446 ("*Haygood* held open the door to drastically disparate recoveries among plaintiffs based on his or her insurance coverage. When confronted with an uninsured plaintiff, defendants must be aware of the convoluted and complicated medical billing practices to construct a valid and persuasive unreasonableness argument."); *see also* Cotton, *supra* note 4, at 602; Painter, *supra* note 4, at 45 (discussing how the impact of *Haygood* has left trial lawyers on either side to contemplate how their daily practice will be affected).

7. *Haygood*, 356 S.W.3d at 392.

8. *Id.*

9. *Id.*

time of trial, $13,257.41 had been paid, but $14,482.02 remained due.[10]

Each party attempted to exclude certain evidence related to medical expenses. Escabedo moved under section 41.0105 of the Texas Civil Practice and Remedies Code to exclude evidence of any medical bills "other than those paid or owed."[11] Haygood moved under the collateral source rule to exclude evidence of anything other than the medical expenses that had been billed—effectively attempting to exclude evidence that his bills had been reduced by $82,329.69 as a result of his Medicare coverage.[12]

In analyzing the issue, the Texas Supreme Court noted that section 41.0105 was enacted by the Legislature "against a backdrop of health care pricing practices and the collateral source rule."[13] The modern practice of medical providers is to charge "list" rates to uninsured patients who frequently fail to pay them and to charge significantly lower rates for patients covered by government or medical insurance.[14] The court noted the collateral source rule, which prevents reductions in a tortfeasor's liability because of benefits a plaintiff received from someone else, was an established part of Texas common law.[15] However, the court rejected Haygood's claim that the collateral source rule precluded evidence of reductions in medical bills related to insurance.[16] It reasoned:

> The collateral source rule reflects "the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor." To impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to a tortfeasor; it creates one for a claimant . . . ."[17]

In that context, the court examined section 41.0105 and concluded it allows for the recovery only of "expenses that have been or will be paid[] and excludes the difference between such amount and charges the service

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 392–93.

14. *See id.* at 394 (describing how patients are commonly billed at list rates). Indeed, the list rates "are generally at least double" and occasionally up to eight times the rates that would be accepted from government or private insurers. George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 104 (2005).

15. *Haygood*, 356 S.W.3d at 394–95 (citations omitted).

16. *Id.* at 395.

17. *Id.* (first quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. B (AM. LAW. INST. 1979); and then citing Daughters of Charity Health Servs. of Waco v. Linnstaedter, 226 S.W.3d 409, 412 (Tex. 2007)).

provider bills but has no right to be paid."[18]

B. *Factoring*

"Factoring," a noun, has been defined as follows: "The buying of accounts receivable at a discount. The price is discounted because the factor (who buys them) assumes the risk of delay in collection and loss on the accounts receivable."[19]

Factoring is what happens when one business has a right to collect money, and it sells that right—at a discount—to another business before the money has been paid.[20] In some form or another, factoring can be traced back 5000 years to the Babylonians.[21] More recently, the nationwide adoption of the Uniform Commercial Code spurred its widespread use, often under the name "accounts receivable financing."[22] A law review note from the early 1950s explains the general process:

> Accounts receivable financing begins when the borrower presents the factor with a schedule of accounts payable at specified intervals, usually thirty, sixty, or ninety days, together with copies of the invoice for each account. After investigating the borrower, his business[,] and the particular invoices, the factor will calculate a value, or "aging," for the accounts, usually expressed in terms of a percentage of their face value. The loan will also be a certain percentage of face value, known as the "rate of advance." As accounts become due, the borrower collects the checks paid by the account debtors and sends them to the factor at intervals depending upon the volume of sales. It is not uncommon for the borrower to remit checks daily.[23]

Little has changed since then.[24] Factoring continues to be "a financing tool that reduces the amount of working capital a business needs by

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18. *Haygood*, 356 S.W.3d at 396–97.

19. *Factoring*, BLACK'S LAW DICTIONARY 630 (10th ed. 2014).

20. Hous. Lighting & Power Co. v. City of Wharton, 101 S.W.3d 633, 636 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

21. *See* NOEL RUDDY ET AL., SALINGER ON FACTORING 5 (4th ed. 2006) (stating the practice of debt-selling has been long-established and some historical writers on factoring have traced it back to Babylonian times).

22. *See id.* at 5, 8, 11 ("[I]t is significant that since the adoption of the Uniform Commercial Code by most states in the 1950s factoring and, in particular, 'accounts receivable financing' has increased rapidly . . . . This trend has appeared to continue.").

23. Note, *Policing Accounts Receivable and Inventory Under Modern Factor's Legislation*, 101 U. PA. L. REV. 392, 392–93 (1952).

24. *See, e.g.*, Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 601 n.4 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing Note, *Policing Accounts Receivable and Inventory Under Modern Factor's Legislation*, 101 U. PA. L. REV. 392, 392–93 (1952) as "explaining typical factoring scenarios")).

reducing the delay between the time of sale and the receipt of payment."[25]

Medical factoring companies are a subset of factoring companies that deal in the accounts receivable of medical providers.[26] These companies are particularly important because medical treatment generates significant bills, and payment of those bills is often delayed.[27] When medical treatment arises out of a plaintiff's third-party liability claims, medical factoring companies customarily purchase the relevant medical bills from the medical providers.[28]

Section 41.0105 and tort reform in general came about long after medical factoring was a common practice in Texas.[29] In *Haygood*, however, the Texas Supreme Court did not decide the effect of factoring on section 41.0105,[30] but rather limited its analysis to the effect of insurance pricing schemes.[31] Accordingly, it has been unclear what amount of damages could be recovered by Texas plaintiffs whose medical bills were sold to factoring companies at a discount.[32] There are two possibilities: (1) the full amount billed or (2) the discounted amount the factoring company paid to the medical provider.[33]

For an uninsured plaintiff whose medical bills were bought by "Factoring CO.," the arrangement could look like this:[34]

25. *Hous. Lighting & Power Co.*, 101 S.W.3d at 636.

26. *See* Galaviz v. C.R. Eng., Inc., No. A-12-MC-82 LY., 2012 WL 1313301, at *1 n.1 (W.D. Tex. Apr. 17, 2012) (describing an entity as a medical factoring company, and explaining such companies typically purchase medical providers' medical bills at a discounted rate).

27. Brief for Texas Trial Lawyers Ass'n as Amicus Curiae Supporting Appellant at 3, Huston v. United Parcel Serv., Inc., 434 S.W.3d 630 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (No. 01-12-00387-CV).

28. *Galaviz*, 2012 WL 1313301, at *1 n.1.

29. M. Colby Lewis, *Collateral Source Rule: A Look into Plaintiffs' Creative Ways Around Tort Reform*, *in* HARMONIE GROUP, 2015 TRANSPORTATION SEMINAR 34, 38 (2015).

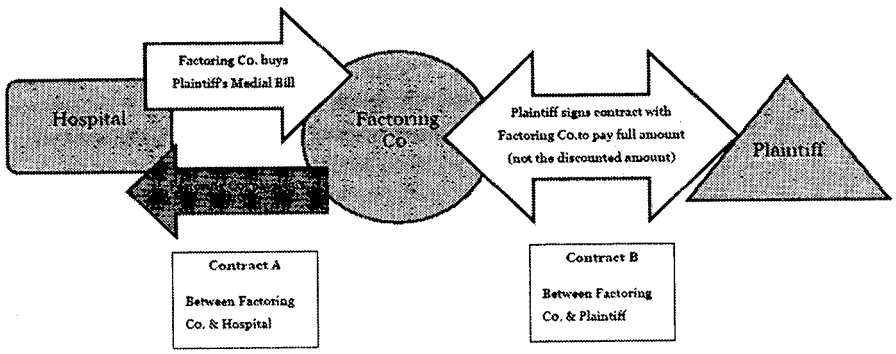
30. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 603 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

31. Lewis, *supra* note 29, at 38.

32. *See generally id.* at 39 (illustrating how factoring companies work with hospitals and plaintiffs).

33. *See* Huston v. United Parcel Serv., Inc., 434 S.W.3d 630, 639 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (following *Haygood* and limiting "a plaintiff's recovery to the amount that the *medical providers* have a right to be paid") (emphasis in original).

34. Lewis, *supra* note 29, at 39.



Contract *A* allows the hospital to avoid delay in receiving payment for plaintiff's medical bills, which Factoring C0. buys at a discounted rate to account for that delay and possible non-payment—a classic factoring arrangement.[35]

Contract *B* is more interesting for purposes of the present Article. Nationally, less than five percent of uninsured patients actually pay the full amount billed by medical providers.[36] In *Haygood*, the Texas Supreme Court admitted that the full amounts charged to uninsured patients are "frequently uncollected."[37] Against that backdrop, why would an uninsured plaintiff agree to be liable for the full amount billed? The answer may depend on who you ask.

Defense attorneys argue that the reason for Contract *B* is a third, unwritten contract—Contract *C*—that establishes the true amount Factoring C0. will accept as full payment from Plaintiff.[38] By setting an expected payment amount lower than the full amount billed, Contract *C* allows Plaintiff to frustrate tort-reform efforts and increase his recovery beyond the medical expenses actually paid or incurred on his behalf.[39] Plaintiffs' attorneys vehemently deny the existence of Contract *C*.[40] Instead, they argue that Plaintiff accepts the obligation to pay the full amount—Contract *B*—because it is one of the only ways to pay for

35. *See* BLACK'S LAW DICTIONARY, *supra* note 19, at 630 (10th ed. 2014) (defining "factoring" as "[t]he buying of accounts receivable at a discount"); NOEL RUDDY ET AL., *supra* note 21, at 1–2 (4th ed. 2006) (explaining what a business needs to assess before entering into a factoring agreement).

36. Nation, *supra* note 14, at 104.

37. Haygood v. De Escabedo, 356 S.W.3d 390, 393 (Tex. 2011).

38. Lewis, *supra* note 29, at 40.

39. *Id.* at 39.

40. *See* Texas Trial Lawyers Ass'n, *supra* note 27, at 26 ("To portray what AR/Net[, a medical factoring company,] does as some reaction to circumvent tort reform is inaccurate[] given that this practice predates tort reform.").

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desperately needed medical care.[41]

The reasoning behind Contract *B* is less important than its practical effect. When the Fourteenth Court of Appeals recently became the first appellate court in Texas to directly address the effect of factoring companies on the recovery of medical expenses, that effect was made clear: A plaintiff who agrees to pay the full amount billed may introduce evidence of that full amount under section 41.0105.[42]

III. ONE COURT'S TAKE: *KATY SPRINGS & MANUFACTURING, INC. V. FAVALORA*[43]

"The circumstances here involve a factoring arrangement; *Haygood* and *McChristian* did not."[44]

To date, the Fourteenth Court of Appeals is the only court to directly examine the effect of medical factoring on personal-injury practice.[45] It did so in the recent *Katy Springs & Manufacturing, Inc. v. Favalora* case.[46]

Joseph Favalora was injured while working in a facility owned by Katy Springs & Manufacturing, Inc.[47] Following the injury, Favalora suffered from chronic neck pain and numbness in his arm.[48] He underwent epidural steroid injections and used prescription pain medications before finally undergoing surgery to fuse his vertebrae.[49] At trial, Favalora offered evidence that twenty-one medical providers billed him a total of $207,901.59.[50] Favalora testified to owing more than $200,000 in unpaid medical expenses.[51]

Before trial, Favalora entered into contracts with several of his medical providers under which he assigned to them an interest in any proceeds that

41. Lewis, *supra* note 29, at 40.

42. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 604 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

43. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

44. *Id.* at 603.

45. Outside of Texas, California appellate courts, in dealing with similar "paid or incurred" statutes, have held that a plaintiff can present and recover the full amount of medical bills owed to a factoring company when it has purchased a health care company's accounts receivable. *See, e.g.*, Katiuzhinsky v. Perry, 152 Cal. App. 4th 1288, 1296–98 (Cal. Ct. App. 3d 2007).

46. *See Katy Springs & Mfg., Inc.*, 476 S.W.3d at 586 ("This is a personal injury case involving a worker's compensation nonsubscriber.").

47. *Id.* at 587.

48. *Id.*

49. *Id.*

50. *Id.* at 605–06.

51. *Id.* at 602.

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might be recovered as a result of his pending lawsuit.[52] Through these contracts, Favalora also assigned to his medical providers a security interest in his potential tort recovery.[53] Afterwards, a medical factoring company named MedStar Funding purchased, at a discount, the providers' accounts receivable, including their respective interests in Favalora's potential tort recovery and the liens on those interests.[54]

Citing *Haygood* and *Metropolitan Transit Authority v. McChristian*,[55] a previous opinion from the Fourteenth Court of Appeals, Katy Springs argued that the trial court had erred by admitting evidence of the total amount billed by Favalora's medical providers rather than the discounted price at which those bills were sold to MedStar.[56] Katy Springs argued that section 41.0105 limited a plaintiff's recovery "to the amount that the *medical providers* have a right to be paid, which, in this case, is the amount for which MedStar purchased the accounts receivable from the providers."[57]

Favalora countered, saying that neither case cited by Katy Springs was applicable to his situation.[58] Instead, Favalora argued that he was entitled to recover the full amount billed by his medical providers because he was contractually obligated to pay that amount to MedStar.[59] Essentially, he argued the existence of Contract *B*, as described above.[60]

The *Katy Springs* court distinguished *Haygood* and *McChristian* on the grounds that neither one of those cases involved a factoring arrangement.[61] In examining the issue, however, the court found a 2012 opinion out of the Fifth Court of Appeals to be informative.[62] In *Big Bird Tree Service v. Gallegos*,[63] a manual laborer was injured on the job and underwent multiple surgeries, including the placement of fifteen screws in his foot.[64] At trial, the plaintiff offered evidence that his medical providers had billed $67,699.41 and $16,659.50, respectively.[65] Because the plaintiff was

52. *Id.*
53. *Id.*
54. *Id.* at 603.
55. Metro. Transit Auth. v. McChristian, 449 S.W.3d 846 (Tex. App.—Houston [14th Dist.] 2014, no pet.).
56. *Katy Springs & Mfg., Inc.*, 476 S.W.3d at 600.
57. *Id.* at 601 (emphasis in original).
58. *Id.*
59. *Id.*
60. Lewis, *supra* note 29, at 40.
61. *Katy Springs & Mfg., Inc.*, 476 S.W.3d at 603.
62. *Id.* at 602.
63. Big Bird Tree Serv. v. Gallegos, 365 S.W.3d 173 (Tex. App.—Dallas 2012, pet. denied).
64. *Id.* at 175.
65. *Id.*

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indigent, however, he received those services free of charge.[66] At trial, testimony from the medical providers' custodians of records indicated that the plaintiff would be required to pay the billed amounts if he recovered for them in his lawsuit.[67] The *Gallegos* court reasoned that, because the plaintiff remained liable for the full amount billed if he were to recover those funds, section 41.0105 did not apply to limit his recovery.[68]

Along the same lines, the *Katy Springs* court determined that, because Favalora remained liable for the full amount billed, section 41.0105 did not apply to reduce Favalora's potential recovery.[69] The court then turned to Katy Springs' assertion that *Haygood* limited any recovery to the amount a plaintiff was required to "*pay the provider.*"[70] Katy Springs reasoned "that if the medical provider is no longer entitled to be paid, then the claimant cannot recover the full amount of the medical expenses from the tortfeasor but must settle for the discounted amount received by the provider."[71]

The *Katy Springs* court dismissed this contention out of hand as being in direct conflict with well-established tenets of Texas common law.[72] When a factoring agreement is at play, a court is not tasked with addressing the "great disparities between amounts billed and payments accepted."[73] Instead, the court noted there is simply an assignment of rights to collect the amount billed, and there is no question in Texas that, when a contract is assigned, the "assignee stands in the shoes of the assignor" and receives the assignor's full rights.[74]

IV. WHAT THE OTHER COURTS HAVE SAID

To date, *Katy Springs* is the only appellate opinion to speak directly to the issue of factoring and the role it plays in determining a plaintiff's possible recovery. So, while the issue is settled for the time being in one of Houston's

66. *Id.*

67. *Id.* at 175–76.

68. *Id.* at 177.

69. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 603 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

70. *Id.* at 603 (emphasis added) (quoting Haygood v. De Escabedo, 356 S.W.3d 390, 397 (Tex. 2011)).

71. *Id.*

72. *Id.*

73. *Haygood*, 356 S.W.3d at 391.

74. *Katy Springs & Mfg., Inc.*, 476 S.W.3d at 604 ("Katy Springs' position ignores the longstanding principle that 'an assignee under Texas common law stands in the shoes of his assignor' [and] [i]n so doing, the assignee 'receives the full rights of the assignor.'") (citations omitted) (first quoting Sw. Bell Tel. Co. v. Marketing on Hold, Inc., 308 S.W.3d 909, 920 (Tex. 2010); and then quoting Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex. 1994)).

courts of appeals, the thirteen other courts of appeals have not yet decided the issue, and of course, stare decisis does not prevent them from disagreeing with *Katy Springs*.[75]

As mentioned above, factoring has been around for a very long time, and there is no indication that it will die out as a business practice any time in the foreseeable future. As a result, *Katy Springs* will almost certainly not be the final word on factoring's effect on personal-injury litigation in general and section 41.0105's interpretation in particular.[76] With that in mind, what follows is a brief review of the applicable case law in each court of appeals.

A. *First Court of Appeals (Houston)*

The First Court of Appeals came close to considering the effect of medical factoring companies on section 41.0105 in *Huston v. United Parcel Service, Inc.*[77] In that case, Sharon Huston was injured when Gabriel Haskin, a delivery driver for UPS, rear-ended her.[78] A medical factoring company, A/R Net, purchased $240,849.44 of Huston's medical bills for the discounted price of $81,589.[79] Huston entered into an agreement with A/R Net to pay the full amount billed by her medical providers.[80] At trial, the defense argued that section 41.0105 should limit Huston's recovery to the amount A/R Net paid to the medical providers, and the trial court agreed.[81] Subject to Huston's objections, the parties stipulated that the total amount that Huston's medical providers were entitled to was $206,146.62.[82] The jury ultimately awarded Huston $50,000 for past medical expenses.[83]

On appeal, the issue was hotly contested, and the Texas Trial Lawyers Association filed an amicus brief in support of reversal.[84] UPS made an identical argument to the defense's claim in *Katy Springs*: "*Haygood* clearly limits a plaintiff's recovery to the amount that *medical providers* have a right to

75. *See, e.g.*, Dowell v. Quiroz, 462 S.W.3d 578, 585 n.6 (Tex. App.—Corpus Christi 2015, no pet.) (refusing to follow the decisions of other appellate courts).

76. *See* Leo Aranda, Note, *Structured Settlements: The Assignability Problem*, 9 S. CAL. INTERDISC. L.J. 465, 465 (2000) (opining factoring companies have threatened the effectiveness of structured settlements for personal injury victims).

77. Huston v. United Parcel Serv., Inc., 434 S.W.3d 630 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

78. *Id.* at 633.

79. *Id.* at 635.

80. *Id.*

81. *Id.* at 635–36.

82. *Id.* at 635.

83. *Id.* at 636.

84. *See* Texas Trial Lawyers Ass'n, *supra* note 27, at 1 (supporting reversal of the trial court's judgment, specifically with regard to Huston's recovery of past medical expenses).

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be paid, which, here, is the amount for which A/R Net purchased the accounts receivable from the providers."[85] The court, however, determined that any error was harmless, given that the jury only awarded $50,000.[86]

Though the court avoids explicitly addressing the issue in *Huston*, its language indicates that the holding is limited to the facts of the case: "Huston has not established that the trial court committed reversible error when it limited the evidence of past medical expenses to the amount that the medical providers, as opposed to A/R Net, had a legal right to collect."[87]

B. *Second Court of Appeals (Fort Worth)*

The Second Court of Appeals has cited neither section 41.0105 nor *Haygood* in a full opinion. In fact, it has cited only one of them—*Haygood*—in a memorandum opinion.[88] Even then, it was in reference to a plaintiff's failure to offer any documentary evidence regarding her medical expenses.[89] Therefore, it is unclear what the Second Court of Appeals would do if confronted with a situation like that in *Katy Springs*.

C. *Third Court of Appeals (Austin)*

The Third Court of Appeals has only tangentially touched on topics relevant to this Article.[90] In *Texas Department of Transportation* v. *Banda*,[91] the trial court allowed the plaintiff to admit documentary evidence of the full amount billed by one of his medical providers even though the medical

85. *Huston*, 434 S.W.3d at 639 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (emphasis in original). *Compare id.* (emphasis in original) (interpreting *Haygood* as restricting a plaintiff's recovery of medical expenses to the amount paid by the factoring company), *with* Katy Springs & Mfg., Inc., v. Favalora, 476 S.W.3d 579, 601 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (arguing *Haygood* limits recovery for medical expenses to the amounts paid for purchase of accounts receivable from the medical providers).

86. *Huston*, 434 S.W.3d at 639.

87. *Id.*

88. Sutton v. Helwig, No. 02-12-00525-CV, 2013 WL 6046533, at *5 (Tex. App.—Fort Worth Nov. 14, 2013, no pet.) (mem. op.).

89. *Id.*

90. *See* Kosaka v. Hook & Anchor Marine & Watersports, LLC, No. 03-11-00134-CV, 2012 WL 5476844, at *4–5 (Tex. App.—Austin Nov. 8, 2012, no pet.) (mem. op.) (holding a judgment is irreversible on appeal on grounds that the trial court performed an error of law unless the complained-of error was harmful); Tex. Dep't of Transp. v. Banda, No. 03-09-00724-CV, 2010 WL 5463857, at *4–5 (Tex. App.—Austin Dec. 22, 2010, pet. denied) (mem. op.) (remanding for new trial—due to insufficient evidence to support damages amount—on all issues, including past medical expenses).

91. Tex. Dep't of Transp. v. Banda, No. 03-09-00724-CV, 2010 WL 5463857 (Tex. App.—Austin Dec. 22, 2010, pet. denied) (mem. op.)

provider settled with the plaintiff for a smaller amount before trial.[92] The court of appeals reversed on other grounds without addressing the issue.[93]

In *Kosaka v. Hook & Anchor Marine & Watersports, LLC*,[94] the plaintiff stipulated that his medical providers would accept $44,733.69 as full payment for the services that had been rendered to him, and he settled his claim with another defendant for $320,000.[95] The plaintiff argued that the jury improperly awarded zero damages for past medical expenses, but the court held that any error was harmless, citing section 41.0105 and *Haygood* as limiting the plaintiff's recovery to the stipulated $44,733.69 and noting that the $320,000 settlement credit far exceeded that amount.[96]

D. *Fourth Court of Appeals (San Antonio)*

Almost five years before *Haygood*, the Fourth Court of Appeals "h[e]ld that section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or 'written off.'"[97] In a more recent memorandum opinion interpreting *Haygood*, the court further explained that, under section 41.0105, "the plaintiff may only recover the amount of medical care expenses he actually has to pay."[98] This wording is similar to that used in *Katy Springs*.[99]

In addition to that similarity, the Fourth Court of Appeals has historically been aware of the practice of factoring and the effect that its holdings could have on that practice.[100] After determining that a statute had been enacted to encourage factoring,[101] the court refused to reach a holding that would

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92. *Id.* at *3.

93. *Id.* at *6.

94. Kosaka v. Hook & Anchor Marine & Watersports, LLC, No. 03-11-00134-CV, 2012 WL 5476844, at *4–5 (Tex. App.—Austin Nov. 8, 2012, no pet.) (mem. op.)

95. *Id.* at *1.

96. *Id.* at *4–5.

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

98. VIA Metro. Transit Auth. v. Barraza, No. 04-13-00035-CV, 2013 WL 6255761, at *7 (Tex. App.—San Antonio Dec. 4, 2013, pet. denied) (mem. op.).

99. Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 603–04 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) ("This situation, in contrast, involves medical expenses that Favalora is contractually obligated to pay in full."). Similarly, plaintiffs in California are able to recover the "reasonable value of medical care and services." Hanif v. Hous. Auth., 246 Cal. Rptr. 192, 195 (Ct. App. 1988).

100. *See* Scarborough v. Victoria Bank & Trust Co., 250 S.W.2d 918, 922 (Tex. Civ. App.—San Antonio 1952, writ ref'd) (claiming a potential "result of compliance with the mechanic's and materialmen's statutes would be to prevent funds from passing into the hands of the contractor and thus prevent their being received by the assignee" and such holding would essentially defeat the purpose of the statute).

101. *See id.* ("From the wording of the [A]ct itself it appears that its purpose was to encourage accounts receivable financing."). In the opinion, the court used the term "accounts receivable

prevent mechanic's liens from being factored.[102] With a few small revisions, the court's reasoning perfectly mirrors that of *Katy Springs* with regard to a medical factoring company's rights as the assignee of the medical providers: "The mechanic's lien statute relates to the relationship between the owner, contractor, sub-contractors, materialmen and laborers. They do not relate to the relationship between a contractor and his assignee."[103]

E. *Fifth Court of Appeals (Dallas)*

The Fifth Court of Appeals decided the *Gallegos* case explained above that was so informative to the *Katy Springs* court.[104] In addition to the brief description of the case above, the following language from the *Gallegos* opinion is relevant here: "Unlike *Haygood*, there was no evidence of any contract that would have prohibited [the medical providers] from charging Gallegos for the full value of the services rendered."[105] This statement references the Medicare contracts lowering the price of Haygood's medical services,[106] but it also implies the effectiveness of Contract *B*, outlined above.[107] If the absence of a contract reducing medical expenses allows for the recovery of the full amount billed, then surely the existence of a contract explicitly requiring payment of the full amount will do the same.

Two additional relevant decisions out of the same court indicate a more ambiguous stance.[108] In a 2014 memorandum opinion, the court remanded

financing," which is synonymous with factoring. *See* NOEL RUDDY ET AL., *supra* note 21, at 7–8.

102. *Scarborough*, 250 S.W.2d at 922–23.

103. *Compare id.* at 922 ("The mechanic's lien statute relates to the relationship between the owner, contractor, sub-contractors, materialmen and laborers. They do not relate to the relationship between a contractor and his assignee."), *with Katy Springs & Mfg.*, 476 S.W.3d at 604 ("[By] virtue of the assignments, MedStar and the medical providers are one and the same for purposes of determining the admissibility of evidence under [S]ection 41.0105 and *Haygood*.").

104. *Katy Springs & Mfg., Inc.*, 476 S.W.3d at 602–03 (citing *Gallegos* to support finding that evidence of medical expenses paid is admissible irrespective of factoring company's discount purchase of accounts receivable from the medical providers); *see also* Big Bird Tree Serv. v. Gallegos, 365 S.W.3d 173, 177 (Tex. App.—Dallas 2012, pet. denied).

105. *Id.*

106. *Compare* Haygood v. De Escabedo, 356 S.W.3d 390, 392 (Tex. 2011) ("Federal law prohibits health care providers who agree to treat Medicare patients from charging more than Medicare has determined to be reasonable."), *with Big Bird Tree Serv.*, 365 S.W.3d at 177 ("Unlike *Haygood*, there was no evidence of any contract that would have prohibited [the medical providers] from charging Gallegos for the full value of the services rendered.").

107. Lewis, *supra* note 29, at 40 (asserting the effectiveness of Contract *B*—between the injured plaintiff and the factoring company—in allowing non-insured injured parties to recover full medical expenses by obligating the plaintiff to pay for the full amount of medical expenses—not the reduced amount paid by the factoring company, thereby recovering the full amount actually paid or incurred).

108. Adley v. Privett, No. 05-12-01581-CV, 2014 WL 3371920 (Tex. App.—Dallas July 9, 2014, no pet.) (mem. op.); Prabhakar v. Fritzgerald, No. 05-10-00126-CV, 2012 WL 3667400 (Tex. App.—

for a new trial after the trial court admitted three medical bills into evidence in support of the plaintiff's claim for past medical expenses and the jury awarded $44,568.07—the total amount claimed by the plaintiff.[109] Three sentences could have broad implications on the present discussion:

> [A]t least two of the medical bills Privett submitted as evidence did not establish the amounts charged by the providers were actually paid or incurred by or on behalf of Privett. The unadjusted hospital bill shows only what Privett was billed. Similarly, the PHI Air bill provided no evidence of the amount actually paid or incurred on behalf of Privett.[110]

Though this passage could be interpreted as requiring affirmative evidence that the amount billed is the amount owed, practitioners would be better served to interpret the case more narrowly: In addition to the two above-mentioned medical bills, Privett submitted a third, which indisputably contained unrecoverable amounts and payments in violation of the collateral source rule.[111] After noting that the addition of these unrecoverable costs could have contributed to the jury's assessment of non-economic damages, the court reversed and remanded for a new trial.[112]

In a full opinion from 2012 that was not published in the Southwestern Reporter, the court affirmed a trial court's reduction in damages awarded by a jury to an amount the parties stipulated was the actual amount paid to the plaintiff's medical providers.[113] In that case, the parties signed a Rule 11 agreement stipulating that (1) the full amount billed by plaintiff's medical providers was $1,280,041.32; (2) that said amount was reasonable and necessary; and (3) the actual amount paid to plaintiff's medical providers was $932,649.42.[114] The jury awarded $1,280,000 for past medical expenses, and the trial court modified the judgment to reduce that award to the stipulated amount actually paid.[115]

F. *Sixth Court of Appeals (Texarkana)*

The Sixth Court of Appeals has not had occasion to interpret either

Dallas Aug. 24, 2012, no pet.).

109. *Adley*, 2014 WL 3371920, at *1.

110. *Id.* at *2.

111. *Id.* (indicating plaintiff may only recover medical expenses evidenced by actual payment).

112. *Id.* at *3.

113. *Prabhakar*, 2012 WL 3667400, at *13–14.

114. *Id.* at *14.

115. *Id.* at *13–15. The court actually reduced the award to "an amount six cents less than th[e] stipulated amount" but that six cents was not complained of. *Id.* at *15 n.2.

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section 41.0105 or *Haygood.*

G. *Seventh Court of Appeals (Amarillo)*

In *Henderson v. Spann*[116] the Seventh Court of Appeals addressed an issue similar to that addressed by the Fifth Court of Appeals in *Adley v. Privett.*[117] In *Henderson*, Timothy Wayne Spann was injured in a motor-vehicle accident and submitted unadjusted medical bills at trial in the amount of $69,583.20.[118] The defendant attempted to introduce evidence of $54,379.56 in adjustments to those medical bills, but was not allowed to do so.[119] On appeal, the court relied on *Haygood* to hold that the trial court abused its discretion and committed reversible error by admitting the unadjusted medical bills while excluding evidence of the adjusted medical bills.[120] As with *Adley*, practitioners would be wise to interpret *Henderson* narrowly—when evidence of write-offs or adjustments is available, admission of the unadjusted medical bills is reversible error.

The Seventh Court of Appeals has also held, in a pre-*Haygood* opinion, that a debt for medical expenses discharged in bankruptcy is not paid or incurred for purposes of section 41.0105.[121]

Defense attorneys who are considering arguing the existence of Contract *C* as described above[122] should know that the Seventh Court of Appeals has rejected unsubstantiated claims of such a contract.[123] Liability was not at issue in the appeal, but the defendant took issue with a bill for an MRI that was presented by the plaintiff in the trial court:

> "This $5,400 MRI bill is part of the same chiropractic scam to make the damages seem higher than they really are. Neither Quintero nor his attorney is obligated to pay these fees in their full amount, if at all. Pursuant to Civ. Prac. Rem. Code § 41.0105, Delacerda is only obligated to pay what Qunitero paid or incurred . . . If the plaintiff's attorney refuses to disclose this agreement to the [c]ourt, the [c]ourt should disregard any claimed damages

116. Henderson v. Spann, 367 S.W.3d 301 (Tex. App.—Amarillo 2012, pet. denied).

117. Adley v. Privett, No. 05-12-01581-CV, 2014 WL 3371920 (Tex. App.—Dallas July 9, 2014, no pet.) (mem. op.).

118. *Henderson*, 367 S.W.3d at 302.

119. *Id.*

120. *Id.* at 305.

121. Tate v. Hernandez, 280 S.W.3d 534, 536–37 (Tex. App.—Amarillo 2009, no pet.).

122. Lewis, *supra* note 29, at 40.

123. *See* Delacerda v. Quintero, No. 07-16-00081-CV, 2016 WL 4702332 (Tex. App.—Amarillo Sept. 6, 2016, pet. filed) (mem. op.) (citing TEX CIV. PRAC. & REM. CODE § 41.0105 (West 2016)).

for the medical care."[124]

This court was puzzled over the meaning of the argument before dismissing it as waived under Texas Rule of Appellate Procedure 38.1(i).[125] "Is [Delacerda] suggesting that Quintero's attorney had some type of agreement with a chiropractor whereby the chiropractor would prescribe unnecessary treatment to clients simply to enhance the amount of recoverable damages?" The court further noted that the record contained no evidence of such an agreement or scam.[126]

H. *Eighth Court of Appeals (El Paso)*

The Eighth Court of Appeals has not examined section 41.0105 since *Haygood*, and it has never substantively examined the *Haygood* decision itself. The court did issue an opinion in 2000 that examined factoring arrangements in the context of a security agreement and foreclosure sale.[127] Though that opinion examined a situation very different from personal-injury litigation and was eventually reversed for applying the wrong statute, it indicates a willingness on the part of the court to uphold the validity of proper factoring agreements.[128]

I. *Ninth Court of Appeals (Beaumont)*

The Ninth Court of Appeals has not interpreted section 41.0105 or *Haygood*. Before the *Haygood* decision, section 41.0105 was implicated once, but the court reversed on other grounds and did not reach the issue.[129]

J. *Tenth Court of Appeals (Waco)*

The Tenth Court of Appeals has cited to *Haygood* in a memorandum opinion in support of its application of the collateral source rule.[130] Aside from that, the court has not examined section 41.0105 or *Haygood*.

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124. *Id.* at *1.

125. *Id.* at *2.

126. *Id* at *1.

127. *See* Al Gailani v. Riyad Bank Hous. Agency, 22 S.W.3d 560 (Tex. App.—El Paso 2000) (identifying a case in which the Eighth Court of Appeals briefly reviewed factoring arrangements), *rev'd sub nom.* Riyad Bank v. Al Gailani, 61 S.W.3d 353 (Tex. 2001).

128. *See id.* at 565 (quoting the official comments on a previous version of the Texas Business and Commerce Code regarding factoring and refusing to interpret the security agreement at issue to make it inconsistent with the purposes of the statute as explained in those comments).

129. Christus Health Se. Tex. v. Hall, No. 09-07-074, 2008 WL 2759785, at *7 n.3 (Tex. App.—Beaumont July 17, 2008, no pet.) (mem. op.).

130. Maddux v. Reid, No. 10-13-00174-CV, 2015 WL 3821153, at *3 (Tex. App.—Waco June 18, 2015, no pet.) (mem. op.).

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K. *Eleventh Court of Appeals (Eastland)*

The Eleventh Court of Appeals is yet another court that has not yet examined a case with the benefit of the *Haygood* opinion's analysis. Prior to *Haygood*, however, this court reached the same conclusion:

> Section 41.0105 does not provide for the recovery of the amounts initially incurred by the claimant. To the contrary, it limits the recovery to the amounts actually incurred by the claimant or his insurer. Amounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred by either the claimant or the claimant's insurer because neither the claimant nor the insurer will ultimately be liable for paying these amounts.[131]

L. *Twelfth Court of Appeals (Tyler)*

The Twelfth Court of Appeals has not substantively reviewed *Haygood*, but it is important to note that it was this court's application of section 41.0105 that was affirmed by the Texas Supreme Court in *Haygood*.[132]

M. *Thirteenth Court of Appeals (Corpus Christi)*

The Thirteenth Court of Appeals considered a limited appeal involving the application of section 41.0105 but decided the case without addressing that issue.[133] More recently, the court has relied on both section 41.0105 and *Haygood* to refute the argument that a plaintiff may recover only "what he has paid or is obligated to pay out of pocket."[134] Accordingly, insurance payments to or for a plaintiff do not reduce his recovery.[135]

N. *Fourteenth Court of Appeals (Houston)*

In addition to *Katy Springs*, the Fourteenth Court of Appeals also decided *Metropolitan Transit Authority v. McChristian*,[136] which it distinguished in *Katy Springs*.[137] In that case, Calvin McChristian was injured when a light-rail

131. Matbon, Inc. v. Gries, 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.).

132. De Escabedo v. Haygood, 283 S.W.3d 3 (Tex. App.—Tyler 2009), *aff'd*, 356 S.W.3d 390 (Tex. 2011).

133. Flores v. Garcia, No. 13-15-00047-CV, 2015 WL 5895087, at *2, *8 (Tex. App.—Corpus Christi Oct. 8, 2015, no pet.) (mem. op.).

134. PHI, Inc. v. LeBlanc, No. 13-14-00097-CV, 2016 WL 747930, at *6–7 (Tex. App.—Corpus Christi Feb. 25, 2016 pet. filed) (mem. op.).

135. *Id.* (citing Haygood v. De Escabedo, 356 S.W.3d 390, 395 (Tex. 2011)).

136. Metro. Transit Auth. v. McChristian, 449 S.W.3d 846 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

137. *See* Katy Springs & Mfg., Inc. v. Favalora, 476 S.W.3d 579, 603 (Tex. App.—Houston [14th

train collided with the bus on which he was riding.[138] At trial, McChristian offered into evidence medical bills totaling $31,264.99.[139] Some of the bills affirmatively indicated on their face that no adjustments or write-offs had been made to the billed amounts; others merely showed list prices and did not indicate either way whether those prices had been subject to any reductions or reimbursements.[140] Records clearly showed that McChristian was uninsured and his payment method was identified as "self pay."[141] On these facts, the court found that "the difficulty highlighted in *Haygood*" did not apply, and the trial court properly admitted evidence of the full amount paid.[142]

In another case, the Fourteenth Court of Appeals rejected the idea that contracts between insurance companies and medical providers were protected by the collateral source rule.[143] Its language could broadly be applied to factoring agreements as well:

> Parkan is entitled to discovery of the insurance contracts to aid in determining whether the providers are required to accept payments of less than the amounts billed. The record does not reflect that Parkan is attempting to bring a breach of contract action, nor is he required to do so to be entitled to discovery of the insurance contracts.[144]

Under that logic, Contracts *A* and *B*—and even the rumored Contract *C*—in the example outlined earlier in this Article are all discoverable.[145]

V. THE NEED FOR CLARITY

After the foregoing review of the relevant case law, there are no obvious signs of a coming split between the courts of appeals on the issue of medical factoring and how it affects the application of section 41.0105. Only one Texas court of appeals has so far directly addressed the issue, but several of its sister courts have indirectly addressed portions of the issue. Of course, a conflict between courts of appeals is only one reason for the Texas

Dist.] 2015, pet. denied) (underscoring that the *McChristian* opinion was distinguishable because it did not involve a factoring arrangement).

138. *McChristian*, 449 S.W.3d at 849.

139. *Id.* at 853.

140. *Id.*

141. *Id.* at 853–54.

142. *Id.* at 854.

143. *In re* Jarvis, 431 S.W.3d 129, 136–37 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

144. *Id.* at 137.

145. *See* Lewis, *supra* note 29, at 39–40.

Supreme Court to take up a case.[146] Another is that "the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court."[147] This latter reason is the one that should lead the Texas Supreme Court to take up the issue.

Because of the long history of medical factoring in Texas and elsewhere and the continued tort reform movement, especially in Texas,[148] there is no question that the issue will re-emerge. And though the simplest and most effective course of action for the Texas Supreme Court would have been an affirmation of *Katy Springs*, that court has denied review of that case. This, of course, indicates that the Texas Supreme Court "is not satisfied that [*Katy Springs*] has correctly declared the law in all respects" but has found no reversible error.[149]

Nevertheless, *Katy Springs* is the only appellate decision to directly consider the interplay between medical factoring and section 41.0105. Until the issue is decided by the Texas Supreme Court, practitioners should pay close attention to the reasoning laid out in *Katy Springs*. Though the facts of their own cases may provide grounds for distinguishing *Katy Springs*, attorneys who ignore that decision do so at their own peril.

146. *See* TEX. R. APP. P. 56.1 (identifying "factors the Supreme Court considers in deciding whether to grant a petition for reviewa").

147. *Id.* 56.1 (6).

148. *See, e.g.*, Robert M. (Randy) Roach, Jr., *The Top Ten Reasons for Hiring an Appellate Specialist in the Trial Court*, HOUS. LAW. at 32, 33 (Sept.–Oct. 2015) ("Over the last few years, the combination of statutory tort reform and a more conservative Texas Supreme Court has changed some areas of the law dramatically and some other areas very subtly.").

149. TEX. R. APP. P. 56.1(b)(1).