

MEDICAL DEFENSE AND HEALTH LAW

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Robert G. Smith and Emiliano Farciert Jr. summarize a recent opinion by the Supreme Court of Texas, where the Court clarified who can provide affidavits to contradict the reasonableness and necessity of a plaintiff's medical charges, and that a defendant can contest such evidence at trial whether or not it filed counteraffidavits.

Clarification Regarding Defendant's Right to Contest Plaintiff's Affidavits Concerning Cost and Necessity of Medical Expenses

ABOUT THE AUTHORS



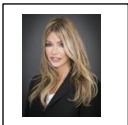
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ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

In personal injury cases in Texas, plaintiff attorneys often use affidavits to prove the plaintiff's medical bills are reasonable and necessary and they almost always use the medical provider's "charge master" rate, as opposed to the usual and customary reimbursement rates paid by insurers, Medicare, or cash payors. *In Re Allstate Indemnity Company* (No. 20-0071, 2021 Tex. LEXIS 375, *1-30 (May 7, 2021)) provides clarification that:

1. Experts with knowledge of CPT codes who routinely use databases to determine reasonableness of medical charges may be qualified to prepare counteraffidavits, and do not have to be health care providers in a particular specialty.
2. Defendants can challenge the reasonableness and necessity of plaintiff's medical charges at the time of trial even though no counteraffidavit was filed or a counteraffidavit was filed and struck.

Background:

In Texas, section 18.001 of the Civil Practice and Remedies Code permits a plaintiff to submit affidavits in support of past medical expenses to establish that the charges for the services rendered are reasonable and necessary. The affidavit concerning cost and necessity provides sufficient evidence to support a finding of fact by the judge or jury that the amount charged was reasonable and that the service was medically necessary.

Once submitted, a defendant intending to controvert a claim reflected in the affidavit must serve a counteraffidavit within a limited time period. To comply with the statute, the defendant's counteraffidavit must "give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths." Further, the "counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." *Id.* § 18.001(f).

Defendants use a wide range of experts to challenge the reasonableness or necessity of plaintiff's claimed medical expenses. Plaintiffs often move to strike the defendant's counteraffidavits for a variety of reasons including, the opinion is unreliable, the expert is unqualified to render the opinion, and lack of notice as to how the defendant intends at trial to controvert the medical charges. In many jurisdictions in Texas, courts frequently strike defendants' counteraffidavits because the courts have misinterpreted the statutory requirements. Further, in those instances when no counteraffidavit has been filed, or a counteraffidavit has been struck, courts often refuse to allow the defendant from challenging at trial the reasonableness of the charges. Such sanction operates as a death penalty. *In Re Allstate* provides much

needed guidance regarding the meaning and application of section 18.001. The new opinion clarifies what experts are qualified to render an opinion on the reasonableness of medical billing charges, the meaning of the “reasonable notice” requirement of the counteraffidavit, and the practical effect of a trial court completely barring the defense from challenging at trial the “reasonableness” of the medical bills.

The Holding:

The trial court abused its discretion by striking the defendant’s counteraffidavit on improper grounds and by precluding the defendant’s expert from testifying on the reasonableness and necessity of the plaintiff’s medical expenses.

Why It Matters:

In Re Allstate recognizes that several routine arguments being made on behalf of plaintiffs seeking to strike a defendant’s 18.001 counteraffidavit based on lack of expertise, lack of notice, and unreliability find no support in the express words in the statute. The opinion also clarifies that preventing a party from introducing evidence or even inquiring as to the reasonableness or necessity of medical charges at trial where no counteraffidavit, was filed or it was struck, has no textual support and is subject to correction in a mandamus proceeding.

Case Synopsis:

Norma Alaniz was injured in an automobile accident and attempted to collect Underinsured Motorist (UIM) benefits from her own insurance company, Allstate Indemnity Company. Alaniz brought suit against Allstate for breach of contract, violations of the Texas Insurance Code and the Deceptive Trade Practices-Consumer Protection Act. In support of her past medical expenses, Alaniz filed affidavits from several medical providers pursuant to Civil Practices and Remedies Code section 18.001. Her medical expenses totaled approximately \$41,000.

In response, Allstate served a counteraffidavit from Christine Dickison, a registered nurse experienced in medical billing and coding. Dickison’s counteraffidavit challenged the reasonableness of the medical charges. Dickison’s counteraffidavit outlined her qualifications: twenty one years of experience in the healthcare industry, twelve years of medical billing review, coding and auditor certification by the AAPC (formerly the American Association of Professional Coders), associate’s and bachelor’s degrees in nursing. Dickison also provided her methodology for determining what is a reasonable charge. She compared the provided CPT codes and charges to an online database called “Context4Healthcare” to determine the median charge for the service associated with each CPT code in the zip code and on the date on which the service was rendered, and opined that charges that exceed the median rate were unreasonable.

Alaniz filed a Motion to Strike Dickison's counteraffidavit which was granted after an evidentiary hearing in which the trial court made the following findings: (1) Dickison did not "have the expertise required . . . to controvert the reasonableness of the charges for the hospitals, doctors, physical therapists, pharmacies, and other healthcare providers at issue in this case"; (2) Dickison's opinions and the data on which they are based are "unreliable"; (3) Dickison's counteraffidavit failed to provide reasonable notice of the bases for her contravention of Alaniz's affidavits or show that she is qualified to contravene the matters contained in Alaniz's affidavits, and that her "familiarity with CPT codes" does not establish that she has the requisite knowledge of the services themselves; and finally (4) Dickison's choice of the "median" charge for determining reasonability is conclusory and her affidavit fail to establish how a charge that exceeds the selected median is unreasonable. Based on all of these findings, the trial court struck Dickison's counteraffidavit, prohibited her from testifying at trial regarding reasonableness and necessity of the medical bills filed to date, and prohibited Allstate entirely from "questioning witnesses, offering evidence, or arguing to the jury the reasonableness of the medical bills" Alaniz had already submitted by her 18.001 affidavits.

The 13th Court of Appeals denied mandamus relief stating only that Allstate "ha[d] not met its burden to obtain mandamus relief."

In re Allstate Indemn. Co., No. 13-19-00346-CV, 2019 WL 5866592, at *2 (Tex. App.—Corpus Christi-Edinburg Nov. 8, 2019, orig. proceeding) (mem. op.). On appeal by writ of mandamus, Allstate asked the Texas Supreme Court for relief.

Alaniz argued that Dickison is not qualified to opine on the reasonableness of medical charges by a hospital or other medical provider because those may be challenged only by someone who is in the same field of medicine. The Court disagreed entirely, noting that this issue was already settled in *Gunn v. McCoy*, wherein the court concluded that insurance agents who have access to national and regional databases to compare pricing "are generally well suited to determine the reasonableness of medical expenses." 554 S.W.3d 645, 673 (Tex. 2018).

The trial court also found that Dickison's counteraffidavit failed to meet the statute's "reasonable notice" requirement because (1) it failed to show that she is familiar with the services in dispute and (2) it was conclusory insofar as she used the median charge as the test for reasonableness. The Court noted that the stated issues may be potential bases on which to challenge the admissibility and weight of Dickison's opinions at trial, but the statute does not charge trial courts with determining admissibility of the affiant's opinions and that admissibility issues are not a proper basis to strike a counteraffidavit. The Court stated that section 18.001's "reasonable notice" requirement is simply an analysis of whether the affiant provided the opposing

party sufficient information to enable that party to prepare a defense or a response.”

The trial court further found Dickison’s opinions to be unreliable. Alaniz argued that section 18.001 requires that the affiant and any opinions expressed must meet the admissibility requirements for expert testimony at trial because section 18.001(f) requires the person making the counteraffidavit to be qualified “to testify” regarding the matters contained in the initial affidavit. The Court disagreed. The use of the phrase “to testify” in the second sentence of section 18.001(f) “focuses not on the substance of the testimony, but only on the qualifications of the affiant.” Whether the witness is qualified to provide expert testimony and whether the expert’s opinions are reliable are two distinct issues. The Court expressly rejected the examination of reliability of the expert’s opinion under Texas Rule of Evidence 702 or *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) as it relates to providing reasonable notice on the bases on which a party intends to controvert the reasonableness of a party’s medical expenses.

Finally, the Court examined the reasoning that guided the trial court to prohibit Allstate from questioning witnesses, offering evidence or arguing to the jury the reasonableness of the medical charges. Justice Huddle stated, “[w]hile an uncontroverted section 18.001(b) affidavit

may constitute *sufficient* evidence of reasonableness and necessity, nothing in section 18.001 even suggests an uncontroverted affidavit may be *conclusive* on reasonableness and necessity. There is no textual support for the assertion that the absence of a proper counteraffidavit constitutes a basis to constrain the defendant’s ability to challenge—through evidence or argument—the claimant’s assertion that her medical expenses are reasonable and necessary.” The Court expressly rejected this complete bar to the introduction of contrary evidence at trial because it lacks any basis whatsoever in the statute’s text. “Section 18.001 nowhere provides for the exclusion of any evidence based on the absence of a proper counteraffidavit.” The Court ultimately found that this complete exclusion on part of Allstate was anything but a “routine evidentiary ruling” and would “preclude Allstate from engaging in meaningful adjudication of Alaniz’s claim for payment of medical services, vitiating or severely compromising Allstate’s defense.”

Significant language in the court’s reasoning: “The claimant’s decision to file initial affidavits may relieve her of the burden to adduce expert trial testimony on reasonableness and necessity, but the opposing party’s failure to serve a compliant counteraffidavit has no impact on its ability to challenge reasonableness or necessity at trial.” *Allstate*, 2021 Tex. LEXIS 375 at *23.

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