Legal Backgrounder

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Texas High Court Rulings on Medical-Expense Damages Reel in Plaintiffs' Windfall-Profit Tactics

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The Texas legislature and courts have long sought to prevent plaintiffs in personal injury cases from exploiting medical expense damages to produce windfall recoveries. With the enactment of Tex. Civ. Prac. & Rem. Code § 41.0105 in 2003, the Texas legislature limited the sums recoverable for treatment of the plaintiff's injuries to "the amount actually paid or incurred by or on behalf of the claimant." And in the groundbreaking *Haygood v. De Escabedo* ruling, which addressed whether plaintiffs could be awarded sums disallowed or written off pursuant to Medicare reimbursement terms, the Texas Supreme Court held that "the common-law collateral source rule does not allow recovery as damages of medical expenses a health care provider is not entitled to charge."[1]

Despite the strong framework Texas law presents, plaintiffs' attorneys have found ways to expand the available medical expense damages or prevent defendants from challenging the recoverability of claimed treatment costs. One such tactic involves the use of a "letter of protection," which is an agreement between a claimant and the care provider in which the claimant guarantees the provider will be paid at the undiscounted invoice rate for the treatment services rendered with proceeds from a lawsuit and the health care provider agrees not to submit a claim for payment to the plaintiff's insurer. This mechanism allows plaintiffs to avoid the *Haygood* holding and the intended effect of §41.0105 by maintaining treatment bills in an incurred but unpaid status until after the lawsuit is resolved.[2] Another commonly employed approach challenges the defendant's ability to contest whether the plaintiff's claimed treatment expenses are reasonable. These attacks initially focus on the validity of a defendant's expert affidavit under Tex. Civ. Prac. & Rem. Code § 18.001, and if successful then expand to preclude all defendants' evidence at trial.[3]

In two recent mandamus decisions, *In re K & L Auto Crushers, LLC*[4] and *In re Allstate Indemnity Co.*,[5] the Texas Supreme Court examined these practices and imposed substantial constraints on their use. In doing so, the court re-established Texas' commitment to ensuring that damage awards for medical expenses truly represent the reasonable value of the treatment provided and are not artificially inflated.

In re K & L Auto Crushers, LLC. The court's May 28, 2021 *In re K & L Auto Crushers, LLC* decision lays the foundation for defendants to blunt the often-abusive effects of "letter of protection" arrangements used to obtain medical treatment for an injured plaintiff. The ruling considers the relevance of reimbursement rates

[1] 356 S.W.3d 390, 396 (Tex. 2011).
[2] *See, e.g., Rutherford v. Joe Rud Trucking Inc.*, No. SA-13-CA-856-FB (HJB), 2015 WL 12582805, at *3 (W.D. Tex. Jan. 15, 2015).
[3] *See, e.g., In re Savoy*, 607 S.W.3d 120, 130 (Tex. App.—Austin 2020) ("[I]f no counteraffidavit is filed, an opposing party may not introduce contrary evidence at trial[.]"); *Ten Hagen Excavating, Inc. v. Castro-Lopez*, 503 S.W.3d 463, 494 (Tex. App.—Dallas 2016) (holding that trial court properly excluded evidence contesting the reasonableness of plaintiff's claimed medical expenses "in the absence of a proper counteraffidavit").
[4] ___ S.W.3d ___, No. 19-1022, 2021 WL 2172535 (Tex. May 28, 2021).
[5] ___ S.W.3d ___, No. 20-0071, 2021 WL 1822946 (Tex. May 7, 2021).

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that a plaintiff's providers have accepted for patients covered by private insurance or government programs, when compared to the treating physicians' "chargemaster"[6] rates invoiced for the same services provided to a plaintiff pursuant to an attorney letter of protection in determining what constitutes a "reasonable" charge. Ultimately, the court ruled that defendants may pursue discovery into the providers' agreed payment rates from insurers and other sources for services similar to what the plaintiff received.[7] This ruling will allow defendants to mount more effective challenges against claims for bloated health care charges incurred under a letter of protection scheme, and will likely deter some medical providers from entering into such agreements.

The *In re K & L Auto Crushers, LLC* holding specifically examined a trial court's order disallowing discovery aimed at uncovering the claimant's medical providers' reimbursement rates from private insurers and government programs such as Medicare and Medicaid for the same treatment as the plaintiff received under a letter of protection arrangement.[8] Letter of protection arrangements are generally put in place to avoid the damages cap established by §41.0105, which prevents a plaintiff from recovering more for claimed medical expenses than were "actually paid or incurred." Under a letter of protection arrangement, because no sums have changed hands to pay for the care provided to the plaintiff, the provider can assert that the "incurred" value of the services that the plaintiff received is the undiluted chargemaster rate, and §41.0105 will not directly pose an obstacle to recovering that inflated sum. The plaintiff involved in the case claimed that the value of the medical expenses for treatment of shoulder and back injuries exceeded $1.2 million, even though treatment was not sought immediately after the accident and actually did not even begin until four days after the accident.[9] The defendant asserted as a primary defense that the claimed charges were unreasonable, and served subpoenas directly on the plaintiff's health care providers to obtain documents and information revealing the reimbursement rates the providers agreed to accept as payment in full for similar services provided to other patients covered by private health insurance or government programs. The trial court refused to allow this discovery.[10]

The Texas Supreme Court determined that the complete denial of this discovery reflected an abuse of discretion.[11] Under §41.0105, a plaintiff's damages for medical expenses are capped not just by the amounts "actually paid or incurred," but also by the common law limitation that medical expenses must be "reasonable." Although sums accepted for providing similar treatment to other patients might not be dispositive of the services' value, the fact that a provider has accepted substantially smaller sums as payment in full for giving the same treatment to another patient is certainly relevant to evaluating whether the chargemaster rate represents a reasonable price for those treatment services.[12] To the extent that the plaintiff has agreed to pay the provider a sum that exceeds a reasonable charge, responsibility for paying the inordinate amounts lies with the claimant and not the tortfeasor.[13]

The court also considered arguments about the proper scope of discovery addressing providers' reimbursement rates with insurers and government programs. Broad discovery seeking "all documents" or "all communications" on this topic are overbroad and disproportionate to the needs of the case, particularly in light of the providers' third-party status in a lawsuit against the tortfeasor. Targeted discovery focused

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[6] As one court has described, "a 'chargemaster' is a hospital's list reflecting the predetermined charge, akin to a 'sticker price,' for each service or product that it provides." *In re Muller*, No. 07-20-00138-CV, 2020 WL 6555050, at *1 n.1 (Tex. App.—Amarillo, Nov. 6, 2020). The chargemaster price does not account for any discounts or write-offs mandated by insurance contracts, nor does it reflect the reimbursement rate allowed by Medicare, Medicaid, or other government health care coverage programs.

[7] 2021 WL 2172535, at *13.

[8] *Id*. at *1.

[9] *Id*.

[10] *Id*. at *2 -*3.

[11] *Id*. at *13.

[12] *Id*. at *5.

[13] *See id*. at *5 ("It has long been well-settled that 'recovery of [medical] expenses will be denied in the absence of evidence showing that the charges are reasonable[.]'") (quoting *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380, 383 (Tex. 1956)).

on instances of similar treatment as the plaintiff received and delivered at the same time, however, seeks relevant evidence properly tailored to defenses asserted.[14] Further, the court acknowledged that the letter of protection arrangement effectively gives the providers a direct stake in the outcome of the litigation, which undercuts any argument the providers might assert that responding to discovery about reimbursement rates applicable to other patients would be unduly burdensome and oppressive.[15]

Allowing discovery into providers' reimbursement rates from insured and Medicare- or Medicaid-eligible plaintiffs will help defendants present a more substantial defense against excessive medical expense claims arising from letter of protection arrangements. Because the chargemaster rate is often three, five, or even ten times higher than the typical reimbursement rate,[16] many juries will have a difficult time accepting that the plaintiff's medical expenses received under a letter of protection are reasonable. Further, providers who enter into letter of protection schemes will now be required to respond to discovery about their recovery rates for other patients and to defend the notion that the chargemaster rate reflects a reasonable charge for the service provided to the plaintiff—even though the doctor may get paid only a small fraction of that sum to give other patients similar care. As a result of these disincentives, at least some health care providers will refuse to treat the plaintiff under a letter of protection arrangement.

In re Allstate Indemnity Co. The Texas Supreme Court's May 7, 2021, *In re Allstate Indemnity Co*. ruling significantly improved the defendants' opportunity to challenge the reasonableness of a plaintiff's claimed medical expenses. The *Allstate* decision addresses §18.001, a statute meant to streamline the presentation of damages evidence. Under Texas law, plaintiffs must prove that the amounts paid or incurred for past medical expenses are "reasonable." Plaintiffs can make this showing with expert testimony presented to the jury at trial, but § 18.001(b) allows a claimant to make this showing by submitting a simple affidavit from the treatment provider or the provider's records custodian. If the charges are uncontroversial, this affidavit will be sufficient proof to support the damages claim for the charged sums. Defendants, however, may challenge this proof by serving a "counteraffidavit" from an expert. Despite this opportunity afforded by statute, contesting the plaintiff's claimed expenses became difficult in practice because Texas lower courts established obstacles to defendants' submission of viable counteraffidavits.[17] Also, courts prevented defendants from contesting the reasonableness of a plaintiff's charges unless a fully compliant counteraffidavit had been provided.[18] The Texas Supreme Court in *Allstate* eliminated many of the hurdles that impeded defendants' ability to submit viable counteraffidavits, and further determined that Texas law allows defendants to dispute whether the plaintiff's claimed medical treatment charges are reasonable even if they do not serve a counteraffidavit.[19]

The *Allstate* defendants had served a counteraffidavit pursuant to §18.001(e) to challenge the reasonableness of the medical charges at issue. The trial court had excluded that counteraffidavit based on findings that: (1) the affiant, as a former nurse and medical coding and auditing professional, was not shown to have sufficient expertise; (2) the affidavit did not provide reasonable notice of the bases for her opinions; and (3) the affidavit itself did not demonstrate that the methods and bases of the opinions were

[14] *Id*. at *8.
[15] *Id*. at *9.
[16] *See*, *e.g*., *Weston v. AKHappytime, LLC*, 445 P.3d 1015, 1019 (Alaska 2019) (Hospital bill prices plaintiff's care at over $135,000, but Medicare settled the bills in full with payment of $24,247.45, representing just 18% of the chargemaster rate); *Harris v. R.J. Reynolds Tobacco Co*., 383 F. Supp. 3d 1315, 1330 (M.D. Fla. 2019) ($1,019,709.79 invoice resolved for $293,578.46 from health care insurer after contractual discounts, or 29% of the billed amount).
[17] *See*, *e.g*., *Hong v. Bennett*, 209 S.W.3d 795, 804 (Tex. App.—Fort Worth 2006) (defendant's counteraffidavit was insufficient to controvert reasonableness of medical expenses because the affiant failed to indicate how he was qualified to opine on those expenses); *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001) (counteraffidavit was inadequate to establish a dispute regarding the reasonableness of medical expenses because the affiant failed to show how he was qualified to controvert those expenses).
[18] *See* n.3, *supra*.
[19] *Allstate*, 2021 WL 1822946 at *9.

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reliable.[20] The Texas Supreme Court found the trial court's approach to the counteraffidavit erroneous. First, an expert who provides a counteraffidavit need not be a medical practitioner in the same field of medicine as the treating provider. So long as the affiant has sufficient "knowledge, skill, experience, training, or education" related to the field, that person may qualify as an expert to challenge the reasonableness of charges.[21] Second, the statutory requirement that the counteraffidavit provide "reasonable notice" only means that the counteraffidavit must set forth "sufficient information to enable [the opposing] party to prepare a defense or a response."[22] The counteraffidavit need not provide exacting detail on the bases for the opinions, the methodology employed, and the witness's qualifications. Finally, reliability of the opinions expressed in the counteraffidavit do not need to meet the standard for admissibility of expert witnesses. Admissibility of the opinion testimony set forth in the counteraffidavit is a distinct consideration that the court must address at a different stage of the proceedings.[23]

The trial court in *Allstate* had also ruled that, because the submitted counteraffidavit was inadequate under §18.001(e), the defendants would not be allowed to question witnesses, offer their own evidence, or argue to the jury that the plaintiff's medical charges were unreasonable. The Texas Supreme Court found that perspective wrong as a matter of law: a plaintiff's affidavit addressing the reasonableness of the medical expenses does not become conclusive proof simply because a defendant submits no qualifying counteraffidavit.[24] The purpose of §18.001 is to streamline evidence, not to remove the issue entirely from the jury's consideration. Certain widely cited appellate decisions, such as *Beauchamp v. Hambrick*, 901 S.W.2d 747 (Tex. App.—Eastland 1995), had improperly invented the notion that serving a counteraffidavit was a necessary prerequisite to any challenge to the reasonableness of the plaintiff's medical charges. The Texas Supreme Court determined that, to the contrary, the governing statute contains no such requirement. Accordingly, the court concluded that a defendant may dispute, through cross-examination, contrary evidence, or argument, the reasonableness of the claimed medical expenses even if no counteraffidavit was served.[25] By eliminating practical impediments to contesting a plaintiff's claimed medical expenses, the *Allstate* ruling should open opportunities for defendants litigating personal injury claims to resist excessive medical expense damages claims.

In recent years, policymakers have taken legislative action to prevent injured plaintiffs from recovering medical expense damages that exceed the reasonable market value of the treatment received. For example, Iowa's damages-limitation statute, enacted in 2020, thwarts questionable mechanisms like letters of protection when used to boost medical expense awards. If a plaintiff has available health coverage, then that claimant cannot introduce evidence suggesting that the jury should award more than what the applicable plan would pay the medical providers upon submission of the invoices.[26] Montana's statute, which took effect April 30, 2021, similarly prevents a plaintiff from claiming that the value of the treatment received exceeds the sum that the plaintiff's health insurer or applicable government program would pay the providers for the plaintiff's medical care.[27] The Texas Supreme Court's rulings in *K & L Auto Crushers* and *Allstate* will go far to ensure that medical expense damages awarded under Texas law contain no windfalls.

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[20] *Id*. at *2 - *3.
[21] *Id*. at *6.
[22] *Id*.
[23] *Id*. at *7.
[24] *Id*. at *9.
[25] *Id*.
[26] *See* I.C.A. § 622.4 (a plaintiff cannot present evidence of the value for medical services that "exceed[s] the amount by which the bills could be satisfied by the claimant's health insurance, regardless of whether such health insurance is used or will be used to satisfy the bills.").
[27] M.C.A. § 27-1-308(3)(b) (Evidence submitted to the jury on the value of a plaintiff's as-yet unpaid medical expenses "may not include any reference to sums that exceed the amount for which the unpaid charges could be satisfied if submitted to any health insurance covering the plaintiff or any public or government-sponsored health care benefit program for which the plaintiff is eligible, regardless of whether the incurred but not yet satisfied charges have been or will be submitted to the plaintiff's health insurance or public or government-sponsored health care benefit program.").

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