



## SHIPPING | JUNE 2021

# IN RE ALLSTATE INDEMNITY COMPANY: TEXAS SUPREME COURT HOLDS COUNTERAFFIDAVITS CHALLENGING UNREASONABLE AND UNNECESSARY MEDICAL BILLS NOT MANDATORY.

On May 7, 2021 the Texas Supreme Court clarified rules related to medical billing counteraffidavits. *In re Allstate Indem. Co.*, no. 20-0071. Texas statutory law allows parties in personal injury actions to file affidavits and counteraffidavits to prove and disprove whether medical expenses were reasonable and necessary. Section 18.001 of the Texas Civil Practice and Remedies Code is an evidentiary statute which allows for the admission of an affidavit to prove reasonable and necessary medical charges, even though an affidavit is normally hearsay.

The Texas Supreme Court in *In re Allstate* considered whether the trial court abused its discretion when it struck the defendant's counteraffidavit challenging the reasonableness of the claimant's medical bills. The trial court struck the counteraffidavit because (1) the affiant lacked the necessary expertise; (2) the affiant used unreliable data; (3) the counteraffidavit did not provide reasonable notice of the bases of the contravention; and (4) parts of the counteraffidavit were conclusory. Once struck, the trial court also prohibited the defendant from offering any defense to the reasonableness of the medical bills.

The Texas Supreme Court disagreed, finding the defendant's counteraffidavit *complied* with section of 18.001, and clarifying that even absent a counteraffidavit a defendant may still present evidence and argue at trial regarding whether medical bills are reasonable and necessary.

### Qualifications

The Texas Supreme Court rejected that "only someone with expertise in a particular medical field can be qualified to challenge the reasonableness of medical expenses in that field." The Court reaffirmed its express recognition<sup>1</sup> that "even non-doctors could provide expert testimony on a specific medical issue, provided that the offering party establishes the expert's knowledge, skill, experience, training or education regarding the specific issue." The Court found the defendant's expert qualified: a registered nurse with 21 years of experience in healthcare, 12 years reviewing medical bills, a certified professional coder, and a certified professional medical auditor.

### Reasonable-notice standard

The Texas Supreme Court held that the statute's reasonable-notice requirement is no different than that for pleadings under Texas Rule of Civil Procedure 47. It found the counteraffidavit at issue satisfied the reasonable-notice requirement by comparing "the charges set forth in the initial affidavits with the median charges for those same services during the same timeframe and in the same zip code, according to the Context4Healthcaredatabase." Further, when a defendant files a counteraffidavit that satisfies the reasonable-notice standard, the trial court should not assess the expert's reliability under Texas Rule of Evidence 702 or *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

### Failure to file a counteraffidavit

After striking the defendant's expert, the trial court prohibited the defendant from offering any evidence or arguing to the jury the reasonableness of the claimant's medical bills. The Texas Supreme Court ruled this action an abuse of discretion, thereby overruling part of *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no

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<sup>1</sup> See *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996).

writ). The Court held for the first time that a defendant's "failure to serve a compliant counteraffidavit has no impact on its ability to challenge reasonableness or necessity at trial." The filing of an initial affidavit by a plaintiff, although it may constitute sufficient evidence of reasonableness and necessity, is not *conclusive* evidence of reasonableness and necessity.

### Practical take-aways

Defendants may retain billing experts who are qualified by credentials, education, experience, skill, etc. They need not be a specialized medical professional.

Litigants should take note of what the Texas Supreme Court has found as reasonable notice and confidently use this format moving forward.

Defendants now have choices in defending against unreasonable and unnecessary medical expenses: (1) file a counteraffidavit which will be admitted into evidence and argue it to the jury; (2) forego a counteraffidavit and instead designate an expert on "reasonable and necessary" who will testify about the bills; or (3) both. Defense counsel's decision will be impacted by the severity of the case and the value of the unreasonable and unnecessary medical bills.

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