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LAW REVIEW

"AMENDMENTS TO TEXAS CIVIL PRACTICE & REMEDIES CODE SECTION 18.001"

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The Texas legislature enacted new amendments to Section 18.001 of the Texas Civil Practice & Remedies Code which provide clarity on a key issue faced by defendants litigating personal injury matters: the procedural use of affidavits to streamline proof of the reasonableness and necessity of medical expenses. The new amendments to Section 18.001 include the scope of affidavits, applicable deadlines, and required procedure.[1] Additionally, recent Texas appellate court opinions have provided essential guidance as to the qualifications required to execute an affidavit under Section 18.001, as well as, the qualifications required to provide a counteraffidavit under the same provision.

This article focuses on the September 2019 amendment and explores its effect on the reach of counteraffidavits, relevant deadline changes, alterations to the procedure, and qualifications required to execute an affidavit or counteraffidavit.

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[1] Tex. H.B. 1693, 86th Leg., R.S. (2019). The Bill was sent to the Texas Governor on May 24, 2019.

I. OVERVIEW OF CURRENT TEXAS CIVIL PRACTICE & REMEDIES CODE SECTION 18.001

Generally, affidavits of reasonableness and necessity are inadmissible and insufficient proof, absent expert testimony.[2] However, Section 18.001 of the Texas Civil Practice & Remedies Code provides a procedural mechanism "for the use of affidavits to streamline proof of the reasonableness and necessity of medical expenses."[3] The statute provides that an affidavit meeting Section 18.001 specifications is sufficient evidence to support a finding of fact by a factfinder that the amount charged was reasonable, or that the service was necessary.[4] However, Section 18.001 affidavits are not conclusive; as the statute specifically indicates, these affidavits can be controverted by competing affidavits.[5] Although the legislature provided an avenue to "streamline" proof of reasonableness and necessity of medical expenses, these avenues cannot negate the requirement that reasonableness and necessity be in fact proved by legally sufficient evidence.[6]

Further, "the Section 18.001(b) exception to the general rule that affidavits of reasonableness and necessity are inadmissible and insufficient proof, absent expert testimony, applies *only* if the offering party satisfies the requirements of Section 18.001(b) *and* the opposing party fails to file a controverting affidavit."[7] "By filing a proper controverting affidavit, the opposing party can force the offering party to prove reasonableness and necessity by expert testimony at trial."[8] The affidavits filed by a plaintiff are a statutory means to allow submission of uncontroverted medical bills without the normal requisite of expert testimony under Texas Rule of Evidence 702.[9]

II. THE REACH OF SECTION 18.001 COUNTERAFFIDAVITS

Prior to the passage of H.B. 1693, Texas courts uniformly recognized that uncontroverted affidavits in compliance with Section 18.001 did not substitute for evidence establishing a causal nexus between the defendant's tortious conduct and the plaintiff's medical expenses.[10] Therefore, even if a plaintiff filed such an

[2] Hong v. Bennett, 209 S.W.3d 795, 801 (Tex. App—Fort Worth 2006, no pet.) (citing Castillo v. Am. Garment Finishers Corp., 965 S.W.2d 646, 654 (Tex. App.—El Paso 1998, no pet.)).
[3] Gunn v. McCoy, 554 S.W.3d 645, 672 (Tex. 2018), *reh'g denied* (Sept. 28, 2018) (quoting Haygood v. De Escabedo, 356 S.W.3d 390, 397 (Tex. 2001) (internal quotations omitted)).
[4] Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b).
[5] *Id*; *Gunn*, 554 S.W.3d at 672.
[6] *See Haygood*, 356 S.W.3d at 397–98.
[7] *Hong*, 209 S.W.3d at 801 (citing *Castillo*, 965 S.W.2d at 654).
[8] *Hong*, 209 S.W.3d at 801 (citing *Castillo*, 965 S.W.2d at 654).
[9] Tex. R. Evid. 702.
[10] *E.g.*, Christus Health v. Dorriety, 345 S.W.3d 104, 108 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (citing Texarkana Mem'l Hosp. v. Murdock, 946 S.W.2d 836, 839–40 (Tex. 1997)); *see also* Atwood v. Pietrowicz, No. 02-10-00010-CV, 2010 WL 4261600, at *4 (Tex. App.—Fort Worth Oct. 28, 2010, no pet.) (mem. op.) ("Section 18.001 affidavits do not establish that the costs

affidavit, she still shouldered the burden of establishing that the medical expenses were made necessary by the defendant's tortious acts or omissions.[11] Thus, a factfinder is not obligated to award damages merely because a plaintiff filed a Section 18.001 compliant affidavit.[12] Instead, the factfinder is entitled to answer the damages issue as it deems appropriate.[13]

H.B. 1693 further clarified the scope of Section 18.001 as to causation, specifically adding the italicized text below:

> (b) Unless a controverting affidavit is served 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. *The affidavit is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action.*[14]

The added language makes clear that initial affidavits do not support a finding as to the causation element in a civil action. The legislature also clarified the reach of Section 18.001 as to counteraffidavits by including additional language about the use of counteraffidavits concerning causation.

> (f) The 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. The counteraffidavit must be made by a person who is qualified, by

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were caused by the defendant's actions or that the plaintiffs are entitled to those costs as a matter of law."); Walker v. Ricks, 101 S.W.3d 740, 748 (Tex. App.—Corpus Christi 2003, no pet.) ("[E]vidence presented in accordance with the statute does not conclusively establish the amount of damages nor does it establish a causal nexus between the accident and the medical expenses."); Sloan v. Molandes, 32 S.W.3d 745, 752 (Tex. App.—Beaumont 2000, no writ) (18.001 affidavits do "not establish that the amount of the damages shown to be reasonable and necessary was caused by the defendant's negligence and therefore does not establish the plaintiff's entitlement to those damages as a matter of law."); Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ) ("The statute does not provide that the evidence [submitted in the medical affidavit] is conclusive, nor does it address the issue of causation.").

[11] *Id*.

[12] *Atwood*, 2010 WL 4261600, at *4 (citing Gutierrez v. Martinez, No. 01-07-00363-CV, 2008 WL 5392023, at *9 (Tex. App.—Houston [1st Dist.] Dec. 19, 2008, no pet. (mem. op.))).

[13] *Id.*

[14] Tex. H.B. 1693.

> 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. *The counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action.*[15]

Thus, neither the initial affidavit nor the counteraffidavit may address the issue of causation.

III. RELEVANT DEADLINE CHANGES.

In addition to clarifying the scope of Section 18.001 affidavits, H.B. 1693 alters the deadlines for both service of initial affidavits and service of counteraffidavits. Prior to the amendments, a party was permitted to offer an initial affidavit at least 30 days before the first day evidence was presented at trial. However, the amendments changed this timeline.

> (d) The party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit on each other party to the case *by the earlier of:* (1) *90* days *after* the *date the defendant files an answer*; *(2) the date the offering party must designate any expert witness under a court order; or (3) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure.*[16]

This important change will require plaintiffs to serve Section 18.001 affidavits earlier than the pre-amendment 30 days before trial.

When viewed in conjunction with the plaintiffs' new requirement to serve initial affidavits within 90 days after the defendant files its answer, defendants are again left with the same 30 day allotment for controverting. Prior to the enactment of H.B. 1693, Section 18.001 required a party intending to controvert a claim to serve a copy of the counteraffidavit no later than 30 days after the date the party received the affidavit, or with leave of court at any time before the commencement of evidence at trial. [17] The statute's amended language provides:

> (e) A party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record *by the earlier of: (1) 120 days after*

[15] *Id*.
[16] *Id*.
[17] Tex. Civ. Prac. & Rem. Code Ann. § 18.001(e-1).

> *the date the defendant files its answer; (2) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Texas Rules of Civil Procedure.* [18]

Upon first read, the statute could be misinterpreted to provide additional time to defendants. However, because the amendments altered the plaintiff deadline to serve, in most circumstances, defendants are still left with the 30 day service timeframe.

IV. ALTERATIONS TO PROCEDURE.

All too often Section 18.001 affidavits were used offensively by plaintiffs early in litigation. For example, as the statute previously read, "[t]he party offering the affidavit in evidence or the party's attorney must *serve* a copy of the affidavit on each other party to the case . . . ."[19] As a result, plaintiffs often attempted to "serve" medical cost affidavits inconspicuously attached to disclosures, piecemealed throughout the discovery process, or attached to production responses. Now, H.B. 1693 seemingly will eliminate such gamesmanship by requiring "[t]he party offering the affidavit … [to] file notice with the clerk of the court when serving the affidavit that the party or the attorney served a copy of the affidavit . . . ."[20] Now, the lead attorney should receive notice that Section 18.001 affidavits were served. Similarly, the party offering a counteraffidavit must also file notice with the clerk of the court when serving the counteraffidavit.

Additionally, the statute requires a person who is qualified by knowledge, skill, experience, training, education, or other expertise to make a controverting affidavit.[21] However, H.B. 1693 provides no additional clarity as to whether individuals other than medical doctors within the specific field of medical care produced in the initial affidavit may opine as to the reasonableness and necessity of medical expenses.[22]

While the H.B. 1693 changes to Section 18.001 of the Texas Civil Practice & Remedies Code provide much needed structure and guidance, defendants will need to remain wary of the time limitations imposed upon the provision related to controverting affidavits.

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[18] Tex. H.B. 1693.
[19] Tex. Civ. Prac. & Rem. Code Ann. § 18.001(d) (emphasis added).
[20] Tex. H.B. 1693.
[21] Tex. Civ. Prac. & Rem. Code Ann. §18.001(f).
[22] *See generally* Tex. H.B. 1693.

V. QUALIFICATIONS TO EXECUTE AN AFFIDAVIT UNDER SECTION 18.001.

Section 18.001(c)(2) requires the affidavit concerning cost and necessity of services, "be made by: (A) the person who provided the service; or (B) the person in charge of records showing the service provided and charge made."[23] Unsurprisingly, several Texas courts have disputed the interpretation of this statutory language.[24]

In a recent case, *Gunn v. McCoy*, the Texas Supreme Court issued an opinion reasoning, "the plain language of section 18.001 does not limit the proper affiants to medical providers and medical providers' record custodians."[25] In assessing whether insurance agents are qualified to testify as to the reasonableness and necessity of medical expenses, Justice Green acknowledged that "with [access to] national and regional bases on which to compare prices actually paid, insurance agents are generally well-suited to determine the reasonableness of medical expenses."[26] Further, in evaluating the *necessity* of medical expenses, the court recognized that medical doctors "are in the best position to determine what treatments or procedures and resulting expenses are 'necessary.'"[27] Nevertheless, the legislature has acknowledged, "for better or for worse, in the context of our health care system, what is 'necessary' is often heavily influenced by insurance companies and by what treatments and procedures they are willing to cover."[28] Thus, the court recognized that the health care system required the recognition of persons without medical licenses as qualified to establish the reasonableness of billed charges.

VI. QUALIFICATIONS TO PROVIDE A COUNTERAFFIDAVIT.

In a few instances, Texas courts have determined that individuals other than medical doctors specializing in the specific medical field identified within the plaintiff's affidavit may opine as to the reasonableness and necessity of medical expenses while medical doctors may, in some cases, only testify as to the reasonableness and necessity of services within their practice area.[29]

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[23] Tex. Civ. Prac. & Rem. Code Ann. §18.001(c)(2).
[24] *Gunn*, 554 S.W.3d 645; In re Brown, 12-18-00295-CV, 2019 WL 1032458, at *4 (Tex. App.—Tyler Mar. 5, 2019, orig. proceeding).
[25] *Id.*
[26] *Id.* at 673.
[27] *Id*. at 674.
[28] *Id*. (citing Janet L. Dolgin, Unhealthy Determinations: Controlling "Medical Necessity," 22 VA. J. SOC. POL'Y & L. 435, 442–43 (2015) (explaining that the insurance industry sits at the center of the delivery and coverage of health care in the United States and occupies "a privileged position in rendering medical necessity determinations—the rationale in terms of which health care is apportioned")).
[29] *Compare In re Brown*, 2019 WL 1032458, at *4 (holding nonphysician qualified to opine as reasonableness and necessity of medical expenses), *with*, *Hong*, 209 S.W.3d at 804 (holding

As previously discussed, Section 18.001(c)(2)(B) allows a "person in charge of records" to prove the reasonableness and necessity of charges.[30] In contrast, Section 18.001(f) requires that a counteraffidavit be prepared by a person qualified to testify in contravention about matters contained in the initial affidavit.[31] Moreover, Section 18.002 sets forth a form for an affidavit regarding cost and necessity of services, yet the chapter fails to provide a form for a counteraffidavit.[32] Thus, the statute places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings.[33]

Pursuant to Section 18.001(f):

> (f) The 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. 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. The counteraffidavit may not be used to controvert the causation element of the cause of action that is the basis for the civil action.[34]

"What is required is that the offering party establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject."[35] If "a party can show that a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields."[36] Although Texas Rule of Evidence 702 does not require a specific degree, license,

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chiropractor qualified to testify as to reasonableness and necessity of chiropractic services not all medical services) *with* Turner v. Peril, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied) (holding orthopedic surgeon not qualified to opine as to reasonableness and necessity of "services provided by a hospital, pharmacies, a chiropractor, a diagnostic center, a nurse anesthetist, and doctors who were not orthopedic surgeons.").

[30] Tex. Civ. Prac. & Rem. Code Ann. § 18.001(c)(2)(B).

[31] *Id.* § 18.001(f) ("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.").

[32] *See* Tex. Civ. Prac. & Rem. Code Ann. § 18.001–.091.

[33] *Turner*, 50 S.W.3d at 747.

[34] Tex. Civ. Prac. & Rem. Code Ann. § 18.001(f).

[35] Broders v. Heise, 924 S.W.2d 148, 153–54 (Tex. 1996).

[36] *Id.* at 154.

or certification,[37] general experience in a specialized field does not qualify a witness as an expert.[38]

The Fort Worth Court of Appeals examined whether a chiropractor was qualified to provide a counteraffidavit as to the reasonableness and necessity of the services provided by the plaintiff's chiropractor, medical doctor, radiologist, and pharmacist.[39] In affirming the trial court's initial decision, Justice Livingston found that though the affiant chiropractor was qualified to opine as to the plaintiff's chiropractor's affidavit, the affiant chiropractor failed to state how he was qualified to opine as to the medical doctor, radiologist, and pharmacist's services.[40]

In a recent case, the Texas Twelfth District Court of Appeals held the trial court committed a clear abuse of discretion by striking a counteraffidavit made by a registered nurse.[41] In an opinion authored by Justice Hoyle, the court found the affiant qualified because she "worked case management and claim analysis for insurance companies since 1999. As part of that experience, she maintained and worked with databases for medical costs. In addition, she is familiar with medical coding and billing practices."[42] The court ultimately opined the argument set forth by the plaintiff—that the counteraffiant was unqualified and her opinion was unreliable because she was not a practicing nurse and relied upon databases—was without merit.[43]

Thus, courts remain unsure as to what qualifies an individual to provide a counteraffidavit as to the reasonableness and necessity of medical expenses. However, recent decisions by the Tyler Court of Appeals and the Texas Supreme Court tend to suggest a widening of the courts' allowance for persons other than medical professionals within the same field as the original medical provider's affidavit to provide a counteraffidavit.

VII. CONCLUSION

Overall, the H.B. 1693 changes to Section 18.001 of the Texas Civil Practice & Remedies Code provide much needed structure and guidance. Defendants will need to remain wary of the time limitations imposed upon the provision of controverting affidavits. The statute requires a controverting affidavit be made by a person who is qualified by knowledge, skill, experience, training,

[37] Harnett v. State, 38 S.W.3d 650, 659 (Tex. App.—Austin 2000, pet. ref'd) ("[L]icensure, or certification in the particular discipline is not a per se requirement."); Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 852 n.3 (Tex. 2011).

[38] Gen. Motors Corp. v. Burry, 203 S.W.3d 514, 526 (Tex. App.—Fort Worth Sept. 21, 2006, no pet. h.); Pack v. Crossroads, Inc., 53 S.W.3d 492, 506 (Tex. App.—Fort Worth 2001, pet. denied).

[39] *Hong*, 209 S.W.3d at 801–04.

[40] *Id.* at 804.

[41] *In re Brown*, 2019 WL 1032458, at *4.

[42] *Id*. at *3.

[43] *Id*. at *4.

education, or other expertise. However, H.B. 1693 provides no additional clarity as to whether individuals other than medical doctors within the specific field of medical care produced in the initial affidavit may opine as to the reasonableness and necessity of medical expenses.