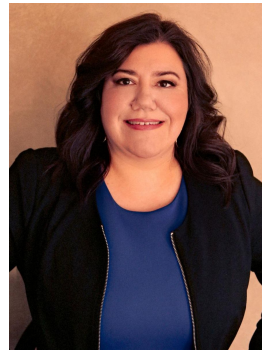


"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Kristi Kautz

It is amazing to think that it is already June and summer is upon us. Here in Texas, we are certainly hoping our power grid is more prepared for our upcoming 100+ degree days than it was for the snowmageddon we had in February!



For many of us here at Fletcher Farley, summer plans are in full swing for the first time since the summer of 2019. Isn't that crazy to think about?! Kids have returned to summer camps and vacations to fun places are on tap. As the child of two teachers, summer was always a time for relaxation and fun road trips, family reunions, and trips to the beach near where I grew up. It was a time to really enjoy the blessing of family. I hope you are all planning for vacations and summer fun with your families.

As I reflect on the first half of 2021, the word that comes to mind is rejuvenation. Typical summer activities are resuming, local restaurants are reopening, businesses are returning, and, importantly for our practice and clients, courts are resuming in-person trials and hearings. We are excited that this reopening also includes the resumption of our in-person Texas Law Update! More information will be announced soon but we are excited to be able to see you in person!

Of course, as business resumes and normalcy returns claims will arise. As always, we are here to help and remain thankful for the opportunities you give us to assist you and your insureds!

Summer Clerks

We are happy to have Rachel Evans returning to the Austin office as a Summer Clerk. She had previously worked with us before starting law school at the University of Texas at Austin School of Law.



We are also happy to have Brent Miles with us as a Summer Clerk in our Dallas office. He is pursuing his law degree at SMU Dedman School of Law.

The Supreme Court Addresses Counteraffidavits under Section 18.001

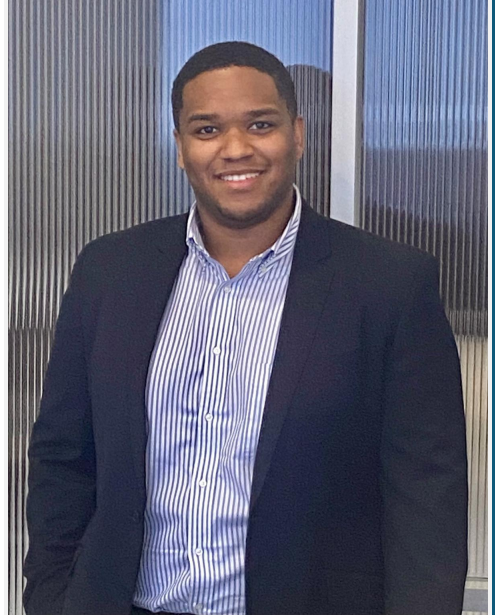
by Craig Reese

The Texas Supreme Court recently addressed an important issue regarding counteraffidavits under Section 18.001 of the Texas Civil Practice and Remedies Code in the case of *In re Allstate Indem. Co.*, 2021 WL 1822946 (Tex. 2021). This case involved a claim for underinsured motorist benefits. The insured sought to establish the reasonableness and necessity of her medical expenses by serving affidavits from several medical providers under Section 18.001. In response, Allstate served a counteraffidavit from a registered nurse experienced in medical billing and coding. Her affidavit challenged the reasonableness, but not the necessity, of the charges from three different medical providers.

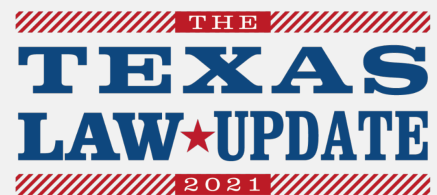


The counteraffidavit set out the nurse's educational and professional background. She has an associate degree in nursing and a bachelor's degree in the Science of Nursing. She is a registered nurse and a Certified Professional Coder. She is also certified as a Professional Medical Auditor. The counteraffidavit also explained the process used to arrive at the conclusions regarding the medical expenses. She opined that the expenses charged by the three medical providers exceeded what could be considered a reasonable charge and contained billing errors and other issues.

The plaintiff filed an objection and motion to strike the counteraffidavit. Not surprisingly, the trial court struck the counteraffidavit finding that (1) it did not satisfy 18.001(f)'s requirement that the counteraffidavit show, on its face, that it was made by a person who is qualified, (2) the opinions and data on which the opinions were based were unreliable, and (3) the counter-affidavit failed to provide reasonable notice of the bases for the opinions or that the affiant was qualified to contravene all the matters contained in the 18.001 affidavits. The trial court's order contained three key rulings: (1) the counteraffidavit is stricken from the record and may not be offered in any form or fashion to contest the reasonableness of the plaintiff's medical expenses; (2) the affiant is prohibited from testifying in this case regarding the reasonableness of the medical bills; and (3) Allstate is prohibited from questioning witnesses,



SAVE THE DATE



We are excited to announce that our Annual Texas Law Update is back and in-person.

Save the date for the 2021 Texas Law Update in Dallas on **Friday, October 29th.**

More information coming soon!

Community Events

Blue Goose Texas Pond's Golf Tournament

We are proud to be a sponsor at the Blue Goose Texas Pond's 14th Annual Golf Tournament on Friday, June 11th in Dallas, Texas benefitting the North Texas Food Bank and the Texas Pond Scholarship. To learn more, please [click here](#).

offering evidence, or arguing to the jury the reasonableness of the medical bills.

The Corpus Christi-Edinburg Court of Appeals denied mandamus relief to Allstate.

The Texas Supreme Court held that the counteraffidavit complied with Section 18.001(f) and that the trial court abused its discretion by holding that it did not and by penalizing Allstate for its purportedly noncompliant affidavit in a manner not authorized by 18.001.

The Court first determined that the nurse was qualified to testify as to the reasonableness of the medical charges. This holding alone makes this a very important opinion to the defense bar, given that defense lawyers often use similarly situated persons to challenge reasonableness. The Court rejected the plaintiff's argument 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 then turned to the determination by the trial court that the counteraffidavit failed to meet the reasonable notice requirement of 18.001(f). The trial court gave two reasons for this determination: (1) the affidavit failed to show that the affiant was familiar with or knowledgeable about the services and products in dispute; and (2) the affidavit was conclusory insofar as it used the median charge for a particular medical service as the litmus test for opining whether an expense was reasonable. The Court held that while these might be potential bases on which to challenge the admissibility and weight to be ascribed to the nurse's opinions at trial, nothing in Section 18.001(f) charges trial courts with determining the admissibility of an affiant's opinions and doubts about admissibility are not a proper basis for striking a counteraffidavit. Instead, the Court noted that while Section 18.001 does not define "reasonable notice," its meaning is similar to the familiar "fair notice" requirements for pleadings under Rule 47. The Court had no problem finding that the counteraffidavit satisfied the reasonable-notice requirement.

The Court then turned to the trial court's conclusion that the opinions were unreliable. The Court concluded that nothing in Section 18.001(f) requires that an opinion expressed in a counteraffidavit must meet the admissibility requirements for expert testimony. Whether a witness is qualified to provide expert testimony and whether the expert's opinions are reliable are distinct inquiries. Therefore, the trial court erred by importing a reliability requirement into its Section 18.001 analysis.

Attorney Meeting

We were happy to get back to business as usual with our educational attorney meeting in-person. Craig Reese discussed the recent Texas Supreme Court decision regarding 18.001 affidavits.



After the attorney meeting, we headed to dinner together to continue the discussion and to enjoy a return to some normalcy.



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If you want more
information or have
questions, please contact:

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Joanna Salinas
Austin Office Managing

The Court then noted that even if the trial court's decision to strike the counteraffidavit has been correct, it would nevertheless grant mandamus relief because the trial court abused its discretion by overcorrecting for its perceived defects when it prohibited the affiant from testifying at trial and prohibited Allstate from questioning witnesses, offering evidence, or arguing to the jury the reasonableness of the medical bills.

The Court noted that nothing in Section 18.001 even suggests that an uncontroverted affidavit may be conclusive on reasonableness or necessity and 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, either through evidence or argument, the claimant's assertion that her medical expenses are reasonable and necessary. In other words, the opposing party's failure to serve a compliant counteraffidavit has no impact on its ability to challenge reasonableness or necessity at trial.

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