UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2021 Car Crash Seminar

August 26-27, 2021
Austin, Texas

Medical Specials: The Defendant's and Plaintiff's Perspective

This presentation navigates the new changes and recent case law challenges regarding CPRC 18.001. Learn what to file and what to argue, including an overview of both the defendant's challenges and the plaintiff's defense of 18.001 affidavits.

Defense Perspective:
Junella G. Reese

Author Contact Information:
Junella G. Reese
Meynier, Reese, Liber & Matte
Salaried Employees of Progressive
3800 Horizon Hill, Suite 101
San Antonio, TX 78229
Jreese4@progressive.com
(210) 610-3948

Medical Specials: The Defendant's and Plaintiff's Perspective

This presentation navigates the new changes and recent case law challenges regarding CPRC 18.001. Learn what to file and what to argue, including an overview of both the defendant's challenges and the plaintiff's defense of 18.001 affidavits.

Defense Perspective: Junella G. Reese

To Counter or Not to Counter

Timing under 18.001

For all cases filed after September 1, 2019 the CPRC 18.001 timing rules have been updated and changed. Plaintiff must serve their medical reasonableness and necessity affidavits the earlier of (a) 90 days of the date of service of Defendant's Original Answer or (b) offering party (Plaintiff's) expert designation deadline. Defendant must serve any counter affidavit the earlier of (a) 120 days after the date of service of Defendant's Original Answer or (b) offering party (Defendant's) expert designation deadline.

The 90/120-day option will be the earlier of the two options for the majority of cases. However, it is important to note any deadlines in Level 3 scheduling orders issued by the court and/or submitted as agreed by the parties. It is also critical to note your Level 1 and Level 2 rule deadlines as well.

Trial Strategy

It is important to analyze your trial strategy when deciding whether to obtain an expert and file a counter affidavit. What is the goal of the counter affidavit? What is the desired outcome?

Filing a counter affidavit does not make your expert's opinion automatically admissible, nor does it nullify plaintiff's affidavit. It only requires plaintiff to *rebut* your expert's opinion and prove up the reasonableness and necessity of medical specials/treatment by further testimony beyond their affidavit. Typically, this will require plaintiff to obtain the treating provider's testimony via oral deposition, deposition on written questions or live at trial.

When determining whether to controvert, you must take into account the planned or hopeful outcome. If you want to force plaintiff to bring medical providers to testify, you must controvert the affidavit. Similarly, you may choose to controvert because you want the opportunity to engage opposing counsel to present "*dueling affidavits"* to the jury versus the time and expense of expert testimony. "Dueling affidavits" is an agreement between the parties to submit each side's

affidavit to the jury, plaintiff's original affidavits and defendant's counter-affidavits, without further testimony. To seek such an agreement, you *must* controvert plaintiff's original affidavit.

There are situations where you may not want to controvert the affidavits. If you plan to bring an expert live to trial to refute the reasonableness or necessity while plaintiff would produce only the paper affidavits, you do *not* want to controvert. This is a newer realm of inquiry since *In re Allstate Indemnity Company*, 2021 WL 1822946 (Tex. 2021) (Opinion delivered May 7, 2021). There will be more to come on the primary holdings, but as part of the holding the court found:

> "There is no textual support for the assertion that the absence of a proper counter affidavit 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 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 counter affidavit has no impact on its ability to challenge reasonableness or necessity at trial. Section 18.001 nowhere provides for the exclusion of any evidence based on the absence of a proper counter affidavit." Further the court stated: "Just as the exclusion of evidence is not justified by a party's failure to comply with section 18.001(f), the trial court's prohibition on questioning witnesses or presenting jury argument on the topics of reasonableness and necessity of medical expenses has no legal basis". (*Id*. at p.8-9)

What does this mean? In layman's terms it means a defendant does not have to file a counter affidavit in order to preserve their right to attack the reasonableness of charges and/or necessity of medical treatment at trial. If your plan is to bring your expert live to trial, it may be best not to file a counter affidavit.

I'm Going to File a Counter Affidavit, Now What?

Choosing the Right Expert

To meet the requirements of 18.001, it is crucial to choose the correct type of expert to complete your counter affidavit. 18.001 (f) states, "The counter affidavit must be made by a person who is qualified, by knowledge, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." A good first question to start with is "Am I wanting to file a counter affidavit for the cost of treatment (reasonableness) or the necessity of treatment, or both?

If your goal is to refute the reasonableness of charges, the expert (1) does not need to be a medical provider, (2) should have familiarity with medical billing and coding practices, (3) *must* be able to identify the methods and data on which the expert bases their opinion, and (4) can utilize national and/or regional databases of charges to determine the reasonableness of the questioned

Title search: Medical Specials: The Defendant’s and Plaintiff’s Perspective

First appeared as part of the conference materials for the
2021 The Car Crash Seminar session
"Medical Specials: The Defendant’s and Plaintiff’s Perspective"