

Challenging CounterAffidavits

After In Re Allstate



Drew Gibbs



3307 Northland Drive, Suite 320

Austin, Texas 78731

(800) 488-7840 ext 101 | drew@slingshotlaw.com

www.slingshotlaw.com

UT Car Crash Seminar

Hosted by University of Texas Law School

- CLE Department

August 27, 2021

Drew Gibbs is a founding partner of Gibbs & Crivelli – Slingshot Law, a personal injury law firm which prides itself on helping the little guy take down the big guy. He is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and is an Associate Member of the American Board of Trial Advocates. He has been recognized by Texas Monthly as a “Super Lawyer” and is a Lifetime Member of the Multi-Million Dollar Advocates Forum. Drew is a graduate of the University of Texas at Austin and Southern Methodist University School of Law. He is licensed to practice law in Texas since 2004 and in Colorado since 2021.

Before becoming a zealous advocate for personal injury victims, Drew began his legal career as a prosecutor at a county attorney’s office in East Texas. He left criminal prosecution to practice insurance defense before ultimately switching to the plaintiff’s side, where he became a partner at one of the highest volume personal injury firms in Texas. After becoming the highest fee earner in that firm’s history, Drew left to form Gibbs & Crivelli in 2019.

Drew is currently the President of the Capital Area Trial Lawyers Association and a member of the Texas Trial Lawyers Association’s Board of Directors. He serves as a volunteer court-appointed advocate for CASA of Travis County, advocating on behalf of children who find themselves in the State’s child welfare system. In his spare time, Drew enjoys wakesurfing, snowboarding, mountain biking and spending time with his family. Drew lives in Austin Westlake with his wife Sarah, their two young children (Keira and Killian), 1 chocolate lab (Major), 4 hens and 3 Nigerian dwarf goats (Ricky, Vince, and Earl).

Table of Contents

I.	Introduction.....	4
A.	Scope of Article.....	4
II.	The Burden.....	4
A.	What to Prove	4
B.	Deadlines.....	4
C.	Why File a Counteraffidavit?.....	6
III.	The Immovable Object.....	6
A.	Gatekeeping: Daubert (TRE 702) v. 18.001(f)	6
IV.	The Path Forward.....	7
Appendix A:	Pre- <i>In Re Allstate</i> Motion to Strike Counteraffidavit re Reasonableness (Granted from the bench)(Exhibits Omitted)	
Appendix B:	Post- <i>In Re Allstate</i> Letter from Offering to Reconsider Bench Ruling On Appendix A	
Appendix C:	Pre- <i>In Re Allstate</i> Motion to Strike Counteraffidavit re Necessity with Order Granting (Exhibits Omitted)	

I. Introduction.

The rights granted to us by the 7th Amendment are little known to most of our fellow Americans, but they are the sole focus of attack for most of the country's most powerful lobbying organizations. With each new legislative action or appellate decision, the challenge of recovering damages for our clients becomes more and more difficult. On May 7, 2021, Texas took another big step toward making damage recoveries more difficult for Texans with the Texas Supreme Court's decision in *In Re Allstate*.

A. Scope of Article.

I intend for this paper to be a brief, introductory discussion of the post-*In Re Allstate* fight over recovering our clients' past medical damages. Recovering these damages involves proving the injuries were caused by the defendant's breach of some duty and that the medical charges to the Plaintiff are for amounts that are reasonable for treatment that was necessary. Proving the latter of these is the focus of this paper. Topics raised and cited herein can and should lead you on a path to learning the vast intricacies of medical billing and the challenge of keeping juries focused on what actually matters.

II. The Burden

A. What to Prove

Claimants can recover damages for medical, surgical, hospital and nursing services and any other items incurred in effecting a cure of claimant's injuries. *Coca-Cola Bottling Co. v. White*, 545 S.W.2d 279, 280-81 (Tex. App.-Waco 1976, no

writ), *Texas & N.O.R. Co. v. Parry*, 1 S.W.2d 760 (Tex. Civ. App.--Texarkana 1927), rev'd on other grounds, 12 S.W.2d 997 (Tex. 1929).

To recover these past medical expenses, claimants must prove:

1. The treatment was **necessary**;
2. The charges are **reasonable**;
3. The cause was the incident/breach; and
4. Plaintiff actually paid (including amount paid on their behalf) or owes the bill.

This article will focus only on the first two of these elements. Causation is an issue unrelated to CPRC 18.001. Amounts paid or owed and recoverable under CPRC 41.0105 are often muddled with "reasonable charges" but in terms of medical billing, they are separate questions. More on this later. CPRC 18.001 originally created a process to facilitate the process of proving up reasonableness and necessity through an affidavit signed by a records custodian of the medical providers' bills. If a defendant sought to challenge the claims of the affidavit, either because they felt the charges were unreasonable or the treatment was unnecessary, they had to hire a qualified expert to challenge these claims through an instrument called a "counteraffidavit". Based on the Texas Supreme Court's ruling in *In Re Allstate*, that no longer appears to be the case. Defendants can challenge these claims without a counteraffidavit, and in the event they choose to file a counteraffidavit, it doesn't have to be made by a qualified expert, at least not one whose qualifications and opinions must pass muster under a court's gatekeeper function.

B. Deadlines

Under the most recent iteration of 18.001, these are your deadlines

For completed, or ongoing treatment Plaintiff's must serve a billing custodian's or provider's affidavit by the earlier of:

- 90 days after Defendant answers;
- The date the offering party must designate experts per your scheduling order; or
- The date the offering party must designate experts per TRCP.

Let me know when 90 days after Defendant's answer isn't the earlier of those deadlines. I'm at a loss to think of any examples.

Controverting affidavits must be served by the earlier of:

- 120 days after Defendant files its answer;
- The date the controverting party must designate experts per scheduling order; or
- The date the controverting party must designate experts per TRCP.

Again, I'm at a loss to think of examples of when 120 days isn't the earlier of those.

For treatment that occurs after Defendant files an answer, claimant's deadline to serve a billing custodian's or provider's affidavit the earlier of:

- The date the offering party must designate experts per scheduling order; or
- The date the offering party must designate experts per TRCP.

Counteraffidavits in that instance must be served by the later of:

- 30 days after service of the affidavit;
- The date the controverting party

must designate experts per scheduling order; or

- The date the controverting party must designate experts per TRCP.

-

If treatment occurs after these deadlines, claimant case serve the affidavit on or before the 60th day before trial. The counteraffidavit for this treatment may be served on or before the 30th day before trial.

Once upon a time (April 2021), claimants could challenge the qualifications of the counteraffiant and the claims of the counteraffidavit in the same way they would any other expert under TRE 702. Not anymore. *See In Re Allstate*.

If the defendant doesn't bother to file a counteraffidavit, it's apparently of no matter according to our Supremes in *In Re Allstate*:

"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—**through evidence or argument**—the claimant's assertion that her medical expenses are reasonable and necessary."

I used to think you needed evidence to make an argument, but I've been set straight. I also used to think that when CPRC 18.001 said "a party intending to controvert a claim reflected by the affidavit **must** serve a copy of the counteraffidavit," that meant they *must* do it. Apparently that "must" was not intended to constrain anything. Defendants can use evidence OR argument, and the "must" is no basis to constrain them from controverting these issues at all, with or without the counteraffidavit. So if you're a claimant, don't get too hung up on defendants' deadlines under 18.001. Worst case for

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Challenging Counter Affidavits: After In Re Allstate

Also available as part of the eCourse

[2021 The Car Crash eConference](#)

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"