Legal Opinion Letter

Vol. 31 No. 1 January 28, 2022

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Show Me the Money: Texas Expands the Discoverability of Medical Providers' Billing Practices

by Scott K. Field and Victoria Filoso

For years, personal injury plaintiffs in Texas have used letters of protection to inflate damage awards for medical and health care expenses in Texas. That practice may cease after a series of recent Texas Supreme Court decisions.

A Letter of Protection (LOP) is an agreement between a plaintiff and his medical provider whereby the plaintiff agrees to pay his medical bills with a percentage of his recovery if he is successful in his lawsuit.[1] LOPs encourage providers to charge plaintiffs higher amounts than their insurance-negotiated billing rates for the same services. As a result, juries almost always rely on these higher rates to determine medical expense damages to award a plaintiff, even if the plaintiff never owes these higher rates.

The Texas Supreme Court recently curbed this practice by allowing defendants to discover medical providers' negotiated billing rates. The court in *In re ExxonMobil Corp.*, No. 20-0849, 2021 WL 5406052 (Tex. Nov. 19, 2021), built on its previous decision in *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 249 (Tex. 2021) in affirming that a medical provider's usual or negotiated billing rates are, in fact, discoverable information. While not unlimited, the right to discover this information levels the playing field by providing a more complete picture to both sides.

How LOPs Circumvented the Texas Damages Scheme. Under Texas law, recovery of medical expenses depends on establishing that the charges were reasonable and necessary. *See In re Allstate Indem. Co.*, 622 S.W.3d 870, 876 (Tex. 2021); *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (1956). In addition, Section 41.0105 of the Texas Civil Practice and Remedies Code, enacted in 2003 as part of comprehensive tort reform measures, limits recovery to the amount actually "paid or incurred" by or on behalf of the claimant. In 2011, the Supreme Court of Texas interpreted this statute to allow recovery of only medical charges the provider has a legal right to be paid. *See Haygood v. De Escabedo*, 356 S.W.3d 390, 396-98 (Tex. 2011).

Plaintiffs often used LOPs to circumvent this requirement. LOPs sometimes require medical providers to testify during the plaintiff's case that the provider's full chargemaster rate is reasonable. Of course, government regulation and negotiations with private insurers drive modern health care charges.[2] As a result, patients rarely, if ever, pay the full chargemaster rate for medical services. Nevertheless, when operating under a LOP, providers often testify that the plaintiff owes the provider the full chargemaster rate. Consequently, when determining the amount of damages to award the plaintiff, juries often rely on these inaccurate figures, resulting in damage awards much higher than the true cost of the services.

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[1] Malcolm E. Wheeler & Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, 13 J. Tort L. 281, 297 (2020).
[2] *See* Keith T. Peters, *What Have We Here? The Need for Transparent Pricing and Quality Information in Health Care: Creation of an SEC for Health Care,* 10 J. Health Care L. & Pol'y 363, 366 (2007).

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Notably, LOPs protect the provider only to the extent of "reasonable and necessary charges" and include provisions allowing the plaintiff's counsel to make "any reasonable reduction of medical charges" before ultimately paying the provider. In other words, nothing obligates the plaintiff to pay the full amount charged if the amount is unreasonable. Therefore, the provider has no legal right to the full chargemaster rates, which is directly contrary to the law.

The Supreme Court of Texas Tackles the Problem. Until *In re Exxon* and *K&L Auto Crushers*, trial courts routinely refused to allow a defendant to discover what the provider normally charges for the plaintiff's services. Without obtaining discovery of this figure, defendants were forced to try cases with one hand tied behind their back. Only through such discovery could a defendant meaningfully challenge a provider's testimony concerning the reasonableness of its chargemaster rates.

In 2018, the Texas Supreme Court gave defendants hope that such discovery would be allowed in the future cases. In *In re N. Cypress Medical Ctr. Operating Co*., 559 S.W.3d 128 (Tex. 2018), North Cypress Medical Center charged the plaintiff its full chargemaster prices for her treatment. Following a disagreement between the plaintiff and North Cypress over the total amount owed, the plaintiff filed suit arguing that the charges were unreasonable.

The plaintiff served discovery requests on North Cypress seeking contracts regarding negotiated or reduced rates for the hospital services provided to her and the Medicare and Medicaid reimbursement rates for tests performed on her. North Cypress objected to these requests as irrelevant and overbroad, which the trial court denied. On mandamus review, the Supreme Court of Texas held that the discovery was permissible. The court concluded that evidence of the negotiated rates was relevant, though not dispositive, when considering the reasonableness of the chargemaster rates.

Last year, the Texas high court twice followed its reasoning from *North Cypress* and provided defendants in personal injury suits such discovery when LOPs were in play. First, in *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021), the defendants in a personal injury suit challenged the trial court's decision to quash their discovery requests for information on the plaintiff's medical providers' negotiated rates and costs. The court held that the trial court abused its discretion by denying outright the defendant's requests, which were limited to the discovery approved in *North Cypress.* Although not all communications or documents regarding the negotiated rates are automatically discoverable, the court held that such information is relevant to whether the amounts billed to the plaintiff are reasonable. The court, however, cautioned that discovery must be not only relevant but also proportional to the needs of the case. "Proportionality," the court concluded, "must control the extent to which a trial court orders such relevant information discoverable."

The court followed its *K&L* decision by providing even more clarity. In *In re ExxonMobil Corp*., No. 20-0849, 2021 WL 5406052 (Tex. Nov. 19, 2021), nearly sixty plaintiffs sued Exxon for personal injury resulting from an explosion at an Exxon plant. The plaintiffs sought, in part, millions of dollars in reimbursement for past medical expenses. Many plaintiffs were treated by the same medical providers pursuant to LOPs. Exxon formulated discovery requests for the amounts and rates the providers accepted from the majority of their patients for the same procedures performed during the same time. The providers argued that their status as nonparties afforded them protection from such discovery. The court, however, held that the discovery was permissible and that the providers' financial interest in the case, granted by the LOPs, offset their nonparty status when balancing the benefits and burdens of discovery.

Conclusion: What This Means for Providers and Defendants. The *North Cypress*, *K&L*, and *ExxonMobil* decisions level the playing field for plaintiffs and defendants when LOPs are used. Although a provider can still enter a LOP and can still testify that its chargemaster rate is reasonable, the defendant will now be able to counter such testimony with information gained through limited, narrow discovery of the provider's usual rates for that service. This type of discovery potentially reduces the risk of an inflated damage award based

  ISBN 1056 3059

on a rate that no one pays, possibly preventing a windfall.

Strategically, these decisions also offer opportunities for defendants to challenge the reasonableness of a plaintiff's medical expenses pre-trial. If successful, challenges to the reasonableness of charges not only have the potential to reduce the overall damage figures before they are presented to the jury, but they may also widen the potential window for settlement pre-trial.

Additionally, these decisions may affect health care billing practices. Providers that give a LOP to a plaintiff will now be hesitant to provide testimony that their full chargemaster rate is reasonable, knowing that they will be subject to discovery. In fact, it would not be surprising if many providers become hesitant to provide LOPs at all. Whether that is a good or bad thing is a subject for another day. In the meantime, trials will continue; but now both sides—and the jury—will have access to the same information when a provider testifies about the reasonableness of a medical charge.

ISBN 1056 3059