The Weekly Update of Texas Insurance News
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June 18, 2007

TEXAS CIVIL PRACTICES AND REMEDIES CODE AND RECOVERY OF MEDICAL EXPENSES / GOV. RICK PERRY VETOES H.B. 3281

Recently, in *Mills v. Fletcher*, 2007 WL 1423883 (May 16, 2007), the San Antonio Court of Appeals addressed Tex. Civ. Prac. & Rem. Code §41.0105's recovery of medical expenses. In *Mills*, Fletcher obtained a jury award of $1,551 in past medical expenses from Mills. On appeal, Mills argued that Tex. Civ. Prac. & Rem. Code §41.0105 limited the amount of Fletcher's award for past medical expenses which should have been reduced because his medical providers accepted lesser amounts for their services from his health insurance company, thereby "writing off" the balance due from Fletcher.

Essentially, Mills argued that the "written-off" or adjusted amounts were neither actually paid nor actually incurred by or on behalf of Fletcher. As such, Mills argued, Tex. Civ. Prac. & Rem. Code §41.0105 Fletcher was not entitled to recover the written-off amounts. In response, Fletcher argued that he "incurred" the medical charges at the time of his doctor's visit and that any amounts later written off do not affect the charges that he "incurred."

In resolving this issue, the Court began its analysis by applying those rules enunciated in the Code Construction Act. Next, the Court reviewed various dictionary interpretations of "incur" and evidence of the charges assessed Fletcher as well as amounts written off. The Court adopted Mills' interpretation and held that Section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or "written off."

Notably, although *Mills* was issued May 16, 2007, the Texas Legislature was already considering statutory resolution of this exact issue. Due in part to this precise issue as previously raised in *Self v. Wal-Mart Stores, Inc.*,, 2:05cv301, on March 8, 2007, HB 3281 was introduced. As submitted to Gov. Perry on May 22, 2007, the final version of HB 3281 would limit Tex. Civ. Prac. & Rem. Code §41.0105 to health care liability claims under Chapter 74 and would not apply to a claim for future medical or health care expenses.

On Friday, June 15, 2007, however, Gov. Rick Perry vetoed HB 3281 and issued the following statement:

> **TO THE MEMBERS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE EIGHTIETH TEXAS LEGISLATURE, REGULAR SESSION:**
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> **Pursuant to Article IV, Sections 14 and 15 of the Texas Constitution, I, Rick Perry, Governor of Texas, does hereby disapprove and veto House Bill No. 3281 of the 80th Texas Legislature, Regular Session, due to the following objections:**
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> **House Bill No. 3281 would reverse Texas' sweeping lawsuit reforms passed in 2003 that reasonably limited the amount of medical bills a plaintiff could recover to the amount actually paid or incurred by the individual or their insurer.**

This bill would permit an individual in a personal injury lawsuit (other than a medical malpractice claim) to recover more money for medical expenses than actually was or will be paid. This would be done by allowing a person to submit bills that are higher than those actually paid to health care providers. For example, if this bill became law, an individual who was billed $20,000 by a hospital, but whose insurance company negotiated the bill down to an actual amount paid of $12,000, could still submit the original $20,000 bill to the jury as if their insurance company actually paid that amount. This would deceive the jury as to the true amount of actual medical damages.

Our civil justice system holds a defendant accountable for economic damages caused, including medical bills. A person should not be allowed to recover, and a defendant should not be required to pay, an inflated amount of actual medical costs. If a defendant has caused damage in addition to medical expenses, those damages should be addressed and recovered under the rules of our civil justice system, rather than inflating medical bills to cover them.

Proponents of this bill argue it would reverse the "collateral source" rule, which prevents defendants from introducing evidence that an insurance company, rather than the individual, paid all or a portion of the medical bills. This is not true. Nothing in Section 41.0105 allows a defendant to introduce this evidence or hinders an individual's ability to recover the amount of the medical bills paid by their insurance company.

The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions. It should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid.

The bill contains a second provision, which correctly restates that Texas' tort reform law does not prevent a person in a lawsuit from recovering damages for future medical bills caused by their injury. On its own, this provision would have been acceptable.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this the 15th day of June, 2007.

RICK PERRY
Governor of Texas

OVERBROAD DISCOVERY REQUESTS SUBJECT TO MANDAMUS

Last Friday, the Texas Supreme Court addressed the issue of overbroad discovery requests which may be subject to mandamus relief. In *In Re Allstate County Mutual Insurance Company*, 2007 WL 1721953 (June 15, 2007), the Court observed that "[d]iscovery is a tool to make the trial process more focused, not a weapon to make it more expensive." Accordingly, trial courts are to make an effort to impose reasonable discovery limits. In *In Re Allstate*, the plaintiffs (third-party claimants against Allstate County Mutual's insured) sued Allstate County Mutual and its claims professional claiming that Allstate reneged on a $13,500 settlement offer. The plaintiffs then served a total of 213 discovery requests (89 requests for production; 59 interrogatories; and 65 requests for admissions) upon Allstate County Mutual and its claims professional. Allstate County Mutual and its claims professional objected to the discovery. The trial court overruled the objections and ordered Allstate County Mutual and its claims handler to respond to all the requests. The Thirteenth Court of Appeals denied

mandamus relief without explanation. Allstate County Mutual and its claims professional then sought relief from the Texas Supreme Court.

First, the Court observed the broad nature of many of the discovery requests, including requests for transcripts of all testimony ever given by any Allstate agent on the topic of insurance; every court order finding Allstate wrongfully adjusted the value of a damaged vehicle; personnel files of every Allstate employee a Texas court has determined wrongfully assessed the value of a damaged vehicle; and legal instruments documenting Allstate's status as a corporation and its net worth. Next, the Court noted that plaintiffs made no effort to justify their hundreds of requests. Instead, the Court pointed to its prior holdings in *In Re CSX Corporation*, 124 S.W.3d 149 (Tex. 2003), wherein the Court held that "discovery orders requiring document production from an unreasonably long time period or from distant and unrelated locales are impermissibly overbroad." The Court also looked to its prior holdings in both *Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d 491 (Tex. 1995) (per curiam) (holding overbroad a request for every false imprisonment case in the last five years throughout twenty states) and *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995) (per curiam) (holding overbroad a request for all documents ever written by the defendant's safety director about safety). Analogizing to *In Re CSX Corporation, Dillard Department Stores,* and *Texaco, Inc.*, the Court observed that the plaintiffs' discovery requests propounded to Allstate County Mutual were overbroad as to time, location, and scope, and could have been more narrowly tailored to avoid including tenuous information.

More important to the Court, the Court noted that "the plaintiffs' requests and the trial court's order reflect a misunderstanding about relevance." Continuing, the Court noted that "American jurisprudence goes to some length to avoid the spurious inference that defendants are either guilty or liable if they have been found guilty or liable of anything before. . . . While such evidence might be discoverable in some cases, . . . , it is hard to see why reneging on some other settlement offer makes it more or less probable that the insurer reneged on this one."

Further, the Court noted that a party's objection that a discovery request is irrelevant necessarily encompasses an overbroad objection and assertion – overbroad requests for irrelevant information are improper whether they are burdensome or not, so the objecting party is not requited to detail any burden associated with its overbroad objection.

In conclusion, the Court noted that "reasonable" discovery "necessarily requires some sense of proportion. With today's technology, it is the work of a moment to reissue every discovery request one has ever sent to an insurer before. But by definition such a request is not 'reasonably tailored'. . . . Given the limited scope of the plaintiffs' claims and the amount at issue, the trial court erred by compelling discovery of everything the plaintiffs could imagine asking in any unfair insurance practice case."

MANDAMUS RELIEF APPLIED TO ORDER OF TRIAL SETTING

In *In Re Allied Chemical Corporation*, 2007 WL 1713378 (June 15, 2007), also issued last Friday, the Texas Supreme Court addressed the application of mandamus relief to an order of trial setting. In *In Re Allied Chemical*, roughly 1,900 plaintiffs sued 30 defendants in Hidalgo County alleging exposure to chemical fumes and leaks from several sites over a period of many years. The plaintiffs identified no particular incidents or products, instead alleging exposure to a "toxic soup" of emissions in the air for many decades. Because no such claim has ever been tried or appealed in Texas, the Court had declared such torts as "immature."

Five years after the filing of the underlying lawsuit, the trial court set the first trial for a little more than six months following its order of trial setting. The trial court consolidated five claims for the initial trial. The five plaintiffs had little in common, including discrepancies in age ranges, residences and distances from multiple sites, alleging exposure over different parts of seven decades, and suffering injuries from asthma and arthritis to miscarriages and heart disease and property damage.

After the Supreme Court granted a stay of the trial setting and requested full briefing, the plaintiffs asked the trial court to sever out the property claims, drop one plaintiff from the trial setting, withdraw its consolidation order and allow them to proceed to trial on just one plaintiff's claims. Observing the plaintiffs' subsequent change in position, the Court noted ripeness issues associated with the plaintiffs' discovery responses. Additionally, the Court observed that plaintiffs refused to give any assurance that they would not seek future consolidated trials akin to that which precipitated the Supreme Court filings, which would put the defendants to the repeated expense of seeking review. As the Court noted, "[p]re-trial cannot be conducted one way when appellate courts are looking and another way when they are not."

In its analysis, the Court first looked to its prior holdings in *Able Supply Company v. Moye*, 898 S.W.2d 766 (Tex. 1995). First, the Court noted *Able Supply's* holdings that a trial court can not postpone responses to basic discovery until shortly before trial. Next, the Court analogized *Able Supply* to *In Re Allied Chemical* in that defendants sought discovery of medical experts who could connect the plaintiffs' diseases to the defendants' products. Although five years had passed since the filing of the underlying lawsuit, the plaintiffs all responded either "not applicable" or that "none of their treating physicians" could do so. Notably, however, the interrogatory did not inquire about treating physicians, but, instead, sought *any* expert. "By changing the defendants' question, the plaintiffs were able to respond with almost nothing."

During the pendancy of the Supreme Court mandamus, plaintiffs supplemented their discovery responses with a long list of chemicals to which they were "potentially exposes" and medical articles and expert reports suggesting some of those chemicals were "capable of causing" or "significantly contributed" to some of their diseases. The Court observed such supplementation, but found such supplementation inadequate under *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). Specifically, evidence that a chemical *can* cause a disease is no evidence that it *probably* caused the plaintiff's disease. An expert's assurances that a study established causation does not make it so. Plaintiffs must have an expert who can answer why a study is reliable, and how the plaintiff's exposure is similar to that of the study's subjects. An expert must also exclude other causes with reasonable certainty. By failing to list any expert who could make such connection, the plaintiffs' responses were, for all practical purposes, were akin to those in *Able Supply* – "We'll tell you later."

Summarily stated, the *In Re Allied Chemical* problem was the same as *Able Supply* – too little time between adequate discovery response and trial for the defendants to have a fair chance to mount a defense. Thus, as in *In Re Allied Chemical*, the trial court may remedy this situation by moving back the trial setting.