

The Defense

NOTEWORTHY DECISIONS IN TEXAS

In re: N. Cypress Ned. Ctr. Operating Co., Ltd.

No. 16-0851, 2018 WL 1974376 (Tex. April 27, 2018, Orig. proceeding).

What a hospital is willing to accept as payment for services rendered for cash-based and insured patients is relevant to the reasonableness of its charges for identical services to uninsured patients.

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Plaintiff sought mandamus to require the Defendant hospital, North Cypress Medical Center Operating Company, to provide information on what it typically charges patients for the services Plaintiff received. Plaintiff, an uninsured patient, was billed \$11,037.00 by North Cypress at their maximum rate for services arising from a June 9, 2015 collision; Plaintiff was transported by ambulance to the hospital and released approximately three (3) hours later, after the hospital performed a series of x-rays, CT scans, lab tests and other emergency services for which Plaintiff was billed. Plaintiff sought to reduce these bills, by declaratory judgment that the charges were unreasonable and, therefore, the hospital lien was invalid. Through discovery, the Plaintiff requested: (1) all contracts for negotiated rates or reduced rates for identical services, (2) Medicare annual cost reports for five years, and (3) Medicare and Medicaid reimbursement rates for the services Plaintiff received. North Cypress objected and requested a protective order, arguing the pre-negotiated repayment rates with established insurance carriers are not relevant to an uninsured patient's charges. Plaintiff argued these pre-established contract rates were necessary to determine if the rates Plaintiff was charged were excessive compared to identical services provided to other patients.

The trial court ordered North Cypress to produce the requested information. North Cypress filed a petition for writ of mandamus with the appellate court which was rejected and subsequently appealed to the Texas Supreme Court. The Texas Supreme Court held, in a 6-3 decision, "the reimbursement rates sought taken together reflect the amount the hospital was willing to accept from the vast majority of its patients as payment in full for such services.

While not dispositive, such amounts are at least relevant to what constitutes a reasonable charge.” Thus, the Texas Supreme Court allowed Plaintiff to obtain specific billing information about insurance contracts and actual charges in its dispute over the reasonableness of the hospital’s fees and lien. The Supreme Court further explained the two tiers of rates charged by most hospitals. Hospitals will set “list” or “full” rates, which are generally uncollected, and “reimbursement rates” for patients with private or government insurance. Hospitals are incentivized to set “full” rates as high as possible since “reimbursement rates” are, at least partially, driven by the “full” rate. As a result, “list” rates have been steadily elevated to the point they are no longer dispositive of what is reasonable for an insured to be charged. Because, what constitutes “reasonable and regular” rates becomes an issue. Thus, what a hospital is willing to accept from the majority of its patients, who are covered by private or public insurance, is relevant to determine what is a reasonable charge.

EVALUATION:

This case is important as it provides defense counsel a useful tool when confronting unreasonable or excessive charges propounded by medical providers. It establishes that insurance contracts and actual reimbursement rates are discoverable when the reasonableness of medical bills are at issue. “Considered together, reimbursements from insurers and government payors compromise the bulk of a hospital’s income for services rendered. It defies logic to conclude that those payments have nothing to do with the reasonableness of charges to the small number of patients who pay directly.” Resultantly, discovery requests can now include specific billing information and insurance contracts to compare to the inflated rates and bills often produced by Plaintiffs’ counsel.



In re Carolina Garza

544 S.W.3d 836 (Tex. 2018).

Sanctions are inappropriate for the conduct of non-parties; and, critical and relevant billing information should be allowed, when possible.

Plaintiff was injured in a motor vehicle collision and sought medical treatment in San Antonio with Dr. Michael Leonard at the Alamo Neurosurgical Institute. On May 2, 2014, Dr. Leonard performed a cervical spine two-level fusion at Foundation Surgical Hospital of San Antonio where Plaintiff remained for three (3) days. The hospital billed over \$183,000, with \$75,000 for three hours' use of an operating room and \$77,705 for supplies used during surgery. Dr. Leonard's charges exceeded \$60,000. Plaintiff demanded medical costs for both past and proposed future expenses. Plaintiff designated Dr. Leonard as a testifying expert and noticed his deposition. Defense counsel cross-noticed Dr. Leonard's deposition and subpoenaed relevant medical and billing records related to Dr. Leonard's general billing practices, previous depositions and trial testimony for the Thomas J. Henry law firm. Defense acknowledged that documents sought were part of an effort to "(1) show that: Dr. Leonard, Foundation Surgical Hospital and Alamo Neurosurgical Institute were financially connected with the [Thomas J.] Henry law firm; (2) cast doubt on Dr. Leonard's credibility; and (3) support Logistics position that the medical procedures performed by Dr. Leonard were not necessary nor were the charges for them reasonable in amount." Dr. Leonard did not provide the subpoenaed records and sought a motion to quash. Further, Dr. Leonard testified he was unable to recall the specific details requested. Defense filed a motion to compel in Jim Wells County. The district judge ordered the depositions of Dr. Leonard's billing staff, non-parties McClain and Palacio, and directed the requested documents be produced. Both McClain and Palacio were served with re-issued subpoenas in Bexar County where they are employed. Both retained counsel and sought protective orders in the 225th District Court of Bexar County and argued the documents contained private, confidential and privileged business information as well as patient information which they could not disclose per Federal regulations. Bexar County granted relief. Based on Dr. Leonard's lack of cooperation, and Plaintiff's failure to credibly establish the reasonableness and necessity of Plaintiff's treatment, or the associated costs, Defense sought to exclude Dr. Leonard as an expert.

The Jim Well County judge granted Defendant's motion to exclude and issued an order excluding for all purposes (1) Dr. Leonard as an expert witness; (2) expert or fact testimony by any agents, representatives, and employees of Alamo Neurosurgical Institute and Foundation Surgical Hospital; (3) evidence in any form concerning Garza's charges for her treatment by Dr. Leonard, Alamo Neurosurgical Institute and Foundation Surgical Hospital; and (4) all medical records from Dr. Leonard, Alamo Neurosurgical Institute and Foundation Surgical Hospital regarding Garza. On appeal, the Texas Supreme Court overturned both the trial court's ruling and the appellate court's denial of mandamus relief and determined that sanctions were an abuse of discretion and appeal was an inadequate remedy. The Court found sanctions arbitrary and unreasonable due to (1) Carolina Garza herself not being an offending party as she was not the one who refused to produce the requested documents, (2) rather the custodian of records refused to produce the subpoenaed documents, and (3) the custodian of records were permitted to withhold records after they obtained a protective order under Rule 176.6(e) and 192.6 of the Texas Rules of Civil Procedure. Additionally, the Court held an appeal would not be an adequate remedy as Plaintiff's damage claims were based primarily on the cause and extent of her injuries with Dr. Leonard's treatment forming the lion's share of her medical care. Excluding Dr. Leonard entirely would not be fatal to Plaintiff's case but would effectively eliminate her ability to reasonably plead the majority of damages sought. Similarly, with the custodian of records testimony excluded, Plaintiff would be unable to effectively prove hospital bills.

Evaluation:

This case establishes that sanctions are an inappropriate remedy when sought against a party for a non-party's actions and provides a greater umbrella for Plaintiffs to include unsupported medical billing testimony when it forms the majority of their damages. Further, it limits Defense attorneys' ability to compel Plaintiffs' doctors to produce unrelated medical bills and records to establish possible bias and attack the doctors' credibility, when the doctor's testimony is required to establish the majority of Plaintiff's damages.

Farmers Texas County Mut. Ins. Co. v. Zuniga

04-16-00773-CV, 2017 Tex. App. LEXIS 10725 (Tex. App.—San Antonio, Nov. 15, 2017), reconsideration en banc denied, No. 04-16-00773-CV, 2018 WL 1310157 (Tex. App. —San Antonio, Mar. 14, 2018).

Insurance policy which covered bodily injury did not provide for punitive damages despite the policy not expressly excluding punitive damages.

Plaintiff Jennifer Zuniga was struck from behind by Defendant Christopher J. Medina while walking along the sidewalk near O'Connor High School. Plaintiff Zuniga sued Defendant Medina for negligence and gross negligence; the jury found Defendant Medina both negligent and grossly negligent, awarding Plaintiff Zuniga \$93,244 in actual damages and \$75,000 in punitive damages, as well as pre- and post-judgment interest and costs of court. Defendant Medina was insured by Farmers Texas County Mutual Insurance Company. Farmers paid Plaintiff Zuniga the actual damages but not punitive damages and filed for declaratory relief against both Medina and Zuniga in Harris County, claiming punitive damages are not covered by the policy, or, alternatively, Texas public policy prohibits insurance coverage of punitive damages.

Farmers stated they have “no further duty to defend or indemnify Medina; that Zuniga is not entitled to recover or collect any additional monies from Farmers; and that Farmers has no further duty with respect to final judgment.” Farmers specified the policy limits coverage is limited to actual damages arising from “bodily injury,” punitive damages would not constitute “bodily injury,” nor damages arising directly from the “bodily injury” claim. Furthermore, punitive damages exist to punish gross negligence, and deter future bad actions. An insurance agreement which indemnifies the holder completely thwarts these goals as the grossly negligent party will not bear the burden, and future parties may recognize an escape to damages resulting from their grossly negligent behavior. The Fourth Court of Appeals determined “the plain meaning of bodily injury is physical damage to a human being’s body and the plain meaning of damages is some money to compensate for injury. Therefore, ‘damage for bodily injury’ is a commitment to pay a sum of money as compensation in exchange as the equivalent of the physical damages to the injured person’s body.” The court explained it interprets insured policies under the plain language used and construes ambiguity by adopting construction which most favors the insured; however, ambiguity is not caused simply because a party proffers an alternate conflicting interpretation, but rather only when “two or more reasonable interpretations” exist. Further, when the policy’s plain language includes punitive damages, the court may ascertain if Texas public policy allows coverage. In the specific case, it was undisputed that Medina was a covered person and is personally legally responsible for punitive damages.

However, his policy specified and indemnified against bodily injury. The court determined that “bodily injury” unambiguously is injury to a “human being’s body” and damages “is a sum of money to compensate for an injury.” Taken collectively, the policy unambiguously does not provide protection for punitive damages. Further, the court determined that the lack of a specific exclusion for punitive damages is not dispositive as “the absence of an exclusion cannot confer coverage.” As the policy unambiguously does not offer coverage for punitive damages the court did not rule on the public policy arguments.

Evaluation:

The Farmers policy can be differentiated from other policies in that it specifically agrees to pay “damages for bodily injury” whereas other policies frequently carry much broader, open-ended indemnifying language to cover any and all bodily injury damages. Additionally, Plaintiffs have argued absent a specific exclusion, insurance contracts must provide coverage for gross negligence; however, this case establishes gross negligence exclusions are not required to avert liability for punitive damage awards.



Loncar v. Progressive Cty. Mut. Ins. Co.

No. 05-16-00530-CV, 2018 WL 2355205 (Tex. App.—Dallas, May 24, 2018).

Uninsured motorist benefits do not extend when the alleged tortfeasor holds sovereign immunity protection.

In May 2008, Brian Loncar drove into a City of Dallas fire truck that was responding to an alarm call with its lights and sirens engaged. Plaintiff Loncar sued the City of Dallas, who filed a successful plea to the jurisdiction and ultimately received official immunity. In turn, Loncar filed against Progressive County Mutual Insurance Company under his UM policy, for breach of contract, violations of the Texas Insurance Code and sought declaratory judgment. Progressive filed for summary judgment and argued that UM coverage did not extend as Loncar was not legally entitled to recover from the emergency vehicle accident. The policy language specified Progressive would only pay when the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle due to bodily injury. As the emergency vehicle had sovereign immunity, Loncar was not legally entitled to recover which prevented his uninsured motorist claim from being successful. It also barred Loncar from recovering on his excess policy.

The Loncar's policy contained language stating "[w]e will pay damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury' sustained by an 'insured[.]'"



The Court determined while any ambiguous policy language must be construed in the manner most favorable to the insured, only language with multiple reasonable interpretations may be considered ambiguous. When only a single reasonable interpretation exists the term is not ambiguous and only the plain meaning will stand. The Court plainly reads "legally entitled to recover" to mean the insured can only recover against a party from whom the insured can legally recover. Thus, if the insured lacks the right to recover from the in-question party, the insured cannot recover under an excess or UIM policy.

Evaluation:

An insured's UM/UIM claim is limited to parties against whom Plaintiff can recover. When no claim against tortfeasor can exist, then there is no UM/UIM claim. Thus, claims do not extend to vehicles against which Plaintiff is barred from recovering from when the policy language specifies it only provides coverage against vehicles that the insured is legally entitled to recover.



In re Farmers Tex. Cty. Mut. Ins. Co.

No. 13-17-00513-CV, 2017 WL 4769112 (Tex. App.—Corpus Christi Oct. 20, 2017, orig. proceeding).

Extra-contractual claims should be abated pending resolution of the contractual claims in a UIM case; however, it is not an abuse of discretion for a trial court to refuse to rule on such claims.

On February 23, 2016, Plaintiff was involved in an automobile collision with an uninsured motorist. Plaintiff subsequently brought suit against Farmers Texas County Mutual Insurance Company under a UM/UIM claim. Farmers sought severance and abatement of extra-contractual claims; the trial court took the motion under advisement and then ordered both parties to proceed with discovery and mediation. Farmers subsequently filed a writ of mandamus to compel the trial court to issue a motion to sever and abate the extra-contractual claims. Farmers argued the trial court abused its discretion when it effectively denied its motion to sever and abate by failing to rule in a timely fashion. This required Farmers to prepare for and litigate claims which had not accrued and may be rendered moot by the outcome of the contractual claims. Alternatively, Farmers argued the trial court abused its discretion when it refused to rule in a timely fashion.

The appellate court determined that mandamus relief is reserved for extraordinary situations and is applicable to resolve clear abuses of discretion when there is no remedy by appeal. The movant bears the burden of proving such relief is necessary. Further, severance and abatement is generally the proper remedy to UM/UIM claims, as the breach of contract must generally be established before underlying extra-contractual causes of actions can be adjudicated. Resultantly, mandamus relief can be appropriate when a motion to sever and abate is denied. However, the appellate court did not grant mandamus relief as the trial court had not ruled for or against the severance of the extra-contractual claims, instead moving for early mediation and withholding judgment while taking Farmers' request under advisement.

Further, the trial court had not compelled discovery of the underlying extra-contractual claims, rather the court had directed the parties to "file a motion" if a dispute regarding extra-contractual claims arose. The court recognized Plaintiff had not specifically sought motions to compel discovery of extra-contractual issues, nor had Farmers requested protective orders for extra-contractual evidence. Thus, the appellate court determined as discovery had not been sought, and abatement had not been denied, insufficient evidence had been compiled to surmount the high threshold required for mandamus relief, and the trial court had not so clearly abused its discretion by refusing to rule.

Evaluation:

This holding provides Plaintiffs an avenue to avoid early severance and abatement by filing, but not directly seeking discovery of such matters in Plaintiff friendly venues. In this manner they may be able to keep the insurance companies extra-contractual liability in question throughout the litigation process. Had Plaintiff sought bad faith discovery, Defendants could have filed for a protective order, and potentially forced the issue and required the trial court to rule. As Plaintiff did not seek discovery Defendant was not in imminent danger of suffering actual harm, and mandamus was inappropriate. Sharp Plaintiff firms in Plaintiff friendly venues can use this ruling to stave off severance and abatement of extra-contractual claims and keep the matter at issue through out the litigation process.

In re State Farm Mut. Auto. Ins. Co.

No. 04-18-00018-CV, 2018 WL 2121354 (Tex. App. — San Antonio, May 9, 2018, no pet. h.)

Menchaca's "distinct and independent" holding does not lead to the conclusion that abatement of extra-contractual claims is no longer required in a UIM case when the UIM claim is disputed.

Plaintiff was injured in an automobile accident. Tortfeasor's insurer tendered policy limits. Following this, Plaintiff sued State Farm Mutual Auto Insurance Company under an UM/UIM motorist claim alleging breach of contract, and extra-contractual causes of action for violations of the Texas Insurance Code. Plaintiff also sought discovery related to the extra-contractual claims. State Farm filed a severance and abatement. The trial court granted the severance but denied the abatement. State Farm moved for a writ of mandamus to abate the extra-contractual claims until the breach of contract claims had been litigated. Plaintiff contended *USAA Texas Lloyds Co. v. Menchaca* eliminated the requirement to abate extra-contractual first party claims subject to breach of contract claims, as they were each independent causes of action.

Plaintiff argued *Menchaca* may provide an alternative means of pressing claims and asserted that the contract claim is a "distinct and independent" cause of action separate from the extra-contractual claims simultaneously asserted. However, *Menchaca* involved a property damage claim, not a UM/UIM claim. Courts have already established an UM/UIM claim is separate from a property claim and occupies a unique position, and *Menchaca* does not modify these holdings. For UM/UIM an insured must first establish that a breach of contract actually exists before an insured can recover on a potentially underlying extra-contractual cause of action. Resultantly, extra-contractual claims must be severed and abated until the contract issues are resolved, as the extra-contractual causes of action may be rendered moot if it is determined no breach of contract occurred. Further, the Court of Appeals determined "(1) discovery on a contractual claim may not be relevant to discovery on the extra-contractual claim and (2) an insured should not be required to incur litigation expenses on extra-contractual claims that may be rendered moot by a trial on the contractual claim."

Plaintiff may seek discovery on breach of contract claims. Given the interwoven nature of contractual and extra-contractual claims, discovery may overlap and allow Plaintiff's access to some extra-contractual information as long as it is relevant to breach of contract claims.

Evaluation:

Menchaca does not provide Plaintiff with a new avenue of pursuing extra-contractual claims, instead it is consistent with existing case law that breach of contract claims must be resolved before extra-contractual causes of action may be pursued. Thus, severance and abatement is the appropriate remedy when Plaintiff alleges extra-contractual claims. The contract claim must be determined before the underlying breach of contract issues are satisfied.





The American Board of Trial Advocates has invited Larry J. Goldman into their ranks of the most preeminent trial lawyers in America. The American Board of Trial Advocates is a prestigious national organization dedicated to the perseverance of the constitutional vision of equal justice for all Americans, and to preserve our civil justice system. Members are recognized for elevating the standards of legal professionalism, integrity, honor, and courtesy. Larry Goldman's induction represents a highlight in his long and storied career as a trial advocate.

Additionally, Larry J. Goldman has been elected as a Fellow of the Texas Bar Foundation. The Foundation represents the top 1/3 of 1% of Texas attorneys and is among the highest honors a Texas Bar member can receive. Selection is based on outstanding contributions to the legal community and demonstrated excellence in the profession of law. Larry Goldman's election is recognition of his luminous career, and many celebrated victories on behalf of Texans.



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