Section 18.001 Affidavits and Counter Affidavits:

Changes in the Law and Recent Court Decisions

RPC Research and Planning Consultants, LP

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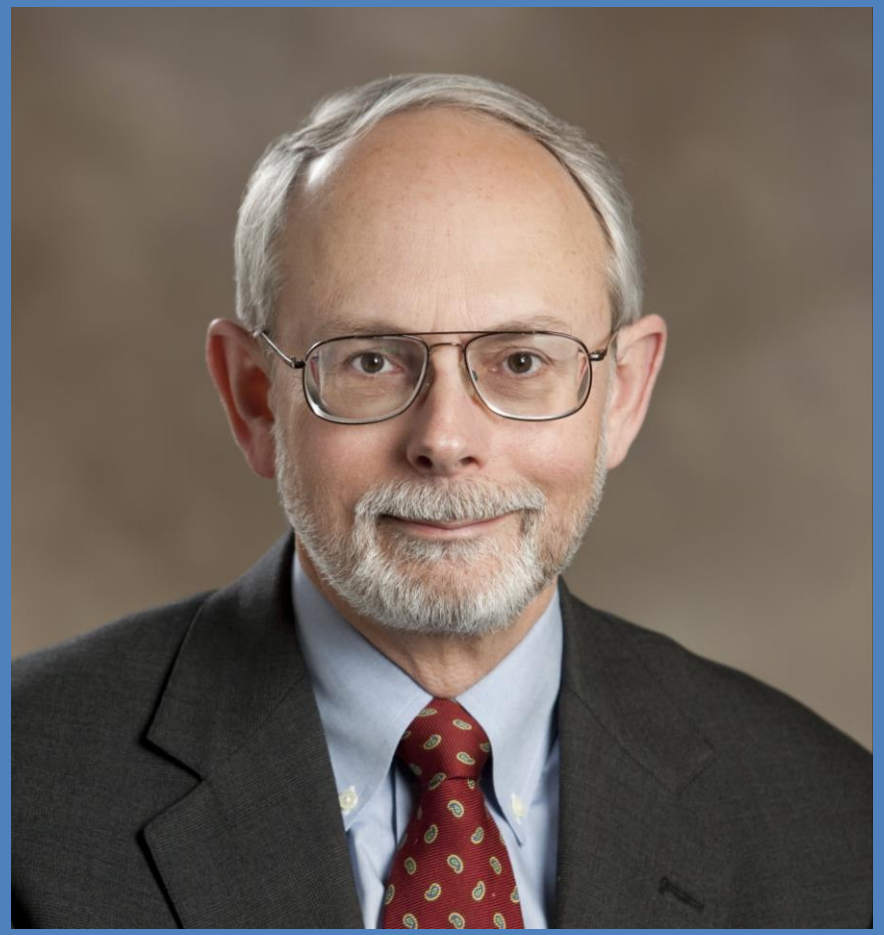

Ron Luke, JD, PhD

Dr. Luke is the President of Research & Planning Consultants in Austin, Texas. RPC is an inter-disciplinary firm providing expert witness services as well as economic, financial, and public policy studies. Dr. Luke has been accepted as an expert in economics by state and federal courts and by state administrative agencies. He has testified on health care matters including market structure, billing fraud and abuse, reasonableness of charges, medical staff credentialing, workers' compensation fee guidelines, utilization review, physician contracts, and managed care contracts. He was an original member, and later chairman, of TDI's Utilization Review Advisory Committee. He has had several appointments from Governors George W. Bush and Rick Perry to state councils and boards for health care. He is also a Director of the Texas Association of Business where he chairs TAB's Health Policy Committee.

Christopher Elliott, JD

Chris is a Shareholder at Graves Dougherty Hearon & Moody. He has extensive experience in both commercial and tort litigation, including personal injury cases. Chris represents clients on both the plaintiff and defense sides of the docket. Chris is recognized by his peers as an accomplished litigator. He is A.V. rated by Martindale-Hubbell, was elected to membership in the Austin Chapter of the American Board of Trial Advocates, and served in 2000-2001 as the president of the Capital Area Trial Lawyers Association. He is also adept at conflict resolution outside the courtroom. He puts these skills to use for his litigation clients and also as a member of the adjunct faculty at the Baylor University School of Law in Waco, where he teaches a class on Alternative Dispute Resolution.

Brian Piper, PhD

Dr. Piper is a Senior Consultant at Research & Planning Consultants in Austin, Texas. Dr. Piper has been accepted as an expert in economics and provided testimony in cases in both state and federal courts. He has testified regarding personal injury damages, *qui tam* violations, and reasonableness of charges. Prior to joining RPC, Dr. Piper was a professor teaching a variety of classes at universities in both Texas and Oklahoma. He has taught graduate classes in statistics and econometrics in both MBA and PhD programs. Much of Dr. Piper's published research involves modeling spatially dependent data and economic effects across geographies.

Presentation Overview

- §18.001 Purpose and Procedure
- Issues with §18.001
  - Timing of affidavits and counter affidavits
  - Qualifications of person filing counter affidavit
- Determination of a UCR reasonable charge
- Unresolved issues with medical expenses
- Questions

§18.001 Purpose

- Intent is to streamline the presentation of evidence on past medical expenses
- Eliminates the expense of bringing witnesses to court for uncontested medical expenses

§18.001 History

- Initially passed in 1985
- Amended in 2013 to put form of affidavit in statute
- Amended in 2019 to change when to file affidavits and counter affidavits
- 2019 changes apply only to cases filed after September 1, 2019

§18.001 Procedure

- Plaintiff files an affidavit for each provider stating the services were medically necessary and the charges were reasonable
  - The affidavit may be signed by the provider or a custodian of medical records
  - The affidavit may be signed by an insurance adjustor (Gunn v. McCoy)

- If the Defendant does not file a controverting affidavit:
  - The Plaintiff need not present testimony at trial on the medical necessity of the services or the reasonableness of charges
  - The Defendant is prevented from putting on evidence at trial to contest the affidavit
  - The affidavit is sufficient evidence to support a finding
  - The affidavit is not conclusive evidence
  - The affidavit is not evidence with respect to causation

§18.001 Procedure

- If a Defendant files an affidavit controverting medical necessity and/or reasonableness of charges
  - Plaintiffs routinely file motions to exclude the person filing the counter affidavit as unqualified
  - If the Defendant defeats the motion to exclude, it is as if the affidavit was never filed
  - Plaintiff must bring a witness or witnesses at time of trial to establish medical necessity and reasonableness of charges

Details of §18.001

- Form of the affidavit
- Timing of the filing of affidavits and counter affidavits
- Qualifications of the person filing counter affidavits
  - Qualifications to contest medical necessity
  - Qualifications to contest reasonableness of charges

Form of the Affidavit

- Must include itemized statement of services and charges
- Form of affidavits included in §18.002
  - Samples in handouts
- No similar direction was provided regarding form of counter affidavits
  - Sample affidavits contesting medical necessity and reasonableness of charges in handouts

Timing to file initial affidavits

- Affidavits Before 9/1/2019
  - Affidavits due at least 30 days before the first day evidence presented at trial

- Affidavits Currently
  - Must be served by the earlier of:
    - 90 days after the defendant files an answer
    - Offering party's expert designation deadline (scheduling order or under level 1 or 2 discovery in the Texas Rules of Civil Procedure)

Timing to file initial counter affidavits

- Counter Affidavits Before 9/1/2019
  - Controverting affidavits due 30 days after the receipt of the affidavit and 14 days before evidence is first presented at trial or any time with leave of the court before evidence is presented at trial

- Counter Affidavits Currently
  - Must be served by the earlier of:
    - 120 days after the defendant files its answer
    - Offering party's expert designation deadline (scheduling order or under level 1 or 2 discovery in the Texas Rules of Civil Procedure)

Timing to File for medical care by new provider

(Timing for continuing care not addressed before 9/1/19)

- Affidavits
  - If services are provided for the first time by a provider after the date the defendant files an answer, affidavit must be served by Offering party's expert designation deadline (scheduling order or under level 1 or 2 discovery in the Texas Rules of Civil Procedure)
  - Must file notice of service with the court clerk

- Counter Affidavits
  - Must be served by the later of:
    - 30 days after the affidavit for new service is filed
    - Offering party's expert designation deadline (scheduling order or under level 1 or 2 discovery in the Texas Rules of Civil Procedure)
  - Must file notice of service with the court clerk

Timing to File for continuing medical care by existing provider

(Timing for continuing care not addressed before 9/1/19)

- Affidavits
  - If continuing services are provided after a relevant deadline, affidavits may be supplemented on or before 60th day before trial commences
- Counter Affidavits Currently
  - Supplemental affidavits may be controverted on or before 30th day before trial commences

The Court's Discretion

- Statute allows deadlines to be altered by agreement of parties
- Statute allows deadlines to be altered with leave of the court
- Leave may be granted when failure to file timely was not intentional or the result of conscious indifference and when a late filing does not disadvantage the opposing party
- Leave is not automatic, the court has discretion to deny or grant leave
- Courts must strike untimely controverting affidavits filed without leave

Qualifications of person filing counter affidavit

- “The counter affidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.” (§18.001 part (f))
- Qualification bar is the same and no higher than for experts testifying about medical necessity or reasonableness of charges outside of §18.001

Qualifications to testify on medical necessity (1)

- To counter an affidavit for physician services, the expert should be a physician in the same specialty
- To counter an affidavit for services ordered by a physician
  - The expert should be a physician in the same specialty, or
  - The expert should be a provider of the service ordered (e.g. imaging, physical therapy, home health care, prosthetist, etc.)

Qualifications to testify on medical necessity (2)

- To counter an affidavit from a hospital, surgery center, or other facility
  - If the issue is the need for the specific place of service – could the procedure have been safely done in a less expensive setting – the expert should be a physician in the same specialty that performed the procedure
  - If the issue is the need for the physician service that generated the use of the facility (e.g. injections or surgery), the expert should be a physician in the same specialty
  - If the issue is whether the facility provided unnecessary services during a necessary visit or admission, the expert should be a physician in the same specialty or a physician in the specialty related to the unnecessary services (e.g. radiology, pathology, etc.)

Physician Qualifications to testify on reasonableness of charges

- Physicians were deemed qualified to testify on reasonableness of charges but this is now being questioned
- Regarding physician services, physicians have no automatic knowledge of what other physicians charge for services and should have to explain on what data they base their opinion
- Regarding services ordered by physicians
  - The physician has no automatic knowledge of what other types of providers charge
  - The provider of the service has no automatic knowledge of what other providers charge
- Regarding hospitals, surgery centers, and other facilities
  - The physician has no automatic knowledge of what facilities charge
  - The facility representative has no automatic knowledge of what other facilities charge

Qualifications to testify on reasonableness of charges (2)

- The mandamus order in *Brown v. Saucedo* (Tyler Court of Appeals, 2019)
  - The person does not need to be a medical provider
  - The person should have familiarity with medical billing and coding practices
  - The person can use national and regional databases of charges to determine the reasonableness of the charge
  - The person must identify the methods and data on which the opinion is based
- Possible counter affiants
  - Economists
  - Health planners
  - Insurance professionals
  - Medical billing professionals
  - Clinicians with relevant experience

Prevention and Remedy for an Improperly Struck Counter Affidavit

- Striking a counter affidavit deprives the defendant of substantial rights: the ability to present evidence on necessity of services and/or reasonableness of charges
- The Defendant should have the affiant on reasonableness of charges prepare a detailed counter affidavit with supporting documents describing methods, data sources, and calculations
- The Defendant should fully brief its response to the motion to strike with the participation of the affiant and have the affiant available to testify at a hearing
- If the counter affidavit is struck, the Defendant should immediately file a mandamus action

Determining a Usual, Customary, and Reasonable ("UCR") Charge

- What a Usual, Customary, and Reasonable Charge means
- Definitions and Examples of Percentiles
- Appropriate Benchmark UCR Percentiles
- Appropriate Geographic Markets
- Data Sources for Percentile Values

Definition of a UCR Charge

- §18.001 allows for challenges based on reasonableness of a provider's charges
- "Usual and customary charges" are the charge amounts on a provider's chargemaster
- The term "usual, customary and reasonable," are charges at or below a percentile benchmark
- UCR charges differ between geographic markets and across time
- Each payor determines what it considers the UCR charge percentile absent a negotiated rate with a provider
- There is a reasonable range of percentiles, and there are several acceptable data sources
- A reasonable charge is not necessarily the same as the reasonable value

Definitions and Examples of Percentiles

- Percentiles of medical charges are based on full, undiscounted charges
- A percentile rank is a number, 0-100, that indicates the percent of the providers' charges at or below a percentile amount
  - Example: If a charge of $230 is at the 73rd percentile, then 73% of all charges in the data are at or below $230
  - This is very different from taking 73% of a charge; a percentile is a comparison, not a multiplier

Charge, Ranking, and Percentile Example

Charge	Rank (from Lowest to Highest Charge)	Percentile Rank
$97	13	100th
$83	12	91.6th
$81	11	83.3rd
$79	10	75th
$77	9	66.6th
$75	8	58.3rd
$73	7	50th
$71	6	41.6th
$69	5	33.3rd
$67	4	25th
$65	3	16.6th
$63	2	8.3rd
$61	1	0th

What is an Appropriate Benchmark UCR Percentile?

- Texas law does not mandate a specific percentile benchmark for determining UCR charges
- New Texas law on surprise medical bills (SB 1264) says arbitration on reasonable charges must consider 80th percentile of charges as well as 50th percentile of payments
- Available sources for defining industry standards in benchmark percentiles include:
  - Other state laws
  - Past practices of Medicare
  - Practices of health plans and property/casualty insurers

Past Percentile Benchmarks Used by Medicare

- Medicare is the single largest payor in the United States
- Before moving to a relative value-based fee schedule, Medicare paid approved amounts for services, limited by the 75th percentile of customary charges by local providers

State UCR Regulations

Regulation or Payor	60th	70th	75th	80th	90th
Alaska Law on Emergency Services					
Connecticut UCR Definition					
Connecticut Workers' Comp[4]					
Idaho Workers' Comp					
Indiana Workers' Comp					
Illinois Workers' Comp[2]					
New Jersey PIP Law					
New Mexico Workers' Comp					
New York Out-of-Network Law					
Pennsylvania PIP Law[1]					
Pennsylvania Workers' Comp[3]					
Rhode Island Workers' Comp					
Utah PIP Law					

[1] *For this chart RPC treats the actual benchmark of 1.1 x 75th percentile as roughly equivalent to the 80th percentile*

[2] *For this chart RPC treats the actual benchmark of 0.9 x 80th percentile as roughly equivalent to the 75th percentile*

[3] *For this chart RPC treats the actual benchmark of 1.13 x 75th percentile as roughly equivalent to the 80th percentile*

[4] *For this chart RPC treats the actual benchmark of the 74th percentile as roughly equivalent to the 75th percentile*

Insurer UCR Benchmarks

Payor	60th	70th	75th	80th	90th
Prior Medicare Rates					
United Healthcare (some plans)					
Aetna (some plans)					
Blue Cross Blue Shield (some plans)					
Cigna (some plans)					
Liberty Mutual Auto Insurance					

Data Sources for UCR Charges

- Charge Databases for Independent Analysis
  - Texas HealthCare Information Collection – Hospitals & ASCs
  - Medicare Physician and Other Provider Public Use Data Files – Physicians and other providers
- Published Percentile Benchmarks
  - FAIR Health – Hospitals & ASCs, Physicians and other providers
  - Context4Healthcare – Hospitals & ASCs, Physicians and other providers
  - Medical Fees in the United States – Physicians and other providers
  - Physicians Fee Reference – Physicians and other providers

Definitions of Geographic Health Care Markets

- Criteria
  - Considers patient origin and destination
  - Enough providers in the market
- Common geographic definitions include
  - Counties – may or may not meet criteria
  - Medicare Cost Index Regions (8 in Texas) – based on cost differences, seven cities and "rest of Texas"
  - Geo-zips – three-digit zip codes unrelated to healthcare markets, may not include sufficient providers
  - *Dartmouth Atlas of Healthcare* Hospital Service Areas and Hospital Referral Regions – most closely tied to actual healthcare markets, but can only be used in independent analysis

When UCR is not a Measure of Reasonableness

- UCR charge may not be reasonable when:
  - There is no reasonable geography that includes enough providers
  - The provider's primary service is emergency services which are not subject to market forces
- Example providers for whom UCR may not measure reasonableness include:
  - Air ambulances
  - Emergency physician groups

Unresolved Issues with Past Medical Expenses

- Effect of Plaintiff's available insurance on paid or incurred cost
- Discovery of negotiated rates from providers
- Requirement of provider to present a "clean claim"

Effect of Plaintiff's available insurance on paid or incurred cost

- What is the amount incurred if the Plaintiff is insured?
- Obligation of Plaintiff to submit claims
- Obligation of providers to submit claims
- Obligation of health plans to pay claims and seek subrogation

Discovery of negotiated rates from providers (North Cypress)

- Hospital liens (North Cypress)
- Past medical expenses (Lacky v. Austin Dement)

Requirement of provider to present a “clean claim”

- Texas defines a “clean claim” at §21.2803 of the Texas Administrative Code
  - Uses industry standard claim form
  - Uses standard coding for services
  - Ties services to diagnoses
  - Identifies the place of service
- Clean claims include the necessary elements to compare a provider’s charges to other providers in the area
- All providers or their billing companies have the ability to produce a clean claim because public and private health plans have no obligation to pay providers until they receive a clean claim

Questions