KING & JURGENS LLC

MEMORANDUM

TO:	Dr. Ron Luke
FROM:	King & Jurgens, LLC
DATE:	February 27, 2023
RE:	Recoverable Damages in Louisiana and Comparison with Texas Law

INTRODUCTION

The fountainhead of Louisiana tort liability is La. C.C. art. 2315, which provides that "every act of man that causes damage to another obliges him by whose fault it happened to repair it." The term damage in La. C.C. art. 2315 refers to "compensatory damages" which are designed to restore the plaintiff to the state he would have been in, but-for the tort. *Perry v. Starr Indem. & Liab. Co*., 52,720, (La. App. 2 Cir. 9/25/19); 280 So.3d 813, 821. In addition to compensatory damages recoverable under La. C.C. art. 2315, Louisiana law allows for the recovery of punitive (or exemplary) damages, but only when specifically authorized by statute.

Compensatory damages can generally be divided into two categories – "special" and "general." "Special damages" are those which have a ready market value, i.e., their value can be determined with relative certainty. *Smith v. Escalon*, 48,129 (La. App. 2 Cir. 6/26/13), 117 So. 3d 576, 583. Special damages include items such as: past, present, and future medical expenses; past, present, and future lost wages; loss of financial support, services or benefits; property losses; and other economic-based losses. Conversely, "general" damages are those which may not be fixed with pecuniary exactitude because they involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or lifestyle which cannot be definitively measured in monetary terms. *Id.*

DISCUSSION

I. Recovery of Special Damages Under Louisiana Law.

As noted above, special damages are those which proximately flow from the defendant's fault and are reasonably susceptible of quantification to a market value. The plaintiff bears the burden of proving entitlement to special damages, which must be demonstrated with reasonable possibility or probability. *Cormier v. Colston*, 918 So. 2d 541 (La. App. 3d Cir. 2005).

For instance, to recover past medical expenses, the plaintiff must present medical testimony to prove he suffered an injury in the accident at issue and that the injury was caused by the accident. *Reed v. LaCombe*, 15-120 (La. App. 3 Cir. 7/29/15), 172 So.3d 679. If it is established that the treatment was necessitated by the accident, then the plaintiff can generally establish the costs of the care by producing his or her medical bills for the treatment.[1]

With respect to future medical expenses, the plaintiff must show that, more probably than not, these expenses will be incurred and must present medical testimony that they are indicated and the probable cost of these expenses. *Veazey v. State Farm Mut. Auto Ins*., 587 So.2d 5 (La. App. 3 Cir.1991). The defendant may then attack the future medical expense award on the grounds that the need for continued care and its cost are purely speculative. *Simmons v. Custom-Bilt Cabinet & Supply Co*., 509 So. 2d 663 (La. App. 3d Cir. 1987).

Similarly, a plaintiff seeking to recover damages for past lost wages must show the time missed from work because of the injury. *Hammons v. St. Paul*, 2012-0346 (La.App. 4 Cir. 9/26/12); 101 So.3d 1006, 1012. In connection with demonstrating entitlement to future lost wages, the plaintiff must present "medical evidence which indicates with reasonable certainty that there exists a residual disability causally related to the accident" at issue. *Aisole v. Dean*, 574 So.2d 1248, 1252 (La.1991). When assessing an award for future lost wages, the factfinder is to consider the following factors: (1) the plaintiff's physical condition before the injury, (2) the plaintiff's past work history and work consistency, (3) the amount the plaintiff would have earned absent the injury complained of, and (4) the probability that the plaintiff would have continued to earn wages over the remainder of his working life. *Hammons,* 101 So.3d at 1011.

Importantly, with respect to the calculation of both past and future lost wages, Louisiana courts have recognized that the plaintiff's gross/pretax earnings should be used, rather than his or her net/post-tax earnings. *See Franklin v. AIG Cas. Co*., 2013-0226 (La. App. 1 Cir. 6/7/13) ("The general rule is that gross rather than net earnings are the appropriate measure of damages for calculating lost wages.").

Comparison with Texas law.

Texas law is generally in accord with Louisiana law with respect to many aspects of special damages recovery.[2]

For instance, with regard to future medical expense damages, the plaintiff must establish the need for future treatment and that medication is reasonably probable. *Antonov v. Walters*, 168 S.W.3d 901, 908 (Tex. App. —Fort Worth 2005, pet. denied). Like Louisiana, under Texas law,

[1] As discussed *infra*, the amount of recoverable past medical expenses will be drastically impacted by the Louisiana legislature's recent repeal of the collateral source rule. However, as further discussed, plaintiff firms have begun using LOPs and third-party agreements with medical factoring agreements in order to be able to present past medical expense claims at "chargemaster" or "list" rates. The treatment of these agreements by Louisiana and Texas courts is discussed *infra*.

[2] As noted, a more detailed discussion on plaintiff attorney tactics to present inflated medical expense claims is below.

the plaintiff generally must prove a future medical expense claim with expert testimony, usually through the testimony of the plaintiff's treating physician or another medical professional. Once the plaintiff establishes that the future care is reasonably probable, he or she may then present evidence of the probable cost of the future medical care. *Bowens v. Patterson*, 716 So. 2d 69 (La. Ct. App. 3d Cir. 1998). This is generally done through a treating physician or life care planner. As in Louisiana, the award should be discounted to present value, while also considering the impact of inflation. *See generally* Knox D. Nunnally and Ronald G. Franklin, Medical expenses—Future medical expenses—Expert medical testimony—Cost of medical services, 2 Tex. Prac. Guide Torts § 10:130 (West 2022). A defendant may also attack the plaintiff's projected future medical care costs on the basis that the claimed necessity of future care and its costs are purely speculative. *See Chevron U.S.A. Inc. v. Lara*, 786 S.W.2d 48, 52 (Tex. App. —El Paso 1990, writ denied) (reversing award of $10,000 in future medical expense damages where plaintiff's treating physician admitted that the costs for future care were "just conjecture.").

We note that one significant difference between Texas and Louisiana with respect to special damage awards is the applicable wage base to be used in calculating past and future lost wages. Texas statutory law provides that "if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove ***the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law***." Tex. Civ. Prac. & Rem. Code Ann. § 18.091(a) (emphasis added). Texas courts have concluded that the purpose of this statute is "to prevent a plaintiff from obtaining a windfall by being awarded pretax income on awards that are not subject to taxation." *Big Bird Tree Servs. v. Gallegos,* 365 S.W.3d 173, 179 (Tex. App.2012). Unlike Texas, Louisiana employs the opposite approach, allowing a plaintiff to use a gross or pretax wage base to calculate his or her claims for lost wages and/or loss of future earning capacity. The obvious result is that the use of gross or pretax wage base can have a significant upward adjustment on a plaintiff's lost wage claim, particularly where the plaintiff was a high earner prior to the injury.[3]

II. Recovery of General Damages Under Louisiana Law.

General damages compensate a tort victim for physical and mental pain and suffering, inconvenience, loss of intellectual gratification or physical enjoyment, and other factors that affect the victim's life, and other losses of lifestyle that cannot be measured definitively in terms of money. *American Cent. Ins. Co. v. Terex Crane*, 861 So. 2d 228, 234 (La. App. 1st Cir. 2003). The "loss of enjoyment of life," compensable by general damages (also called hedonic damages) refers to the detrimental alterations of a person's life or lifestyle or a person's inability to participate in

[3] For instance, we recently had a case applying Louisiana law involving a 28-year-old plaintiff, who was earning approximately $120,000.00 annually at the time of an accident in which he sustained significant injuries that required multiple surgeries. The difference in the plaintiff's economic loss claim according to our expert was between $500,000 to $1,000,000 when pretax gross income was used as compared to post-tax net income. Stated differently, the plaintiff's economic loss claim was between $500,000.00 to $1,000,000 greater under Louisiana law, than if he had been asserting a claim under Texas law (or under the Jones Act) where post-tax net income is used to determine the plaintiff's applicable wage base.

the activities or pleasures of life that were formerly enjoyed. *See* Russ M. Herman and Joseph E. Cain, 1 La. Prac. Pers. Inj. § 5:7, Recoverable damages—Compensatory damages—General damages (West 2023).

Louisiana courts generally preclude parties from offering expert testimony with respect to general damages or to quantify such damages. *See Foster v. Trafalgar House Oil & Gas*, 603 So.2d 284, 286 (La. Ct. App.1992) ("we hereby order that no attempt to qualify an expert or present evidence quantifying general damages, including 'hedonic damages,' be allowed."); *Longman v. Allstate Ins. Co*., 635 So.2d 343 (La.App. 4th Cir.1994) (rejecting expert testimony regarding hedonic damages); *Pick v. Am. Med. Sys., Inc*., CIV.A. 94-1729, 1997 WL 149985, at *1 (E.D. La. Mar. 25, 1997) ("The Court notes that Louisiana courts have not permitted expert testimony for hedonic damages at trial…Because Dr. Wolfson's testimony on hedonic damages is inadmissible both under Rule 702 because it is not helpful and under Rule 403, the Court need not address plaintiff's arguments regarding Daubert.").

Comparison with Texas law.

Texas law allows for recovery of general damages for "pain and suffering" defined to include all the physical discomfort and emotional trauma occasioned by an injury. Damages for loss of enjoyment of life are an element of damages for pain and suffering. *Rentech Steel, L.L.C. v. Teel,* 299 S.W.3d 155 (Tex. App. —Eastland 2009, pet. dism'd). Texas courts have recognized that "probably no other item of damages is more difficult to describe, define, or reasonably compensated…By its very nature the amount reasonably necessary to compensate an injured person for his past and future physical pain and mental anguish must largely be left to the discretion of the jury." *Primoris Energy Services Corporation v. Myers*, 569 S.W.3d 745, 758 (Tex. App. — Houston [1st Dist.] 2018, no pet.). The process of awarding damages for amorphous, discretionary injuries covered by general damages, such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss. *Id.* Texas courts, like Louisiana courts, recognize that assessing the amount of general damage to award a plaintiff is firmly within the jury's discretion. *Id. See also Antill v. State Farm Mut. Ins. Co.,* 20-131 (La. App. 5 Cir. 12/2/20); 308 So.3d 388, 405 ("Our jurisprudence has consistently held that in the calculation of general damages, considerable discretion is left to the jury. The discretion vested in the jury is great, even 'vast,' so that an appellate court should rarely disturb an award of general damages.") (citation omitted).

Texas courts have similarly refused to allow expert testimony with respect to general or hedonic damages. *See Innovative Block of S. Texas, Ltd. v. Valley Builders Supply, Inc*., 603 S.W.3d 409, 423–24 (Tex. 2020) (precluding expert opinion testimony offered to quantify a party's claim for general damages due to reputational harm, noting that "[r]eputational damages are not amenable to exact calculation, so the factfinder must use 'sound judgment' in determining the amount of such damages.") (citation omitted); *see also Thomas v. T.K. Stanley, Inc.,* No. 9-12-CV-158, 2014 WL 12910538, at *2 (E.D. Tex. Oct. 27, 2014) (applying Federal Rules of Evidence) (excluding expert testimony "regarding the economic present or future value of pain and suffering, mental anguish, physical impairment, loss of enjoyment of life, or 'hedonic damages,'" on the

basis that expert economists "do not have any advantage over the jury in determining pain and suffering or mental anguish.").

There do not appear to be any notable differences between Texas and Louisiana with respect to general damages, except to note that the amounts of such awards are inherently subjective and highly dependent on such factors as: (1) venue, (2) whether the case is judge-tried or bench-tried, (2) the make-up of the jury pool if a jury trial, (3) the particular defendant(s), and (4) the particular plaintiff(s).

III. Future Damage Awards and Judicial Interest.

Both special and general damages can be awarded to compensate a tort victim for past, present and future losses. However, in the case of a lump sum award intended to compensate a plaintiff for future damages, such as future medical expenses or future lost wages, the award should be discounted to a present-day value. *Birdsall v. Regional Elec. & Const., Inc.,* 710 So. 2d 1164 (La. App. 1st Cir. 1998). Inflation should also be considered with respect to future damage awards. *Id.*

Importantly, Louisiana law allows for legal prejudgment interest to be awarded with respect to both past and future damages in tort cases, which interest is calculated from the date of judicial demand (i.e., the date the lawsuit is filed) until paid. *See Mistich v. Volkswagen of Germany, Inc*., 94-0226, (La. App. 4 Cir. 6/25/97); 698 So.2d 47, *abrogated on other grounds by McGee v. A C And S, Inc*., 2005-1036 (La. 7/10/06); 933 So.2d 770. *See also* La. R.S. § 13:4203.[4]

Comparison with Texas law.

A plaintiff's entitlement to prejudgment legal interest differs in certain respects under Texas law. Most significantly, in cases involving personal injury, wrongful death, or property damages, prejudgment interest is not permitted on future damages awards. *See* TX FIN § 304.1045. In Louisiana, this can have a significant amount on the potential value of the judgment where the claimant's future damages are expected to be significant. Further, as opposed to accruing from the date of judicial demand, prejudgment interest under Texas law begins to accrue from the earlier of: (1) the 180th day after the date the defendant receives written notice of a claim or (2) the date the suit is filed and ending on the day preceding the date judgment is rendered.[5]

[4] In Louisiana, breach of contract cases involving failure to pay a sum of money, legal interest accrues from the date that the sum is due, rather than from the date of judicial demand. *See* La. C.C. art. 2000.

[5] With respect to interest rates, Louisiana's judicial interest rate is determined on an annual basis by the Louisiana Commissioner of Financial Institutions. In 2023 -- is 6.5% (up from 3.5% in 2022). Texas's judicial interest rate for non-contract actions is determined on a monthly basis (the 15th day of each month) based on the following formula: (1) the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation;(2) five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is more than 15 percent. TX FIN § 304.003(c).

IV. Punitive Damages.

It is well-settled in Louisiana that punitive damages are not recoverable unless expressly provided for by statute. *See, e.g., Mosing v. Domas*, 2002-0012 (La. 10/15/02); 830 So.2d 967, 974. Examples of offenses where Louisiana expressly authorizes an award of punitive damages, include where the injuries caused by an intoxicated driver; injuries stemming from child pornography or criminal sexual abuse of a minor; domestic abuse; and hazing. *See* La. C.C. art. 2315.3 (child pornography) *id.* at art. 2315.4 (intoxicated driver); *id.* at 2315.7 (criminal sexual activity involving minor).

Comparison with Texas law.

Texas state law likewise limits recovery of punitive damages, but not to specific statutorily prescribed conduct like Louisiana. Nonetheless, Texas places a heavy burden on the claimant seeking to recover punitive damages. A party seeking to recover punitive damages must prove by clear and convincing evidence that the damages resulted from the defendant's fraud, malice, or gross negligence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a). Consistent with due process concerns, Texas law also limits the amounts that may be awarded in punitive damages to the greater of: (1) two times the amount of economic damages plus an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). These limitations, however, do not apply when the defendant's conduct involves a knowing and intentional violation of certain types of criminal conduct. *Id.*

V. Collateral Source Rule.

Louisiana courts traditionally recognized and applied the collateral source rule in Louisiana tort cases. Pursuant to the collateral source rule, a tortfeasor may not benefit and an injured plaintiff's tort recovery may not be diminished because of benefits received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. *Cooper v. Borden, Inc*., 709 So. 2d 878 (La. Ct. App. 2d Cir. 1998). Accordingly, under this rule payments received from an independent source, such as Medicare or private health insurance, are not deducted from the award the aggrieved party would otherwise receive from the wrongdoer, and a tortfeasor's liability to an injured plaintiff should be the same, regardless of whether or not the plaintiff had the foresight to obtain insurance. *Id.* Under this rule, the plaintiff would receive the benefit of any Medicare or health insurer negotiated rates for medical expenses, because he or she was permitted to recover the amount billed to Medicare or insurance, as opposed to the amount the health provider is required by contract or regulation to accept as payment in full.

In January 2021, the Louisiana legislature largely repealed the collateral source rule with respect to medical expense damages with the passage of House Bill 57. Now codified as La. R.S. § 9:2800.27, the new law provides that in cases where a plaintiff's medical expenses have been

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In contract actions, post judgment interest is limited to the lesser of (1) the rate specified in the contract, which may be a variable rate; or (2) 18 percent a year. TX FIN § 304.002.

paid by Medicare or private insurance, the recovery of past medical expenses is "limited to the amount ***actually paid*** to the contracted medical provider by the health insurance issuer or Medicare, and any applicable cost sharing amounts paid or owed by the claimant, ***and not the amount billed***." La. R.S. § 9:2800.27(B) (emphasis added). In cases where expenses were paid by private insurance or Medicare, the statute permits the plaintiff to recover an additional 40% of the amount billed to cover the cost of procuring the insurance and/or Medicare, subject to the defendant's right to demonstrate that recovery of this additional amount would be unreasonable. There is very little case law applying this new statute, which was given prospective effect only, applying to injuries occurring after January 1, 2021.

The statute also addresses situations where a plaintiff's medical expenses are paid by either Medicaid or by workers compensation, and again limits recovery to the amounts actually paid. Given the fact that an injured plaintiff does not actually pay anything to procure Medicaid or workers compensation, he has no right to recover an additional 40%.

Comparison with Texas law.

Like La. R.S. § 9:2800.27, Texas repealed the collateral source rule. In particular, TX CIV PRAC & REM § 41.0105, enacted in 2003, provides that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." The Texas limitation is broader than Louisiana law insofar as it is an outright prohibition on recovery of any medical expense amounts more than the amounts actually paid or owed. Conversely, Louisiana permits the plaintiff to recover an additional 40% in cases where medical expenses were paid by private health insurance or Medicare.

VI. Louisiana Jurisprudential Treatment Towards Medical Factoring Arrangements and/or Letters of Protection to Increase Medical Expense Claims by Having Medical Care Be Provided at "Chargemaster" or "List" Rates.

A recent issue that has arisen in Louisiana, Texas, and other states, is the trend of plaintiff firms to utilize medical factoring arrangements or letters of protection to drastically inflate past medical expense claims. The typical arrangement involves sending a plaintiff who is either uninsured (or is instructed to forego using insurance)[6] to a medical provider who charges full

[6] Another recent and developing issue is where a plaintiff is instructed to forego using available insurance (whether through private insurance or workers' compensation) and instead incur expenses on an uninsured basis at chargemaster rates. In our OCSLA practice, for instance, we have seen an uptick in OCSLA cases where the plaintiff firm instructs the client to forego filing a LHWCA claim and instead undergo treatment at inflated rates. Defendants have predictably tried to argue that the willing failure to use applicable insurance thereby grossly inflating the medical expense claims constitutes a clear failure of the plaintiff to mitigate his damages. The few cases that have addressed this argument, however, have not been receptive to it. For instance, in *Grant v. CRST Expedited, Inc*., 1:18-CV-433, 2020 WL 9720500, at *7 (E.D. Tex. Dec. 2, 2020), a federal court applying Texas law relied on the collateral source rule to hold that a defendant could not assert a failure to mitigate defense based on the plaintiff's decision to forego available insurance and instead treat at uninsured retail rates that were much higher than those that would have been paid by his insurance. This decision is questionable for several reasons. First, the court ignored that the collateral source rule was largely repealed by TX CIV PRAC & REM § 41.0105. Second and more importantly, following *Grant*, the Texas Supreme Court issued two rulings *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021), *reh'g denied* (Sept.

"chargemaster," "list," or "retail" rates for the medical care. These rates are drastically inflated when compared with the negotiated rates that a medical provider receives from private insurers or public payors for the same services and care. The provider then assigns the accounts receivable to a medical factoring company to which the plaintiff remains responsible for the full amount. Alternatively, the plaintiff's law firm may provide a letter of protection ("LOP") for the costs of the care. In either event, the purpose of this arrangement is to keep the plaintiff legally responsible to pay the full billed amounts at the increased chargemaster rates during the litigation, so that he can claim and present evidence of this elevated amount to the factfinder at trial. The plaintiff will never actually pay these full retail rates that he seeks to recover from the defendants.

The Louisiana appellate courts have had several occasions to address these arrangements, and their impact on medical expense claims. The decisions have been decidedly in favor of plaintiffs. In 2021, the Louisiana Third and Fifth Circuits addressed the situation when a medical factoring company purchases the account receivables from a medical provider at a significant discount, but the plaintiff remains liable to the factoring company for the full amount of the provider's receivables. Both courts held that the plaintiff was entitled to claim the full "billed" amount from the defendants, and to present evidence of these full billed amounts at trial. *See Ochoa v. Aldrete*, 21-632 (La. App. 5 Cir. 12/8/21), 335 So.3d 957, 966; *Fontenot v. UV Insurance Risk Retention Group, Inc*., 20-361 (La. App. 3 Cir. 4/14/21), 2021 WL 1399874, *writ denied* 21-656 (La. 10/5/21), 325 So.3d 357. It should be noted that the *Ochoa* court also rejected the defendants' arguments that the full billed charges were not recoverable because they were excessive and unreasonable. In particular, the court noted that Louisiana law is clear that "[e]ven if a tort victim has been overcharged for medical treatment, the tortfeasor is liable for the expenses unless they were incurred by the victim in bad faith." *Ochoa,* 335 So.3d at 966. Bad faith with respect to past medical expense claims exists where plaintiffs continue treatment, despite having already been healed, for the sole purpose of increasing their damages. *Bass v. Allstate Ins. Co*., 32,652 (La. App. 2 Cir. 1/26/00), 750 So.2d 460. Similarly, a plaintiff's deliberate exaggeration of the impact of an accident and the extent any alleged injuries may constitute "bad faith." *Hamilton v. Wild*, 40,410 (La. App. 2 Cir. 12/14/05), 917 So.2d 695.

Defendants have also tried to argue that a plaintiff's decision to inflate his medical expenses through use of medical factoring agreements or LOPs constitutes "bad faith" in connection with past medical expense claims. Louisiana courts, however, have generally rejected these arguments on the grounds that "bad faith" in this context focuses on whether the treatment was medically appropriate, as opposed to the costs for the treatment. For instance, in *Ochoa*, the defendants argued that that the plaintiff acted in "in bad faith for accepting treatment" at excessive and inflated rates. *Ochoa,* 335 So.3d at 969. The Louisiana Fifth Circuit rejected this argument, noting that "Louisiana law is clear that '[e]ven if a tort victim has been overcharged for medical treatment, the tortfeasor is liable for the expenses unless they were incurred by the victim in bad faith.'" *Id* (quoting *Lair v. Carriker*, 574 So.2d 551, 553 (La. App. 3d Cir. 1991)). Relying on the

3, 2021) and *In re ExxonMobil Corp*., 635 S.W.3d 631 (Tex. 2021) (discussed *infra*) which largely undermine the reasoning employed by the federal court. In sum, there is a strong likelihood that the Texas Supreme Court would reach a different result on the failure-to-mitigate issue than that reached by the federal court in *Grant*.

cases referenced above, the Fifth Circuit reiterated that bad faith exists only where the plaintiff "continu[es] treatment, despite having already been healed, for the sole purpose of increasing his damages," or deliberately exaggerates "the extent of his alleged injuries." *Id.* Because the defendants failed to submit proof that plaintiff engaged in unnecessary treatment or exaggerated his injuries, they had failed to establish bad faith as that term is applied in the context of post-accident medical treatment.

Very recently, in December of 2022, the Louisiana Supreme Court addressed another medical factoring situation in the case of *George v. Progressive Waste Sols. of La, Inc*., 2022-01068 (La. 12/1/22), 2022 WL 17546741. The facts of the case were as follows: the plaintiff was struck by defendant's garbage truck sustaining injuries and underwent back surgery for total billed charges of $192,020.14 at chargemaster rates. Thereafter, the medical providers that performed the plaintiff's surgery assigned the accounts receivable to a third-party medical financing company, which paid a total of $76,808.06 to the providers for the assignment.[7] The defendants filed a motion in *limine* seeking to limit the plaintiff's recovery to the $76,808.06 that had been paid to the medical providers. The trial court granted the motion and held that the plaintiff could only present evidence and recover the amount that was actually paid by the financing company to the medical providers to acquire its assignment (i.e., $76,808.06), as opposed to the full charged amounts of $192,020.14.

On writs to the Louisiana Supreme Court, the Court reversed, and held that the plaintiff could present evidence of the full billed amount at trial. In line with *Ochoa* and *Fontenot,* the Louisiana Supreme Court held that the assignment to the third-party factoring company did not release the plaintiff's obligation to pay the full billed amounts for his medical care to the third-party factoring company. The Court also held that the collateral source was not implicated under the facts presented because that rule only applied where the plaintiff received monies "from sources independent of the tortfeasor's procuration or contribution." *George,* 2022 WL 17546741, at *6 (quoting *Bozeman v. State of La., DOTD*, 03-1016, p. 9 (La. 7/2/04), 879 So.2d 692, 698). The collateral source rule had no application because the plaintiff "had not diminished his patrimony to receive medical treatment from his healthcare providers, as he has not procured any separate benefit or negotiated rate at his own expense." *Id.* Thus, the Court concluded that: "[i]n the absence of any evidence that plaintiff is not liable for the full billed medical charges in this matter, defendant cannot benefit from any reduction as a result of the subject medical factoring agreement." *Id.* Therefore, the plaintiff would be permitted to present evidence of the full charged amount of the surgery and for which he remained liable to pay. *Id.*

Justice Crain issued a concurring opinion in *George* for the purpose of reiterating that the collateral source rule did not apply in the case because the plaintiff had not negotiated or received any discount to the full medical bill, and thus he remained liable for the full medical bill. *George*,

[7] The plaintiff's former attorney also executed a letter of protection in favor of the medical factoring company guaranteeing the company's interest in any recovery by the plaintiff via settlement or judgment. The only relevance of this LOP is that it also did not release the plaintiff himself from the obligation pay the full billed amount of the medical charges.

2022 WL 17546741 at *6 (Crain, J, concurring). Importantly, however, Justice Crain noted that the $192,020.14 medical bill was "still subject to a determination that the charges are 'reasonable and customary,'" because such a determination "ha[d] not yet been made" at that point in the case. *Id.*, n. 1. Justice Crain's statement indicates that although a plaintiff is entitled to present evidence of the full billed charges in such third-party financing situations, the defendant is permitted to attack the excessiveness of the charges by putting on evidence that such charges are not "reasonable and customary."[8]

Ochoa, *Fontenot*, and most recently *George*, will encourage Louisiana plaintiff firms to continue using LOPs and third-party financing arrangements with medical providers for the purpose of obtaining medical care at inflated chargemaster or list rates, for which the plaintiff remains "legally obligated" to pay through the pendency of the litigation, but which the plaintiff will likely never pay at any point. At the same time, it should be noted that Justice Crain's concurring opinion appears to give personal injury defendants an avenue to attack such bills on the grounds that the charges are not "reasonable and customary."

Comparison with Texas law.

In contrast to Louisiana, where a defendant is generally not entitled to a discount for excessive medical charges (absent bad faith), in Texas, it is well-settled that "recovery of [medical] expenses will be denied in the absence of evidence showing that the charges are reasonable," and proof of the amount charged does not itself constitute evidence of reasonableness. *Dall. Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380, 383 (1956). In other words, Texas law appears to place an affirmative obligation on plaintiffs to demonstrate the ***reasonableness*** of the amount paid or incurred for medical expenses.

Consistent with this rationale, the Texas Supreme Court has issued several recent opinions that are favorable to defendants with respect to the efforts of plaintiff firms to inflate past medical expense claims by instructing their clients to undergo care at excessive chargemaster rates. In three recent cases where plaintiffs sought to recover past medical expenses at chargemaster rates, the Texas Supreme Court has permitted defendants to proceed with discovery on the plaintiff's medical providers for the purpose of determining what rates those same providers normally negotiate and charge to insurers or public payors. *See In re N. Cypress Med. Ctr. Operating Co*., 559 S.W.3d 128 (Tex. 2018) (orig. proceeding); *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021), *reh'g denied* (Sept. 3, 2021); *In re ExxonMobil Corp*., 635 S.W.3d 631 (Tex. 2021).

In *K&L*, for instance, which involved a plaintiff's claim to recover $1.2 million in past medical expenses at inflated chargemaster rates, the Texas Supreme Court concluded that the defendant was entitled to discovery of the medical providers negotiated and discounted rates with insurers and public payors. *K&L,* 627 S.W.3d at 255. This discovery was relevant because it would allow the defendant "to rebut the alleged damages at trial by offering concrete evidence—rather

[8] Justice Crain's suggestion that the medical charges are required to be "reasonable and customary" also seems to cut against the principle that a defendant is liable for a tort victim's medical expenses "[e]ven if a tort victim has been overcharged for medical treatment." *Lair v. Carriker*, 574 So.2d 551, 553 (La. App. 3d Cir. 1991).

than speculative evidence in the form of affidavits and cross-examination based on generalized data—of the amounts the providers usually charge and accept as payment and the cost to providers for the services and devices provided to [the plaintiff] …" *Id.* In sum, and in line with the plaintiff's obligation to demonstrate the reasonableness of incurred medical expenses, the Texas Supreme Court has provided defendants with a basis to discover the rates that medical providers used by plaintiffs charge to others (namely, insurers), so that defendants have the ability to attack the reasonableness of the undiscounted list charges presented by plaintiffs.

Louisiana courts have been receptive to discovery with respect to the financing and LOP arrangements used by plaintiff firms to inflate medical expense damages, but for reasons other than to directly attack the reasonableness of the amounts. In *Collins v. Benton*, CV 18-7465, 2021 WL 638116, at *6 (E.D. La. Feb. 17, 2021), a federal court in Louisiana applying Louisiana law found that defendants were entitled to discovery of information with respect to the plaintiff's third-party medical financing arrangement pursuant to which the plaintiff remained liable for the full charged amounts of his medical expenses. The court found that the discovery could be relevant to if the plaintiff incurred treatment unnecessarily and thus was in bad faith and, further, could also demonstrate bias on the part of the plaintiff's treating medical providers. *Id.* at *6-7. It remains to be seen whether Louisiana courts will expand on the scope of permissible discovery with respect to these financing arrangements used by plaintiff firms to grossly inflate their clients' medical expenses. As noted above, Justice Crain's concurrence in *George*, discussed *supra*, indicates that defendants may attack treatment at inflated prices on the grounds that the charges are not "reasonable and customary." This suggests that defendants are entitled to discovery of the billing and payment practices of the medical providers and third-party financing companies utilized by plaintiffs (including what amounts are typically charged and/or paid for the same care) to attack the reasonableness of the charges.