RPC Webinar

Differences in Damages in Personal Injury Cases in Texas and Louisiana

Objective:

For attorneys practicing in Texas or Louisiana, handling personal injury cases under the laws of the other state may involve navigating some significant differences in the way damages are rendered. This webinar explores those differences with the goal of answering these questions:

Available Materials:

The following materials will be available for download once logged into the webinar and emailed to the attendees after the webinar is over.

- PDF of webinar PowerPoint
- King & Jurgens memo: Recoverable Damages in Louisiana and Comparison with Texas Law
- RPC White Paper: Damages for Past Medical Expenses in Texas Personal Injury Litigation
- PDF of Judicial decisions cited in the webinar
- Speaker CVs

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Differences in Damages in Personal Injury Cases Between Texas and Louisiana

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Housekeeping Notes

- This webinar has been approved by both the Texas and Louisiana bars for 1.5 hours of CLE credit.
  - Louisiana requires us to submit data from Zoom showing when each attendee logged on and off for the webinar.
  - Printable certificates will be available after the webinar
  - RPC will furnish the Louisiana Bar with attendee information in accordance with its CLE rules. Those attorneys will not need to take any further steps to claim their CLE credits.
  - RPC will furnish the State Bar of Texas with attendee information in accordance with its CLE rules. Those attorneys will not need to take any further steps to claim their CLE credits.
- We have reserved 15 minutes at the end of the presentation to respond to questions from attendees. Use Zoom's "Q&A" feature to post your questions at any time during the webinar.
- If you have post-event questions, we provide the presenters' contact information.
- After the webinar, you will be asked to complete a brief optional online survey.
- A recording of the webinar and the download documents will be available online for later viewing, but CLE credit is available only for those viewing the live webinar.

Documents Available for Download

After the webinar, registrants will receive an email with a link to download several documents

- PDF of webinar PowerPoint
- Presenters' CVs
- King & Jurgens memo: "Recoverable Damages in Louisiana and Comparison with Texas Law"
- RPC White Paper: "Damages for Past Medical Expenses in Texas Personal Injury Litigation"
- Judicial decisions cited in the webinar

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Spencer King is a member at King & Jurgens. He focuses primarily on the areas of commercial litigation and casualty defense. In his casualty practice he has assisted and counseled clients in personal injury disputes in both Louisiana and Texas state and federal courts. He has litigated claims arising under state law and the General Maritime Law, as well as offshore accidents involving the application of the Outer Continental Shelf Lands Act (OCSLA).

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Michael Scullin is a Certified Rehabilitation Counselor, Certified Vocational Evaluator, and Certified Life Care Planner with RPC. He has been accepted as an expert witness in these fields. He has experience conducting vocational evaluations and providing case management and career counseling services. To determine pre-injury and post-injury employability in personal injury cases, he conducts vocational testing, transferable skills analysis, labor market studies, rehabilitation plans, and definition of reasonable accommodations under the Americans with Disabilities Act. He is a member of the International Association of Rehabilitation Professionals.

Michael earned his Bachelor of Science from Louisiana State University and his Master of Health Science in rehabilitation counseling from the LSU Health Science Center in New Orleans. He lives in Louisiana.

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Angela VanDerwerken is an economist with RPC. She specializes in econometrics, health and disability policy, and labor economics. Angela provides expert testimony, analysis, affidavits, and reports for litigation. She has many years of experience preparing expert reports and has taught a variety of courses in economics and statistics, including graduate courses at NYU.

Angela earned her Bachelor of Science in economics from Brigham Young University. She earned her master and doctoral degrees in economics from the State University of New York at Albany.

Recoverable Damages: Louisiana Law vs. Texas Law

Damages Under Louisiana Law

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.

Damages Under Texas Law

- Under Texas law, an injured tort plaintiff is entitled to recover his "actual" damages. "Actual" damages are also called "compensatory" damages and are "intended to compensate a plaintiff for the injury she incurred and include general damages (which are non-economic damages such as for loss of reputation or mental anguish) and special damages (which are economic damages such as for lost income)." *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013).
- In addition, Texas allows for recovery of punitive damages in tort cases, but such damages are typically only available where the plaintiff proves by clear and convincing evidence that the defendant engaged in aggravating conduct that caused the injury. Texas statutory law sets forth three types of aggravating conduct that can support an award of punitive damages: (1) fraud; (2) malice; or (3) gross negligence. Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (a).

Special Damages in Personal Injury Cases

Special and General Compensatory Damages

Compensatory damages can generally be divided into two categories: “special” and “general.”

- Special damages 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); *Smith v. Escalon*, 48,129 (La. App. 2 Cir. 6/26/13), 117 So. 3d 576, 583. Special damages include:
  - Past, present, and future medical expenses
  - Past, present, and future lost wages
  - Loss of financial support, services or benefits
  - Property losses
  - Other economic-based losses
- General damages are those that may not be fixed with pecuniary exactitude because they involve mental or physical pain or suffering, or other losses of life or lifestyle cannot be definitively measured in monetary terms.

Past Medical Expenses

- To recover past medical expenses, plaintiffs must present medical testimony establishing an injury was suffered in the accident at issue and that the accident was the cause of the injury. Once causation is established, the costs of care generally can be established by producing the medical bills for treatment of the injuries.
- What types of experts are used by each side?
    - **Plaintiffs:** Treating medical providers and economists
    - **Defendants: E**conomists and consulting medical expert(s)
- Types of discovery permitted: Defendants are typically afforded broad rights of discovery regarding pre-accident medical records that may bear on issues of causation, including pre-event medical records, workers' compensation, military or Social Security disability claim files.
- Plaintiffs have the corresponding right to object to discovery into medical issues that they deem to not be supported by a legitimate factfinding interest.

Past Medical Expenses in Louisiana

While Louisiana defendants can attack causation and the medical necessity of treatments, once it has been established that treatment was medically necessary and related to the accident, Louisiana law typically has not allowed a defendant to attack the reasonableness of past medical expenses because it 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 v. Aldrete*, 21-632 (La. App. 5 Cir. 12/8/21), 335 So.3d 957, 966. However, following the repeal of the collateral source rule, Defendants do get some relief where treatment is paid by third-party payor (such as private insurance or Medicare).

- **Plaintiffs** will typically need to present the testimony of their treating physician(s) to meet their burden of proof on medical causation (i.e., that the claimed medical treatment and associated expenses were causally related to the accident). They will then be able to introduce the bills for this treatment into evidence.
- **Defendants** intending to challenge medical causation will retain a doctor in the specialty at issue to perform an independent medical examination (IME) to address causation, which would allow the defendant to address the medical necessity of the claimed medical treatment.

Recoverable Medical Expenses in Texas

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).

- Texas law appears to place an affirmative obligation on plaintiffs to demonstrate the reasonableness of the amount paid or incurred for medical expenses.
- Several recent Texas Supreme Court opinions favor defendants with respect to plaintiffs who undergo care at chargemaster rates. Rulings in three recent cases (*In re N. Cypress Med. Ctr. Op. Co.*, 559 S.W.3d 128 (Tex. 2018); *In re ExxonMobil Corp.*, 635 S.W.3d 631 (Tex. 2021); and *In re K&L Auto Crushers*, LLC, 627 S.W.3d 239 (Tex. 2021)) permitted defendants to proceed with discovery on the plaintiff's medical providers to determine the rates they normally negotiate and charge to insurers or public payors.
- The Texas high court rulings 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.

The Collateral Source Rule in Louisiana

Louisiana courts traditionally recognized and applied the collateral source rule in 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)

- 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.
- 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.

Louisiana's Repeal of Collateral Source

House Bill 57, passed in 2021, largely repealed Louisiana's the collateral source rule with respect to medical expenses. Now codified as *La. R.S. § 9:2800.27*, the law provides that in cases where a plaintiff's medical expenses have been paid by Medicare or private insurance, recovery of those 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."

- 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 little case law applying to the statute, which was given prospective effect only, applying to injuries occurring after January 1, 2021.
- The statute also addresses situations in which a plaintiff's medical expenses are paid by either Medicaid or by worker's compensation, and again limits recovery to the amounts actually paid. The 40% insurance cost recovery does not apply here.

Collateral Source Rule in Texas

- Texas also repealed the collateral source rule. In particular, Tx. Civ. Prac. & Rem. Code § 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.

Medical Factoring Arrangements and/or Letters of Protection

Plaintiff firms in several jurisdictions are increasingly using medical factoring arrangements or letters of protection to inflate past medical expense claims. The typical arrangement involves sending a plaintiff who is either uninsured (or is instructed to forego using insurance) to a medical provider who charges full chargemaster, list, or retail rates for the medical care. These rates are typically higher than negotiated rates providers receive 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.

Both arrangements assign responsibility to the plaintiff to pay the full billed amounts at chargemaster rates. During litigation, this allows the plaintiff to claim and present evidence of this elevated amount to the factfinder at trial. In reality, the plaintiff would never actually pay the full retail rates that he seeks to recover from the defendants.

Medical Factoring in Louisiana

On several occasions, Louisiana appellate courts have had the opportunity to address these arrangements and their effects on medical expense claims, with the decisions decidedly favoring the plaintiffs.

- In 2021, cases in which a medical factoring company purchased the accounts receivable from a medical provider at a significant discount, but the plaintiff remained liable to the factoring company for the full amount of the provider's receivables came before the Louisiana Fifth Circuit (*Ochoa v. Aldrete*, 21-632 (La. App. 5 Cir. 12/8/21), 335 So.3d 957, 966) and the Third (*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). 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.
- It should be noted that in *Ochoa*, the 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 Louisiana law is clear: "[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."

Medical Factoring in Louisiana: Bad Faith

Louisiana courts have generally rejected defense arguments that that the use of medical factoring agreements or LOPs constitutes bad faith in connection with past medical expense claims, ruling that in this context, bad faith focuses on whether the treatment was medically appropriate as opposed to the cost of the treatment.

- In *Ochoa*, 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." *Ochoa*, 335 So.3d at 969.
- Because the defendants in that case 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.

George v. Progressive Waste Solutions

In December 2022, the Louisiana Supreme Court reversed a trial court decision in *George v. Progressive Waste Sols. of La, Inc.*, 2022-01068 (La. 12/1/22), 2022 WL 17546741 that would have limited a tort plaintiff's recovery to the amount that medical providers had been paid by a third-party medical financing company to acquire an assignment of a back surgery bill that had been calculated at chargemaster rates.

- The decision allowed the plaintiff to present evidence of the full billed charges of $192,202.14 for a back surgery instead of the $76,808.06 the financing company had paid to providers. The high court also ruled 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."
- In a concurring opinion, Justice William J. Crain reiterated that the collateral source rule did not apply because the plaintiff had not negotiated or received any discount to the full medical bill, and thus remained liable for the bill. Significantly, the opinion also noted that the full billed charges were "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.

Future Medical Expenses

To establish future medical expenses, the plaintiff must demonstrate expenses will more probably than not be incurred by presenting medical testimony showing the treatments will be indicated and establishing their probable costs.

Defendants may then attack the award for future medical expenses on the grounds that the need for continued care and its cost are purely speculative.

- Louisiana courts allows defendants to offer expert testimony as to probable costs of future medical care, such as the usual, customary, and reasonable ("UCR") charges for the medical care. See *Abadie v. Target Corp. of Minnesota*, No. CV 18-14112, 2021 WL 5029462, at *3 (E.D. La. June 22, 2021).

Future Medical Expenses: The Role of Life Care Planners

- What types of experts are used by each side?
- A certified life care planner is necessary to determine future medical costs in both Texas and Louisiana.
- Texas and Louisiana are generally in accord regarding future medical expenses.
- The life care planner should seek recommendations from other qualified professionals and/or relevant sources for inclusion of items and services outside the life care planner's scope of practice.
- Following the standards set by the "Journal of Life Care Planning, Standards of Practice for Life Care Planners, 4th Edition, Standards of Practice" should be the benchmark for life care plans.

Lost Wages

- A Louisiana plaintiff seeking to recover damages for past lost wages must show the time missed from work because of the injury.
- As established by *Aisole v. Dean*, 574 So.2d 1248, 1252 (La.1991), to show entitlement to future lost wages, a plaintiff must present "medical evidence which indicates with reasonable certainty that there exists a residual disability causally related to the accident."
- What types of experts are used by each side?
- What is the ability of defendants to interview plaintiffs and administer vocational tests in both Texas and Louisiana?

Lost Wages

- The fact finder is to consider several factors in assessing future lost wages, including: (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.
- Louisiana courts have recognized that calculations of both past and future wages should be based on the plaintiff’s gross/pretax earnings, rather than net/post tax earnings.

Lost Wages

- Non-exclusive factors that Texas courts have considered in determining future lost earning capacity include: **(1)** evidence of the plaintiff's past earnings, **(2)** the plaintiff's stamina, efficiency, and ability to work with pain, and **(3)** the plaintiff's work-life expectancy. *Big Bird Tree Servs. v. Gallegos*, 365 S.W.3d 173, 178 (Tex. App. 2012).
- Texas law applies the opposite position than Louisiana with respect to the applicable wage base used to calculate lost wages: Texas statutory law mandates that lost wages claims be based on net/post-tax earnings.
  - "[I]f 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).

Lost Wages: The Role of Vocational Experts

- To determine past and future lost wages in both Louisiana and Texas, the use of a vocational consultant or expert is necessary.
- The vocational expert will complete a comprehensive vocational evaluation, if allowed.
- Once the comprehensive vocational evaluation is complete a pre-injury earning capacity can be established.

Lost Wages: The Role of Vocational Experts

- To determine post-injury earning capacity in both Texas and Louisiana, the vocational expert must consider several factors.
- Some injuries may leave the plaintiff permanently and totally unable to perform any job.
- In other cases, the impairment may prevent the injured party from returning to their pre-injury job.
- A vocational expert gives the economist the essential basis for his or her opinions on damages from loss of earning capacity.
- The economist can then determine the amount of past and future lost wages, if any.

Loss of Future Earning Capacity

Both states use some concept of earning capacity as the standard for future economic losses

- Louisiana
  - Damages may be assessed for the deprivation of what the injured plaintiff could have earned *Folse v. Fakouri (1979)*
  - The trier of fact should consider the injured person's age, life expectancy, worklife expectancy, investment income factor, productivity increase, prospects for rehabilitation, probable future earning capacity, loss of future earning capacity, loss of earning ability, and inflation. *Bouley v. Guidry (2004)*
- Texas
  - Loss of earning capacity is the proper measure of damages, not loss of earnings… However, evidence of loss of earnings is admissible to establish loss of earning capacity. *Matbon, Inc. v. Gries (2009)*
  - Recovery for loss of earning capacity is not based on the actual earnings lost, but rather on the loss of capacity to earn money. *Brazoria County v. Davenport (1989)*

Measuring Earning Capacity

Guiding principles to measure a loss of earning capacity

- Pre-event and post-event earning capacity should be measured consistently within the limitations of available evidence
- Non-binding choices do not reduce earning capacity
- Assumption that actual earnings are strong indicators of earning capacity—no latent capacity unless evidence to support
- Assumption demand for vocational capacity exists

Work Life Expectancy

Both states require an estimate of earning capacity which involves applying a probability of earning in the future

- Analogous to life expectancy, work life expectancy incorporates the probability of life, participation in the labor force, and employment
- Generally accepted models include econometrically estimating transitional probabilities by an individual's labor participation, age, gender, and education level
- Caution against models using biased data which assume work life expectancies for disabled populations
  - *Luwisch v. American Marine Corporation,* 2018 U.S. Dist. LEXIS 101371 (E.D. LA 2018)
  - *Noel v. Inland Dredging Company, LLC,* 2018 U.S. Dist. LEXIS 67768 (E.D. LA 2018)

Tax Considerations

State courts differ in their respective treatments of income taxes

- Louisiana: Do not adjust damage award to account for income tax exemption
  - No adjustment to earning capacity for payroll or income taxes
  - Both past and future lost wages are calculated based on gross/pre-tax earnings
- Texas: Adjust damage award to account for income tax exemption
  - Loss must be presented after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law. (Section 18.091)
  - Prevents 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* (2012)
- Payroll taxes: no specific state rules for treatment, but federal courts consider income taxes to include Social Security and Medicare payroll taxes

Earnings Growth

Both states require an estimate of earning capacity, which involves applying growth in future wages

For minors or those who have not completed formal education

- Louisiana: Valuation of earning capacity must consider their most probable education level. *Bowens v. Patterson* (1998)
- Educational attainment probability models
- Human capital earnings function: nonlinear growth over work life based on age/experience

Productivity growth for established workers

- Reasonable wage growth rate based on trends in occupation, geography, or education
- Louisiana: must be grounded in the facts of the case *Lewis v. Seacor Marine, Inc. (*2002)
- Prescribed growth by union contract, government schedules, etc.
- Minimum reasonable growth rate equal to overall inflation

Fringe Benefits

Both states consider lost employer-paid fringe benefits as an element of damages

- Texas: Earning capacity is the ability and fitness to be employed in exchange for compensation including salary, commissions, and other benefits. *Baccus v. Am. States Ins. Co.* (1993)
- Louisiana: Any benefits must be proven and can be recovered if reasonably ascertained. *Bienvenu v. State Farm Mut. Auto Ins. Co.* (1989)

Categories of employer-paid fringe benefits

- Health and other insurance or non-cash employer benefits
  - Employer may pay for employee insurance, rarely dependents
  - Reimbursements for expenses such as per-diems are not earnings or fringe benefits
- Employer-funded retirement plans
  - Defined contribution plans: calculated as percentage of earnings
  - Defined benefit plans: calculated using prescribed formula

Social Security Retirement Benefits

Both states consider lost fringe benefits as damages, which may include Social Security retirement benefits.

- Louisiana: A party should not be deprived of the right to recover loss of Social Security benefits. *Bienvenu v. State Farm Mut. Auto Ins. Co.* (1989)

Direct calculation is preferred to contribution proxy

- It is erroneous to add employer FICA contributions, which go directly from the employer to the federal government. The worker has no right to receive the resulting benefits until retirement or disability. *Culver v. Slater Boat Co.* (1984) and *Jenkins v. Kerr-McGee Corporation* (1993)
- Direct calculation is available using a plaintiff's easily obtained Social Security Earnings Statement and the Social Security Administration's detailed calculator
  - ssa.gov/myaccount/
  - ssa.gov/oact/anypia/
- Special considerations for railroad and some public sector workers

Loss of Financial Support in Wrongful Death

Both states require reducing projected earnings of a decedent by personal consumption. It is the role of the jury to allocate earnings *available* for support between survivors.

- Texas
  - Pecuniary loss sustained in the past and future which survivors would have, in reasonable probability, received from decedent had he or she lived. (TX Pattern Jury Charges)
  - Survivors: spouse, children, and parents. (Sec. 71.004)
  - Limited to the lesser of the decedent's life expectancy or the maximum life expectancy of any survivors. *Columbia Medical Center of Las Colinas, Inc. v. Hogue* (2005)
- Louisiana
  - "Loss of past support from the date of death to the date of trial and loss of future support from the date of trial through the duration of the decedent's work-life expectancy." *Magee v. Pittman*, 98-1164 (La. App. 1 Cir. 5/12/00), 761 So. 2d 731, 748–49.
  - Survivors: tiered definition, 1) spouse and children 2) parents 3) siblings 4) grandparents (CC 2315.2)

Loss of Household Services

Texas

- Plaintiff must produce some evidence showing the tasks or activities that he can no longer perform. *Plainview Motels, Inc. v. Reynolds* 127 S.W. 3d 21, 39 (Tex. App. 2003)
- No need to prove out-of-pocket expenditures to replace lost services. *Armellini Express Lines v. Marilyn Ansley* (1980)

Louisiana

- Item of special damage that requires some measurable proof, more than a showing of potential loss, of the value or replacement cost of the services. *Magee v. Pittman, 98-1164* (La. App. 1 Cir. 5/12/00)

Measuring a Loss of Household Services

Replacement cost of household services

- May be evaluated by economist or life care planner, in consult with medical experts
  - Determine which services were performed before the event
  - Determine which services can no longer be performed because of the event
  - Determine the value of replacing lost services with a price survey

Catastrophic loss of household services

- In the case of catastrophic injury where virtually no services can be performed
  - Economists can rely on time-use survey data to value the loss of entire categories of services

Loss of household services to survivors

- In wrongful death cases
  - Reduce total by the value of household services they would have performed for themselves

General Damages in Personal Injury Cases

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. The “loss of enjoyment of life,” compensable by general (hedonic) damages refers to the detrimental alterations of a person's life or lifestyle or the inability to participate in the activities or pleasures of life that were formerly enjoyed.
- Given the prohibition on expert testimony in support of general damages, these types of damages are typically proven through testimony of plaintiffs and their family members, who would be expected to provide testimony as to the effect of the incident in question and injuries to the plaintiff’s life and lifestyle.
- 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.").

Recovery of General Damages Under 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.
- 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. Myer*, 569 S.W.3d 745, 758 (Tex. App. —Houston [1st Dist.] 2018, no pet)
- In the recent SCOTX case, *Gregory v. Chohan*, 670 S.W.3d 546, 562 (Tex. 2023), the court held that to survive a legal sufficiency challenge to a damage award for mental anguish in a wrongful death case, the plaintiff must show (1) "the existence of compensable mental anguish or loss of companionship;" and (2) "a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded." Gregory reversed $15 million in mental anguish damages to wrongful death plaintiffs because the evidence did not support a rational connection between the injuries suffered and the amount awarded.

Recovery of General Damages Under Texas Law

Texas courts, like Louisiana courts, recognize that assessing the amount of general damages to award a plaintiff is firmly within the jury's discretion. –*See Innovative Block of S. Texas, Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 423–24 (Tex. 2020). Also similarly, Texas courts have refused to allow expert testimony over general or hedonic damages. *Thomas v. T.K. Stanley, Inc.*, No. 9-12-CV-158, 2014 WL 12910538, at *2 (E.D. Tex. Oct. 27, 2014)

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, (3) the makeup of the jury pool if a jury trial, (4) the particular defendant(s), and (5) the particular plaintiff(s).

- Notwithstanding the subjective nature of general damage awards, the Gregory decision suggests that plaintiffs may need to ensure at trial that evidence of mental anguish provides a rational basis for the amount of the award.

Common Statutory Limitations on General Damages

Medical Malpractice

- Louisiana – total recovery (exclusive of costs for future medical care and benefits) is capped at $500,000. La. Stat. Ann. § 40:1231.2.
- Texas – general damages for non-death medical malpractice claims are capped at $250,000 per physician or health care provider or $500,000 for two or more health care institutions. Tex. Civ. Prac. & Rem. Code § 74.301.

Lawsuits Against the State and Municipalities

- Louisiana – general damages capped at $500,000-per-plaintiff. La. Stat. Ann. § 13:5106.
- Texas – claims under the Texas Tort Claims Act (TTCA) against Texas governmental units are capped at: $250,000-per-plaintiff in claims against the state government, $100,000-per-plaintiff in claims against a local government, and $250,000-per-plaintiff in claims against a municipality.

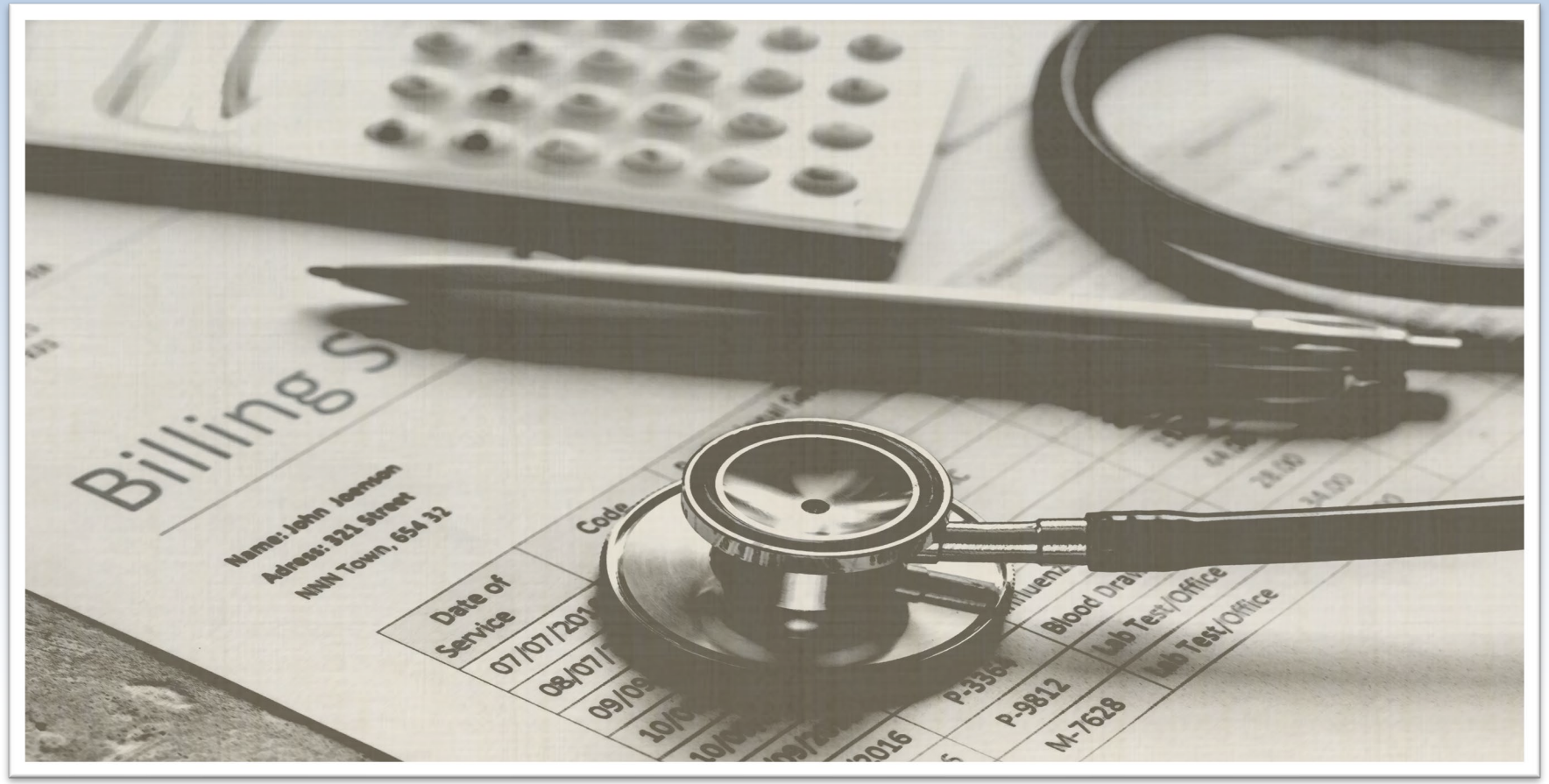
Punitive Damages: Louisiana

- It is well settled in Louisiana that punitive damages are not recoverable unless expressly provided for by statute. Examples of offenses where Louisiana expressly authorizes an award of punitive damages include cases in which the injuries were caused by an intoxicated driver; injuries stemming from child pornography or criminal sexual abuse of a minor; domestic abuse; and hazing.
- Louisiana's statutory law does not cap or limit punitive or exemplary damages. Instead, punitive damages awards are reviewed based on whether the amount of the award is "grossly excessive" in violation of the Due Process Clause. To determine whether the amount of punitive damages awarded is appropriate, Louisiana courts consider: (1) the reprehensibility of the conduct in question; (2) the ratio between the exemplary damage award and the harm the defendant's conduct caused, or could have caused; (3) the size of any civil or criminal penalties that could be imposed for comparable misconduct; and (4) the wealth of the defendant. *Mosing v. Domas*, 02–12 (La.10/15/02), 830 So.2d 967, 973.

Punitive Damages: Texas

- Texas law likewise limits recovery of punitive damages, but not to specific statutorily prescribed conduct as in Louisiana. Nonetheless, Texas places a heavy burden on the claimant seeking to recover punitive damages, who must prove by clear and convincing evidence that the damages resulted from the defendant's fraud, malice, or gross negligence.
- 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. These limitations, however, do not apply when the defendant's conduct involves a knowing and intentional violation of certain types of criminal conduct.

Judicial Interest and Discounted Present Value



Judicial Interest for Past Damages

- In Louisiana, a lump sum award intended to compensate a plaintiff for future damages, such as medical expenses or lost wages should be discounted to a present-day value. Inflation should also be considered. – *Birdsall v. Regional Elec. & Const., Inc.* 710 So. 2d 1164 (La. App. 1st Cir. 1998)
- Louisiana law allows for legal prejudgment interest to be awarded with respect to both past and future damages in tort cases. That interest is calculated from the date of judicial demand (i.e., the date the lawsuit is filed) until paid. Louisiana's judicial interest rate is set annually and is 6.5% for the 2023 calendar year. Texas's judicial interest rate is adjusted on a monthly basis based on the formula set forth in Tex. Fin. Code Ann. § 304.003.
- 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 damage, prejudgment interest is not permitted on future damages awards. In Louisiana, this can have a significant effect on the potential value of the judgment where the claimant's future damages are expected to be significant.

Discounted Present Value

No established discount rate or legal restrictions on discounting in either Texas or Louisiana

- Future damages must be discounted to present value
  - Joint adjustment for future inflationary growth and earnable interest
- Government debt instruments are assumed acceptable in present value calculations
  - Choice of investment instruments should be risk-free *Jones & Laughlin Steel Corp. v. Pfeifer* (1983)
  - Discount rate should be based on the rate of interest that would be earned on "the best and safest investments." *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916)
- Economic opinions vary about which is the 'best' approach based on assumptions about inflation and interest rates
  - Forecasting nominal inflation and interest rates versus forecasting real interest rates

Questions?

Submit your questions through the Q&A feature on the webinar.

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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.").

A recent Texas decision that is worth noting is the Texas Supreme Court's decision in *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. 2023). In *Gregory*, a wrongful death case arising out of trucking accident, the SCOTX addressed the jury's award of $15,065,000 in noneconomic damages for mental anguish and loss of companionship to the widow, children and parents of the deceased trucker. In advocating the jury to award damages for mental anguish and loss of companionship, the counsel for the plaintiffs equated the damages sustained by the plaintiffs to inanimate, highly valuable objects such as fighter jets and priceless artwork. The plaintiffs' counsel also recommended to the jury that the plaintiffs should be compensated in the amount of two cents for each of the 650 million miles that the defendant's trucks had driven in the year of the accident.

In analyzing the appropriateness of the award for mental anguish, the SCOTX noted that under Texas precedent: "'evidence of the nature, duration, and severity of [ ] mental anguish' is required to establish the existence of mental anguish damages." *Id.* at 554 (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995)). The SCOTX also noted that Texas cases generally require that the plaintiff seeking to recover mental anguish damages is required to put forth evidence to both (1) demonstrate "the *existence* of compensable mental anguish;" and (2) "*justify* the amount awarded." *Id.* (quoting *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)).

Applying the foregoing principles in the wrongful death context, the *Gregory* Court elaborated on the test to determine the legal sufficiency of an award for mental anguish damages to a wrongful death plaintiff. Specifically, the SCOTX held that to survive a legal sufficiency challenge to an award of noneconomic damages, a wrongful death plaintiff has the burden to show: (1) "**the existence** of compensable mental anguish or loss of companionship;" and (2) "**a rational connection**, grounded in the evidence, between the injuries suffered and the amount awarded." *Id.* at 562 (emphasis added).

Turning to the decisions of the trial and appeals courts, the SCOTX held that the first element – existence of compensable mental anguish or loss of companionship – was satisfied because the surviving spouse of the decedent had provided detailed testimony indicating how she, her children, and the parents of the decedent had been affected by the decedent's passing. *Id.* at 562-63.

However, the SCOTX concluded that the second element – a rational connection between the injury sustained and the amount awarded – was not satisfied based on the record because the plaintiffs did not provide any evidence "of the *amount* of damages incurred on account of that suffering." *Id.* at 563 (emphasis in original). The SCOTX appeared to take particular issue with the tactics of plaintiff's counsel in closing argument, in which they referred to fighter jets and priceless artwork to suggest damage amounts (a tactic called "unsubstantiated anchoring"), noting that these tactics clearly did not satisfy the rational connection test. *Id.* at 557-58. The Court reasoned that the "self-evident purpose of these anchors…is to get jurors to think about the

appropriate damages award on a magnitude similar to the numbers offered, despite the lack of any rational connection between reasonable compensation and the anchors suggested." *Id.* at 558. The SCOTX also rejected the plaintiffs' suggestion that the jury should award "two cents a mile" based on the miles driven by the defendant's trucks on the basis that the "unmistakable purpose of this argument" was to suggest that the defendant "can afford a large award and that it should be punished for denying [plaintiff] and her family justice for Deol's death." *Id.* at 558. However, the SCOTX noted that "punitive damages are not at issue here; only compensatory damages are, and the 'two cents a mile' argument has nothing to do with compensation." *Id.*

After foreclosing the notion that plaintiffs' improper jury arguments could satisfy the rational connection element, the SCOTX then suggested ways that plaintiffs could meet this second element. First, the Court reasoned that "just as evidence of the existence of mental anguish damages generally must establish the 'nature, duration, and severity' of the anguish suffered, the same kind of evidence—of 'nature, duration, and severity'—will naturally also be relevant to the amount awarded." *Id.* at 560. To this end, the Court noted that in certain cases, "there may be direct evidence supporting quantification of an amount of damages, such as evidence of the likely financial consequences of severe emotional disruption in the plaintiff's life." *Id.* At other times, "there may be evidence that some amount of money would enable the plaintiff to better deal with grief or restore his emotional health." *Id.* These examples were simply illustrative and the Court refused to "speculate here about all the permissible ways in which parties may demonstrate that a rational connection between the evidence and the amount awarded exists or is lacking." *Id.* at 561.

In any event, the holding in *Gregory* makes clear that plaintiffs' counsel will not be permitted to simply rely on the damages amount awarded by the jury as evidence in of itself that the award is reasonable. And the Court in *Gregory* appeared to have specifically warned counsel for plaintiffs' that excessive damage awards obtained by inflaming the passions of the jury will clearly not be tolerated or upheld on appeal. Rather, plaintiffs' attorneys must clearly be prepared to point to specific evidence that justifies the amounts awarded by the jury for wrongful death damages by showing a rational connection between the harm suffered and the amount awarded.

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]

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

[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). 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.

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 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 "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*

[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. 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*.

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 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

[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.

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*, 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.[9] At the same time, it should be noted that Justice Crain's

[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).

[9] It should be noted that, in contrast to **past** medical expense claims, Louisiana courts have frequently recognized that a defendant, in attacking the reasonableness of a claim for future medical expenses, may put on expert testimony of the expected costs of the future treatment. This is because under Louisiana law, "[f]uture medical expenses must be established with some degree of certainty and must be supported with medical testimony *and [an] estimation of probable costs*." *Tamayo v. Am. Nat. Gen. Ins. Co.,* 150 So. 3d 459, 470 (La. App. 5 Cir. 2014) (emphasis added).

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 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

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Thus, courts have routinely endorsed the right of parties to put on evidence of the plaintiff's probable cost of future medical treatment based on the anticipated costs of such care. This would include, for instance, the Usual, Customary and Reasonable ("UCR") charges for such future care. *See Abadie v. Target Corp. of Minnesota,* No. CV 18-14112, 2021 WL 5029462, at *3 (E.D. La. June 22, 2021) (holding that the testimony of defendant's expert as to the UCR charges of plaintiffs' future care was relevant to determining the reasonable costs for plaintiffs' future medical treatment).

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.

Research and Planning Consultants, LP

DAMAGES FOR PAST MEDICAL EXPENSES IN TEXAS PERSONAL INJURY LITIGATION

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Table of Contents

INTRODUCTION

This paper focuses on damages a plaintiff can recover for past medical expenses in personal injury cases in Texas courts.[1] We note damages for future medical expenses raise different issues and that discussion is outside the scope of this paper. To recover for past medical expenses in a Texas personal injury case, the plaintiff must prove the past medical expenses were medically necessary due to the injury that is the subject of the litigation. The plaintiff must also prove the reasonable value of the past medical expenses. We discuss how the courts define reasonable value. We then discuss the discovery courts permit from plaintiffs, their health care providers, and health plans to determine reasonable value. While plaintiffs have a duty to mitigate damages by timely seeking reasonable medical treatment, no Texas court has to date ruled they have a duty to mitigate damages by using their insurance coverage. We discuss the interaction between mitigation of cost and the reasonable value limits on the amount a plaintiff may recover. We discuss how Texas Senate Bill (SB) 1264 and the federal No Surprises Act may affect the determination of reasonable value in personal injury cases. Lastly, we discuss how Texas Civil Practice and Remedies Code (TCPRC) §18.001 affects the recovery of past medical expenses.

WHAT CAN A PLAINTIFF RECOVER?

2. If the defendant is found liable for a personal injury, the plaintiff can recover the reasonable value of expenses for medically necessary goods and services needed due to the injury that is the subject of the litigation. Medical necessity and relatedness are issues for a physician or other clinician to address and are outside the scope of this paper. The reasonable value of the goods and services is an economic or financial question for an economist or other financial expert and is our focus.

[1] Dana Cottone, LLB, MRes, provided substantial research assistance for this paper, and her help is gratefully acknowledged.

3. The starting point for analysis of reasonable value is the provider's bill. Not all providers in personal injury cases bill using standard claim forms,[2] and not all providers include the standard Health Care Procedure Coding System (HCPCS)[3] codes to describe the goods and services provided. Texas Department of Insurance (TDI) rules define the data elements on a "clean claim."[4] Health care providers in personal injury cases are not required to file clean claims, but the TDI rules are relevant to show what it is reasonable to expect a provider to include on a bill to document goods and services. When the provider has not filed a clean claim, the services of a certified coder may be necessary to supply missing codes. When the provider does not provide standard coding or sufficient documentation for a certified coder to assign standard codes, the provider may not have established the services were medically necessary and the charges were reasonable, which would justify a court denying any recovery for those services.

4. There are generally accepted billing rules for how goods and services are billed. Many of the rules, such as those in the National Correct Coding Initiative (NCCI),[5] were developed by the Center for Medicare and Medicaid Services (CMS) to adjudicate Medicare and Medicaid claims. They have since become generally accepted by other public programs and by private health plans. A standard step in reviewing any bill is to check for violations of billing rules, modify improper codes, and delete or adjust improper charges.

Billed Charges

5. The upper limit of damages for past medical expenses is the billed charges of the healthcare provider. Each provider unilaterally sets its billed charges, usually with no limits on how high they may be. Providers are supposed to bill all patients the same charge for the same

[2] "CMS 1500," Centers for Medicare and Medicaid Services (CMS), https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/CMS-Forms-Items/CMS1188854, accessed February 6, 2023. Helsinn Cares, "Sample CMS-1450 (UB-04) Claim Form," https://helsinnreimbursement.com/pdfs/V-AKYN-US-0079-Sample-CMS-1450-Claim-Form.pdf, accessed February 6, 2023.
[3] "HCPCS Quarterly Update," CMS, https://www.cms.gov/Medicare/Coding/HCPCSReleaseCodeSets/HCPCS-Quarterly-Update, accessed February 6, 2023.
[4] "Subchapter T. Submission of Clean Claims 28 TAC §21.2802 and §21.2803," https://tdi.texas.gov/rules/2007/documents/21.2802-2803.pdf, accessed February 7, 2023.
[5] "The National Correct Coding Initiative (NCCI)," CMS, https://www.cms.gov/medicare-medicaid-coordination/national-correct-coding-initiative-ncci, accessed February 6, 2023.

service on the same day, even if they expect to be paid differently for each patient. This is referred to as the provider's "usual and customary" charge. There is no presumption by Texas courts that a provider's billed charge is a reasonable charge for services in a medical market or that the billed charge, even if a reasonable charge, is the reasonable value of the service.[6]

Usual, Customary, and Reasonable Charges

6. Reasonable charges are usually determined by comparing one provider's charge for a service to the charges of other providers in the same medical market. This is referred to as a "usual, customary, and reasonable" (UCR) charge. A UCR charge for a service is usually one that falls below the 80th percentile in the medical market. An RPC white paper explains how UCR charges are calculated and the general acceptance of the 80th percentile.[7] If the billed charge is greater than the UCR charge, the upper limit on damages may be the UCR value.

7. HCPCS codes, Ambulatory Payment Classifications (APCs), Diagnosis Related Groups (DRGs) and other standard code sets are used to define similar services. Medical markets can best be defined using market definitions by the Dartmouth Atlas of Healthcare.[8] However, many publishers of UCR values use the first three digits of zip codes, called "geozips," to define market areas.[9] The data used to calculate UCR values for different percentiles can come from public use data files from state or federal agencies or from claims data from one or more health plans. It is necessary to choose a percentile to define the upper bound of a reasonable charge. The 80th percentile is the most frequently used and is the charge percentile referenced by SB 1264 and statutes in other states.[10]

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[6] "[B]ecause of the way chargemaster pricing has evolved, the charges themselves are not dispositive of what is reasonable, irrespective of whether the patient being charged has insurance." *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128, 133 (Tex. 2018).
[7] "Determining Usual, Customary, and Reasonable Charges for Healthcare Services," Research and Planning Consultants, LP, July 1, 2022, https://www.rpcconsulting.com/determining-ucr-charges-for-healthcare-providers. (Hereafter cited as RPC UCR White Paper.)
[8] Dartmouth Atlas of Healthcare, Dartmouth Atlas Project, https://www.dartmouthatlas.org, accessed February 6, 2023.
[9] See, e.g., Price Management Information Corporation, *Medical Fees Directory 2023 E-Book*, https://www.pmic online.com/product-page/medical-fees-directory-2023-e-book, accessed June 30, 2022.
[10] RPC UCR White Paper, starting on p. 17.

Paid or Incurred

8. If a medical bill has been paid or is to be paid by a health plan at a rate the provider accepts as payment in full, that amount is the upper limit on the reasonable value of the service. TCPRC §41.0105 states, "Recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the plaintiff."[11] This legislative enactment codified an earlier court decision in *Haygood v. De Escabedo.*[12] In *Haygood*, the Texas Supreme Court (SCOTX) limited the recovery of medical expenses to only those costs actually paid or to be paid, and not the "list price" on the medical bills. The court stated it did not want to create a windfall for the plaintiff and that "to impose a liability for medical expenses that a health care provider is not entitled to charge"[13] would create such a scenario. As explained below, this holding effectively means that a plaintiff's recovery of past medical expenses is capped by what the provider is entitled to be paid, not what it charged, for the service to the plaintiff.

9. TCPRC §41.0105 substantially modifies or eliminates the collateral source rule, at least for insured patients and providers who have agreed to accept negotiated or regulated rates as payment in full. If there is a negotiated or regulated rate, the patient has only incurred that rate as the allowed amount, as the provider has agreed to accept the allowed amount as payment in full. Evidence of insurance coverage and the allowed amount should be discoverable and admissible to determine the amount incurred.

10. When the provider writes off amounts as contractual adjustments, the claimant is not entitled to the unadjusted amount, as these are not considered "paid or incurred." In *Prabhakar v. Fritzgerald*,[14] the court stated, "In other words, amounts written off by medical providers are not amounts 'paid or incurred' under the statute."[15] The jury must award the

[11] Texas Civil Practice and Remedies Code 41.0105, https://statutes.capitol.texas.gov/Docs/CP/htm/CP.41.htm#41.0105.
[12] *Aaron Glenn Haygood v. Margarita Garza De Escabedo*, 356 S.W.3d 390 (Tex. 2011).
[13] Ibid.
[14] *Meenakshi S. Prabhakar, MD, and Infectious Disease Doctors, PA, v. David Fritzgerald*, No. 05-10-00126-CV, 2012 Tex. App. LEXIS 7154 (Tex. App. Aug. 24, 2012).
[15] Ibid.

amount the claimant has actually incurred. This point was also raised in the *Beasley* case,[16] where the plaintiff made a personal injury protection (PIP) claim to his insurer, Farmers Insurance, for the billed charges rather than the lower negotiated rate with his health plan, Blue Cross Blue Shield (BCBS), the provider had accepted as payment in full. The judge denied Beasley the billed charges, stating, "According to Farmers, the medical expenses incurred were not the providers' list rates—they were what the providers accepted as full payment from BCBS."[17] The lower negotiated rate was the expense the claimant actually incurred, not the billed charges.

11. The case of *Adley v Privett* also supports this idea.[18] In *Adley*, the claimant was trying to claim two charges where the cost was eventually adjusted to $0. The court held those initial billed charges could not be claimed, because a claimant "cannot claim paid or incurred if charges were not actually recoverable."[19]

12. The case of *Big Bird Tree v. Gallegos* provides an example of when a provider's billed charges may be recoverable under *Haygood*.[20] In that case, the uninsured, indigent plaintiff had qualified for an indigent charity program that required him to pay only a small amount. The trial court, however, ruled that, with the damages award, the plaintiff would no longer qualify for the indigent care program and would have to pay the full charges. The trial court therefore awarded the plaintiff the billed charges for his medical expenses. The defense apparently did not challenge the reasonableness of the billed charges or introduce evidence on the reasonable value of the services.

13. On appeal, the defendants argued that the plaintiff should not receive the full amount of his medical expenses because the medical expenses were not actually "incurred." The appeals court, however, found, based on *Haygood* and combined with the collateral source rule, that "allowing a negligent tortfeasor to avoid liability for medical expenses born by a charity

[16] *Farmers Texas County Mutual Insurance Company v. Rodney Beasley*, 598 S.W.3d 237 (Tex. 2020).
[17] Ibid.
[18] *Larry Derome Adley v. Kevin Wayne Privett*, No. 05-12-01581-CV, 2014 Tex. App. LEXIS 7447 (Tex. App. July 9, 2014).
[19] Ibid.
[20] *Big Bird Tree Service Inc. v. Julian Gallegos*, No. 05-10-00923-CV, 365 S.W.3d 173 (Tex. App. 2012).

program designed to benefit indigent patients, not only results in a windfall to the tortfeasor, it rewards the tortfeasor for injuring an indigent." The appeals court therefore held the plaintiff could recover the billed charges for his medical expenses as the court considered them to be "incurred."

Reasonable Value

14. The term "reasonable value" is used as a synonym for "fair market value" or "market price." There are many definitions from different sources, but all involve the neoclassical economic concepts of a price freely arrived at by a willing buyer and a willing seller in a competitive market, with both being fully informed and neither under undue pressure. *Black's Law Dictionary* has this definition: "The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction; the point at which supply and demand intersect (fair market value)."[21] Another common definition of fair market value is found in IRS Revenue Ruling 59-60. The IRS defines fair market value as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts."[22] Because different data points can be considered in determining reasonable value, the term implies a range of values rather than a single value.

15. Markets for medical services are seldom the "perfectly competitive markets" of economic theory. In any geographic market, there are relatively few hospital systems and few physician groups in many specialties. Individual patients have less information and bargaining power than medical providers. Rates set by government programs are negotiated through a political process by provider organizations and elected or appointed officials representing the

[21] Bryan A. Garner, ed., *Black's Law Dictionary*, 5th pocket edition (St. Paul, MN: Thomson Reuters, 2016), *s.v.* "reasonable value."
[22] IRS Revenue Ruling 59-60, 1959-1 CB 237 -- IRC Sec. 2031 (Also Section 2512) (Also Part II, Sections 811(k), 1005, Regulations 105, Section 81.10.)

payor. Individual providers then decide whether they are willing to accept those rates by participating or not participating in the government program.

16. Rates in negotiated contracts between providers and private health plans may be the closest approximation of "the point at which supply and demand intersect." However, a major factor in the negotiated rate in each provider contract is the relative market power of the provider and the health plan. Another factor is the expectations of the provider and health plan on what the effective rate will be in the absence of a contract. The provider would then be an "out-of-network" provider able to balance bill the health plan's subscribers for the difference between billed charges and the health plan's allowed amount.

17. The cost to providers to deliver a service is also relevant in determining reasonable value. CMS considers provider costs in setting Medicare rates.[23] Private health plans have access to cost data for hospitals and other providers that are required to file cost reports with government agencies. They may also be able to construct cost models for physician practices using survey data from physician organizations (e.g., Medical Group Management Association).[24] Reasonable value can be viewed as a range, with Medicare rates at the bottom. Negotiated rates for insurers are the middle of the range. The rates the provider has accepted for patients without insurance and the UCR 80th percentile are toward the top of the range.

DISCOVERY OF INFORMATION RELEVANT TO REASONABLE VALUE

18. In recent years, the Texas Supreme Court has expanded the ability of parties to discover the rates providers have negotiated with health plans, overriding confidentiality clauses in provider contracts. CMS administrative rules require hospitals to make their negotiated rates public.[25] The No Surprises Act requires health plans to publish their negotiated rates for all

[23] "Medicare Rates as a Benchmark: Too Much, Too Little, or Just Right?" Altarum Healthcare Value Hub, Research Brief No. 40, February 2020, https://www.healthcarevaluehub.org/advocate-resources/publications/medicare-rates-benchmark-too-much-too-little-or-just-right, accessed February 6, 2023.
[24] "Benchmarking Data: DataDive Cost and Revenue Data," Medical Group Management Association, https://www.mgma.com/data/benchmarking-data/costs-revenue-data, accessed February 6, 2023.
[25] "Hospital Price Transparency Frequently Asked Questions," CMS, https://www.cms.gov/files/document/hospital-price-transparency-frequently-asked-questions.pdf, accessed February 6, 2023.

providers.[26] The federal requirements were only recently implemented and, in practical terms, access is hindered by the noncompliance of a substantial percentage of hospitals and the size and complexity of the health plan data. Therefore, litigants' ability to access negotiated rates through discovery will be important for at least the next several years.

19. In 2018, the *North Cypress* case helped pave the way for more discovery regarding reasonableness of medical charges by allowing negotiated rates to be discoverable in a medical lien case.[27] Here, the patient was admitted to a hospital emergency department without insurance after a car accident, and the hospital filed a lien for billed charges. After settling with the defendant's insurance company, the plaintiff tried to discharge the lien by negotiating an amount less than the billed charges.

20. When they could not agree, the plaintiff requested to see the negotiated rates for patients who received similar services but had private insurance or Medicare/Medicaid. The hospital objected to the discovery requests and refused to produce the information. The SCOTX held that the requested information was discoverable because, (1) under the lien statute, the hospital was entitled to be paid only the *reasonable* value of its services, and (2) the requested information was relevant to determining the reasonable value of the services.

21. In *K&L Auto Crushers*, the SCOTX expanded the ruling in *North Cypress* to personal injury cases. The plaintiff had a letter of protection with one or more providers, and the medical bills were about $1.2 million for multiple spine and shoulder surgeries.[28] The defendants sought discovery of the plaintiff's providers' negotiated rates as evidence of the reasonable value of the services. The SCOTX allowed the defendants to discover the providers' negotiated rates for similar services with commercial insurers as evidence of what the providers considered the reasonable value of their services.

[26] "Frequently Asked Questions for Providers About the No Surprises Rules," CMS, https://www.cms.gov/files/document/faq-providers-no-surprises-rules-april-2022.pdf, April 6, 2022, accessed February 6, 2023.
[27] *In re North Cypress Medical Center Operating Co.*, 559 S.W.3d 128 (Tex. 2018).
[28] *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021).

22. Another recent case, *In re ExxonMobil Corp.*,[29] also addressed whether defendants in a personal injury case can discover the negotiated rates that the plaintiff's medical providers have with insurance providers. The defendants argued that medical providers typically ask for chargemaster rates in letters of protection, but those rates are not the rates the providers negotiated with health plans. The defendants argued that discovery of the provider contracts was necessary to see the rates the providers had agreed to accept as payment in full. The plaintiffs argued that discovery would expose trade secrets and confidential information. The court allowed discovery of the provider contracts.

23. Before *North Cypress*, *K&L Auto Crushers*, and *ExxonMobil*, defendants were usually denied discovery of medical providers' charges for certain medical services. These decisions by the SCOTX establish (1) plaintiffs are entitled to recover only reasonable value of past medical expenses, (2) a provider's negotiated rates with health plans are relevant and admissible evidence to establish reasonable value, and (3) defendants are entitled to reasonable discovery or a provider's negotiated rates as evidence of what it considers the reasonable value of its services, even when the plaintiff is uninsured and not entitled to those negotiated rates.

24. A case now before the SCOTX, *In re Kuraray America, Inc.*, is a mandamus action in a personal injury case in which the defendant requested discovery from several medical providers of the amounts the medical providers actually accept as full payment for medical procedures for patients of health plans with which it has a contract and for self-pay patients. Defendants requested corporate representative depositions on the same topics. The trial court and court of appeals denied discovery. The plaintiffs in this case are uninsured, just like the plaintiff in *In re North Cypress*. Given the three SCOTX decisions, there seems to be no reason for a Texas court to deny discovery of provider contracts or corporate representative depositions on those contracts.

25. The new issue in this case is whether discovery is permitted of amounts providers accept as payment in full from self-pay patients. To quote the relator's petition on this point, "It

[29] *In re ExxonMobil Corp*., No. 20-0849, 635 S.W.3d 631 (Tex. 2021).

would be entirely illogical to conclude that a defendant is entitled to discover the amounts a provider actually accepts for services from third-party-providers (such as insurance companies) in litigation brought by plaintiffs who disclaim insurance coverage, but is *not* entitled to discover the amounts those same providers actually accept from self-pay patients who are similarly situated to the plaintiffs. Indeed, one federal court has twice applied *K&L* in self-pay situations. *Zuniga v. Tri-National, Inc.*, 2022 WL 255427 (W.D. Tex., Jan. 27, 2022); *Acuna v. Covenant Transp., Inc.*, 2022 WL 95241 (W.D. Tex., Jan. 10, 2022)."[30]

26. However, in the two federal cases, the court ordered the providers to produce contracts and rates with health insurance companies. The court was not asked to order the production of data showing the amounts the providers accepted as payment in full from self-pay patients. Therefore, the court in these two cases did not order production of the self-pay data the defendants seek in *In re Kuraray America, Inc.* There appears to be no reason the SCOTX should not order production of the self-pay data. It is relevant to establish the reasonable value of the services. It is not available from public sources. Most, if not all, providers could produce claims-level data from their billing systems showing the charges, payments, and write-offs for self-pay patients with no undue burden.

IS THERE A DUTY TO MITIGATE THE COST OF MEDICAL CARE?

27. According to TCPRC §147.123, "The court shall instruct the finder of fact regarding a plaintiff's duty to mitigate or avoid damages in a manner appropriate to the action."[31] In personal injury cases, the purpose of the mitigation of damages doctrine is to encourage the plaintiff to act reasonably to avoid or reduce the harm from the defendant's actions. When a plaintiff does not act reasonably to mitigate damages, "recovery is not permitted as to that part of damages that could have been avoided or was incurred as a result of the failure to mitigate."[32]

[30] *In re Kuraray America, Inc.*, Relator's Petition for Writ of Mandamus, August 11, 2022, p. 2.
[31] TCPRC §147.123, https://statutes.capitol.texas.gov/Docs/CP/htm/CP.147.htm.
[32] *Pinson v. Red Arrow Freight Lines Inc.*, 801 S.W.2d 14 (Tex. App. 1990). See also: *Alexander & Alexander of Texas Inc. v. Bacchus Industries Inc. and U.S. Insurance Group*, 754 S.W.2d 252 (Tex. App. 1988); *R.A. Corbett Transport Inc. v. Oden*, 678 S.W.2d 172 (1984).

However, the burden of proof lies on the defendant as to whether the plaintiff did not mitigate their damages and to what extent their failure caused or further increased their damages.[33]

28. There are two types of mitigation of damages for past medical expenses. The first is delay in medical treatment, which causes the plaintiff's condition to worsen and requires more expensive treatment.[34] That type of mitigation is outside the scope of this paper. The second type is the plaintiff's failure to mitigate by paying or agreeing to pay more for medical services than was reasonable or necessary by not taking advantage of regulated or negotiated rates to which the plaintiff is entitled. In a series of cases that preceded the SCOTX cases just discussed, Texas courts held that plaintiffs do ***not*** have a duty to use insurance available to them after the injury to mitigate the cost of past medical services:[35]

> **Private Insurance:** In *Grant v. CRST Expedited Inc.*, a federal court applying its understanding of Texas law found the plaintiff did not fail to mitigate his damages when he did not use his health insurance when receiving medical treatment. The federal court based this finding on the collateral source rule and its reading of *Haygood.* It did not cite or discuss TCPRC §41.0105.[36]
>
> **Provider Cash Discount:** However, the *Grant* court found the plaintiff had a duty to mitigate by not agreeing to pay higher amounts under a letter of protection than he would have paid under the provider's cash discount arrangement. The court said the collateral source rule did not apply, and the defendant could introduce evidence on the amount paid or incurred under the cash discount arrangement (*Grant v. CRST Expedited Inc*., 2020).[37]
>
> **Workers Compensation:** Defendants "suggest that [plaintiff] in fact had workers' compensation insurance available to him under his employers' Texas Mutual Insurance Company policy, and failed to avail himself of the insurance when he obtained medical care, and also that [plaintiff] failed to obtain insurance under the

[33] Ibid.
[34] *Alamo Ambulance Services Inc. v. Philip J. Moulton et al*., 402 S.W.2d 200 (Tex. Civ. App. 1966).
[35] *Emory Grant v. CRST Expedited Inc. and Karl O. Brooks*, No. 1:18-CV-433, 2021 U.S. Dist. LEXIS 61977 (E.D. Tex. 2021); *Sprester v. Bartholow Rental Co*., No. A-14-CV-00955-LY, 2016 U.S. Dist. LEXIS 19498 (W.D. Tex. Feb. 18, 2016); *Jaime Guzman, Derrick Lambert v. Melvin Jones, Celadon Trucking Services Inc*., 804 F.3d 707 (5th Cir. 2015); *City of Fort Worth et al. v. Don Barlow et al.*, 313 S.W.2d 906 (Tex. Civ. App. 1958).
[36] *Grant v. CRST Expedited, Inc*., No. 1:18-CV-433, 2020 WL 9720500, at *7 (E.D. Tex. Dec. 2, 2020).
[37] Ibid.

> Affordable Care Act, all of which would have reduced the costs of his medical care." The court held that "evidence of what [plaintiff's] medical costs would have been had he obtained or used insurance" was "inadmissible at trial" (*Sprester v. Bartholow*, 2016).[38]
>
> **Government Insurance:** "Plaintiff was entitled to a finding of probable, reasonable cost of such services in his home county…. [I]n no event, can [defense] claim, in mitigation of damages, that plaintiff might receive cheaper care, or even gratuitous care in a veterans hospital" (*Forth Worth v. Barlow*, 1958).[39]

29. These cases may no longer be good law after the SCOTX decisions in *North Cypress, K&L Auto Crushers,* and *ExxonMobil*. These recent cases affirm that the most the plaintiff or provider can recover is the reasonable value of the services, regardless of the charges. They also confirm that the negotiated rates of providers are relevant and admissible evidence on reasonable value. The courts in *Grant* and *Sprester* appear to have ignored how TCPRC §41.0105 repeals the collateral source rule and makes insurance rates relevant to determine the amount the plaintiff owes or the amount the provider is obligated to accept as payment in full. Whether the damages are limited by failure to mitigate under the common law or are limited to reasonable value under the statute, the effect on the damages a plaintiff can recover may be similar: a defendant is liable only for the reasonable value of medical care, not necessarily the cost billed to, or paid by, the plaintiff.

RECENT STATUTES AND REASONABLE VALUE

30. Within the last several years, a Texas statute and a federal statute were passed with a focus on eliminating balance billing of patients in certain situations by certain out-of-network providers. The statutes also created procedures to follow and the criteria to consider in deciding the reasonable amount the health plans should pay. The federal and state procedures may not apply directly to medical bills incurred in personal injury cases in Texas. However, the criteria are legislative statements of the factors that should be considered in determining

[38] *Sprester v. Bartholow Rental Co.*, No. A-14-CV-00955-LY, 2016 U.S. Dist. LEXIS 19498 (W.D. Tex. Feb. 18, 2016).
[39] Ibid.

reasonable value and reasonable payment for medical services. Therefore, Texas plaintiffs' and defendants' experts may cite these criteria to support opinions about the reasonable value of past medical services.

SB 1264

31. In 2019, Texas enacted SB 1264,[40] which protects consumers with state-regulated health care plans from receiving "surprise" medical bills—when the patient did not select the provider and in emergency situations.[41] The purpose of the bill is to create "a mechanism for providers to resolve billing disputes directly with health plans" and to prohibit "balance billing consumers for these services."[42] SB 1264 applies to the roughly 20 percent of Texans with health care plans regulated by TDI and those who are covered under state employee and teacher retirement plans.

32. The bill created two dispute resolution processes: "arbitration for physicians and other similar providers and mediation for facilities and labs."[43] The results of arbitration are binding on the practitioner and the health plan, while the results of mediation are not.

33. The legislation lists these ten factors the arbitrator or mediator must consider in reaching a decision on a reasonable payment amount:[44]

1) Whether there is a gross disparity between the fee billed by the out-of-network provider and fees paid to the out-of-network provider for the same services or supplies rendered by the provider to other enrollees for which the provider is an out-of-network provider; and fees paid by the health benefit plan issuer to reimburse similarly qualified out-of-network providers for the same services or supplies in the same region

[40] SB 1264, https://capitol.texas.gov/tlodocs/86R/billtext/html/SB01264F.htm.
[41] See §1.08, where SB 1264 gives a long overview of what is covered in emergency situations, with references to insurance codes.
[42] Texas Department of Insurance, "Senate Bill 1264 2021 Midyear Report," https://www.tdi.texas.gov/reports//documents/SB1264-2021-midyear-update.pdf, July 2021, accessed January 20, 2023.
[43] Ibid.
[44] Texas Medical Association, "A General Overview of SB 1264 (86th Texas Legislature) and Texas' New Arbitration Process for Certain Out-of-Network Claims," rev. December 19, 2019; Tex. Ins. Code § 1467.083(b), https://statutes.capitol.texas.gov/Docs/IN/htm/IN.1467.htm.

2) The level of training/education/experience of the provider
3) The provider's usual billed charge for comparable services or supplies in comparison to other enrollees
4) The circumstances and complexity of the enrollee's particular case
5) Individual enrollee characteristics
6) The 80th percentile of all billed charges for the service or supply performed by a health care provider in the same or similar specialty and provided in the same geozip area as reported in a benchmarking database [selected by TDI]
7) The 50th percentile of rates for the service or supply paid to participating providers in the same or similar specialty and provided in the same geozip area as reported in a benchmarking database [selected by TDI]
8) The history of network contracting between the parties
9) Historical data for the percentiles
10) An offer made during the [required] informal settlement teleconference

34. While in theory arbitrators consider several factors in their decision-making process, reports indicate that arbitrators in other states seem to favor the 80th percentile in the final payment amount.[45]

No Surprises Act[46]

35. The federal No Surprises Act covers some health plans not covered under SB 1264. Most importantly, it covers employer-sponsored plans not regulated by TDI. The Act took effect January 1, 2022, to provide balance billing protections to consumers with other types of health care coverage. It "protects people covered under group and individual health plans from receiving surprise medical bills when they receive most emergency services, non-emergency

[45] USC Schaeffer Center, "Arbitration Decisions in New Jersey Surprise Billing Cases Result in Large Payouts," January 5, 2021, https://healthpolicy.usc.edu/article/new-study-finds-arbitration-decisions-in-new-jersey-surprise-billing-cases-result-in-large-payouts; Loren Adler, "Experience with New York's Arbitration Process for Surprise Out-of-Network Bills," Brookings, October 24, 2019, https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/10/24/experience-with-new-yorks-arbitration-process-for-surprise-out-of-network-bills.
[46] H.R. 3630 – No Surprises Act, 116th Congress (2019–2020), https://www.congress.gov/bill/116th-congress/house-bill/3630/text.

services from out-of-network providers at in-network facilities, and services from out-of-network air ambulance service providers."[47]

36. The No Surprises Act instructs arbitrators to consider several factors:

- The "qualifying payment amount," which, as described further below, is generally the insurer's median in-network rate for similar services in that geographic region as of 2019, inflated forward by the Consumer Price Index for All Urban Consumers (CPI-U)
- Demonstrations of good-faith efforts (or lack thereof) to reach a network agreement and any contracted rates between the two parties during the previous four years
- Market shares of both parties
- Patient acuity
- The level of training, experience, and quality of the clinician, or the teaching status, case mix, and scope of services offered by the facility

37. For air ambulance services, the arbitrator is also instructed to consider:

- The ambulance vehicle type
- The population density at the pickup location.[48]

38. Several provider groups have filed lawsuits challenging the rules CMS adopted to implement the Act. Although there are several pending lawsuits challenging the rules adopted to implement the Act,[49] the statute itself has not been challenged, and the statutory factors listed above can therefore be cited in determining reasonable value in personal injury cases.

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[47] "No Surprises: Understand Your Rights Against Surprise Medical Bills," CMS, January 3, 2022, https://www.cms.gov/newsroom/fact-sheets/no-surprises-understand-your-rights-against-surprise-medical-bills.
[48] Loren Adler, Matthew Fiedler, Paul B. Ginsburg, Mark Hall, Benedic Ippolito, and Erin Trish, "Understanding the No Surprises Act," Brookings, March 9, 2022, https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/02/04/understanding-the-no-surprises-act, accessed January 21, 2023.
[49] [49] In December 2021, the American Hospital Association and the American Medical Association filed suit alleging the rules implementing the independent dispute resolution (IDR) process favors insurers. See *American Medical Association et al. v. U.S. Department of Health and Human Services et al. (2021)*.[49] The Texas Medical Association (TMA) has filed three lawsuits challenging the different aspects of the rule. One suit challenges the administrative rules on how the qualifying payment amount (QPA) is calculated. See *Texas Medical Association and Dr. Adam Corley, Plaintiffs, v. United States Department of Health And Human Services, Department of Labor, Department of the Treasury,*

SECTION 18.001 AND REASONABLE VALUE

39. TCPRC §18.001 allows a plaintiff's medical provider to submit an affidavit stating the services were medically necessary and the charges were reasonable. The affidavit may be signed by the provider's clerical employees and requires no showing the signer has any expertise on either medical necessity or reasonableness of charges. If the defendant does not challenge the affidavit, it is sufficient evidence to support a jury finding that the amount charged was reasonable and that the service was necessary.

40. If the defendant serves a counter-affidavit challenging the medical necessity and/or the reasonableness of charges in a plaintiff's affidavit, then the plaintiff may not rely solely on the affidavit, but must offer expert testimony to prove those issues at trial. Unlike the original affidavit, the counter-affidavit must be signed by a person with the expertise to make the statements in the counter-affidavit and must give reasonable notice of the basis for the opinions expressed.

41. In a recent decision, *In re Allstate*,[50] the SCOTX addressed two important questions: (1) Who is qualified to testify on the reasonableness of medical charges? (2) What limits does the absence of a counter-affidavit have on the defendant's ability to offer evidence challenging past medical expenses at trial?

42. In *Allstate*, the plaintiff filed an 18.001 affidavit covering bills with charges totaling $41,000 for past medical expenses. Allstate filed a counter-affidavit contesting the reasonableness of the charges. The person who signed the counter-affidavit had over twenty years' experience as a registered nurse and extensive experience as a medical biller. The plaintiff

Office of Personnel Management, and the Current Heads of those Agencies in Their Official Capacities (2021).[49] Other suits have challenged parts of the rule the TMA sees as giving excessive weight to the QPA compared to other factors the statute says should be considered. See *Texas Med. Ass'n. v. United States Dep't. of Health & Hum. Servs*., No. 22-40264, 2022 WL 1632580 (5th Cir., May 3, 2022), *Texas Medical Association et al. v. United States Department of Health and Human Services et al. (2021)*.

[50] *In re Allstate Indemnity Company*, 2021 WL 1822946 (Tex., May 7, 2021).

moved to strike the counter-affidavit on the basis the counter-affiant was not qualified to opine on the reasonableness of medical charges.

43. The trial court ruled in favor of the plaintiff, but the SCOTX ruled in favor of the defendant. The court found that, so long as the person signing the counter-affidavit has "sufficient knowledge, skill, experience, training, or education" related to that field, they can testify as an expert and therefore challenge the "reasonableness" of the charges. The court had earlier held that an insurance adjuster was qualified to make a counter-affidavit challenging reasonableness of charges because of the adjuster's familiarity with medical billing and medical databases.[51] The counter-affiant need not be a clinician or have any particular academic degree. The court required only that the counter-affiant have experience and knowledge of medical billing practices and medical charge data.

44. The other holding in *Allstate* is much more important. The court held that the defendant's ability to offer evidence at trial challenging the reasonableness of the medical charges is not constrained by whether or not it filed an 18.001 counter-affidavit or whether the trial court accepted that counter-affidavit. The court held in *Allstate* that "the claimant's decision to file initial affidavits *may* relieve her of the burden to adduce expert trial testimony on reasonableness and necessity, but the opposing party's failure to serve a compliant counter affidavit has *no* impact on its ability to challenge reasonableness or necessity at trial" (emphasis in the original).[52] For defendants to challenge reasonableness of charges at trial, they must designate an expert whose qualifications and opinions can withstand a plaintiff's motion to strike challenging the admissibility of the testimony.[53] This may cause defendants to choose to file expert reports on the reasonable value of past medical services instead of counter-affidavits on the reasonableness of charges.

[51] Ibid.
[52] *In re Allstate Indem. Co.*, 622 S.W.3d 870, 881 (Tex. 2021) at [12].
[53] *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

CONCLUSION

45. The law on the amount a plaintiff may recover for past medical expenses in Texas personal injury cases has seen major developments in recent years. These developments generally favor defendants and should reduce the size of awards for this element of damages. In summary:

- Regardless of what a practitioner or facility charges, the plaintiff is only entitled to recover the reasonable value of the goods and services. A provider's billed charges are not presumed to be the reasonable value.
- A range rather than a single amount defines the reasonable value of specific services.
- The upper end of the range is usually the lesser of the billed charge or the usual, customary, and reasonable (UCR) charge at the 75th or 80th percentile. Charges are relevant to establishing reasonable value because some health plans continue to use the UCR method to set the allowed amount for out-of-network providers and some state statutes adopt this method for certain situations.
- If the plaintiff or someone acting on the plaintiff's behalf has paid or incurred an amount for goods or services, the reasonable value cannot exceed the amount paid or incurred.
- The lower end of the range is usually the reasonable cost for providers to deliver the goods or services. Because Medicare rates are intended to cover the reasonable costs of a reasonably prudent provider, Medicare may be used as an approximation of the lower end of the range.
- Fair market value often means a price arrived at through arm's length negotiations between a willing buyer and a willing seller with both being well informed and neither under undue pressure to buy or sell. Healthcare markets are far from perfect economic markets, but the best evidence of fair market value is found in the negotiated rates of provider contracts with health plans.
- This evidence of fair market value is not limited to negotiated rates available to the plaintiff in a personal injury case. Several types of negotiated rates can be relevant:

  - The negotiated rates available to an insured plaintiff for a specific provider, whether or not the plaintiff filed a claim with the insurer
  - All negotiated rates the plaintiff's provider had with health plans, whether or not the plaintiff had access to these rates
  - All negotiated rates of health plans for the plaintiff's specific service in the plaintiff's medical market

- Texas courts have not found that plaintiffs have a duty to mitigate damages for past medical expenses by filing insurance claims to take advantage of negotiated or regulated rates. If they do not file claims, however, the negotiated or regulated rates may be the reasonable value of the services and may thus limit recovery.
- The Texas Supreme Court has allowed defendants to discover provider contracts and negotiated rates from the plaintiff's health plan and the plaintiff's providers and the health plans with which they contract. Provider contract confidentiality and non-disclosure terms will not prevent discovery.
- Texas SB 1264 and the federal No Surprises Act do not specifically apply to personal injury cases. However, they contain legislative statements of criteria that courts can consider in determining the reasonable value of services. For instance, Texas SB 1264 has UCR80 as one of nine criteria used to determine reasonable value. However, the federal No Surprises Act excludes billed or UCR charges as a factor in determining payment.
- An affidavit on the reasonableness of charges for past medical services filed by a plaintiff under TCPRC §18.001 is sufficient to support a jury finding, unless the defendant serves a counter-affidavit by an expert. However, regardless of whether the defendant serves a counter-affidavit or the trial court strikes the counter-affidavit, Section 18.001 does not affect the defendant's ability to present expert testimony or other evidence at trial on the reasonable value or medical necessity of past medical services.

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- King & Jurgens Attorneys Honored in 2023 Edition of Louisiana Super Lawyers
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CHARLES RIVER ASSOCIATES, Washington, DC
Associate (1993–1998)

- Produced economic analysis for expert testimony support in antitrust and regulatory cases

TEACHING EXPERIENCE

UNIVERSITY OF RICHMOND, Richmond, Virginia
Visiting Professor (2017–2019)

- Principles of Microeconomics, Robins School of Business

NEW YORK UNIVERSITY, New York, New York
Adjunct Professor (2015–2017)

- Managerial Economics (graduate level), Tandon School of Engineering

UNIVERSITY AT ALBANY, Albany, New York
Lecturer (2011–2015)

- Quantitative Approaches (graduate level), Rockefeller College of Public Affairs & Policy
- Labor Economics, Department of Economics (Excellence in Teaching Award)
- Money and Banking, Department of Economics
- Graduate Assistant: Intermediate Microeconomics, Econometrics

HONORS AND AWARDS

- Mathematica Dissertation Fellowship, Disability Research Consortium
- Social Security Administration DDP Research Grant, Policy Research Institute
- University of Michigan Institute for Social Research, SSB Conference Grant
- Duke University Social Science Research Institute, SIPP Research Conference Grant
- University at Albany, Department of Economics, Thad Mire Teaching Award
- University at Albany Department of Economics, Graduate Assistantship
- Brigham Young University, Department of Economics Teaching Assistantship
- Brigham Young University, Academic Full-Tuition Scholarship

PRESENTATIONS

- "The Role of Earnings, Pharmaceutical Innovation, and Unemployment on SSDI: Analysis Using Merged SIPP/Administrative Data," Doctoral Dissertation
- "A Latent Variable Model of Disability Status Using Matched SIPP/Administrative Data," Disability Research Consortium Annual Meeting, Washington, DC
- "Social Security Disability Insurance and Pharmaceutical Innovation: Evidence from Matched SIPP Administrative Data," BYU Department of Economics
- "The Social Security Disability Application, Determination, and Review Process: A Demographic and Earnings Analysis Using SIPP/Administrative Data," University at Albany
- "Effects of New Psychotropic Pharmaceuticals on Disability Insurance Applications," University at Albany
- "New York Local Area Labor Market Briefings," Reports for New York Governor
- "Why Go to School?" Hudson Valley Community College Conference
- "New York State's Labor Market," Rockefeller College Policy Conversations
- "The Great Recession," Report to the New York Commissioner of Labor
- "The Decade in Review," Report to the New York Commissioner of Labor

PROFESSIONAL AFFILIATIONS

- American Economic Association
- Society of Labor Economists
- The Econometric Society
- National Association of Forensic Economists
- Healthcare Financial Management Association
- American Society of Health Economists

Michael P. Scullin, MHS, CRC, LRC, CVE, CLCP

EDUCATION

Louisiana State University Health Sciences Center,
New Orleans, Louisiana
M.H.S. Rehabilitation Counseling, May 2013

Louisiana State University, Baton Rouge, Louisiana
B.S., Kinesiology, December 2010

PROFESSIONAL LICENSURE/AFFILIATIONS

Certified Rehabilitation Counselor #00117979
Commission on Rehabilitation Counselor Certification

Licensed Rehabilitation Counselor #798
State of Louisiana, Board of Licensed Professional Vocational Rehabilitation Counselors

Certified Life Care Planner #1583
International Commission on Health Care Certification

Certified Vocational Evaluator (2023-Present)
International Commission on Health Care Certification

PROFESSIONAL EXPERIENCE

RESEARCH & PLANNING CONSULTANTS, LP (RPC), Austin, TX
Consultant, October 2022 – Present

- Certified Vocational Consultant
- Certified Life Care Planner Consultant
    - Provide vocational services and analysis.
    - Provide life care planning services and analysis.
    - Prepare expert reports for personal injury and employment litigation.
    - Provide independent recommendations and expert testimony.
    - Research and technical support for health care litigation.

SEYLER FAVALORO, LTD, New Orleans, LA
Vocational Rehabilitation Counselor, Life Care Planner, June 2013 – October 2022

- Provided vocational services and analysis
- Provided life care planning services and analysis
- Prepared expert reports and provided expert testimony for personal injury and employment litigation

SEYLER FAVALORO, LTD, New Orleans, LA
Counselor Intern, January 2013 - June 2013

- Provided administrative and clerical support to vocational rehabilitation counselors
- Assisted with research for vocational expert reports
- Assisted with preparation of vocational expert reports

ARC OF GREATER NEW ORLEANS, Metairie, LA
Counselor Intern/Job Coach, August 2012 – December 2012

- Assisting people with developmental disabilities with gaining and maintaining meaningful employment
- Performed job development activities for clients by contacting potential employers, setting up interviews, and preparing client for interviews
- Performed job coaching tasks, once clients were hired, to ensure they maintained employment by visiting jobs on a weekly to monthly basis, meeting with their supervisor/manager, and assist with resolving any client/employer issues

MOVEMENT SCIENCE CENTER, Metairie, LA
Physical Therapy Technician, August 2011 – July 2012

- Assisting patients with prescribed exercises
- Instructing patients on appropriate exercise techniques
- Recording patient's progress for the physical therapist
- Cleaning and preparing treatment areas and equipment before and after each session
- Changing and washing patient linens and pillows

CONTINUING EDUCATION

2022 Workers' Compensation Institute Annual Conference – August 21-24, 2022. Orlando, FL

2022 International Association of Rehabilitation Professionals – Virtual Annual Conference; Recipe for Success – June 1-2, 2022. New Orleans, LA

2022 Loyola Annual Longshore Conference, March 23 – 26, 2022. New Orleans, LA.

2021 Workers' Compensation Educational Conference. December 12-15, 2021. The Orlando World Center Marriott, Orlando, FL

2021 International Association of Rehabilitation Professionals – Virtual Annual Conference; A Brave New World – June 3-4. New Orleans, LA.

2020 International Association of Rehabilitation Professionals – Annual Conference; Vision 2020 March 5-6, 2020. Xavier University, New Orleans, LA

2019 Signal Maritime Conference, May 20-22 Memphis, TN

2019 Loyola Annual Longshore Conference, March 21-22, 2019, Loyola University New Orleans College of Law, New Orleans, LA

2019 International Association of Rehabilitation Professionals - Annual Conference; Rehabilitation Rendezvous February 20-21, 2019, International Association Rehabilitation Professionals, New Orleans, LA

ACI 9th Annual DBA Seminar, February 2019, Dallas, TX

2018 International Association of Rehabilitation Professionals Leadership Training, June 24, 2018, Minneapolis, MN

2018 Signal Maritime Conference, May 21-23, 2018 – Omni Shoreham Hotel, Washington DC

2018 Loyola Annual Longshore Conference, March 15-16, 2018 – Astor Crowne Plaza Hotel, New Orleans, LA

2018 International Association of Rehabilitation Professionals – LA Annual Conference, March 8-9, 2018 – East Jefferson General Hospital

2017 Workers' Compensation Educational Conference, August 6-9, 2017 – The Orlando World Center Marriott, Orlando, FL

2017 International Association of Rehabilitation Professionals-LA Annual Conference, April 6-7, 2017

2017 Loyola Annual Longshore Conference, March 9-10, 2017 – Astor Crowne Plaza Hotel, New Orleans, LA

2017 Defense Base Act – Dallas Seminar, February 2, 2017 – Ritz Carlton Hotel, Dallas, Texas

2016 International Association of Rehabilitation Professionals- LA Legislative Seminar, October 7, 2016 – LABI Conference Center, Baton Rouge, LA

2016 International Association of Rehabilitation Professionals-LA Annual Conference, April 7-8, 2016 – East Jefferson General Hospital Conference Center, Metairie, LA

2016 Loyola Annual Longshore Conference, March 10-11, 2016 – Astor Crowne Plaza Hotel, New Orleans, LA

2015 International Association of Rehabilitation Professionals Annual Conference, October 22-24, 2015 – Astor Crowne Plaza Hotel, New Orleans, LA

2015 Signal/LCA Maritime Conference, May18-20, 2015 – Hyatt Regency Downton Boston, Boston, MA

2015 Loyola Annual Longshore Conference, March 19-20, 2015 – Astor Crowne Plaza Hotel, New Orleans, LA

2015 International Association of Rehabilitation Professionals-LA Annual Conference, March 12-13, 2015 – East Jefferson General Hospital Conference Center, Metairie, LA

2014 International Association of Rehabilitation Professionals- LA Legislative Seminar, September 19, 2014 – LABI Conference Center, Baton Rouge, LA

2014 International Association of Rehabilitation Professionals- LA Annual Conference: Looking Forward, April 3-4, 2014 – East Jefferson General Hospital Conference Center, Metairie, LA

2014 Ethics of Confidentiality: Practical Solutions to Protect Client Data, January 10, 2014, University of New Orleans Training, Resource and Assistive Technology Center, New Orleans, LA

2013 International Association of Rehabilitation Professionals-LA Legislative Seminar, September 13, 2013 – LABI Conference Center, Baton Rouge, LA

PROFESSIONAL MEMBERSHIPS AND AFFILIATIONS

- International Association of Rehabilitation Professionals-LA