

SUBJECT: Changing deadlines for affidavits and counteraffidavits relating to services

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Leach, Farrar, Krause, Meyer, Smith, White

3 nays — Y. Davis, Julie Johnson, Neave

WITNESSES: For — Paul Huckabay, Aggregate Haulers I LP; Brian Jackson, Texas Alliance for Patient Access; Mike Hendryx, Texas Association of Defense Council; (*Registered, but did not testify*: Michael Stewart, Aggregate Transportation Association of Texas; Joe Woods, American Property Casualty Insurance Association; Jonathan Kennemer, CKJ Transport; James Grace Jr., CNA Insurance Companies; Kate Buecker, Gulf Intermodal Services; James Mathis, Houston Methodist Hospital; Lee Loftis, Independent Insurance Agents of Texas; Mike Toomey, Liberty Mutual; John Mondics, Mondics Insurance Group Inc; Paul Martin, National Association of Mutual Insurance Companies; Tanya Renee Schultz, RS Equipment Co. dba Hotsy Carlson Equipment; Kinnan Golemon, Shell Oil Company; Michelle Apodaca, Tenet; Lee Parsley, Texans for Lawsuit Reform; Jon Opelt, Texas Alliance for Patient Access; James Hines, Texas Association of Business; Michael Garcia, Texas Association of Manufacturers, Texas Medical Liability Trust; Hector Rivero, Texas Chemical Council; George Christian, Texas Civil Justice League; John W Fainter Jr, Texas Civil Justice League; Carol Sims, Texas Civil Justice League; Cesar Lopez, Texas Hospital Association; Jill Sutton, Texas Osteopathic Medical Association; John Esparza, Texas Trucking Association; Robert Fuentes, The Fuentes Firm, P.C.; Lucas Meyers, The Travelers Companies, Inc. and Subsidiaries; Robert McDowell, W. M. Dewey & Son, Inc.; Tiffany Young)

Against — Will Adams, Texas Trial Lawyers Association

BACKGROUND: Civil Practice and Remedies Code sec. 18.001 provides that an affidavit that the amount charged for a service was reasonable and that the service was necessary is sufficient evidence to support a finding of fact that the

amount charged was reasonable and that the service was necessary, unless a controverting affidavit is served.

A party offering an affidavit must serve a copy of the affidavit on each other party at least 30 days before the day on which evidence first is presented at the trial. A counteraffidavit must be served within 30 days after the party receives a copy of the affidavit or at least 14 days before the day on which evidence first is presented at trial. However, the court may give leave for a counteraffidavit to be filed at any time before the commencement of evidence at trial.

Texas Rules of Civil Procedure 195.2 requires a party to designate an expert by the later of 30 days after a request for disclosure of information regarding a testifying expert is served or:

- 90 days before the end of the discovery period, for experts testifying for a party seeking affirmative relief; or
- 60 days before the end of the discovery period, for all other experts.

DIGEST:

CSHB 1693 would change the deadlines for serving an affidavit and counteraffidavit regarding the cost and necessity of a service. These deadlines could be altered by agreement or with leave of the court.

Affidavit. The bill would require that an affidavit be served by the earlier of 90 days after the date the defendant filed an answer or the date the offering party was required to designate expert witnesses under court order or under the Texas Rules of Civil Procedure (TRCP).

If services first were provided more than 90 days after the date the defendant filed an answer, the party offering the affidavit would have to serve the affidavit by the date the offering party was required to designate expert witnesses under the TRCP.

Counteraffidavit. A counteraffidavit controverting a claim reflected in an affidavit would have to be served by the earlier of 120 days after the date

the defendant filed an answer or the date the party offering the counteraffidavit was required to designate expert witnesses under court order or under the TRCP.

A counteraffidavit controverting a claim in an affidavit regarding services first provided more than 90 days after the defendant filed an answer would have to be served by the later of 30 days after the affidavit was served or the date the party offering the counteraffidavit was required to designate expert witnesses under the TRCP.

Continuing services. If continuing services were provided after a deadline described above, an affidavit could be supplemented no later than the 60th day before the beginning of trial and a counteraffidavit could be supplemented no later than the 30th day before the beginning of trial.

Causation. An affidavit or counteraffidavit could not be used to support or controvert the causation element of a cause of action.

Notice. Parties serving an affidavit or counteraffidavit would be required to file a notice with the clerk of the court that the affidavit or counteraffidavit were served in compliance with applicable law.

The bill would take effect September 1, 2019, and would apply to an action commenced on or after that date.

**SUPPORTERS
SAY:**

CSHB 1693 would improve the fairness of using affidavits to establish the cost and necessity of services by giving defendants more time to evaluate affidavits and determine whether to serve counteraffidavits. The bill also would clarify that affidavits and counteraffidavits only pertained to whether charges were reasonable and necessary and had no bearing on the causation element of a cause of action.

The current practice of using these affidavits allows the parties to know early on in a case whether such things as medical bills are reasonable and necessary. This allows the parties to come to a resolution sooner or work up the case more efficiently for trial.

However, these affidavits are being abused by some attorneys who serve affidavits too early or too late in a case. If affidavits are served too early in a case, defendants often do not have time to conduct discovery regarding the cost and necessity of services under the current rules. As a result, defendants may have to file counteraffidavits in order to be able to present evidence on the issue at trial, even though the defendants do not know whether they dispute the claims being made in the affidavit.

On the other hand, if affidavits are served too late in a case, defendants could be required to obtain the leave of court to designate expert witnesses to refute the affidavit or pre-designate an expert witness if they think that an affidavit will be filed shortly before trial.

CSHB 1693 would prevent this abuse by giving defendants more time to determine whether a counteraffidavit was warranted while balancing the need to promote the early resolution and the efficient preparation of cases.

OPPONENTS
SAY:

CSHB 1693 would not provide enough opportunity for a party to examine opposing expert witnesses or use the party's own expert witness to refute a claim raised by an expert in an affidavit.