BUTLER | SNOW

February 10, 2021

Mr. Blake Hawthorne, Clerk
Supreme Court of Texas
201 West 14th, Room 104
Austin, Texas 78701

Via E-Filing

Re: No. 20-0849; *In re ExxonMobil Corporation*

To the Honorable Supreme Court of Texas:

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, Amici Curiae Texans for Lawsuit Reform (TLR), the American Tort Reform Association (ATRA), and the Chamber of Commerce of the United States of America (U.S. Chamber), submit this letter brief urging the Court to grant mandamus relief and allow discovery from medical providers concerning the reasonableness of medical expenses incurred by a plaintiff. TLR, ATRA, and the U.S. Chamber filed a similar letter brief in Cause No. 19-1022, *In re K&L Auto Crushers, LLC and Thomas Gothard, Jr.* and ask this Court to grant relief in one or more of these proceedings as explained in this letter brief.

INTRODUCTION

Attorneys for personal injury plaintiffs have found a way to circumvent the "paid or incurred" rule—through use of letters of protection to medical providers. The result is the admission of evidence from medical providers at trial about a plaintiff's medical expenses that looks nothing like the reasonable rates they normally charge, but instead has everything to do with maximizing their own recovery along with the plaintiff's. The result is unfair jury trials in personal injury suits because defendants—with no ability to conduct discovery on the provider's reasonable medical charges for the same procedure in the same area—cannot adequately defend themselves.

INTEREST OF AMICI

TLR is an organization founded in 1994 to help foster and maintain a civil justice system that achieves a fair, merits-based means of resolving civil disputes. TLR also seeks to help ensure that the Texas civil justice system operates efficiently to promote economic development and job creation for the benefit of all Texans. TLR has more than 18,000 individual supporters in 857 towns and cities representing 1,266 different trades, businesses, and professions that support TLR's mission. TLR has no direct or indirect interest in this matter other than its interest in promoting an excellent, fair, and merits-based civil justice system in Texas.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the Nation's business community.

TLR, ATRA, and the U.S. Chamber have equally shared payment of all fees incurred in preparing this letter brief.

ARGUMENT

I. Discovery concerning medical charges is necessary to ensure a fair trial.

As part of a comprehensive tort reform package enacted in 2003, the Texas Legislature passed a statute that limits recovery of medical or health expense to the amount a plaintiff actually "paid or incurred." Tex. Civ. Prac. & Rem. Code § 41.0105; *see also Haygood v. De Escabedo*, 356 S.W.3d 390, 396-97 (Tex. 2011) (interpreting statute to allow recovery of only medical charges "actually paid and incurred"). Narrowing recovery in this way holds true to the age-old principle that courts generally limit tort remedies to the amount necessary to make a plaintiff whole, and not more. It recognizes that complexities of the health care system, including negotiated rates between providers, hospitals, insurance companies, and others have led to medical bills that often fail to reflect a plaintiff's actual losses and have the potential to confuse jurors.

Letters of protection are sometimes used to game this statutory limit on a plaintiff's recovery. Instead of proof of the amount actually paid or incurred by a plaintiff, the jury hears from the medical provider that the plaintiff has been charged the full "chargemaster" rate for the provider's services and that this amount is reasonable. But chargemaster rates generally serve as baselines for negotiating payment between providers and insurers or other payors, not the ultimate compensation for the service.

Absent evidence, obtained through discovery, of the providers' actual charges for the relevant types of service, jurors are misled into believing that chargemaster rates reflect a plaintiffs' actual losses. This results in higher verdicts than would otherwise be appropriate, resulting in a windfall to plaintiffs and their counsel. The victim of this scheme is not just the defendant in a personal injury suit; the overarching victim is the justice system because jury trials are skewed by introduction of misleading evidence without the ability of defendants to offer controverting evidence of the amount of reasonable medical charges that were actually paid or incurred.

A. Letters of protection skew the parties' incentives and the testimony at trial.

Medical providers under a letter of protection from plaintiff's counsel routinely testify that their full "chargemaster" rate—which a patient rarely, if ever, pays—is reasonable. Letters of protection often require that the medical provider produce medical records and testify at deposition and trial to prove up the reasonableness of the plaintiff's medical expenses. Then they allow plaintiff's counsel to make reductions in medical charges before paying the provider (or potentially sharing a portion of the plaintiff's recovery to cover the remaining, reduced charges).

In other words, even the parties to most letters of protection recognize that the medical provider will likely not be reimbursed at the end of the litigation for the full amount of medical charges about which the provider testified. Instead, the charges will be reduced to a reasonable amount—an amount that the jury will never hear about absent discovery.

Plaintiff's counsel and the medical provider implicitly acknowledge that the charges testified to by the medical provider and presented to the jury are not reasonable and will likely have to be reduced when the litigation is over. But it is in both of their interests to establish the highest amount of medical charges possible to increase settlement value and to potentially increase the amount of punitive damages obtained at trial. Tex. Civ. Prac. & Rem. Code § 41.008(b)(1)(a) (limiting punitive damages, in part, to twice the amount of economic damages). These motivations lead to a skewing of the evidence presented at trial.

B. This Court's jurisprudence has historically protected the fundamental fairness of jury trials.

Throughout the history of its jurisprudence, this Court has encountered and corrected situations in litigation that fundamentally and unfairly altered the rights of the parties at trial.

For example, this Court held that a settling defendant cannot purchase the plaintiff's claims and then pursue them against a co-defendant because of the potential to confuse the jury and prejudice the remaining parties. *Beech Aircraft Corp. v. Jenkins*, 739 S.W.2d 19, 22 (Tex. 1987) ("We can, however, envision that the settling defendant's unusual posture as surrogate plaintiff, co-defendant and cross-plaintiff will confuse a jury and possibly prejudice the remaining parties.").

Likewise, this Court prohibited Mary Carter Agreements, in part, because they skewed a plaintiff's case against the remaining defendants. *Elbaor v. Smith*, 845 S.W.2d 240, 249 (Tex. 1992). In *Elbaor*, the Court reasoned that such agreements "present to the jury a sham of adversity between the plaintiff and [a settling defendant], while these parties are actually allied for the purpose of securing a substantial judgment for the plaintiff and, in some cases, exoneration for the settling defendant." *Id.* The Court reasoned that "we do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment." *Id.* at 250.

Similar considerations led the Court to hold that a party cannot assign its rights under an insurance policy. *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 712 (Tex. 1996). In *Gandy*, a daughter sued her father for sexual abuse. She then settled with him and agreed not to execute on the settlement in exchange for her father's assignment of his rights against State Farm. The result of that settlement was that the plaintiff changed her position before the trial court to contend that her father had not abused her as badly as she previously claimed. Likewise, her father went from admitting the abuse and entering into a large settlement, to taking the position at trial that he had not abused his daughter and that if State Farm had only provided an adequate defense, he would have prevailed in the suit. In invalidating this assignment of rights, the Court wrote that "[p]arties often take inconsistent positions in lawsuits. Generally the law permits this, but the situation here is different. Here the parties took positions that appeared contrary to their natural interests for no other reason than to obtain a judgment against State Farm." *Id.*

The proceeding before this Court and nearly all personal injury suits involving letters of protection have many of these same considerations in play. Without a letter of protection, the medical provider for an uninsured patient would normally find itself in the position of a debt collector. The provider would try to negotiate payment from the plaintiff, likely based on what the provider charges other uninsured patients. The letter of protection changes the incentives, allowing providers to collect more than they otherwise would and motivating them to testify in support of the highest possible award at trial.

These motivations are, of course, unknown to the jury. To the jury, the medical provider appears to be a neutral third party with the indicia of trustworthiness.

The only way to combat this practice is to allow the defendant discovery of what the same medical providers have charged others in the area for the same medical procedure, as this Court has allowed in the medical lien context. *See In re North Cypress Med. Ctr. Oper. Co.*, 559 S.W.3d 128, 135, 137 ("The amounts North Cypress accepts as payments for those services from other patients, including those covered by private insurance and government benefits, are relevant to whether the charges to Roberts were reasonable and thus are discoverable."). That is the only way to level the playing field at trial; the jury must know that the amount of charges the medical provider has testified to are not a reasonable amount in terms of what the medical provider usually collects—or at least be cross-examined about that motivation with data in the hands of defense counsel. Otherwise, the jury has every reason to believe the medical provider's testimony.

C. Allowing defendants discovery is the only way to combat the problem, particularly given the standards for admission of expert testimony outlined by this Court.

Without discovery, the defense faces difficulty in rebutting a medical provider's testimony regarding the reasonableness of charges for a given procedure. All too often, the plaintiff and the medical provider successfully block discovery on this topic. Then, when the defendant

proffers an expert witness or expert affidavit to counter the plaintiff's case, plaintiff moves to strike the expert for lack of reliability.

In some cases, reliable data on medical charges may be available through sources other than the medical provider, for example from the Texas Department of Insurance or the CMS disclosure regulation discussed in the parties' briefing. However, when that is not the case, a lack of discovery makes it more difficult for a defense expert to have a reliable basis for testifying as to what a reasonable charge is for a particular medical provider and for a particular medical service from that provider. *Merrill Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997) (requiring experts to rely on reliable data).

As this Court and the U.S. Supreme Court have said repeatedly, expert witnesses should not be allowed to testify when relying on their own *ipse dixit*. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009). If a defendant is not allowed to conduct discovery on reasonable medical charges, however, that may be all a defendant's expert is left with. And plaintiffs will take full advantage of the opportunity to pursue a perceived tactical advantage on this basis.

As a result, what remains is a very expensive game. Plaintiff and the medical providers team up to maximize their recovery with full knowledge that their evidence will come in at trial, while opposing the defendant's request for information on which a defense expert can reasonably rely in forming his or her opinions.

This creates an unlevel playing field at trial. Without reliable data, a defendant's expert may be subject to challenge or, at minimum, will seem less credible than the medical provider. Under these unfortunate and unfair circumstances, the result could be that the only evidence a jury hears is that of the provider, who again has every motivation to maximize the plaintiff's recovery while testifying that the provider's highest rate—which it rarely, if ever, collects—is reasonable. And, the provider will not be subject to meaningful cross-examination.

This is a problem, and it needs to be fixed. Although allowing discovery of a provider's charges for the same procedure to other patients is not a perfect fix to the problem, it is necessary. Without discovery in cases like this, defendants in personal injury suits go to trial with one arm tied behind their backs and a blindfold on. This is an unfair situation, and the Court can remedy it by allowing the defendant necessary discovery on reasonable charges, consistent with its *North Cypress* decision.

II. Allowing discovery here will not open the floodgates.

Authorizing discovery into a medical provider's charges for a given procedure will not open the floodgates to abusive discovery. The burden or expense of the requested discovery must not outweigh its likely benefit, taking into account the needs and characteristics of the case. Tex. R. Civ. P. 192.4(b).

In this case, where the medical costs incurred are significant and information on rates charged by the providers are not publicly available, allowing discovery makes sense. But a trial court may be within its discretion to deny discovery in some cases.

For example, in a case where the medical charges are minimal, a trial court may very well be within its discretion to deny broad discovery. Likewise, although for most providers the type of discovery sought in this case likely requires only a few keystrokes on a computer to produce relevant information, there may be cases where a medical provider's records are not automated and, as a result, responding to such discovery may be unduly burdensome (assuming the provider can prove burdensomeness). Finally, in some cases, the information sought may be available on public databases, such as through the Texas Department of Insurance or under the recent CMS regulation. In each of these situations, the trial court would presumably have discretion to either deny such discovery outright or limit its scope in a reasonable manner. *See* Tex. R. Civ. P. 192.4(a).

That is not the case here. Discovery into a provider's relevant charging practices goes to the heart of the actual losses a plaintiff "paid or incurred." Allowing such discovery is the only way to ensure a fair trial.

TLR, ATRA, and the U.S. Chamber respectfully urge this Court to grant the petition, clarify that the *North Cypress* holding applies equally to situations like this, and allow the defendant discovery of rates providers have charged for the same or similar services for other patients. By doing so, the Court will ensure the fairness of jury trials in personal injury suits and close a loophole in the paid or incurred rule caused by the use of letters of protection.

Respectfully submitted,

BUTLER SNOW LLP

By: */s/ Scott K. Field*

Scott K. Field
State Bar No. 00793725
scott.field@butlersnow.com
Amanda G. Taylor
State Bar No. 24045921
amanda.taylor@butlersnow.com
BUTLER SNOW LLP
1400 Lavaca St., Suite 1000
Austin, Texas 78701
Tel: (737) 802-1800

COUNSEL FOR AMICI CURIAE
TLR, ATRA, AND U.S. CHAMBER

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, the foregoing Amici Brief was electronically served on counsel for Plaintiffs by the Electronic Filing Service Provider, if registered; otherwise by email, as follows:

Counsel for Relator ExxonMobil Corporation:

Lynne Liberato
lynne.liberato@haynesboone.com
Mark Trachtenberg
mark.trachtenberg@haynesboone.com
Michelle P. Scheffler
michell.scheffler@haynesboone.com
Ryan Philip Pitts
ryan.pitts@haynesboone.com
HAYNES & BOONE LLP
1221 McKinney Street,
Suite 4000
Houston, Texas 77010

C. Robert Mace
bmace@trialattorneytx.com
Stephen M. Fernelius
stephen.fernelius@trialattorneytx.com
Ryan M. Perdue
ryan.purdue@trialattorneytx.com
Dwain G. Capodice
dwain.capodice@trialattorneytx.com
FERNELIUS SIMON MACE
ROBERTSON PERDUE PLLC
4119 Montrose, Suite 500
Houston, Texas 77006

Kenneth Tekell, Sr
ktekell@balagiatekell.com

Counsel for Real Parties in Interest:

David Keltner
david.keltner@kellyhart.com
Jody Sanders
jody.sanders@kellyhart.com
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102

Counsel for Real Parties in Interest Kassandra Rodriguez, Josue Munoz, Arturo Flores, Raul Rosales, Felipe Lopez, Joseph Silverman, Maria Rojas, Eder Rodriguez, Fidencio Rojas, Carlos Burgoin, Reggie Speights, Bryan Roque, Michael Salgado, Demarcis Friels, Efrain Flores-Rodriguez, and Brandon Windholz, Plaintiffs David Coble, Roberta Pena, Alex Raudez, John Torres, and Angela Wegemer, Tamara Brown, Alvaro Coronel:

LAW OFFICE OF KENNETH TEKELL, SR PLLC
1221 McKinney St., Suite 3200
Houston, Texas 77056

Respondent:

The Honorable Daryl R. Moore
333rd District Court
201 Caroline, 14th Floor
Houston, Texas 77002

Counsel for Real Party in Interest Melinda Charles:

W. Mark Lanier
jrm@lanierlawfirm.com
THE LANIER LAW FIRM, P.C.
10940 Sam Houston Parkway, N., Suite 100
Houston, Texas 77064

Counsel for Real Parties in Interest Cody Lee Fregia, Brian Scales, David Banda and Carl Whitehead:

Taylor Miller
tmiller@rmqlawfirm.com
READ, MORGAN & QUINN, L.L.P.
801 Laurel Avenue
Beaumont, Texas 77701

Counsel for Real Party in Interest Arthur Burleson:

Michael Pierce
michael@pstriallaw.com
Bernardino Agosto
bagosto@awtxlaw.com
Muhammad Suleiman Aziz
maziz@awtxlaw.com
Karl Long
klong@awtxlaw.com
Jonathan Sneed
jsneed@awtxlaw.com
ABRAHAM, WATKINS, NICHOLS, SORRELS, AGOSTO, AZIZ & STOGNER
800 Commerce Street
Houston, Texas 77002

Counsel for Real Parties in Interest Daniel Serrano, Jon Alvarez, Martin Rodriguez, James Neill, Spruiell Rangel, David Carmona, Jr., Martin Garcia, Dennis Woods, Brandon Windholz, Hubert Lawson, Samantha Garza, Jonathan Mendoza, Francisco Rios, Chiquita Bland, Jaime Serrano, Ricardo Hernandez, Martin Lopez, and Pedro Gomez, Jr., Oscar Villegas, Joel Anaya-Gonzalez, Luis Carlos Gutierrez, Noe Reyes, Christopher Wright, David Garza, and Jorge Elizondo, Leonardo Rangel Morfin:

Kurt Brynilde Arnold
Jason A. Itkin
J. Kyle Findley
Kason Kimberley
Adam D. Lewis
Crystal DeLeon

Kyle Chapel
kyle@pstriallaw.com
PIERCE SKRABANEK, PLLC
3701 Kirby Drive, Suite 760
Houston, Texas 77098

Counsel for Real Party Interest Non-Party Medical Provider Woodlake MRI & Diagnostic Imaging:

John J. Brothers
jbrothers@brothersfirm.com
THE BROTHERS LAW FIRM, PLLC
2800 Post Oak Blvd., Suite 4100
Houston, Texas 77056

Counsel for Real Party in Interest Non-Party Medical Provider Altus Hospital:

Jeanine Navarro
jnavarro@altushealthsystem.com
ALTUS HOSPITAL
11233 Shadow Creek Parkway,
Ste. 313 Pearland, Texas 77584

Counsel for Real Parties in Interest Non-Party Medical Providers AD Hospital East, LLC, Texas Brain Center, LLC and Advanced Medical Group:

Jourdain Poupore
jourdain@wynnepoupore.com
Robert Wynne
service@wynnepoupore.com
WYNNE & POUPORE LLP
e-service@arnolditkin.com
ARNOLD & ITKIN, LLP
6009 Memorial Drive
Houston, Texas 77007

Additional Counsel for Real Party in Interest Tamara Brown:

Hilda Sibrian
hilda@sibrianlaw.com
THE LAW OFFICES OF HILDA L. SIBRIAN, P.C.
846 North Loop
Houston, Texas 77009

Additional Counsel for Real Party in Interest Leonardo Rangel Morfin:

David Ortez
dortez@johnsonlawgroup.com
JOHNSON LAW GROUP
2925 Richmond Avenue, Suite
1700 Houston, Texas 77098

Additional Counsel for Real Party in Interest Alvaro Coronel:

John K. Zaid
john@zaidlaw.com
Jawad Zaid
joe@joezaid.com
JOHN K. ZAID & ASSOCIATES
16951 Feather Craft Lane 7
Houston, Texas 77058

3233 W. Dallas Street, Suite 313
Houston, Texas 77019

***Counsel for Amicus Curiae Texas Civil Justice League*:**

George Scott Christian
george@tcjl.com
TEXAS CIVIL JUSTICE LEAGUE
400 W. 15th St. #1400
Austin, Texas 78701

Counsel for Real Party in Interest Freddy Landry:

James Edwards
firm@jimedwardslaw.com
THE LAW OFFICES OF JIM EDWARDS, PLLC
550 Westcott Street,
Suite 470
Houston, Texas 77007

/s/ Scott K. Field
Scott K. Field

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Keeana Kee on behalf of Scott King Field
Bar No. 793725
keeana.kee@butlersnow.com
Envelope ID: 50522741
Status as of 2/10/2021 10:07 AM CST

Case Contacts

Name
Mark Trachtenberg
Lynne Liberato
Michelle Meuhlen
Robert Wynne
James Edwards
Jonathan Sneed
Karl Long
Kurt Brynilde Arnold
David Ortez
C. Robert Mace
Michael Elton Pierce
Jourdain Poupore
Hilda Leonor Sibrian
Ryan Matthew Perdue
Muhammad Suleiman Aziz
Kenneth Tekell
Taylor Miller
Bernardino Agosto
John K Zaid
W. Mark Lanier
Jeanine Navarro
Jawad Zaid
Michelle Scheffler
Ryan Pitts
Jody Sanders

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Keeana Kee on behalf of Scott King Field
Bar No. 793725
keeana.kee@butlersnow.com
Envelope ID: 50522741
Status as of 2/10/2021 10:07 AM CST

Case Contacts

David Keltner		david.keltner@kellyhart.com	2/10/2021 9:52:37 AM	SENT
Stacy Blanchette		stacy.blanchette@kellyhart.com	2/10/2021 9:52:37 AM	SENT
Melissa Mota		melissa.mota@kellyhart.com	2/10/2021 9:52:37 AM	SENT