

## COUNTERPOINT

# ALL-DAMAGES CAP ON HEALTH CARE LIABILITY WRONGFUL DEATH AND SURVIVAL CLAIMS

## OUR VIEW

### THE CAP IS CONSTITUTIONAL

By R. Brent Cooper and Diana L. Faust

Section 74.303(a) of the Texas Civil Practice and Remedies Code statutorily caps all damages in a health care liability wrongful death or survival claim—other than those expressly excluded from its application: necessary medical, hospital, or custodial care damages.<sup>1</sup> These caps existed and were constitutionally applied under former article 4590i of the Texas Revised Civil Statutes.<sup>2</sup> Claimants argue that the literal text of article III, section 66 of the Texas Constitution (added by Texas voters through Proposition 12 in September 2003) limits the application of section 74.303(a) to noneconomic damages. Examining the amendment to discern Texas voters' intent reveals that it sought to ensure that the cap constitutionally applies to noneconomic damages but also that it sought to leave in place the existing common law at the time of chapter 74's enactment. Thus, section 74.303(a) means what it says and constitutionally applies to limit noneconomic and economic damages other than those expressly excluded.

#### Discerning Intent of Texas Voters

The Texas Constitution derives its force from the people of Texas.<sup>3</sup> In construing the language of the constitution, courts must consider "the intent of the people who adopted it."<sup>4</sup> In determining intent, "the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of inquiry."<sup>5</sup> Courts discern intent by considering the amendment in its entirety, as well as its history, nature, and objective.<sup>6</sup>

Courts rely on the constitution's literal text, liberally and equitably construed, while striving to give constitutional provisions the effect their makers and adopters intended.<sup>7</sup> In particular, a remedial constitutional provision is to be construed liberally to carry out its purposes,<sup>8</sup> and provisions are to be construed in light of the common law and the conditions as they existed at the time of adoption.<sup>9,10</sup>

#### Chapter 74, Proposition 12, and Section 66 Amendment

Dire conditions existed at the time Texas voters adopted article III, section 66 in 2003. In May 1977, the Legislature passed article 4590i, a series of medical liability reforms that included a cap on noneconomic damages.<sup>11</sup> In 1988, the Texas Supreme Court declared the noneconomic-damages cap unconstitutional<sup>12</sup> but held a "wrongful death" cap constitu-

tional when applied on a per-defendant basis.<sup>13</sup> Before Proposition 12 in 2003, the only damages caps that had been constitutionally upheld in medical liability cases were those applied in wrongful death and survival claims. As a result, medical liability litigation increased, as did the frequency and severity of awards just five years after enactment of reforms in 1995.<sup>14</sup> Plus, a mandated insurance rate rollback in effect since 1996 was lifted,<sup>15</sup> resulting in an increase in insurance rates that pushed Texas into a well-documented medical liability crisis.<sup>16</sup>

In June 2003, the Legislature enacted the Medical Malpractice and Tort Reform Act of 2003. The purpose of this comprehensive package, in large part, was to alleviate the medical liability crisis.<sup>17</sup> The act's centerpiece was a cap on noneconomic damages, limiting a health care provider or physician's exposure to \$250,000, codified in section 74.301. Economic loss—such as past and future medical expenses, lost wages, and custodial care—remained uncapped, except in the context of wrongful death and survival claims. Nothing in the legislative history evidences any intent to repeal the cap in these cases.

To ensure constitutionality of section 74.301, House Joint Resolution 3 proposed a constitutional amendment authorizing the Legislature to determine limitations on noneconomic damages.<sup>18</sup> The Texas Secretary of State put HJR 3's purpose and text on the ballot for Texas voters as Proposition 12:

HJR 3 would immediately *authorize* the Legislature to limit noneconomic damages assessed against a provider of medical or health care and, after January 1, 2005, to limit awards in all other types of cases.

The proposed amendment will appear on the ballot as follows: "The constitutional amendment concerning civil lawsuits against doctors and health care providers, and other actions, *authorizing the legislature to determine limitations on non-economic damages.*"<sup>19</sup>

Texas voters passed Proposition 12, adding HJR 3 to the Texas Constitution at article III, section 66. Plainly expressed, the purpose of the amendment was not to restrict any legislative authority; it only authorized the Legislature to limit liability for noneconomic damages in all health care liability claims. Section 66 provides, in relevant part:

#### LIMITATION ON LIABILITY FOR NONECONOMIC DAMAGES.

(a) In this section "economic damages" means compensatory damages for any pecuniary loss or damage. The term does not include any loss or damage, however character-



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## LIMITATION ON LIABILITY FOR NONECONOMIC DAMAGES.

(a) In this section "economic damages" means compensatory damages for any pecuniary loss or damage. The term does not include any loss or damage, however character-

ized, for past, present, and future physical pain and suffering, mental anguish and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment.

(b) Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability. The claim or cause of action includes a medical or health care liability claim as defined by the legislature.<sup>20</sup>

Ignoring the express purpose of the amendment, health care liability claimants argue that the literal text found in subsection (b)'s language—"may determine the liability for all damages and losses, however characterized, other than economic damages"—means that the intent of Texas voters was to limit damages and losses "other than economic damages," such that economic damages are now unlimited. Again, voter approval of Proposition 12 affirmed the Legislature's authority to cap noneconomic damages in health care lawsuits.

## Intent of the Amendment

The House Research Organization bill analysis found that HJR 3's intent was to ensure that the Legislature would have the authority to limit noneconomic damages in all cases, without fear of those limitations being overturned by the courts. It recognized that: (1) a crisis existed in the cost and availability of medical professional liability insurance caused by increases in damages and size of awards; (2) a key solution to the crisis would be enactment of a \$250,000 cap on noneconomic damages; and (3) legislative authority to cap such damages is needed because the previous caps had been held unconstitutional as violating the open courts provision of the Texas Constitution in cases other than statutory wrongful death and survival cases.<sup>21</sup>

Consistent with its history and the common law, floor debate on HJR 3 emphasized that article 4590i's prior limitations on damages were constitutionally applied in wrongful death and survival actions.<sup>22</sup> The amendment, titled "Limitation on Liability for Noneconomic Damages," defines economic damages to exclude noneconomic damages.<sup>23</sup> Subsection (b) authorizes the Legislature to determine the limit of liability for noneconomic damages of a physician or health care provider in all medical liability claims, and subsection

(d) applies the amendment to section 74.301.<sup>24</sup> The amendment's text plainly does nothing to restrict the Legislature's authority to enact limitations on economic damages in wrongful death or survival health care liability claims, such as section 74.303(a).

The interpretation of Texas voters' intent to mean that economic damages cannot be limited through section 74.303(a) finds no support when applying the rules for interpreting constitutional amendments. Voters' approval of Proposition 12 made clear their intent to only authorize the Legislature to cap noneconomic damages. Neither the amendment's language nor legislative history supports an intent to limit the Legislature's authority to cap all wrongful death and survival damages that were previously constitutionally capped under article 4590i.

## Notes

1. Tex. Civ. Prac. & Rem. Code Ann. §§ 74.303(a), (c) (West 2011).
2. See *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 845 (Tex. 1990); *Horizon/CMS Healthcare Corporation v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000).
3. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989).
4. *Id.* (citing *Director of Dept't of Agriculture and Env't v. Printing Indus. Ass'n*, 600 S.W.2d 264, 267 (Tex.1980); *Smissen v. State*, 71 Tex. 222, 9 S.W. 112, 116 (1888)).
5. *Edgewood*, 777 S.W.2d at 394 (citing *Markowsky v. Newman*, 134 Tex. 440, 136 S.W.2d 808, 813 (1940)).
6. *Vinson v. Burgess*, 773 S.W.2d 263, 269 (Tex. 1989); *Hall v. Baum*, 452 S.W.2d 699, 702 (Tex. 1970).
7. *Doody v. Ameriquist Mortgage Co.*, 49 S.W.3d 342, 344 (Tex. 2001); *Brown Cty. Water Improvement Dist. No. 1 v. Austin Mill & Grain Co.*, 135 Tex. 140, 138 S.W.2d 523, 525 (1940).
8. *Ferguson v. Wilcox*, 119 Tex. 280, 28 S.W.2d 526 (1930).
9. *Jones v. Ross*, 141 Tex. 415, 173 S.W.2d 1022, 1024 (1943).
10. *In re Nestle USA, Inc.*, 387 S.W.3d 610, 618 (Tex. 2012, orig. proceeding) (citing *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 466 (Tex. 2011)).
11. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1, sec. 11.02(a), repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.
12. *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988).
13. House Research Organization, Bill Analysis, Tex. H.J.R. 3, 78th Leg., R.S., p.1-2 (2003) (emphasis added). See *Rose*, 801 S.W.2d at 845; *Auld*, 34 S.W.3d at 902.
14. Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History*, Part One, 36 Tex. Tech L. Rev. 1, 26-28 (2005).
15. *Id.*
16. *Id.*
17. Hull, et al., 36 Tex. Tech L. Rev. 1, 4-6; Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 875.
18. Tex. H.J. Res. 3, 78th Leg., R.S. (2003).
19. Texas Secretary of State, Ballot Language for September 13, 2003 Constitutional Amendment Election, at Proposition 12—HJR 3, <http://www.sos.state.tx.us/elections/voter/2003sepconsamend.shtml> (last visited July 24, 2016) (emphasis added).
20. Tex. Const. art. III, § 66.
21. Tex. H.J.R. 3, 78th Leg., R.S., pp. 2, 3-4.
22. H.J. of Tex., 78th Leg. R.S. 1062-63, 1070-71 (2003).
23. Tex. Const. art. III, § 66(a).
24. *Id.* §§ 66(b), (d).



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