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## Update on Settlement Credits & Periodic Payments of Future Damages Awarded in a Health Care Liability Claim

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## Subchapter K, Chapter 74 CPRC

- Overview of Subchapter K
  - Definitions
  - Requirements
  - Constitutionality
- Issues
  - Developing Evidence
  - Jury Charge
  - Preservation of Error

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## Settlement Credits, Chapter 33 CPRC

- *Virlar v. Puente* (Tex. Feb. 17, 2023)
  - Definition of “Claimant” Interpreted
  - Open Courts Analyzed

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## Overview of Subchapter K

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## Overview: History, Purpose

- Chapter 74, Subchapter K
  - Included in HB 4, Effective Sept. 1, 2003
  - Purpose: to provide monies for future care when that care is needed and to avoid unearned recovery of certain future damages when death occurs earlier than projected life expectancy
  - Legislative intent: future damages should be paid over a period of time consistent with the life expectancy of the injured claimant

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## Current Interpretations

- *Regent Care of San Antonio v. Detrick* (Tex. 2020)
- *Columbia Valley Healthcare System, L.P. v. A.M.A.* (Tex. 2022)
- *Virlar v. Puente* (Tex. Feb. 17, 2023)

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***Regent Care v. Detrick,***  
**610 S.W.3d 830 (Tex. 2020)**

- Any division between lump-sum payments and periodic payments of damages to be “incurred after the date of judgment” must be founded in the record
- Party requesting an order for periodic payments has burden to identify for the trial court evidence regarding each of the findings required
- Trial court has discretion to receive additional evidence in post-verdict proceedings
- Trial court has no discretion to craft award of damages inconsistent with the jury’s verdict

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***Columbia Valley Healthcare Sys., L.P.***  
***v. A.M.A.,***. 654 S.W.3d 136 (Tex. 2022)

- Trial court not required to submit questions to the jury regarding patient’s disputed life expectancy and annual medical expenses to determine amount and frequency of periodic payments under future damages
- Trial court had no evidence supporting only 5 years of periodic payments and remaining 70% of total to be paid in lump sum

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***Virlar v. Puente,*** \_\_ S.W.3d \_\_ (Tex. Feb 17, 2023) (rehearing pending)

- Post-trial request for periodic payments timely
- Post-trial disclosure of information regarding financial responsibility timely and sufficient
- Financial responsibility for J/S liable Ds may be satisfied by showing of only 1 of those Ds
- Trial court had information to fashion periodic payments award (life care plan, economist’s valuation in present and future value dollars for each element of the plan for Puente’s undisputed 31-year life expectancy);
- Statute affords considerable discretion to trial court in structuring periodic-payment awards but does not require such evidence that only one payment plan could be fashioned—important where the jury awarded less than the full amount of the life care plan;
- Where trial court had evidence to craft periodic payments and make findings required, failure to award any periodic payments for future medical expenses awarded by the jury was error;
- Because of Puente’s death during appeal, computation of judgment considerations on remand

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## Definitions (75.501)

- (1) "Future damages" means damages that are incurred after the date of judgment for:
  - (A) medical, health care, or custodial care services;
  - (B) physical pain and mental anguish, disfigurement, or physical impairment;
  - (C) loss of consortium, companionship, or society; or
  - (D) loss of earnings.
- (2) "Future loss of earnings" means the following losses incurred after the date of the judgment:
  - (A) loss of income, wages, or earning capacity and other pecuniary losses; and (B) loss of inheritance.
- (3) "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

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## Requirements: Conditions Precedent

- CPRC 74.502
  - Applies only to an action on an HCLC against a physician or health care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds \$100,000
  - Note: determining PV of \$100,000 may require the trial court to first adjust the jury's findings to modify the judgment award of future damages through application of settlement credits and 74.301/74.302 limitations on damages

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## Requirements: Conditions Precedent

- CRPC 74.505
  - As a condition to authorizing periodic payments of future damages, the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.
  - *Virlar v. Puente* (Tex. 2023)
    - Even though both jointly/severally liable Ds were underinsured, only vicariously liable employer D provided evidence of financial responsibility = statute satisfied; Dr. Virlar can rely on Gonzaba's assurance of payment
    - D whose liability submitted and D who is vicariously liable for same damages awarded against submitted D constitute single D for purpose of 74.505(a)

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### Requirements: § 74.503(a), (b)

- (a) At the request of a defendant physician or health care provider or claimant, the court shall order that **medical, health care, or custodial services** awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

  - *Regent Care v. Detrick*
  - *Virlar v. Puente*

- (b) At the request of a defendant physician or health care provider or claimant, the court may order that **future damages other than medical, health care, or custodial services** awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.

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### Requirements: Procedure

- Invoking right to periodic payments of future damages §§ 74.503(a), (b)
  - Timing
    - *Virlar: no pretrial pleading required; not affirmative defense; no pretrial expert designation required*
    - *Statute applicable after verdict is rendered exceeding \$100,000 present value*
  - Disclosures or other pretrial/trial preservation
    - *Virlar: allowing post-trial motion does not violate constitutional right to have jury determine contested facts*

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### Requirements: Trial Court's Obligations

- 74.503(c), (d)
  - (c) The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.
  - (d) The court shall specify in its judgment ordering the payment of future damages by periodic payments the:
    - (1) recipient of the payments;
    - (2) dollar amount of the payments;
    - (3) interval between payments; and
    - (4) number of payments or the period of time over which payments must be made.

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### Requirements: Trial Court's Obligations

- Post-Trial Proceedings Generally
- *Regent Care, Columbia Valley, Virilar*
  - Present value of future damages exceeds \$100,000 after settlement credits, caps
  - 74.505(a) Financial Responsibility, if applicable
  - Review jury findings, evidence (from trial and/or post-trial) and make findings and determinations required in §§ 74.503, 74.507
  - *Cases Require:* Record evidence must support division between lump sum and periodic payments
  - 74.505(b) Review evidence/information regarding how periodic payments could be made (annuity, structure, etc.)
  - 74.507 Determine attorney's fees on periodic payments
  - Prepare Judgment (74.503, 74.505)

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### Requirements: Trial Court's Obligations

- Post-Trial Proceedings
- Determining Attorney's Fees § 74.507
  - For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments, the court shall:
    - (1) place a total value on the payments based on the claimant's projected life expectancy; and
    - (2) reduce the amount in Subdivision (1) to present value.

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### Requirements: Effect of Award of Future Damages in Periodic Payments

- 74.505(c)
  - (c) On termination of periodic payments of future damages, the court shall order the return of the security, or as much as remains, to the defendant.
    - Payment through term of annuity
    - Payment through cash

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### Requirements: Death of Recipient (§ 74.506)

- (a) On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction.
- (b) Periodic payments, other than future loss of earnings, terminate on the death of the recipient.
- (c) If the recipient of periodic payments dies before all payments required by the judgment are paid, the court may modify the judgment to award and apportion the unpaid damages for future loss of earnings in an appropriate manner.
- (d) Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant physician or health care provider to make further payments ends and any security given reverts to the defendant.

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### Requirements: Death of Recipient (§ 74.506)

- **Columbia Valley**
  - *Reversed because reversionary interest not addressed in amounts going to special needs trust*
- **Virlar**
  - *Puente alive at judgment; death during appeal*
  - *Remand Computation*
    - *How much of award of future medical expenses P should receive in lump sum and how much P was projected to incur periodically between time of trial and death*
    - *P's estate entitled to recover those amounts*
    - *Trial court may not order Ds to pay damages for any future medical expenses P was projected to incur after the date of death*

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### Constitutionality

- **Virlar v. Puente**
  - Post-trial motion invoking right to periodic payments does not violate constitutional right to have the jury determine contested facts
  - Rejected same argument in *Columbia Valley*
  - Jury made determination of liability and damages and court is merely asked to structure payment of damages that must not be inconsistent with the jury's verdict
  - Constitution does not require jury to allocate how or when its award will be paid

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## Practice Considerations

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## Developing the Evidence

- *Regent Care/Columbia Valley/Virlar*
  - D must point to the evidence before the jury or presented post-trial that provides enough information for the trial court to perform its obligations in awarding future damages in periodic payments, such as:
    - Life Care Plan & Testimony
      - Life Expectancy
      - Care Needs in Present Value and Future Value
      - Jury's Findings Impacting These

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## Developing the Evidence: During Trial and/or Post-Trial

- Life Expectancy
- Life Care Plan
- Work Life Expectancy & Valuation
- Economist – Computations in Present Value and Future Value
- Disputed/Undisputed Life Expectancy, Life Care Plan, Work Life Expectancy & Valuation

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### Developing the Evidence: Post-Trial

- Financial Responsibility
  - Accountant
  - Proved Up Insurance Limits
    - Other Claims/Wasting Expenses Impacting Limits
- Consider an Annuity or other Insurance/Financial Professional – to develop information regarding what type of accepted instrument may fund periodic payments

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### Preservation of Error: Procedural & Substantive Considerations

- *Virlar v. Puente*
  - Evidence supporting periodic payments should be presented during trial or post-trial proceedings
  - Future value determinations based on jury findings in present value
  - Double-discounting problems
  - No need for a specific plan outlining duration and amount of future damages to be paid periodically
  - Information about annuity or other payment vehicle for periodic payments

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### Preservation of Error: Jury Charge

- *Columbia Valley*
  - Disputed life expectancy
  - Requested jury question on life expectancy (refused)
  - Requested jury questions on future value for each year of disputed life expectancy (refused)
  - Refusal did not constitute error
- *Columbia Valley & Virlar*
  - Trial court has discretion to submit jury questions that may assist it in discharging its Subchapter K duties

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### Preservation of Error Considerations

- Provide jury with information to determine life expectancy
- Provide jury with information to determine present value and future value of elements for which periodic payments will be sought
- Post-verdict, request periodic payments for future damages
- Have financial responsibility evidence ready, if applicable

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### Summary of Process

- In summary: Based on evidence provided to the jury or the trial court, present plan for award of future damages in periodic payments, for example:
  - Compute settlement credit and caps for impact on future damages amounts
  - Determine immediate care/environment modifications needs (based on evidence) and request those be awarded in lump sum
  - Determine attorneys' fees on amounts ordered paid periodically (74.507) and request those be awarded in lump-sum
  - Remainder after immediate needs and attorneys' fees: request entire remainder be ordered paid periodically be used to fund periodic payments (to avoid double discounting)
  - Request findings and prepare proposed judgment

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### Settlement Credits

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## Settlement Credits

- Sec. 33.012. AMOUNT OF RECOVERY. (a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.
- (b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.
- (c) Notwithstanding Subsection (b), if the **claimant** in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the **claimant** with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:
  - (1) the sum of the dollar amounts of all settlements; or
  - (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

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## Settlement Credits

- *Utts v. Short*, 81 SW3d 822 (Tex. 2002)

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## Settlement Credits

- (1) "Claimant" means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes:
  - (A) the person who was injured, was harmed, or died or whose property was damaged; and
  - (B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.

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### Settlement Credits

- *Virlar v. Puente*
- “The court of appeals held that applying Chapter 33 to reduce Puente’s damages in this case would be unconstitutional. Because Puente has not lost a common-law remedy, we conclude that the Open Courts provision has not been violated and that C.P.’s settlement should be credited against the judgment.”

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### Settlement Credits

- “We have held that the Open Courts provision is implicated when the Legislature “withdraw[s] common-law remedies for well established common-law causes of action.” *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951, 955 (1955).”

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### Settlement Credits

- “As explained above, the legal principles addressing settlement credits and contribution—whether common-law or statutory—aim to vindicate the one-satisfaction rule and prevent collusion in settlements. Under common-law principles, Puente would recover less than she can recover under Chapter 33. Thus, the application of Chapter 33 here does not withdraw a remedy.’
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