

Update on Statutory Damages Caps



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Problems with 4590i

- Sec. 11.02. (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000. (b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury. (c) This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the "Stowers Doctrine." (d) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors: Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party.

Problems with 4590i

- Sec. 11.03. In the event that Section 11.02(a) of this subchapter is stricken from this subchapter or is otherwise invalidated by a method other than through legislative means, the following shall become effective:
- In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability of the physician or health care provider for all past and future noneconomic losses recoverable by or on behalf of any injured person and/or the estate of such person, including without limitation as applicable past and future physical pain and suffering, mental anguish and suffering, consortium, disfigurement, and any other nonpecuniary damage, shall be limited to an amount not to exceed \$150,000.

Lucas v. United States, 757 S.W.2d 687 (Tex. 1988)

- In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high. As to the legislature's stated purpose to "assure that awards are rationally related to actual damages," section 1.02(b)(2), we simply note that this is a power properly attached to the judicial and not the legislative branch of government. Tex. Const. art. II, § 1. In any event, we hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.

Rose v. Doctors Hospital, 801 S.W.2d 841 (Tex. 1990)

- Like all actions based upon theories of negligence, the Roses' cause of action was a common law claim. It would have died with Rex Rose had it not been preserved by the legislature in the wrongful death statute. . . . The Roses' remedy, therefore, was conferred by statute, not by the common law. Because the Roses do not seek a common law remedy, the open courts provision does not apply to their wrongful death claim. Accordingly, we hold that the open courts provision may not bar the application of the damages provision of the Medical Liability Act in wrongful death cases.

Rose v. Doctors Hospital, 801 S.W.2d 841 (Tex. 1990)

- The Medical Liability Act delineates the interests of the state in a list of purposes found at the beginning of the statute. . . . These purposes include the reduction of excessive severity of health care liability claims, decreasing the cost of those claims, making insurance at reasonably affordable rates available to health care providers, and making affordable health care more accessible and available to the public. . . . The method by which the legislature chose to effect those purposes is outlined in §§ 11.02 and 11.03, the damages provisions. The damages provisions rationally relate to the interests of the state as stated in the statute's list of purposes. The statute, therefore, does not violate equal protection.

House Bill 4 Approaches

- § 74.301. LIMITATION ON NONECONOMIC DAMAGES.
(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

House Bill 4 Approaches

- § 74.302. ALTERNATIVE LIMITATION ON NONECONOMIC DAMAGES.
 - (a) In the event that Section 74.301 is stricken from this subchapter or is otherwise to any extent invalidated by a method other than through legislative means, the following, subject to the provisions of this section, shall become effective:
 - (1) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

House Bill 4 Approaches

- § 74.302

- (2) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant.
- (3) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$500,000 for each claimant.

House Bill 4 Approaches

- Proposition 12, Art. III
 - Sec. 66. 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 characterized, 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.

House Bill 4 Approaches

- Proposition 12, Art. III
 - Sec. 66. LIMITATION ON LIABILITY FOR NONECONOMIC DAMAGES.
 - (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.

Attacks on 74.301

- Federal Constitutional Attacks
 - Due Process
 - Equal Protection
 - Right to Jury Trial
 - Takings
 - Access to the Courts

- Players
- Center for Constitutional Litigation
- Attorney General of Texas
- Texas Alliance for Patient Access

Watson v. Harrison County Hospital; Civil Action
No. 2:08-cv-00081; In the United States District
Court for the Eastern District of Texas, Marshall
Division

- Due Process
- Equal Protection
- Right to Jury Trial
 - Dismissed on 3/12/2009
- Constitutional Takings
- Access to Courts
 - Motion for Summary Judgment argued
3/11/2010

Fritzgerald v. Prabhakar, 5th Court of Appeals, No.
05-10-00126-CV

- Federal Challenges
 - Due Process
 - Equal Protection
 - Right to Jury Trial
 - Constitutional Takings
 - Access to Courts

Fritzgerald v. Prabhakar, 5th Court of Appeals, No. 05-10-00126-CV

- State Challenges
 - Conflict Article I, § 15 with Article III, § 66

- **Art. I, Sec. 17. TAKING, DAMAGING, OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES.** (a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:
 - (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:
 - (A) the State, a political subdivision of the State, or the public at large; or
 - (B) an entity granted the power of eminent domain under law; or
 - (2) the elimination of urban blight on a particular parcel of property.

Fritzgerald v. Prabhakar, 5th Court of Appeals, No. 05-10-00126-CV

- (b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.
- (c) On or after January 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house.
- (d) When a person's property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.
- (Amended Nov. 3, 2009.)

Colombrito v. Janga; In the 5th Court of Appeals

- Not challenged in state court
- Intervened in Federal court

Application Issues

- Damages Caps
 - Chapter 74 Health Care Liability Claims
 - Chapter 41 Exemplary Damages
- Judgment Calculation Considerations
 - Chapter 33
 - Chapter 74
 - Chapter 41

Damages

- **Compensatory – 41.001(8)**
 - "Compensatory damages" means economic and noneconomic damages. The term does not include exemplary damages.
- **Exemplary – 41.001(5)**
 - "Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages.

Damages

- Economic – 41.001(4)
 - "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.
 - Medical, Hospital, Custodial Care
 - Loss of Income, Wages, Earning Capacity
 - Loss of Inheritance

Damages

- Non-Economic – 41.001(12)
 - "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.

Damages Caps Issues

- Interplay of Section 74.301 Capping Non-Economic Damages in Wrongful Death and Survival Actions Involving Awards of Exemplary Damages
- Prejudgment Interest Capped in 74.301 Cap
- Necessity of Pleading for Caps

Applicable Provisions

- CPRC 74.303 “Wrongful Death Cap”
- (a) In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed \$500,000.00 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

Applicable Provisions

- CPRC 74.301(b) “Non-Economic Damages Cap”
- In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$ 250,000 for each claimant.

Applicable Provisions

- CPRC 74.001(a)(13)
- “Health care liability claim” means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

*THI of Texas at Lubbock I d/b/a Southwest
Regional Specialty Hosp v. Perea*

- Non-Economic Damages in Wrongful Death and Survival Cases Are Capped Under Section 74.301
 - “Because the two statutory provisions [74.301 and 74.303] do not conflict on their face, in order to give full effect to the intent of the Legislature, we see no reason why one cap should apply to the exclusion of the other cap.”

*THI of Texas at Lubbock I d/b/a Southwest
Regional Specialty Hosp v. Perea*

- **Non-Economic Damages in Wrongful Death and Survival Cases Are Capped Under Section 74.301**
 - “Neither the express wording of the applicable statutes, nor their legislative history indicates that the Legislature intended anything other than to apply both caps.”
 - “Because Appellees constitute a single claimant, unless otherwise inappropriate, the trial court should have limited THI's civil liability for noneconomic damages to \$ 250,000.”

*THI of Texas at Lubbock I d/b/a Southwest
Regional Specialty Hosp v. Perea*

- Exemplary Damages Cap Based on Capped Non-Economic Damages

- Applicable Law:
 - Section 41.008(b) Exemplary Damages Limitation

THI of Texas at Lubbock I d/b/a Southwest Regional Specialty Hosp v. Perea

- Section 41.008(b) Capping Formula
- Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
 - (1)(A) two times the amount of economic damages; plus
 - (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or
 - (2) \$200,000.

THI of Texas at Lubbock I d/b/a Southwest Regional Specialty Hosp v. Perea

- Exemplary Damages Cap Based on Capped Non-Economic Damages
- “[t]he two provisions [74.301 and 41.008] do not seem to conflict. One caps exemplary damages in all suits, while the other caps all damages in wrongful death and survival actions. Because the two statutes are not irreconcilable, the statutes can be harmonized by applying the exemplary damages cap first, and then applying the overall cap second. . . to give full effect to the intent of the Legislature, we believe both provisions should be applied.”

THI of Texas at Lubbock I d/b/a Southwest Regional Specialty Hosp v. Perea

- Exemplary Damages Cap Based on Capped Non-Economic Damages
- “Having determined that § 41.008(b) does apply, because the limit of exemplary damages is, in part, determined by the amount of non-economic damages, a court must further determine whether to apply the noneconomic damages limitations of § 74.301(b) to the determination of the exemplary damages cap provided by § 41.008(b). . . on their face, the two statutory provisions do not conflict. Accordingly, as before, we believe both provisions should be given effect.”

THI of Texas at Lubbock I d/b/a Southwest Regional Specialty Hosp v. Perea

- Requirement for Pleading of Damages Caps as Affirmative Defenses
- As a Matter of Law
 - 74.301 Caps Apply in Health Care Liability Claim to Limit Non-Economic Damages
 - 74.303 Caps Apply in Health Care Liability Claim to Limit Damages in Wrongful Death & Survival Cases
 - 41.008 Caps on Punitive Damages Apply to Limit Award of Exemplary Damages
- Belts & Suspenders
 - Always Plead the Damages Caps or Any Other Statutory Provision of Chapters 41 and 74 Applicable to Suit

Unanswered Questions

- Is Prejudgment Interest Included Within 74.301 Non-Economic Damages Cap?
 - *THI of Texas v. Perea*: Included Within 74.303 Cap
- Does Statutory Settlement Credit Apply Before or After Caps?
- How Will Statutory Joint & Several Liability Be Applied to Chapter 74 Caps?
 - *Columbia v. Moore* – 4590i
 - Professional Associations
 - Imputed through Common Law Theories

Unanswered Questions

- Cap-Stacking: Will More than \$750,000 in Non-Economic Damages Apply to a Claimant?
 - 74.301(a): \$250,000 Regardless of Number of Physicians or HCP, *Other than Health Care Institutions*, in Judgment
 - HCP: Definition Includes Health Care Institutions
 - HCP: Definition Includes Affiliates, Subdivisions, Parent of HCP:
 - Health Care Institution Not So Expressly Defined

Unanswered Questions

- "Health care institution" includes:
 - (A) an ambulatory surgical center;
 - (B) an assisted living facility licensed under Chapter 247, Health and Safety Code;
 - (C) an emergency medical services provider;
 - (D) a health services district created under Chapter 287, Health and Safety Code;
 - (E) a home and community support services agency;
 - (F) a hospice;
 - (G) a hospital;
 - (H) a hospital system;
 - (I) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended;
 - (J) a nursing home; or
 - (K) an end stage renal disease facility licensed under Section 251.011, Health and Safety Code.

Unanswered Questions

- (12)(A) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including:
 - (i) a registered nurse;
 - (ii) a dentist;
 - (iii) a podiatrist;
 - (iv) a pharmacist;
 - (v) a chiropractor;
 - (vi) an optometrist; or
 - (vii) a health care institution.

- (B) The term includes:
 - (i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and
 - (ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

Unanswered Questions

- Cap-Stacking: Will More than \$750,000 in Non-Economic Damages Apply to a Claimant?
 - 74.301(a): \$250,000 Regardless of Number of Physicians or HCP, *Other than Health Care Institutions*, in Judgment
 - HCP: Definition Includes Affiliates, Subdivisions, Parent of HCP
 - Health Care Institution Not So Expressly Defined
 - 74.301(b): \$250,000 to Single HCI
 - 74.301(c): No more than \$500,000 to Multiple HCI

Unanswered Questions

- Who is Included as HCP?
 - "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including . . .
 - Health Care Institution
 - Includes a hospital AND a hospital system (undefined term) . . .
 - Licensed, certified, registered, or chartered by the State of Texas to provide health care

Judgment Calculation Issues

- Determine Prejudgment Interest on Past Damages
 - Determine 41.0105 Meds
 - Segregate Past Non-Economic/Economic
 - Compute Simple Interest on Each
- Determine Settlement Credits
 - Apply First to Extinguish Pre-judgment Interest on Past Damages, then to Past Damages
 - Requires Computation of Pre-Judgment Interest from Date of Accrual to Date of Settlement

Judgment Calculation Issues

- Apportion Remaining Damages
 - Non-economic v. Economic
- Determine Each Non-Settling D's Liability
- Apply 74.301 Cap to Non-Economic Apportioned by D's Liability
- Add Future Damages
- Compute Any 41.008(b) Punitive Damages Cap
- Apply Any 74.303 Cap

THE END

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