



## Claimants' Attempts to Take Health Care Providers' Pre-suit Depositions

*In re Raja*, 216 S.W.3d 404 (Tex.App.-Eastland Jul. 27, 2006) (NO. 11-06-00137-CV), petition for review filed (Sep. 08, 2006).

- **Claimant should not be permitted to take a physician's pre-suit deposition prior to the service of an expert report under Chapter 74.**

In this opinion, the Eastland Court of Appeals countered the Tyler Court of Appeals' previous holding in *In re Allan* and held that Chapter 74 precludes a patient from taking a physician's deposition before the filing of an expert report. In this case, the petitioner, Ulanda McGruder, filed a request to take the deposition of her OB/GYN, Dr. Raja, under Texas Rule of Civil Procedure 202. This rule of civil procedure essentially allows a claimant to take a party's deposition to investigate a potential claim prior to filing suit. Dr. Raja's attorneys filed a motion to quash the deposition, and the trial court granted the patient's request for the deposition. Counsel for Dr. Raja then sought relief from the trial judge's ruling and filed a petition for writ of mandamus, arguing that the deposition was improperly ordered. The Eastland Court of Appeals, in holding that the patient was not permitted to depose her OB/GYN, explained why it believed the Tyler Court of Appeals was wrong in its decision in *In re Allan*.

The court in *In re Raja* began by explaining the legislative history of Chapter 74 and stated that, in enacting Chapter 74, the legislature clearly stated its desire to reduce the costs of medical malpractice claims and thereby limited almost all discovery prior to the production of an expert report. The Eastland Court then explained that, while House Bill 4 was ultimately silent on Rule 202's applicability under Chapter 74, it was of paramount importance to focus on the actual language of the statute and the legislature's stated findings and purpose in deciding whether pre-suit depositions were permitted.

The court in *In re Raja* ultimately held that, if Rule 202 was permitted to override Section 74.351(s), the Legislature's desire to contain costs by conditioning the oral deposition of a defendant doctor on the production of an expert report would be completely ignored. The court further held that while Rule 202 is a procedural provision adopted by the Texas Supreme Court, Chapter 74 is a substantive enactment that comprehensively governs all medical malpractice actions. Therefore, the court in *In re Raja* ultimately held that Chapter 74 requires a report when asserting a claim against a doctor and that pre-suit depositions under Rule 202 should not be permitted absent this report.

*In re Memorial Hermann Hosp. System*, 209 S.W.3d 835 (Tex.App.-Houston [14<sup>th</sup> Dist.] Nov. 30, 2006) (NO. 14-06-00899-CV, 14-06-00913-CV).

- **Pre-suit depositions are not permitted in a "potential" health care liability claim.**

In this opinion, the Fourteenth Court of Appeals considered whether a Houston trial court abused its discretion when it allowed a claimant to depose two ER physicians and a nurse prior to filing suit. In this case, the claimant, Wendy Guzman, sought to depose three health care providers who provided medical care to her son at Memorial Hermann Southeast Hospital. The hospital, physicians, and nurse argued that these pre-suit depositions were prohibited under Chapter 74. However, the trial court held that Chapter 74 did not apply to Rule 202 depositions because a health care liability claim had not yet been filed. The trial court further held that, even if Chapter 74 did apply to potential claims, §74.351(s) permits a Rule 202 pre-suit deposition.

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## HIPAA Does Not Give Rise to a Private Cause of Action

*Acara v. Banks*, 470 F.3d 569 (5th Cir.(La.) Nov. 13, 2006) (NO. 06-30356).

Since its implementation in 2001, the Health Insurance Portability and Accountability Act (HIPAA) has served to safeguard and protect patients' medical information. However, plaintiffs have oftentimes attempted to bring suit under HIPAA, stating that a violation of this Act should be an actionable tort. For the first time, a federal court of appeals considered this issue and, in *Acara v. Banks*, the Fifth Circuit held that HIPAA does not provide for a private cause of action.

In this case, a patient brought suit against her physician for an alleged violation of the confidentiality provisions of HIPAA in disclosing her medical information during a deposition without her consent. The Fifth Circuit, acting as the first circuit court to address this issue, affirmed the District Court and Court of Appeals' decisions, which held that HIPAA did not create a private right of action. The Fifth Circuit examined the language of the statute and concluded that HIPAA has no express provision creating a private cause of action and that there is a strong indication that Congress intended to preclude private enforcement of this Act. The Fifth Circuit also recognized that, while it was the first Federal Appeals Court to consider this issue, every district court that has considered this issue has held that HIPAA does not support a private right of action.

## Sufficiency of Chapter 74 Expert Reports

*Farishta v. Tenet Healthsystem Hospitals Dallas, Inc.*, 2007 WL 174417 (Tex.App.-Fort Worth Jan. 25, 2007) (NO. 2-06-188-CV).

### • **Claims Not Included In Plaintiff's Chapter 74 Expert Report Were Properly Dismissed**

The Second District Court of Appeals from Fort Worth recently held that a plaintiff's claims found in her petition which were not supported by her expert's Chapter 74 expert report should be dismissed.

In this case, the plaintiff brought suit after her daughter contracted Group B Streptococcus (GBS) during birth and suffered respiratory distress and pneumonia. The plaintiff alleged that the hospital's failure to adopt, implement, and enforce universal GBS culture-based screening protocol constituted a breach of standard of care. The plaintiff filed three expert reports from two experts, a physician and a hospital administration expert. The defendant-hospital filed a motion to dismiss based on the inadequacy of the plaintiff's expert reports, which was granted, and the plaintiff then appealed the trial court's dismissal of her suit.

While the Court of Appeals held that the report from the physician did properly fulfill the requirements of Chapter 74, the court in *Farishta* also held that the claims in the plaintiff's petition that were not supported by her expert's report should be dismissed.

More specifically, the plaintiff's petition stated that the hospital's alleged negligence was a proximate cause of her daughter's "GBS infection, related injuries, illness, developmental impairment, and damages." However, the expert's report only stated that the alleged breach of the standard of care failed to prevent the infant's "infection" and caused her "respiratory distress, cyanosis, pneumonia, and other injuries sustained at birth." The court in *Farishta* compared the report to the petition's allegations and held that the report failed to address "illness" and "developmental impairment" and that, because these claims were not properly addressed through an expert report, they should be dismissed.



## Hot Topics

- **Chapter 74 in the Texas Legislature**

A bill recently proposed in the House Civil Practices Committee by Representative Senfronia Thompson seeks to undo the changes made to the expert report requirements enacted under Chapter 74, which makes it more difficult for plaintiffs to sustain a health care liability claim if they fail to file a timely expert report within 120 days of filing suit. This bill seeks to reinstate Article 4590i's lenient provision that a court may extend the time period for the plaintiff to comply with the expert report requirement for another 30 days. The bill also provides that the court must grant such an extension if the plaintiff's attorney's failure to serve the report was due to an accident or mistake and not intentional or because of "conscious indifference."

Another recently proposed bill sought to repeal Texas Civil Practice & Remedies Code §41.0105, which states that a claimant may only recover the amount of medical or health care expenses which were actually paid or incurred by the claimant or on the claimant's behalf. The bill was considered in committee, and a substitute bill was ultimately proposed that will keep the original language of §41.0105 but clarify that this limitation will only apply to health care liability claims and will not limit a claimant's ability to seek future medical and health care expenses.

Another bill previously proposed in the Texas legislature would bring out-of-state experts who testify in Texas under the scrutiny of the Texas Medical Board and would potentially make them subject to disciplinary action in Texas. While the bill died in the House Civil Practices Committee, it also proposed that such experts be required to apply for a \$900 "physician expert witness" license.

- **Medicaid Funding in Texas**

In January of this year, Gov. Rick Perry and the United States Department of Health and Human Services Secretary Michael Leavitt discussed restructuring Texas' Medicaid program. One plan would entail the State's directing money to Medicaid by using \$2.7 billion from the proposed sale of the Texas Lottery to fund Medicaid for 500,000 low-income Texans.

- **Tort Reform Continues to Help Lower Physicians' Malpractice Insurance Premiums**

The passage of Proposition 12 continues to positively impact physicians in Texas. For instance, Texas Medical Liability Trust (TMLT), Texas' largest provider of malpractice insurance, has reduced rates four times since Proposition 12's enactment, by 12% in 2004, 5% in 2005 and 2006, and 7.5% in 2007, for a total of 29.5% in four years. Also, while in 2003 a physician faced a roughly 20% chance of having a suit brought against him or her, that risk has dramatically decreased in the past four years.

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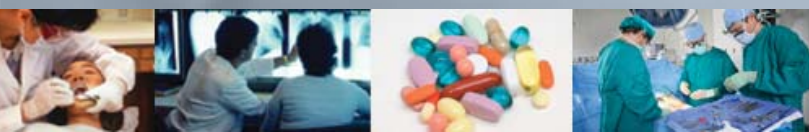
The Court of Appeals disagreed and held that the claimant's petition clearly stated that she sought these depositions to investigate a potential claim related to her son's medical care. The Court of Appeals, citing to *In re Raja*, thereby held that because the Rule 202 deposition was for the purpose of a contemplated health care liability claim, these pre-suit oral depositions were not allowed under Chapter 74 and should not be permitted.

***In re Emergency Consultants, Inc.***, 2007 WL 64217 (Tex.App.-Houston [14<sup>th</sup> Dist.] Jan. 10, 2007) (NO. 14-07-00002-CV).

- **Pre-suit depositions permitted in potential contract-based claim brought by an ER physician.**

The Fourteenth Court of Appeals again considered a potential litigant's ability to take a Rule 202 deposition prior to filing suit in *In re Emergency Consultants, Inc.* In this case, Dr. Crystal Cassidy sought to depose three individuals and one corporation in relation to her potential claims for a violation of the Texas Medical Practice Act and enforceability of a contract regarding her practice of medicine. The trial court allowed the depositions. The four potential deponents challenged the court's decision to allow the depositions, arguing that Dr. Cassidy did not have a true "potential claim" because her only claim was for an alleged violation of the Texas Medical Practice Act, which does not provide a person with a private cause of action.

The Court of Appeals disagreed, however, and held that Dr. Cassidy did have a potential claim that was not limited to her claim under the Texas Occupations Code, as she had possible contract-based claims. The Court of Appeals therefore held that the depositions should be permitted as doing so would prevent a delay of justice in the anticipated suit and because the benefit of allowing the doctor to investigate her potential claims outweighed the burden and cost of the procedures.



## Texas Medical Board Investigations on the Rise

A review of the data from the Texas Medical Board reveals that the number of investigations, informal hearings, and disciplinary rulings have steadily increased over the past six years. For instance, while there were 1,328 investigations opened against physicians in 2001, this number jumped to 2,173 in 2005. Also, the number of disciplinary rulings against physicians tripled from 105 in 2001 to 335 in 2006. The Texas Medical Board also reported that as of 2007, the top physician specialties facing action by the Board are internists, family practice physicians, and pediatricians.

Some argue that the safeguards and barriers to filing medical malpractice lawsuits instituted by tort reform has resulted in an increase in patients utilizing the Texas Medical Board to pursue their claims. Therefore, given the increasing number of patient complaints filed with the Board against all types of physicians, it is essential that physicians ensure that they take the process seriously and obtain legal help immediately.

The attorneys at Chamblee & Ryan have extensive experience in representing physicians in Texas Medical Board proceedings. In a recent proceeding in front of the Texas Medical Board in an Informal Settlement Conference, we were able to obtain a full dismissal of all charges against an internist in a matter involving a patient's allegations of improper prescribing of methamphetamines and narcotics.

## About Chamblee & Ryan

Chamblee & Ryan has consistently achieved success in the courtroom since its inception in 1998. Since 2004, Chamblee & Ryan has prevailed in over thirty jury trials. The firm's shareholders, Bill Chamblee, Jeff Ryan, Jeff Kershaw, Peter Anderson, Todd Allen, David Walsh, and Brandee Todd spend a significant amount of time in the courtroom representing the interests of health care providers.

Chamblee & Ryan represents physicians, physician groups, and other health care providers in many types of cases, including medical malpractice suits, disciplinary proceedings in front of the Texas Medical Board and the Texas Dental Board, hospital peer-review proceedings, setting up professional associations and limited liability partnerships, and other contractual matters or employment matters between physicians, health care entities, and their employees. In addition to its litigation specialty, Chamblee & Ryan is a full-service law firm offering its clients legal services in the areas of family law, wills and estate planning, employment law, employment discrimination claims, trucking law, and appellate law.

Chamblee & Ryan recently obtained defense verdicts on behalf of health care providers in courts throughout Texas. In one Collin County case, the plaintiff was a woman who underwent an LEEP procedure involving the removal of a potentially pre-cancerous lesion from the patient's cervix. Following the procedure, it was discovered that a leak had developed in the patient's bladder due to the surgery. The patient sought past and future medical bills and mental anguish related to her bladder surgery and also alleged that she suffered an excessive removal of her cervix which led to a cerclage in a future pregnancy. The jury found no negligence on the physician's part and refused to award the plaintiff any damages.

In another case in Johnson County, Chamblee & Ryan successfully defended two family practice physicians and their clinic in a suit alleging that the physicians were negligent in giving the plaintiff 30-day prescriptions for Oxy-Contin and Darvocet, which was alleged to have caused the decedent's death from a mixed drug overdose. The trial court in that case granted a directed verdict in favor of the defendants after a one and a half week trial. For more information about these recent defense verdicts, please see our website under "Victories" at [www.chambleeryan.com](http://www.chambleeryan.com).



For more information regarding **Chamblee & Ryan's** Medical Malpractice Law practice, please contact Sakina Rasheed at 214-905-2003.

