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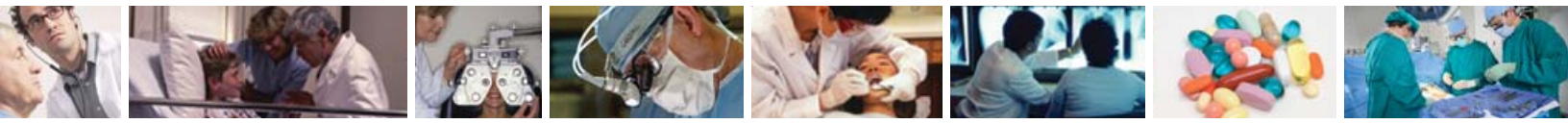

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Understanding the Chapter 74 Damages Caps and Effects of HB 4 Today

- **Background**

In 2003, the Texas state legislature and the voters of Texas initiated a significant tort reform measure with the passage of H.B.4 and approval of a constitutional amendment, Proposition 12. H.B. 4 addressed issues such as limits on *non-economic damages*, product liability reform, punitive damages, medical liability reform, joint and several liability and class action reform. Proposition 12 eliminated potential court challenges to the statutory limitation on non-economic damages.

- **Non-Economic Damages Cap**

Damages caps existed before the tort reform measure of 2003, but they were limited to wrongful death claims and punitive damages. The tort reform legislation of 2003 created a new damages cap in regard to non-economic damages and was codified in Section 74.301 of the Texas Civil Practice & Remedies Code. The cap limits non-economic damages in a healthcare liability claim to an amount not to exceed $250,000, 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. Although the $250,000 cap applies to "each claimant", Chapter 74 defines a single "claimant" to include all persons suing as a result of the injury or death of one individual. Thus, in a typical medical malpractice suit, all of the plaintiffs will be considered to be one "claimant" subject to a single $250,000 limit on their recoverable non-economic damages.

The non-economic damages cap as to health care institutions (hospitals, hospital systems, nursing homes, etc.) is also $250,000, which is apart from and in addition to the $250,000 limit applicable to all combined defendant physicians and other non-institution healthcare providers. There is a separate cap of $250,000 for any additional health care institution sued, and the aggregate non-economic damages cap as to health care institutions only, regardless of the number sued, is $500,000. The total aggregate non-economic damages cap in a health care liability claim as to all defendants, regardless of the number of individual health care providers and institutions sued, is $750,000.

It is important to understand that the cap on damages in medical malpractice causes of action applies only to non-economic damages. These damages include physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, loss of enjoyment of life and all other non-pecuniary losses of any kind other than exemplary/punitive damages. The cap is limited to these types of damages and does not apply to economic damages.

Economic damages, for which there is no cap, are compensatory damages intended to compensate a claimant for actual economic or pecuniary loss, such as past and future medical expenses and loss of wages. Economic damages can be significant for children, teenagers, and even adults who are permanently disabled and require major medical treatment over their future lifetime. Economic damages can also be significant for high wage-earners who are permanently disabled at a relatively young age and have a significant loss of future earning capacity.

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- **Economic Damages: Medical Expenses Must Be "Paid or Incurred"**

Because of the limitations on the recovery of non-economic damages, the plaintiff's recoverable *economic* damages—in large part, medical expenses—have become even more of a driving factor in the value of a lawsuit from the plaintiff's perspective.

Plaintiffs in medical malpractice suits are entitled to recover "reasonable and necessary" medical expenses. *Rivas v. Gariby,* 974 S.W.2d 93, 95 (Tex. App. – San Antonio 1998, pet. denied). In general, the collateral source rule precludes parties from "obtaining the benefit of, or even mentioning, payments to the injured party from sources other than the tortfeasor. In other words, the defendant is not entitled to present evidence of, or obtain an offset for, funds received by the plaintiff from a collateral source." *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613, 626 (Tex.App.-Houston [14th Dist.] 2004).

However, in 2003, the Texas Legislature added Section 41.0105 of the Texas Civil Practice and Remedies Code as part of House Bill 4 to expressly limit a plaintiff's recovery of medical expenses to only those expenses "actually paid or incurred by or on behalf of" the plaintiff. TEX. CIV. PRAC. & REM. CODE § 41.0105. This provision was enacted to eliminate the previous windfall to plaintiffs resulting from their ability to recover the total amount of medical expenses billed or charged, even if the amount billed was significantly larger than the amount ultimately paid by the plaintiff, Medicare, or a third-party payor due to reductions and/or write-offs.

In 2007, the San Antonio Court of Appeals interpreted the meaning and effect of Section 41.0105 and held that "[S]ection 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or 'written off'." Mills v. Fletcher, 229 S.W.3d 765 (Tex. App.—San Antonio 2007). Thus, under Section 41.0105, plaintiffs are not entitled to recovery of the entire amount of medical expenses billed, but rather only those expenses actually paid or incurred, effectively eliminating from the plaintiff's potential recovery the (often large) amounts of write-offs and adjustments.

- **Wrongful Death Damages Cap**

A damages cap also exists in regard to wrongful death claims in Texas. In a medical malpractice action for wrongful death, damages are limited to $500,000 (in 1977 dollars) plus the cost of any necessary medical or custodial care. This cap includes all damages, both economic and non-economic damages, as well as punitive damages. However, it is important to recognize that this cap is adjusted annually for inflation. Currently, the wrongful death cap is approximately $1,650,000.

The wrongful death limitation on damages is distinguished from the tort reform non-economic damages cap as the latter is not adjusted annually for inflation. The non-economic damages cap is a firm number for which the Texas state legislature did not provide adjustments based on inflation.

Texas Supreme Court Addresses Statute of Limitations and "Open Courts" Provision as to Mentally Incompetent Persons

- ***Yancy v. United Surgical Partners International, Inc., 2007 WL 3036878***

(Tex. Oct. 19, 2007)

On October 19, 2007, the Texas Supreme Court issued a fairly significant opinion in the case *Yancy* v. United Surgical Partners International, Inc., No. 05-0925, involving the issue of how the mentally incompetent have access to the court system. The Open Courts provision of the Texas Constitution requires that the court system be open for business and requires that parties have a right of access to that system. The Texas Legislature has attempted to shorten the statute of limitations in medical malpractice cases for minors, but the Texas Supreme Court has found these legislative enactments to violate the Open Courts provision because the limitations period cuts off the minor's right to sue before the minor can legally access the court system. One can easily see how any limitation on the statute of limitations for the mentally incompetent could be equally troubling under the Open Courts provision.

The *Yancy* case addressed the reaches of the Open Courts provision as applied to the mentally incompetent, which is an issue not previously ruled on by the Texas Supreme Court. In this case, Carletha Yates suffered an anoxic brain injury allegedly as part of a lithotripsy procedure. According to expert testimony, Ms. Yates remained in a permanent vegetative state since the time of the surgery. A probate court appointed Eula Yancy as Ms. Yates guardian. Ms. Yancy retained a prominent law firm to investigate and sue for the underlying injuries. Within the statute of limitations, Ms. Yancy, on behalf of Ms. Yates, sued the anesthesiologist and his professional association. A new lawyer took over the representation and decided to add one of the nurses from the procedure as well as the surgery center as defendants in the lawsuit, which was over one year after the limitations period had expired.

The newly added defendants asserted the defense of the expiration of the statute of limitations, and Ms. Yancy claimed that the application of the statute of limitations would be unconstitutional. The argument boiled down to the assertion that Ms. Yates could not access the courts due to her mental incompetence, and thus she should be exempt from the statute of limitations defense. The Texas Supreme Court unanimously rejected this argument. In short, the Court held that a mentally incompetent person has access to the Courts under these circumstances when he or she has a court appointed guardian who has retained a lawyer and filed suit against other parties within the applicable statute of limitations period.

David M. Walsh IV, head of the appellate section at Chamblee & Ryan, P.C., represented the nurse and the surgery center in this appeal.

Providing our clients the best possible result




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, Brandee Todd, and Doug Lewis 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 cerciage 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.

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