

By: Wohlgemuth

H.B. No. 197

A BILL TO BE ENTITLED

AN ACT

relating to health care liability claims.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes), is amended by adding Section 1.04 to read as follows:

Sec. 1.04. CONFLICT WITH OTHER LAW AND RULES OF CIVIL PROCEDURE. (a) In the event of a conflict between this part and another law, including a rule of procedure or court rule, this part controls to the extent of the conflict.

(b) Notwithstanding Section 22.004, Government Code, and except as otherwise provided by this part, the supreme court may not amend or adopt rules in conflict with this part.

(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this part.

SECTION 2. The Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes) is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. SETTLEMENT OFFERS

Sec. 3.01. SETTLEMENT OFFERS; ACCEPTANCE. (a) At any time earlier than the 30th day before the start of a trial of a health care liability claim, a defendant may serve on a claimant a settlement offer for a stated amount of money to be paid on the unqualified execution of a release and settlement agreement by the

1 claimant.

2 (b) The defendant shall prepare and serve the release and
3 settlement agreement with the offer of settlement.

4 (c) A claimant who receives an offer of settlement from a
5 defendant may accept the offer only if the claimant serves written
6 notice on the defendant that the offer is accepted not later than
7 the 10th day after the date the offer is received.

8 (d) If the claimant accepts the settlement offer, the
9 defendant shall pay the full amount of the settlement offer to the
10 claimant in exchange for the claimant's executed release not later
11 than the 10th day after the date the claimant served notice on the
12 defendant accepting the offer, unless the parties agree otherwise.

13 (e) The claimant accepting the settlement offer shall, not
14 later than the seventh day after the date the claimant received
15 payment and delivered the executed release, file a nonsuit with
16 prejudice, dismissing all claims asserted against the defendant.

17 Sec. 3.02. SETTLEMENT OFFERS; REJECTION. (a) A settlement
18 offer by a defendant that is not accepted by a claimant within the
19 time specified by Section 3.01 of this subchapter is considered
20 rejected by the claimant and withdrawn by the defendant.

21 (b) Evidence of the settlement offer is admissible only in a
22 hearing before the court to determine court costs, expenses, and
23 attorney's fees under this section.

24 (c) The court shall determine the amount of monetary damages
25 that were awarded against a defendant who has made a settlement
26 offer to a claimant who has rejected the offer. In determining the
27 amount, the court shall exclude:

- 1 (1) any prejudgment or postjudgment interest; and
2 (2) any legally proper and applicable credit, offset,
3 reduction, and apportionment.

4 (d) If the amount of monetary damages determined under
5 Subsection (c) of this section is equal to or less than the amount
6 of any rejected offer of settlement by the claimant, the court shall
7 assess against the claimant as part of a judgment entered against
8 the claimant or as an offset against a judgment entered against the
9 defendant:

10 (1) all court costs incurred after the date the offer
11 was rejected; and

12 (2) reasonable and necessary expenses and attorney's
13 fees incurred by the defendant after the date the defendant offered
14 the settlement that was rejected.

15 (e) The court shall conduct a hearing to determine the
16 amount to assess against the claimant under Subsection (d) of this
17 section.

18 Sec. 3.03. MULTIPLE SETTLEMENT OFFERS. The defendant may
19 make a settlement offer without regard to whether the claimant has
20 rejected a previous offer.

21 SECTION 3. The Medical Liability and Insurance Improvement
22 Act of Texas (Article 4590i, Vernon's Texas Civil Statutes) is
23 amended by adding Subchapter H to read as follows:

24 SUBCHAPTER H. CAUSE OF ACTION FOR BAD FAITH

25 Sec. 8.01. DEFINITIONS. In this subchapter:

- 26 (1) "Reasonable grounds" means a reasonable basis in
27 fact and law.

1 (2) "Reckless disregard" means:

2 (A) a state or quality on the part of the actor of
3 wanton disregard of the rights of others; or

4 (B) a conscious indifference on the part of the
5 actor to the result that may follow as a consequence of the actor's
6 acts.

7 Sec. 8.02. CAUSE OF ACTION FOR BAD FAITH. (a) A person may
8 bring a cause of action that a health care liability claim is
9 brought in bad faith.

10 (b) A health care liability claim is brought in bad faith if
11 it is maintained or filed with reckless disregard as to whether or
12 not reasonable grounds exist for asserting the claim.

13 Sec. 8.03. PERSONS LIABLE. A cause of action that a health
14 care liability claim is brought in bad faith may be brought against
15 any claimant or the attorney of any claimant if the person is
16 responsible for conduct constituting a reckless disregard as to
17 whether or not reasonable grounds exist for asserting the health
18 care liability claim. It is a defense for the claimant or the
19 attorney for the claimant that the person could not reasonably have
20 had knowledge of the absence of reasonable grounds to assert the
21 claim.

22 Sec. 8.04. BAD FAITH CLAIM BROUGHT IN BAD FAITH. A person
23 asserting a bad faith claim with reckless disregard as to whether or
24 not reasonable grounds exist for asserting the claim may be liable
25 to the defendant for reasonable expenses in defending the lawsuit,
26 including attorney's fees and court costs.

27 SECTION 4. Section 10.01, Medical Liability and Insurance

1 Improvement Act of Texas (Article 4590i, Vernon's Texas Civil
2 Statutes), is amended to read as follows:

3 Sec. 10.01. LIMITATION ON HEALTH CARE LIABILITY CLAIMS.

4 (a) Notwithstanding any other law and except as provided by
5 Subsection (b) of this section, no health care liability claim may
6 be commenced unless the action is filed within two years from the
7 occurrence of the breach or tort.

8 (b) A minor six years of age or older and younger than 18
9 years of age at the time of the occurrence of the breach or tort must
10 bring the health care liability claim within three years from the
11 occurrence of the breach or tort. A minor younger than six years of
12 age at the time of the occurrence of the breach or tort must bring
13 the health care liability claim within three years from the
14 occurrence of the breach or tort or before the minor's eighth
15 birthday, whichever provides the longer period.

16 (c) This ~~[or from the date the medical or health care~~
17 ~~treatment that is the subject of the claim or the hospitalization~~
18 ~~for which the claim is made is completed, provided that, minors~~
19 ~~under the age of 12 years shall have until their 14th birthday in~~
20 ~~which to file, or have filed on their behalf, the claim. Except as~~
21 ~~herein provided, this]~~ subchapter applies to all persons regardless
22 of minority or other legal disability.

23 SECTION 5. Section 11.01, Medical Liability and Insurance
24 Improvement Act of Texas (Article 4590i, Vernon's Texas Civil
25 Statutes), is amended to read as follows:

26 Sec. 11.01. FINANCIAL RESPONSIBILITY. The limit on
27 liability in Section 11.02 of this subchapter does not apply to a

1 physician or hospital that cannot show financial responsibility for
2 a health care liability claim against the physician or hospital by:

3 (1) having liability insurance coverage in effect in
4 the amount of at least \$200,000 for each claim; or

5 (2) demonstrating that the physician's or hospital's
6 financial reserves are sufficient to cover the amount of the claims
7 that, using historical data, have been brought against the
8 physician or hospital and are likely to be brought against the
9 physician or hospital during the calendar year or, if applicable,
10 the fiscal year used by the physician or hospital in the normal
11 course of business. [~~DEFINITION. In this subchapter, "consumer~~
12 ~~price index" means the index published by the Bureau of Labor~~
13 ~~Statistics of the United States Department of Labor that measures~~
14 ~~the average change in prices of goods and services purchased by~~
15 ~~urban wage earners and clerical workers' families and single~~
16 ~~workers living alone.]~~

17 SECTION 6. Section 11.02(a), Medical Liability and
18 Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas
19 Civil Statutes), is amended to read as follows:

20 (a) In an action on a health care liability claim where
21 final judgment is rendered against a physician or health care
22 provider, the limit of civil liability for damages of the physician
23 or health care provider shall be limited to an amount not to exceed
24 \$250,000 [~~\$500,000~~].

25 SECTION 7. The heading of Section 13.01, Medical Liability
26 and Insurance Improvement Act of Texas (Article 4590i, Vernon's
27 Texas Civil Statutes), is amended to read as follows:

1 Sec. 13.01. ~~[COST BOND, DEPOSIT, AND]~~ EXPERT REPORT.

2 SECTION 8. Sections 13.01(a)-(c) and (i)-(m), Medical
3 Liability Insurance Improvement Act of Texas (Article 4590i,
4 Vernon's Texas Civil Statutes), are amended to read as follows:

5 (a) In a health care liability claim, a claimant shall, not
6 later than the 180th ~~[90th]~~ day after the date the claim is filed,
7 serve on each party or the party's attorney one or more expert
8 reports, with a curriculum vitae of each expert listed in the~~[+~~

9 ~~[(1) file a separate cost bond in the amount of \$5,000~~
10 ~~for each physician or health care provider named by the claimant in~~
11 ~~the action;~~

12 ~~[(2) place cash in an escrow account in the amount of~~
13 ~~\$5,000 for each physician or health care provider named in the~~
14 ~~action; or~~

15 ~~[(3) file an expert]~~ report for each physician or
16 health care provider against whom a liability claim is asserted
17 ~~[with respect to whom a cost bond has not been filed and cash in lieu~~
18 ~~of the bond has not been deposited under Subdivision (1) or (2) of~~
19 ~~this subsection].~~

20 (b) If, as to a defendant physician or health care provider,
21 an expert report~~[, cost bond, or cash in lieu of bond]~~ has not been
22 served ~~[filed or deposited]~~ within the period specified by
23 Subsection (a) ~~[or (b)]~~ of this section, the court, on the motion of
24 the affected physician or health care provider, shall enter an
25 order that~~[+~~

26 ~~[(1) requires the filing of a \$7,500 cost bond with~~
27 ~~respect to the physician or health care provider not later than the~~

1 ~~21st day after the date of the order, and~~

2 ~~[(2) provides that if the claimant fails to comply~~
3 ~~with the order,]~~ the action shall be dismissed for want of
4 prosecution with respect to the physician or health care provider,
5 subject to reinstatement in accordance with the applicable rules of
6 civil procedure and Subsection (c) of this section.

7 (c) Before a claim that has been dismissed under Subsection
8 (b) ~~[(b)(2)]~~ of this section may be reinstated, the claimant must
9 pay the reasonable attorney's fees and costs of court incurred by
10 the defendant before the dismissal ~~[and file a \$7,500 cost bond for~~
11 ~~each defendant physician or health care provider]~~.

12 (i) Notwithstanding any other provision of this section, a
13 claimant may satisfy any requirement of this section for serving
14 ~~[filing]~~ an expert report by serving ~~[filing]~~ reports of separate
15 experts regarding different physicians or health care providers or
16 regarding different issues arising from the conduct of a physician
17 or health care provider, such as issues of liability and causation.
18 Nothing in this section shall be construed to mean that a single
19 expert must address all liability and causation issues with respect
20 to all physicians or health care providers or with respect to both
21 liability and causation issues for a physician or health care
22 provider.

23 (j) Nothing in this section shall be construed to require
24 the serving ~~[filing]~~ of an expert report regarding any issue other
25 than an issue relating to liability or causation.

26 (k) Notwithstanding any other law, an expert report served
27 ~~[filed]~~ under this section:

- 1 (1) is not admissible in evidence by a defendant;
- 2 (2) shall not be used in a deposition, trial, or other
- 3 proceeding; and
- 4 (3) shall not be referred to by a defendant during the
- 5 course of the action for any purpose.

6 (1) A court shall grant a motion challenging the adequacy of

7 an expert report only if it appears to the court, after hearing,

8 that the report does not represent a good faith effort to comply

9 with the definition of an expert report in [~~Subsection (r)(6) of~~]

10 this section.

11 (m) A party may make an interlocutory appeal of the decision

12 of the trial court not to dismiss the suit because the claimant has

13 failed to serve on the party or the party's attorney an expert

14 report as required by this section. The appeal is under procedures

15 established for interlocutory appeals. [~~On the claimant's~~

16 ~~compliance with the requirements of Subsection (d) of this section:~~

17 ~~[(1) any cost bond filed or cash deposited in an escrow~~

18 ~~account by the claimant under this section shall be released;~~

19 ~~[(2) the claimant, the claimant's counsel, and any~~

20 ~~surety have no liability on the cost bond or cash deposit; and~~

21 ~~[(3) an execution shall not be issued on the cost bond~~

22 ~~or cash deposit.]~~

23 SECTION 9. Subchapter M, Medical Liability and Insurance

24 Improvement Act of Texas (Article 4590i, Vernon's Texas Civil

25 Statutes), is amended by adding Section 13.03 to read as follows:

26 Sec. 13.03. DEPOSITIONS PROHIBITED BEFORE FILING OF

27 SUIT. Notwithstanding Rule 202, Texas Rules of Civil Procedure, a

1 person may not take the deposition of a physician or health care
2 provider for the purpose of investigating a health care liability
3 claim before the suit based on the claim is filed.

4 SECTION 10. Sections 14.01(a) and (e), Medical Liability
5 and Insurance Improvement Act of Texas (Article 4590i, Vernon's
6 Texas Civil Statutes), are amended to read as follows:

7 (a) In a suit involving a health care liability claim
8 against a physician for injury to or death of a patient, a person
9 may qualify as an expert witness on the issue of whether the
10 physician departed from accepted standards of medical care only if
11 the person is a physician who:

12 (1) is practicing medicine in the same field as the
13 physician who is the subject of the testimony at the time such
14 testimony is given or was practicing medicine in the same field as
15 the physician who is the subject of the testimony at the time the
16 claim arose;

17 (2) has knowledge of accepted standards of medical
18 care for the diagnosis, care, or treatment of the illness, injury,
19 or condition involved in the claim; and

20 (3) is qualified on the basis of training or
21 experience to offer an expert opinion regarding those accepted
22 standards of medical care.

23 (e) A pretrial objection to the qualifications of a witness
24 under this section must be made not later than the later of the 21st
25 day after the date the objecting party receives a copy of the
26 witness's curriculum vitae or the date of the witness's deposition.

27 ~~[If circumstances arise after the date on which the objection must~~

1 ~~be made that could not have been reasonably anticipated by a party~~
2 ~~before that date and that the party believes in good faith provide a~~
3 ~~basis for an objection to a witness's qualifications, and if an~~
4 ~~objection was not made previously, this subsection does not prevent~~
5 ~~the party from making an objection as soon as practicable under the~~
6 ~~circumstances.]~~ The court shall conduct a hearing to determine
7 whether the witness is qualified as soon as practicable after the
8 filing of an objection and, if possible, before trial. If the
9 objecting party is unable to object in time for the hearing to be
10 conducted before the trial, the hearing shall be conducted outside
11 the presence of the jury. This subsection does not prevent a party
12 from examining or cross-examining a witness at trial about the
13 witness's qualifications.

14 SECTION 11. Subchapter N, Medical Liability and Insurance
15 Improvement Act of Texas (Article 4590i, Vernon's Texas Civil
16 Statutes), is amended by adding Section 14.02 to read as follows:

17 Sec. 14.02. QUALIFICATION OF EXPERT WITNESS IN SUIT AGAINST
18 HEALTH CARE PROVIDER. (a) In a suit involving a health care
19 liability claim against a health care provider, a person may
20 qualify as an expert witness on the issue of whether the health care
21 provider departed from accepted standards of care only if the
22 person:

23 (1) is practicing health care in the same field of
24 practice as the health care provider who is the subject of the
25 testimony at the time the testimony is given or was practicing
26 health care in the same field of practice as the health care
27 provider who is the subject of the testimony at the time the claim

1 arose;

2 (2) has knowledge of accepted standards of care for
3 health care providers for the diagnosis, care, or treatment of the
4 illness, injury, or condition involved in the claim; and

5 (3) is qualified on the basis of training or
6 experience to offer an expert opinion regarding those accepted
7 standards of care.

8 (b) For the purposes of this section, "practicing health
9 care" includes training health care providers in the same field as
10 the defendant health care provider at an accredited educational
11 institution or serving as a consulting health care provider and
12 being licensed, certified, or registered in the same field as the
13 defendant health care provider.

14 (c) In determining whether a witness is qualified on the
15 basis of training or experience, the court shall consider whether,
16 at the time the claim arose or at the time the testimony is given,
17 the witness:

18 (1) is certified by a state or national certifying
19 agency or has other substantial training or experience in the area
20 of health care relevant to the claim; and

21 (2) is actively practicing health care in rendering
22 health care services relevant to the claim.

23 (d) The court shall apply the criteria specified in this
24 section in determining whether an expert is qualified to offer
25 expert testimony on the issue of whether a health care provider
26 departed from accepted standards of health care, but may depart
27 from those criteria if, under the circumstances, the court

1 determines that there is a good reason to admit the expert's
2 testimony. The court shall state on the record the reason for
3 admitting the testimony if the court departs from the criteria.

4 (e) A pretrial objection to the qualifications of a witness
5 under this section must be made not later than the later of the 21st
6 day after the date the objecting party receives a copy of the
7 witness's curriculum vitae or the date of the witness's deposition.
8 The court shall conduct a hearing to determine whether the witness
9 is qualified as soon as practicable after the filing of an objection
10 and, if possible, before trial. If the objecting party is unable to
11 object in time for the hearing to be conducted before the trial, the
12 hearing shall be conducted outside the presence of the jury. This
13 subsection does not prevent a party from examining or
14 cross-examining a witness at trial about the witness's
15 qualifications.

16 (f) This section does not prevent a health care provider who
17 is a defendant from qualifying as an expert.

18 SECTION 12. The Medical Liability and Insurance Improvement
19 Act of Texas (Article 4590i, Vernon's Texas Civil Statutes) is
20 amended by adding Subchapters Q, R, and S to read as follows:

21 SUBCHAPTER Q. COLLATERAL SOURCE BENEFITS

22 Sec. 17.01. DEFINITION. In this subchapter, "collateral
23 source benefit" means a benefit paid or payable to or on behalf of a
24 claimant under:

25 (1) the Social Security Act (42 U.S.C. Section 301 et
26 seq.);

27 (2) a state or federal income replacement, disability,

1 workers' compensation, or other law that provides partial or full
2 income replacement;

3 (3) any insurance policy, other than a life insurance
4 policy, including:

5 (A) an accident, health, or sickness insurance
6 policy;

7 (B) a disability insurance policy; and

8 (C) a property or casualty insurance policy,
9 including a motor vehicle or homeowners' insurance policy;

10 (4) an agreement under which a person, including a
11 health maintenance organization operating under a certificate of
12 authority issued under Chapter 843, Insurance Code, is obligated to
13 provide or pay for medical, hospital, dental, or other health care
14 services or similar benefits; or

15 (5) a contractual or voluntary wage continuation plan,
16 provided by an employer or other person, or any other system
17 intended to provide wages during a period of disability.

18 Sec. 17.02. ADMISSIBILITY OF EVIDENCE OF COLLATERAL SOURCE
19 BENEFITS. Evidence of a collateral source benefit is admissible in
20 an action on a health care liability claim if the benefit:

21 (1) has been paid or is substantially certain to be
22 paid to the claimant; and

23 (2) compensates the claimant for at least some of the
24 damages sought in the action.

25 Sec. 17.03. CONSIDERATION OF COLLATERAL SOURCE
26 BENEFITS. (a) The trier of fact shall consider collateral source
27 benefits admissible under Section 17.02 of this subchapter in

1 determining the amount of a judgment.

2 (b) The court shall consider collateral source benefits
3 admissible under Section 17.02 of this subchapter in reviewing a
4 judgment for excessiveness.

5 Sec. 17.04. PREMIUMS PAID FOR COLLATERAL SOURCE
6 BENEFITS. In determining the amount of a judgment, the trier of
7 fact may consider premiums personally paid by a claimant to obtain
8 coverage that provides a collateral source benefit that has been
9 paid or that is payable.

10 Sec. 17.05. SUBROGATION. The payer of collateral benefits
11 introduced under this subchapter may recover an amount from the
12 claimant and is subrogated to any right or claim of the claimant
13 only:

14 (1) as authorized by federal law; or

15 (2) for expenses of necessary medical, hospital, and
16 custodial care associated with the claim actually paid to or on
17 behalf of the claimant.

18 SUBCHAPTER R. PAYMENT FOR FUTURE LOSSES

19 Sec. 18.01. SCOPE OF SUBCHAPTER. This subchapter applies
20 only if the total award of future damages in an action on a health
21 care liability claim against a physician or health care provider
22 exceeds \$100,000.

23 Sec. 18.02. PERIODIC PAYMENT. (a) At the request of the
24 claimant or defendant, the court shall order future damages awarded
25 in a health care liability claim that exceed \$100,000 to be paid in
26 periodic installments, in the amounts, and over the period of time
27 determined by the judge.

1 (b) The judgment must provide that future expenses of
2 necessary medical, hospital, and custodial care are to be paid as
3 incurred.

4 (c) The total amount paid may not exceed the amount of the
5 award for future damages specified in the findings of the trier of
6 fact.

7 (d) Payments for future damages for medical and other health
8 care costs, for economic loss other than the costs of medical or
9 other health care and loss of earning capacity, and for noneconomic
10 loss terminate on the death of the claimant.

11 (e) The total amount of payments for future damages for loss
12 of earning capacity owed but not yet paid to the claimant at the
13 time of the claimant's death shall be paid to the estate of the
14 claimant in a lump-sum amount based on the present discounted value
15 of the total as determined by a court.

16 (f) The court shall require a defendant required to pay
17 future damages to have adequate insurance or to post security in an
18 amount adequate to ensure full payment of the damages.

19 SUBCHAPTER S. ATTORNEY'S FEES

20 Sec. 19.01. LIMITATIONS ON CONTINGENCY FEES.

21 Notwithstanding a contract between a claimant and an attorney, an
22 attorney who represents a claimant in a health care liability claim
23 may not receive attorney's fees for the representation that exceed:

24 (1) 40 percent of the lesser of:

25 (A) the amount awarded to the claimant; or

26 (B) \$50,000; plus

27 (2) 33 percent of the lesser of:

1 (A) the amount by which the award exceeds
2 \$50,000; or

3 (B) \$50,000; plus

4 (3) 25 percent of the lesser of:

5 (A) the amount by which the award exceeds
6 \$100,000; or

7 (B) \$500,000; plus

8 (4) 15 percent of the amount by which the award exceeds
9 \$600,000.

10 Sec. 19.02. COMPUTATION OF ATTORNEY'S FEES. Attorney's
11 fees for the portion of a judgment that awards future damages are
12 computed on the present value of the future damages.

13 SECTION 13. The following sections of the Medical Liability
14 and Insurance Improvement Act of Texas (Article 4590i, Vernon's
15 Texas Civil Statutes) are repealed:

16 (1) Sections 9.03, 9.04, 11.01, 11.03, and 11.04; and

17 (2) Sections 13.01(d), (e), (f), (g), (h), (n), (o),
18 (p), and (q).

19 SECTION 14. (a) Except as provided by this section, the
20 changes in law made by this Act to the Medical Liability and
21 Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas
22 Civil Statutes) apply only to a cause of action that accrues on or
23 after the effective date of this Act. A cause of action that
24 accrues before the effective date of this Act is governed by the law
25 in effect immediately before the effective date of this Act, and
26 that law is continued in effect for that purpose.

27 (b) Subchapter S, Medical Liability and Insurance

1 Improvement Act of Texas (Article 4590i, Vernon's Texas Civil
2 Statutes), as added by this Act, applies only to attorney's fees for
3 representing a claimant in an action filed on or after the effective
4 date of this Act. Attorney's fees in an action filed before the
5 effective date of this Act are governed by the law in effect
6 immediately before that date, and that law is continued in effect
7 for that purpose.

8 SECTION 15. This Act takes effect immediately if it
9 receives a vote of two-thirds of all the members elected to each
10 house, as provided by Section 39, Article III, Texas
11 Constitution. If this Act does not receive the vote necessary for
12 immediate effect, this Act takes effect September 1, 2003.