

By: Leibowitz

H.B. No. 4249

A BILL TO BE ENTITLED

AN ACT

relating to expert reports in health care liability claims.

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

SECTION 1. Section 74.351, Civil Practice and Remedies Code, is amended to read as follows:

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original answer is ~~[petition was]~~ filed serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. A party asserting a healthcare liability claim by joining a physician or health care provider as a defendant, third-party defendant, cross-defendant, counter-defendant or designating a physician or health care provider as a responsible third party in any pending healthcare liability claim shall, not later than the 120th day after the date a physician or health care provider against whom a health care liability is joined as a party or designated as a responsible third party in a healthcare liability claim, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider that has been joined as a party or designated as a responsible third party. The date for serving the report may be shortened or extended by written agreement of the parties or by

1 order of the court. Each defendant physician or health care
2 provider whose conduct is implicated in a report must file and serve
3 any objection to the adequacy [~~sufficiency~~] of the report not later
4 than the 21st day after the date it was served, failing which all
5 objections are waived. For purposes of this provision "service"
6 shall be presumed accomplished if done by U.S. Mail, electronic
7 mail, hand delivery, or any method of service provided by the Texas
8 Rules of Civil Procedure.

9 (d) Objections to and motions challenging the adequacy of an
10 expert report must be clear, specific and tailored to the specific
11 report to which they are directed and must specify how the expert
12 report is claimed to be inadequate. Objections that are found to be
13 conclusory, non-specific or not tailored to the specific report
14 being challenged are waived.

15 (e) In the event a physician or health care provider appeals
16 a denial of a motion challenging the adequacy of an expert report
17 and the denial is not reversed, the court shall enter an order that
18 awards to the claimant and against the physician and/or other
19 health care providers who challenged the adequacy of the report,
20 reasonable attorney's fees and costs of court, related to the
21 challenge and its appeal.

22 [Subsections (f)-(h) reserved]

23 (i) Notwithstanding any other provision of this section, a
24 claimant may satisfy any requirement of this section for serving an
25 expert report by serving reports of separate experts regarding
26 different physicians or health care providers or regarding
27 different issues arising from the conduct of a physician or health

1 care provider, such as issues of liability and causation. Nothing
2 in this section shall be construed to mean that a single expert must
3 address all liability and causation issues with respect to all
4 physicians or health care providers or with respect to both
5 liability and causation issues for a physician or health care
6 provider. Nothing in this section or the expert report served in
7 accordance with Subsection 74.351(a) shall be construed to limit a
8 health care liability claim to the opinions contained in the expert
9 report in any subsequent pleadings, proceedings or trial.

10 (k) Subject to Subsection (t), an expert report served under
11 this section:

12 (1) is not admissible in evidence by any party;

13 (2) shall not be used in a deposition, trial, or other
14 proceeding; ~~and~~

15 (3) shall not be referred to by any party during the
16 course of the action for any purpose, and

17 (4) shall not be construed to limit the claimant's
18 proof or pleading in the case.

19 (r) In this section:

20 (1) "Affected parties" means the claimant and the
21 physician or health care provider who are directly affected by an
22 act or agreement required or permitted by this section and does not
23 include other parties to an action who are not directly affected by
24 that particular act or agreement.

25 (2) "Claim" means a health care liability claim,
26 including designation of a physician or health care provider as a
27 responsible third party in a health care liability claim.

1 [(3) reserved]

2 (4) "Defendant" means a physician or health care
3 provider against whom a health care liability claim is asserted.
4 The term includes a counterdefendant, or responsible third
5 party. third-party defendant, cross-defendant, [~~or~~]

6 (5) "Expert" means:

7 (A) with respect to a person giving opinion
8 testimony regarding whether a physician departed from accepted
9 standards of medical care, an expert qualified to testify under the
10 requirements of Section 74.401;

11 (B) with respect to a person giving opinion
12 testimony regarding whether a health care provider departed from
13 accepted standards of health care, an expert qualified to testify
14 under the requirements of Section 74.402;

15 (C) with respect to a person giving opinion
16 testimony about the causal relationship between the injury, harm,
17 or damages claimed and the alleged departure from the applicable
18 standard of care in any health care liability claim, a physician who
19 is otherwise qualified to render opinions on such causal
20 relationship under the Texas Rules of Evidence;

21 (D) with respect to a person giving opinion
22 testimony about the causal relationship between the injury, harm,
23 or damages claimed and the alleged departure from the applicable
24 standard of care for a dentist, a dentist or physician who is
25 otherwise qualified to render opinions on such causal relationship
26 under the Texas Rules of Evidence; or

27 (E) with respect to a person giving opinion

1 testimony about the causal relationship between the injury, harm,
2 or damages claimed and the alleged departure from the applicable
3 standard of care for a podiatrist, a podiatrist or physician who is
4 otherwise qualified to render opinions on such causal relationship
5 under the Texas Rules of Evidence.

6 (6) "Expert report" means a written report by an
7 expert that provides a fair summary of the expert's opinions as of
8 the date of the report based upon the information and data available
9 to the expert at the time of the report, regarding applicable
10 standards of care, the manner in which the care rendered by the
11 physician or health care provider failed to meet the standards, and
12 the causal relationship between that failure and the injury, harm,
13 or damages claimed.

14 (s) Until a claimant has served the expert report and
15 curriculum vitae as required by Subsection (a), all discovery in a
16 health care liability claim is stayed, except nothing herein shall
17 preclude the claimant from deposing one or more defendants prior to
18 serving the 120 day report, and except for the acquisition by the
19 claimant of information, including medical or hospital records or
20 other documents or tangible things, related to the patient's health
21 care through:

22 (1) written discovery as defined in Rule 192.7, Texas
23 Rules of Civil Procedure;

24 (2) depositions on written questions under Rule 200,
25 Texas Rules of Civil Procedure; ~~and~~

26 (3) discovery from nonparties under Rule 205, Texas
27 Rules of Civil Procedure;

1 (4) pre-suit depositions allowed under Rule 202, Texas
2 Rules of Civil Procedure; and

3 (5) upon showing of good cause, oral depositions to
4 obtain factual data in support of claims set for in claimant's
5 pleadings on file with the court.

6 (t) If an expert report is used by the claimant in the course
7 of the action for any purpose other than to meet the service
8 requirement of Subsection (a), the restrictions imposed by
9 Subsection (k) on use of the expert report by any party are waived.

10 (u) Notwithstanding any other provision of this section,
11 after a claim is filed all claimants, collectively, may take not
12 more than two oral and videotaped depositions pursuant to Rule 191,
13 Texas Rules of Civil Procedure, of any party or witness before the
14 expert report is served as required by Subsection (a). The court
15 may allow additional oral and videotaped depositions pursuant to
16 Rule 191, Texas Rules of Civil Procedure, of any party or witness on
17 a showing by a claimant that additional information is needed for
18 the completion of an expert report that cannot otherwise
19 practicably be obtained in a timely manner under this section and
20 Subsection (s).

21 SECTION 5. This Act takes effect immediately if it receives
22 a vote of two-thirds of all the members elected to each house, as
23 provided by Section 39, Article III, Texas Constitution. If this
24 Act does not receive the vote necessary for immediate effect, this
25 Act takes effect September 1, 2009.