

## Texas's Non-economic Damage Cap Being Challenged in Federal Court

Texas' non-economic damage cap is again being challenged in federal court. Eighteen plaintiffs filed suit in Austin on November 20 against an array of nearly sixty defendants. The plaintiffs argue that the cap is unconstitutional in that it violates the Seventh Amendment. A trial is set for January 7 in Austin.

In 2008, a veritable who's who of trial lawyers filed a somewhat similar and unsuccessful suit in Marshall, Texas. The plaintiffs then claimed that the Texas cap barred access to the courts and violated the takings clause of the U. S. Constitution. Four years later, TAPA prevailed, having spent \$1.1 million in legal fees.

The plaintiffs now contend that the cap violates their right to a trial by jury. Their position is that the jury determines the damages a plaintiff is entitled to recover. By imposing a cap, the Texas Legislature has restricted the jury's function. This deprivation, they argue, violates the 7<sup>th</sup> Amendment.

Our opponents raised this same argument in Colorado, but the judge ruled on the case without addressing the 7<sup>th</sup> Amendment. So, the 7<sup>th</sup> Amendment argument remains an open question.

Robert Peck, with the Center for Constitutional Litigation, is the plaintiff's lead counsel. Peck has a history of overturning medical liability caps in other states.

TAPA is working with the defendants in the underlying cases to mount a competent, coordinated, and consistent legal defense.

The constitutional amendment passed by the voters in 2003 does not apply to this case because the attack is under the federal constitution. Proposition 12 only deals with the state constitution and does not apply to the Federal Constitution.

TAPA Chairman Dr. Howard Marcus said, "this is a case we can and must win. Loss of the cap would dramatically drive up liability insurance premiums, hurt our ability to attract and retain physicians, and undermine our collective efforts to meet the demand for quality care in Texas," he said.