Why Preserving the $250,000 Cap in Medical Liability Cases Is the Only Option

by George Christian | Sep 20, 2021

As we have recently reported, Texas' cap on noneconomic damages has one more come under attack, this time in an Austin federal court. We have speculated as to whether the lawsuit forms part of a larger strategy to repeal or modify the cap in the Legislature, but either way, the cap will have to be defended in every session going forward. But in order to present a persuasive case for maintaining the present cap, we have the burden of persuading legislators and the general public that the $250,000 limit was good policy in 2003, and it remains good policy today.

The origins of the $250,000 go all the way back to 1975, when the California Legislature enacted the Malpractice Insurance Compensation Reform Act (MICRA). The success of the MICRA initiative inspired the Texas Legislature to pass the Texas Medical Liability and Insurance Improvement Act in 1977, which included caps struck down by the Texas Supreme Court in 1988. In the 15 years between SCOTX's decision and the enactment of the present cap in 2003, Texas endured a long period of rising medical malpractice premiums and an exodus of physicians out of Texas. Let there be no doubt that the $250,000 cap had to pass in order to make the other parts of HB 4 effective.

In fact, it is probably not too much of a stretch to say that without the overwhelming grassroots efforts of health care providers to pressure the Legislature to act, there might have been no HB 4 at all. That goes for the business liability provisions as well, which, as you may recall, were contained in a separate bill before the legislative leadership determined it best to roll them in to the "must pass" medical liability reforms. And even if HB 4 and the necessary constitutional amendment to validate the caps had survived the legislative process, convincing Texas voters to approve an amendment limiting their own rights could not have been accomplished without the combined weight of the health care community.

For a preview of what may lie ahead, let us look once more to California. The plaintiff's bar has tried just about everything to raise the cap: 10 court challenges, 5 legislative efforts, and a 2014 ballot initiative that California voters rejected by a 2-1 margin. They're at it again, having successfully collected enough signatures to put another proposition before the voters in 2022. This proposal indexes the current $250,000 cap (which would grow to $1.2 million), similar to what we have seen in the Legislature the past few sessions. But there's more: it would also allow damages awards above the cap in cases of death or catastrophic injury and would permit judges to award larger attorney's fees. If approved by the voters, this proposition would make the cap virtually irrelevant and add billions of dollars in insurance losses that will have to be paid for by both physicians, hospitals, and other providers and California citizens.

Something like this is exactly what we can expect in Texas. It may seem reasonable, for example, simply to "index" the cap to "keep up with inflation." But even if that were really all the plaintiff's bar wanted (and the California experience casts some doubt on that), it would automatically and in growing proportions every year increase the settlement value of all health care liability claims, ramp up the amount of attorney's fees in those cases, and cause much higher losses that have be accounted for in malpractice insurance premiums. In other words, indexing the cap will have precise effectthat the hard $250,000 cap was designed to avert and put us right back where we were prior to September 1, 2003. It's simple arithmetic.

At a basic policy level, moreover, indexing the cap makes no sense. The hard cap recognizes and regulates the inherent subjectivity of noneconomic damages in the first place. For this reason, the Texas Supreme Court began tightening evidentiary standards for mental anguish damages in Parkway Company v. Woodruff, 901 S.W.2d 434 (Tex. 1995) and requiring close appellate scrutiny of mental anguish damages awards (Parkway; Universe Life Insurance Company v. Giles, 950 S.W.2d 48 (Tex. 1997)). Courts have also repeatedly ruled that a $250,000 cap is both reasonable in limiting subjective damages and rationally related to the Legislature's policy objectives to decrease liability insurance costs and expand access to health care. Indexing the cap, which responds to the subjective and unpredictable nature of noneconomic damages, attempts to create a false sheen of objectivity where none exists. Put another way, adjusting a subjective number by an objective number merely produces another subjective number.

In our view, indexing the cap will destroy its efficacy and reverse the gains Texas has made in access to health care since 2003. It will certainly and substantially increase the cost of health care at a time when cost and access are already huge policy concerns not just in Texas, but all over the country. We have often said that Texas' strong economic climate is due in no small part of reforms to the civil justice system enacted since 1995. These reforms have not only attracted jobs and investment to the state, but they have opened the door to an influx of physicians and health care providers who decided to make Texas their home based on those reforms. It would be disastrous to turn back the clock now. Our task will be to remind policymakers and voters how good a decision they made nearly 20 years ago.