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Joan Claybrook, President

S. 22 : Injustice, Texas Style

Texas's Limit on Non-economic Damages is Really a \$250,000 Cap Dressed Up as a \$750,000 Stetson

The Ensign medical malpractice bill, S.22, is advertised as having a \$750,000 aggregate cap on non-economic damages modeled after the Texas statute passed in 2003. It purports to be an improvement over the \$250,000 limit on compensation for pain and suffering previously introduced and widely rejected in the U.S. Senate as being unfair to injured patients. But a closer look at the complicated formula for apportioning liability under Texas law reveals that in over half of all medical malpractice cases, the Texas cap is really no more than a \$250,000 cap in disguise. Here's how it works:

- The Texas cap limits non-economic damages to a total of \$250,000 when the claim is against one or more physicians. \$250,000 is the maximum that can be recovered, regardless of the number of negligent physicians or how many claimants—the patient, dependents, caregivers, beneficiaries, etc.—sustained losses as the result of the injury or death.¹
- The Texas cap limits non-economic damages to \$250,000 from each hospital named as a defendant, up to a maximum total of \$500,000 when two or more hospitals are sued. Statistically, hospitals are named as defendants in fewer than half of all paid claims involving serious injuries, and two or more hospitals are named in just a fraction of these.
- Only in the extremely rare circumstance that *at least one doctor and at least two hospitals* are named as defendants would an injured patient be potentially able to recover the maximum \$750,000 for non-economic damages.

A recent study of closed medical malpractice claims filed with the Texas Department of Insurance for the period 1988 to 2002 revealed that 79.5 percent of injury claims with payouts exceeding \$25,000 name physicians as defendants. Less than half—45.2 percent of these claims—are against hospitals, with only 9.7 percent of claims involving two or more hospitals.² Thus, for all practical purposes, the Texas-style cap is simply another cynical attempt to foist a restrictive and mean-spirited damage limitation on victims of medical negligence while letting negligent doctors and hospitals off the hook.

¹ Texas statutes, Subchapter G, Section 74.301, Limitation on non-economic damages. September 1, 2003.

² Black, Bernard S., Silver, Charles M., Hyman, David A. and Sage, William M., "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002." U of Texas Law & Economics Research Paper No. 30; Columbia Law & Econ Research Paper No. 270; U Illinois Law & Economics Research Paper No. LE05-002, pp. 16-17. Available at SSRN: <http://ssrn.com/abstract=678601> or DOI: [10.2139/ssrn.678601](http://dx.doi.org/10.2139/ssrn.678601)