



The Dallas Morning News

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July 20, 2003

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MEDICAL SUIT FIGHT ESCALATES

Campaigns at Fever Pitch as Texans Prepare to Vote on Liability Caps

By Terry Maxon - *The Dallas Morning News*

The opening shots have been fired in what promises to be a tough, expensive fight over a constitutional amendment to limit medical malpractice awards.

If voters agree on Sept. 13, the Texas Constitution will be changed to let the Legislature put caps on noneconomic damages paid in malpractice lawsuits.

That's just what the Legislature did in early June when it passed a bill that limits damages paid by any doctor, hospital or other health care provider to no more than \$250,000.

But lawmakers are also asking voters to make sure that caps are legal by authorizing them in the Constitution.

Proponents say the limits will keep high insurance costs from running off Texas doctors, particularly in areas of the state that need more physicians, such as the Rio Grande Valley.

Opponents argue that the Legislature is trying to substitute its judgment for that of juries. They say the caps on noneconomic damages would particularly hurt children, housewives and seniors - people who must rely on noneconomic awards in malpractice cases.

"Save Texas Courts," which will lead opposition to the state amendment, has struck first with a mailer to many Texans. Meanwhile, "Yes on 12" is gearing up its campaign.

Two former Texas Supreme Court justices, Deborah Hankinson and James A. Baker, oppose the proposition, along with a number of consumer groups. A former president of the State Bar of Texas is serving as finance chairman of Yes on 12, and medical and business groups are throwing their support behind it.

The opposition's initial mailing repeatedly blamed health maintenance organization lobbyists for the proposal, even though the caps don't protect HMOs. Supporters say they expect personal injury lawyers to fund the anti-12 effort.

Texas voters will decide the fate of 22 constitutional amendments on Sept. 13. But the attention-getter is Proposition 12, which authorizes the Legislature to establish the damage limits.

After a bruising battle in this year's regular session, the Legislature agreed to cap noneconomic damages, such as pain and suffering, in medical malpractice cases.

The limits were included in a sweeping bill that rewrites statutes on civil lawsuits dealing with torts, or wrongful damages or injuries.

As a rule, constitutional amendments are put on the November ballot when many cities hold their own elections, and opponents of Proposition 12 allege that supporters picked a September date to hold down voting.

Elections on constitutional amendments don't draw many voters in odd-numbered years because there are no statewide races to bring voters to the polls.

The lowest statewide turnout since 1970 came in November 2001, when only 6.92 percent of registered voters cast ballots on 19 rather mundane issues.

But the second-lowest turnout came during the only non-November election of the past 23 years, an August 1997 vote on homestead exemption, when only 6.94 percent of registered voters cast ballots.

The Showdown

To oversimplify, the debate over Proposition 12 will have doctors, hospitals and big business facing off against consumer groups and trial lawyers, particularly ones who represent plaintiffs who sue doctors and hospitals in malpractice cases. Supporters of the caps say that rising insurance costs and frivolous malpractice lawsuits have left many Texans without adequate health care.

"We've got doctors leaving the state early, retiring early or restricting their practice because they can't afford the insurance premiums," said Rocky Wilcox of the Texas Medical Association.

One pro-Proposition 12 consultant predicted that opponents would spend \$6 million to \$8 million, while another suggested the number would be higher.

"We expect personal injury lawyers to try to mischaracterize and mislead this campaign," said Rossanna Salazar, an Austin political consultant. "We expected to be outspent, but we won't be outworked." The pro-Proposition 12 campaign has "committed workers ready and willing to spread the word," Ms. Salazar said. "Texans are concerned about lawsuit abuse and the impact on them as patients, and they want the problem fixed. Proposition 12 will fix that problem."

Reporting the money

In initial filings last week, Save Texas Courts reported that it raised nearly \$2 million and spent more than \$500,000 by June 30. Of the \$1,983,380 raised, lawyers and their families contributed all but \$1,370.

By contrast, Yes on 12 reported raising \$200,000 - \$205,000 from Texas Alliance for Patient Access, the coalition of medical, business and insurance groups that lobbied the Legislature to put caps on malpractice awards, plus \$5,000 from the Texas Orthopaedic Association.

Records of spending in past elections are scant. However, by comparison, the group leading the push to allow betting on horse races in 1987 spent \$1.3 million. That election drew a 30.6 percent turnout, highest since 1970 for a special constitutional election.

George Chandler, president of the Texas Trial Lawyers Association, said the opponents "are hoping to raise as much money as we can. We don't have a goal as such." Asked about the predictions of \$8 million or more to be spent by opponents, Mr. Chandler laughed, "I hope they're correct."

Former Texas Supreme Court Justice Deborah Hankinson, who's treasurer of Save Texas Courts, said her opposition to the amendment has nothing to do with changes to the state's tort laws. "At issue to me is the constitution. This is not a question about tort reform and policies that the Legislature makes with respect to tort reform," said Ms. Hankinson, now in private practice in Dallas. Consumer and citizen groups have formed another organization, Texans Against Prop 12, to oppose the amendment.

Dan Lambe, executive director of consumer group Texas Watch, said he and consumer activists oppose the caps because they believe they hurt Texas families, senior citizens and children. In addition, they don't want anything that changes the constitution's guarantee that Texas courts are open to its citizens. "It's not a small issue to be messing with people's constitutional rights. The last thing Texas voters want is the insurance industry to be interfering with their constitutional rights simply because it benefits the insurance industry's bottom line," Mr. Lambe said. "There's nothing in this amendment that's going to guarantee that their premiums go down."

Ms. Hankinson said that she wants to be sure there's "a healthy public debate about the issue." Lawmakers proposed the constitutional amendment to avoid a repeat of 1977. That year, the Legislature authorized caps on some damages in malpractice cases. But in 1988, the Texas Supreme Court ruled that the caps weren't legal in cases involving injured people who hadn't died.

Making sure

Although supporters said they carefully worded the new caps to meet any court challenges, they want a constitutional amendment to make sure of the law's constitutionality without delay.

"You know this is going to be challenged in court - you know that," Sen. Jane Nelson, R-Lewisville, told other lawmakers when the amendment was debated May 16 in the Texas Senate. "We've got to put that issue to rest, and the sooner we put that issue to rest, the sooner that rates can stabilize for our providers' insurance premiums and we can go about the business of protecting patients in this state," Ms. Nelson said.

Mr. Wilcox of the Texas Medical Association said that sponsors designed the legislation to make it constitutional. "We hope that works, but we can't wait eight years or nine years to find out, however long it takes the Supreme Court to rule on it," he said. "The crisis will continue until the insurance companies are sure the provision is going to be effective. It might be declared unconstitutional."

Although attention has been focused on the medical malpractice caps, the amendment would also allow the Legislature to limit other types of civil damages, starting in 2005. That provision "means every session of the Legislature, we're going to have another tort reform fight where the Legislature looks at other areas of damages to cap," Mr. Chandler of the Texas Trial Lawyers Association said. Insurance companies typically claim a crisis and raise premiums whenever their investments go poorly, Mr. Chandler said. "We think it's a cyclical thing," he said, "but amending the constitution is not."

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