

# OKLAHOMA'S TORT REFORM ACT: TEXAS-STYLE TORT REFORM OR TEXAS-SIZE COMPROMISE?

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## *I. Introduction*

Tort reform has quickly become the battle cry for political candidates in both parties at every level of government. In Oklahoma, tort reform has been a staple of campaign promises and legislative action since 1986.<sup>1</sup> At the opening of the 2004 legislative session, Governor Brad Henry promised Texas-style tort reform.<sup>2</sup> The committee formed by Governor Henry used the Texas tort reform statute as a starting point in drafting Oklahoma's proposed legislation.<sup>3</sup> Governor Henry's initiative promised broad-based reform,<sup>4</sup> but after the legislature held extensive public hearings to determine the extent of the problem in Oklahoma, the broad-based, Texas-style reform eventually became a "narrowly tailored" compromise between the medical lobby and the Oklahoma Trial Lawyers Association.<sup>5</sup>

This Article discusses Oklahoma's 2004 tort reform bill and compares it with tort reform efforts recently passed in Texas. While Oklahoma's reform efforts do not go as far as Governor Henry promised or satisfy the insurance lobby, they represent a good start for tort reform in Oklahoma.

## *II. The Case for Tort Reform*

In early 2003, the public became alarmed when thousands of physicians protested against increasing medical malpractice insurance premiums by temporarily closing their practices.<sup>6</sup> Some physicians complained that

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1. See 23 OKLA. STAT. § 9 (1981 & Supp. 1986) (repealed 1995). In 1986, Oklahoma's first effort at tort reform limited the amount of punitive damages to the award of compensatory damages unless the plaintiff established his case for punitive damages by clear and convincing evidence. *Id.*

2. Press Release, Office of Governor Brad Henry, State of Oklahoma, Governor Henry Announces Comprehensive Tort Reform Initiative (Jan. 30, 2004) [hereinafter Governor Henry Announces Tort Reform]. In fact, Governor Henry promised that his initiative "clearly beats Texas and makes the Oklahoma Justice system the best in the nation." *Id.*

3. See *id.*

4. *Id.*

5. Randy Krehbiel, *Tort Reform Fell Short, Group Says*, TULSA WORLD, July 18, 2004, at A13 (detailing negotiations between the two sides and compromises reached by each).

6. Christina O. Jackiw, *The Current Medical Liability Insurance Crisis: An Overview of*

skyrocketing premiums were forcing them to leave their home states or to retire altogether.<sup>7</sup> In that same year, premiums increased more than 25% in several states.<sup>8</sup> Internists' rates increased 30% in Delaware, Idaho, and Illinois.<sup>9</sup> In Connecticut, Missouri, New Jersey, New Mexico, and Tennessee, internists' premiums jumped between 40% and 50%, while rates soared an outrageous 139% in Virginia.<sup>10</sup> In Oklahoma, premiums for medical malpractice insurance paid by internists increased 30% in 2003.<sup>11</sup> Furthermore, Oklahoma had the highest per capita cost of medical malpractice defense at \$24.47 per person.<sup>12</sup> These numbers drew bipartisan attention to the tort reform debate during the 2004 legislative session.

Between 1994 and 2001, the average judgment in a medical malpractice case rose 176% to \$1 million nationwide.<sup>13</sup> In 2002, the costs of the medical liability system reached \$233 billion.<sup>14</sup> Some argue that this increase has resulted in higher malpractice insurance premiums for physicians, leading to higher health care costs and more limited access to medical services.<sup>15</sup> From 1995 to 1997, slightly more than "one in three (36 percent) of cases resulted in an award of \$1 million dollars [sic] or more"<sup>16</sup> and "one-quarter of all awards today exceed \$2.7 million."<sup>17</sup> While defendants prevail in 60% to 80% of cases that go to trial, the majority of medical malpractice claims never reach trial.<sup>18</sup> Even though most malpractice claims that are tried fail, defendant health care providers absorb the high costs of defending these claims.<sup>19</sup>

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*the Problem, Its Catalysts and Solutions*, 13 ANNALS HEALTH L. 505, 506 (2004).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Ctr. for Risk Mgmt. & Ins., Ga. State Univ., *Defense Costs Incurred for Medical Malpractice and Total of All Lines of Business* (2003), available at <http://riskprof.typepad.com/tort/defense.pdf>.

13. JOINT ECON. COMM., *LIABILITY FOR MEDICAL MALPRACTICE: ISSUES AND EVIDENCE* 1, 1 (2003), available at <http://www.house.gov/jec/tort/05-06-03.pdf> [hereinafter *LIABILITY FOR MEDICAL MALPRACTICE*].

14. U.S. TORT COSTS: 2002 UPDATE—TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 1, 7 (2003). This is equivalent to a 5% tax on wages or \$809 per citizen. *Id.*

15. *See, e.g., id.* at 4. Total premiums for medical malpractice insurance topped \$21 billion, doubling the amount from ten years earlier. *LIABILITY FOR MEDICAL MALPRACTICE*, *supra* note 13, at 1.

16. *LIABILITY FOR MEDICAL MALPRACTICE*, *supra* note 13, at 8. From 1998 to 1999, 43% of the awards were at least \$1 million. *Id.* That number rose to more than one-half of all medical malpractice awards by 2000-2001. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* According to the Physicians Insurer Association of America, average defense costs

Those in favor of tort reform contend that the cost to defend frivolous lawsuits drives up premium costs and forces doctors out of business.<sup>20</sup> In contrast, tort reform opponents claim that insurance companies have raised the cost of medical malpractice premiums to recoup losses from poor investments.<sup>21</sup>

Without significant reform, tort reform proponents claim that the health care profession will continue to experience decreasing quality, limited access, and increasing costs for several reasons. First, by increasing the cost of insurance, the medical liability system limits access to health care.<sup>22</sup> Second, increased judgment and litigation costs force higher premiums, reducing the number of those with health insurance and making quality health care cost prohibitive.<sup>23</sup> In addition, the current system causes many physicians to retire or avoid certain specialties and geographic areas.<sup>24</sup> Tort reform proponents argue that new legislation will significantly impact the medical liability system by fixing these problems.

With many insurance companies announcing that they will continue raising rates in 2004,<sup>25</sup> several states are clamoring to enhance their tort reform package. Additionally, premiums are not the only concern — “physicians are facing stricter eligibility criteria, cutbacks in coverage, policy cancellations,” and even lack of coverage.<sup>26</sup>

Leading malpractice insurers are being forced into liquidation or sent into receivership. In Oklahoma, Hospital Casualty Company entered voluntary receivership with the Oklahoma Insurance Commissioner on July 22, 2004.<sup>27</sup> After the company's directors voted to stop operations, sixty-three hospitals and twenty-three nursing homes were without coverage.<sup>28</sup> Earlier in 2004, Physicians Liability Insurance Company was placed under the formal supervision of the insurance commission when the company did not have enough money to pay anticipated claims.<sup>29</sup> Because of the economic

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are close to \$86,000 for each case that gets a defense verdict at trial. *Id.* tbl.2.

20. *See, e.g., id.* at 15-18.

21. *See, e.g., id.* at 5.

22. *Id.*

23. *Id.* at 14; *see also* U.S. GAO, *Private Health Insurance: Continued Erosion of Coverage Linked to Cost Pressures*, GAO/HEHS-97-122 (July 1997), at 24.

24. LIABILITY FOR MEDICAL MALPRACTICE, *supra* note 13, at 14.

25. Jackiw, *supra* note 6, at 507.

26. *Id.*

27. *Hospital Casualty Company to Stop Operating by October*, INS. J., July 26, 2004, available at <http://www.insurancejournal.com/news/southcentral/2004/07/26/44381.htm>.

28. *Id.*

29. *PLICO, Hospital Casualty Under Supervision in Oklahoma*, INS. J., Apr. 23, 2004, available at <http://www.insurancejournal.com/news/southcentral/2004/04/23/41442.htm>.

consequences of higher malpractice premiums, the Oklahoma legislature drafted its new tort reform legislation.

### *III. State Tort Reform Initiatives*

The tort reform statutes of most states are based on the presumption that too many lawsuits are filed and that court awards — especially those for punitive damages or pain and suffering — tend to be excessive.<sup>30</sup> Accordingly, the general idea behind tort reform is to create legislative provisions that discourage the pursuit of marginal cases.<sup>31</sup> Since 1986, several states, including Oklahoma and Texas, have enacted various legislative measures that are considered tort reform.<sup>32</sup> While it is not entirely empirical to compare Oklahoma and Texas's tort reform — because each state has unique political, business, and social issues underlying its respective legislation<sup>33</sup> — Governor Henry set a goal to create an Oklahoma package similar to that of Texas.<sup>34</sup> As such, this Article discusses several important sections of Oklahoma's tort reform statute in comparison with similar provisions enacted by Texas.

#### *A. Joint and Several Liability*

Joint and several liability requires each liable party to be individually responsible for the entire obligation, regardless of his respective percentage of fault.<sup>35</sup> Joint and several liability allows a plaintiff to seek damages from all, some, or only one of the parties alleged to have caused the injury.<sup>36</sup> In many cases, a defendant can seek indemnification or reimbursement from unnamed parties.<sup>37</sup>

Joint and several liability allows plaintiffs the luxury of only needing to establish that one defendant is responsible for the injury, thereby obtaining a judgment against all defendants.<sup>38</sup> The rule of joint and several liability allows plaintiffs to focus their efforts on wealthier defendants regardless of their

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30. CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 4-6 (June 2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5549/06-16-TortReform-Entire.pdf> [hereinafter THE EFFECTS OF TORT REFORM].

31. *Id.*

32. *Id.* at ix.

33. In addition, each state already had various tort reforms in place before its legislatures passed new tort reform packages. For instance, while Texas recently addressed punitive damages in 2003, Oklahoma enacted punitive damage reform in 1995. See H.B. 4, 78th Leg. Reg. Sess. (Tex. 2003); 23 OKLA. STAT. § 9.7 (1991 & Supp. 1995).

34. Governor Henry Announces Tort Reform, *supra* note 2.

35. BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

36. THE EFFECTS OF TORT REFORM, *supra* note 30, at 2.

37. *Id.*

38. *Id.* at 4.

respective percentage of liability. The underlying theory of joint and several liability is that if the individual actions of several defendants are the joint cause of the plaintiff's injury, each defendant is responsible for the total value of the plaintiff's injuries, without consideration for the culpability of each defendant.<sup>39</sup> Proponents maintain that joint and several liability promotes full and quick compensation for plaintiffs.<sup>40</sup> The rule, however, potentially allows plaintiffs to bring marginal to frivolous suits against wealthy defendants by eliminating the need to prove the liability of each separate defendant to obtain judgment against all defendants.<sup>41</sup>

Most joint and several liability reforms focus on limiting a defendant's responsibility to the percentage of damages attributed to each defendant by the jury.<sup>42</sup> Forty-two states currently restrict joint and several liability in some way, while only seven states ban the doctrine altogether.<sup>43</sup> Some states assess total liability on a single defendant only when that defendant is found "primarily" responsible or more than 50% responsible.<sup>44</sup> Other legislative limitations on the common law rule of joint and several liability include instituting the defense of comparative negligence, limiting joint and several liability to only economic damages, and limiting joint and several liability to cases in which defendants acted in a joint effort.<sup>45</sup>

Texas and Oklahoma have enacted similar provisions to limit joint and several liability. Both states provide that a defendant is jointly and severally liable only if the defendant's percentage of fault is greater than 50%.<sup>46</sup> These provisions attempt to ensure that defendants are only held jointly and severally liable when they are truly or primarily responsible for the alleged injury. Texas includes a provision that applies joint and several liability to defendants found to have acted with specific intent to violate particular provisions of the Texas Penal Code.<sup>47</sup> Texas and Oklahoma have taken similar approaches, which

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39. *Id.*

40. *See, e.g., id.*

41. *Id.*

42. *Id.*

43. *Id.*; *see also* AM. TORT REFORM ASS'N, TORT REFORM RECORD 4, 6-8, 11 (Dec. 31, 2003), *available at* [http://www.atra.org/files.cgi/7668\\_Record12-03.pdf](http://www.atra.org/files.cgi/7668_Record12-03.pdf) [hereinafter TORT REFORM RECORD] (listing the states eliminating joint and several liability as Alaska, Illinois, Kentucky, Louisiana, Montana, Utah, and Vermont).

44. THE EFFECTS OF TORT REFORM, *supra* note 30, at 5.

45. *Id.*

46. H.B. 2661, § 18(B), 49th Leg., 2d Sess. (Okla. 2004); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b)(1) (Vernon 2004-2005).

47. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b). For instance, joint and several liability will apply to tortious conduct that occurs in the commission of a crime or violation of the Texas Penal Code. *Id.*

should lead to more equitable distribution of fault in civil cases.

*B. Reform to the Collateral Source Rule*

Amounts of money that a plaintiff recovers outside of the lawsuit, such as medical bills paid for by the plaintiff's own health insurance, are said to come from collateral sources.<sup>48</sup> Under the collateral source rule, compensation from other sources may not be admitted as evidence at trial.<sup>49</sup> This common law rule prohibits the judgment to be offset by the amount paid to the plaintiff from collateral sources.<sup>50</sup> Twenty-three states have reformed the collateral source rule,<sup>51</sup> and most reforms allow the court to introduce collateral source payments into evidence, offset the judgment by the payments, or both.<sup>52</sup>

Proponents of the collateral source rule contend that potential defendants who may absorb the entire cost of the alleged negligent conduct will provide better care, whereas defendants facing responsibility for a smaller payment have less incentive to practice due care.<sup>53</sup> On the other hand, opponents of the rule assert that the rule promotes double compensation, which effectively lowers the plaintiff's incentive to exercise due care.<sup>54</sup> Moreover, opponents contend that the collateral source rule potentially promotes filing of lawsuits by inflating the size of possible judgments.<sup>55</sup>

While Oklahoma enacted reform to the collateral source rule with the 2003 Affordable Access to Health Care Act,<sup>56</sup> Texas has not changed the collateral source rule, and evidence of payments of medical bills is still inadmissible in Texas courts.<sup>57</sup> Oklahoma's new law allows the defendant to introduce evidence of payments made to the plaintiff from collateral sources unless the payment sought to be introduced is subject to subrogation or other right of recovery.<sup>58</sup>

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48. THE EFFECTS OF TORT REFORM, *supra* note 30, at 2.

49. *Id.* at 5.

50. *Id.*

51. *Id.* at 6.

52. *Id.*

53. *See, e.g., id.*

54. *See, e.g., id.*

55. *See, e.g., id.*

56. 63 OKLA. STAT. § 1-1708.1D (Supp. 2004). Before the enactment of the Affordable Access to Health Care Act, evidence of payment of collateral sources was admissible only in certain circumstances. For example, in *Rucker v. Mid Century Insurance Co.*, 1997 OK CIV APP 47, 945 P.2d 507, the Oklahoma Court of Civil Appeals held that "[b]ecause Plaintiff introduced *affirmative evidence* on how Defendant's failure to pay the medical bills exacerbated family stress, the trial judge allowed Defendant a limited inquiry on cross-examination to show that these bills had, in fact, been paid from other sources." *Id.* ¶ 16, 945 P.2d at 511.

57. TORT REFORM RECORD, *supra* note 43, at 3.

58. 63 OKLA. STAT. § 1-1708.1D.

### C. Caps On Noneconomic Damages

Currently eighteen states have statutes that put some type of cap on noneconomic damage awards.<sup>59</sup> The theory behind caps for noneconomic damages is that psychological losses for pain and suffering are not easily valued and often lead to excessive judgments. Moreover, those who support caps believe that juries are naturally biased against corporate defendants.<sup>60</sup> A limit on the amount of noneconomic damages that can be awarded counterbalances those errors and biases.<sup>61</sup> Because total possible awards are capped, the possible benefit of bringing suit is lowered; consequently, the number of lawsuits may fall.<sup>62</sup>

In Texas, limits on noneconomic damages are dependent upon whether the defendant is a health care provider (physician) or a health care institution (hospital).<sup>63</sup> The cap for noneconomic damages against one or more physicians is \$250,000.<sup>64</sup> Likewise, the cap for one hospital is \$250,000.<sup>65</sup> If a judgment is taken against more than one hospital, however, the limit for noneconomic damages for each separate hospital is \$250,000 per plaintiff and a combined limit of \$500,000 for all of the hospitals named in the suit.<sup>66</sup>

Oklahoma's cap on noneconomic damages is more confusing. Although Oklahoma has enacted a "hard cap" of \$300,000 in all obstetrics-gynecology and emergency room cases,<sup>67</sup> the Oklahoma reform has a controversial "soft cap" for all other cases.<sup>68</sup> This soft cap applies only when the defendant has made a settlement offer and the ultimate jury award is one-and-one-half times greater than the final settlement offer.<sup>69</sup> In addition, a judge who believes that a jury could find willful and wanton conduct supported by clear and convincing evidence has discretion to lift the cap.<sup>70</sup> The practical application of this section, however, is extremely limited. First, the defendant must make an offer

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59. THE EFFECTS OF TORT REFORM, *supra* note 30, at 6. Noneconomic damages are "[d]amages payable for items other than monetary losses, such as pain and suffering." *Id.* at 2. Most reforms cap liability at amounts from an upper limit ranging from \$250,000 in Kansas and Montana to \$750,000 in Texas. *Id.* at 6.

60. *Id.* at 6.

61. *Id.*

62. *Id.*

63. Patrice Pujol & Marty Thompson, *Texas Legislature Hammers Out Massive Tort Reform Bill*, HOUS. LAW., July/Aug. 2003, at 10, 16.

64. *Id.*

65. *Id.*

66. *Id.*

67. H.B. 2661 § 21, 49th Leg., 2d Sess. (Okla. 2004).

68. *Id.* § 22.

69. *Id.*

70. *Id.*

of settlement *before* the cap is applicable.<sup>71</sup> Second, the jury has to return a verdict one-and-one-half times the settlement offer.<sup>72</sup>

Instead of discouraging frivolous lawsuits, Oklahoma's measure potentially promotes settlement of marginal cases because defendants will often feel pressure to make a settlement offer to engage the cap.<sup>73</sup> Perhaps Texas's provision better achieves the intended goal of discouraging the filing of marginal to frivolous claims by placing a definite limit on damages.

#### *D. Venue*

Venue laws determine the proper county for a plaintiff to bring suit.<sup>74</sup> Lenient venue rules allow trial lawyers to look for favorable jurisdictions to try their cases, a concept known as "venue shopping."<sup>75</sup> Some counties are viewed as very plaintiff-friendly jurisdictions and, as such, have become litigation magnets.<sup>76</sup> Courts in these areas are overcrowded with cases having no true relationship to the venue.<sup>77</sup>

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71. *Id.*

72. *Id.*

73. Sean Murphy, *Caps on Damages a Key Compromise in Tort Reform Bill*, SHAWNEE NEWS-STAR, June 8, 2004, available at <http://www.news-star.com>.

74. AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES ix-x (2003) [hereinafter JUDICIAL HELLHOLES].

75. *Id.* at 2. Often, plaintiffs manipulate venue laws to bring suit in a county that is more plaintiff-oriented. For example, venue in an action against a corporation organized under the laws of Oklahoma is proper in the county (1) where the business is situated, (2) where it has its principal office or place of business, (3) where any of its principal officers reside, (4) where the cause of action arose, or (5) where a codefendant may properly be sued. 12 OKLA. STAT. § 134 (2001). Plaintiffs often attempt to compel corporate defendants to defend cases in favorable counties simply by joining them with "dummy defendants" or defendants who can be served in the favorable county but have no real connection to the case. Longstanding Oklahoma case law has held:

A plaintiff cannot compel persons residing out of the county where suit is brought to defend there by simply joining them with another person or persons against whom there is no joint right of action. In order to give the court jurisdiction over defendants nonresident of the county where the suit is brought and for whom summons has been issued to another county, those against whom service is had in the former county must have a real and substantial interest in the proceeding adverse to the plaintiff and against whom substantial relief is sought. The law does not permit the important matter of jurisdiction to be determined by joining colorable or dummy defendants in the case.

*Fisher v. Fiske*, 1923 OK 524, ¶ 9, 219 P. 683, 684. A fair venue rule would allow suits to be brought where the plaintiff lives, where the plaintiff was injured, or where the defendant's principal place of business is located.

76. JUDICIAL HELLHOLES, *supra* note 74, at 2.

77. *Id.*



In 2003, Oklahoma, Texas, and West Virginia each enacted reforms to address venue shopping.<sup>78</sup> Texas passed House Bill 4, which allows an immediate appeal from the trial court to determine proper venue and for possible dismissal of lawsuits that have no connection to Texas.<sup>79</sup> In contrast, West Virginia passed Senate Bill 213, which prohibits nonresidents from bringing suit in West Virginia unless the acts related to the claim occurred in West Virginia.<sup>80</sup> In addition, the West Virginia reforms require that in suits brought by more than one plaintiff, each plaintiff must establish proper venue.<sup>81</sup>

Oklahoma recently became the latest state to reform venue laws.<sup>82</sup> Similarly to Texas, Oklahoma's tort reform legislation allows a court, upon a finding of lack of proper venue, to transfer or dismiss that action.<sup>83</sup> The new law limits venue of medical liability cases to counties

where the cause of action or any portion thereof arose, or in any county in which any of the defendants reside, or in the case of a corporation, in a county in which it is situated, or has its principal office or place of business, or in any county where a codefendant of such corporation may be sued.<sup>84</sup>

While this law essentially restates prior venue laws, it provides that the court "shall" dismiss or transfer upon a finding of improper venue.<sup>85</sup> Under Oklahoma's previous venue statute, the court had discretion to dismiss or transfer the case, and the judge would often allow plaintiffs to resolve venue problems by serving another defendant who lived in the appropriate county.<sup>86</sup>

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78. NAT'L ASS'N OF MUT. INS. COS., INTRASTATE FORUM SHOPPING REFORM, at <http://www.NAMIC.org/reports/tortreform/intrastateforumshopping.asp> (last visited Feb. 5, 2005) [hereinafter INTRASTATE FORUM SHOPPING REFORM].

79. The court must transfer or dismiss a claim brought in an improper venue unless the plaintiff can establish (1) his presence is otherwise procedurally proper; (2) there is no unfair prejudice to any other party; (3) there is an essential need to have the plaintiff's claim tried in the county where the suit is pending; and (4) the county is a fair and convenient venue for the plaintiff and all defendants. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon 2004-2005).

80. W. VA. CODE ANN. § 56-1-1(c) (West 2004).

81. *Id.*

82. INTRASTATE FORUM SHOPPING REFORM, *supra* note 78.

83. *Id.*

84. H.B. 2661 § 2, 49th Leg., 2d Sess. (Okla. 2004) (codified at 12 OKLA. STAT. § 130 (Supp. 2005)).

85. *Id.* In cases where a dismissal would act as a dismissal with prejudice, the court must transfer the action. *Id.*

86. *Id.* For a discussion of the practice of naming and serving dummy defendants, see *supra* note 75.

*E. Expert Witnesses*

Expert testimony is required in medical negligence cases to establish both the applicable standard of care and causation.<sup>87</sup> In *Boxberger v. Martin*,<sup>88</sup> the Oklahoma Supreme Court restated the general rule that the plaintiff must establish medical negligence by expert medical testimony.<sup>89</sup> Expert testimony is required to decipher the standard of care, judge whether the defendant breached that standard of care, and determine whether an injury resulted from the breach.<sup>90</sup> Because of the risk that unqualified experts might be allowed to testify to matters outside of their area of expertise, many states have enacted requirements for the admissibility of expert testimony.<sup>91</sup>

Under Oklahoma's new tort reform legislation, courts must ensure that the expert "[i]s licensed to practice medicine or has other substantial training or experience, in any area of health care relevant to the claim; and [the expert] [i]s actively practicing or retired from practicing health care in any area of health care services relevant to the claim."<sup>92</sup> If the court decides to waive these requirements, the court must clearly state the reason for its decision in the record.<sup>93</sup>

Similarly, the Texas bill addresses the potential problem of expert witnesses by setting minimum requirements for their qualifications in medical malpractice suits.<sup>94</sup> In all claims against a physician, the expert must (1) either currently practice medicine or have been practicing medicine at the time of the alleged injury; (2) have knowledge of the appropriate standard of care; and (3) have sufficient training or experience to offer expert opinions concerning the standard of care.<sup>95</sup>

Although the laws are comparable in both states, Texas goes one step further than Oklahoma by allowing appeal of denial of a motion to dismiss or a motion for summary judgment for the failure to obtain qualified expert testimony.<sup>96</sup> In addition, the new Texas reforms allow a party to appeal an interlocutory order denying a motion to dismiss for failure to timely file an expert report in a

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87. *Boxberger v. Martin*, 1976 OK 78, ¶ 14, 552 P.2d 370, 373.

88. 1976 OK 78, 552 P.2d 370.

89. *Id.* ¶ 14, 552 P.2d at 373.

90. *Id.*

91. See Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 722-23 (2002).

92. H.B. 2661, § 24(B)(1)-(2), 49th Leg., 2d Sess. (Okla. 2004) (codified at 63 OKLA. STAT. § 1-1708.11(B)(1)-(2) (Supp. 2004)).

93. *Id.* § 24(A) (codified at 63 OKLA. STAT. § 1-1708.11(A) (Supp. 2005)).

94. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004-2005).

95. Pujol & Thompson, *supra* note 63, at 17.

96. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 51.014, with H.B. 2661, 49th Leg., 2d Sess. (Okla. 2004).

medical malpractice claim.<sup>97</sup> On the other hand, a plaintiff may appeal a motion to dismiss on grounds that the expert report is inadequate.<sup>98</sup>

This right of interlocutory appeal is an important difference between the new Texas and Oklahoma efforts at expert witness reform. Because Oklahoma law does not provide an intermediate appeal of a denial of a motion for summary judgment, the requirement for expert testimony is often rendered inconsequential because the courts may allow plaintiffs more time to find expert testimony.<sup>99</sup> Were the Oklahoma legislature to adopt a measure similar to Texas's that provides for interlocutory appeals, or requires courts to dismiss cases for failure to timely identify experts, the number of marginal cases would likely decline.

#### *F. Good Samaritan Laws*

Good Samaritan laws shield health care providers from liability for gratuitously provided treatment. To qualify for this protection, the health care provider must provide the treatment in good faith and be neither wanton nor reckless.<sup>100</sup> Immunity from civil damages arising out of such care is consistent with public policy, and encourages physicians and other health care workers to render necessary medical treatment without the fear of civil liability for their actions.<sup>101</sup>

The Texas legislature clarified the definition of a "Good Samaritan" to protect persons providing emergency care.<sup>102</sup> Under Texas's new law, a physician is not liable for good faith administration of "emergency care," including use of an automated external defibrillator, unless a plaintiff proves by a preponderance of the evidence that the care was "willfully or wantonly negligent."<sup>103</sup> Additionally, the law protects physicians even if they are legally entitled to receive remuneration for the emergency care.<sup>104</sup> Similarly, persons who are not licensed health care providers, but are acting as emergency medical personnel, are not liable unless they are willfully or wantonly negligent,

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97. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014.

98. *Id.*

99. The Oklahoma Supreme Court "will not review a trial court order which overrules a motion for summary judgment." *McLin v. Trimble*, 1990 OK 74, ¶ 12, 795 P.2d 1035, 1039; *see also* 12 OKLA. STAT. § 952 (2001).

100. INT'L RISK MGMT. INST., TORT REFORM AND ITS IMPACT ON MEDICAL MALPRACTICE INSURANCE (Mar. 2003), at <http://www.irmi.com/Expert/Articles/2003/Kolodkin03.aspx>.

101. *Id.*

102. H.B. 4, § 10.01, subch. D, 78th Leg. Reg. Sess. (Tex. 2003) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (Vernon Supp. 2004-2005)).

103. *Id.*

104. *Id.*

regardless of remuneration.<sup>105</sup> Moreover, any physician or hospital in Texas that provides emergency services pursuant to the federal or state Emergency Medical Treatment and Labor Act (EMTALA) requirements<sup>106</sup> is immune from liability for any civil damages resulting from medical care, unless the measures are taken with reckless disregard for the likely consequences.<sup>107</sup>

Oklahoma's law provides that any volunteer medical professional is immune from liability for services provided at a free clinic.<sup>108</sup> In addition, if a volunteer medical professional refers a patient to another physician, the consulting physician also receives immunity, but only if certain conditions are met.<sup>109</sup> For example, "the patient must sign a written statement acknowledging that the physician is acting as a volunteer and that immunity applies."<sup>110</sup> Although Oklahoma's measures similarly attempt to shield volunteer physicians from liability, the Texas provision goes further by actually extending immunity to those physicians who are entitled to remuneration for their efforts.<sup>111</sup>

### G. Miscellaneous Reforms

Several reforms exist in Texas that are not present in Oklahoma, and vice versa. For instance, the reforms in Texas allow future damages, other than medical expenses, to be paid periodically.<sup>112</sup> In addition, the new Texas tort reform bill provides a ten-year statute of repose for medical malpractice claims, which requires a plaintiff to file a medical negligence claim within ten years of the date of the act giving rise to the claim, or the claim is time-barred.<sup>113</sup>

On the other hand, Oklahoma's statute includes what is called the "I'm Sorry" law, which makes physician statements of condolence, sympathy, or apology expressed to patients and their families inadmissible.<sup>114</sup> In addition,

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105. *Id.*

106. *See* 42 U.S.C. § 1395dd (2000).

107. H.B. 4, § 10.01, subch. D (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 74.151).

108. H.B. 2661, § 34(B), 49th Leg., 2d Sess. (Okla. 2004) (codified at 32 OKLA. STAT. § 76(B)(1) (Supp. 2005)).

109. *Id.* § 34(C).

110. Okla. State Med. Ass'n, Message From the OSMA Executive Committee (June 3, 2004), at <http://www.osmaonline.org/userfiles/documents/letter.pdf> [hereinafter OSMA Message].

111. *Compare* H.B. 4, 78th Leg. Reg. Sess. (Tex. 2003), with H.B. 2661, § 34, 49th Leg., 2d Sess. (Okla. 2004).

112. H.B. 4, § 10.01, subch. K (codified at TEX. CIV. PRAC. & REM. CODE §§ 74.502-74.503). Specifically, future damages in excess of \$100,000 can be paid in periodic payments instead of a lump sum. *Id.*

113. H.B. 4, § 10.01, subch. F (codified at TEX. CIV. PRAC. & REM. CODE § 74.251).

114. OSMA Message, *supra* note 110.

Oklahoma's statute strengthens preexisting statutes relating to sanctions for abusive discovery and definitions of frivolous lawsuits.<sup>115</sup>

Possibly the single most important section of Oklahoma's new tort reform act, however, is the section providing an eighteen-month moratorium on capitalization requirements, which is specifically intended to keep Physicians Liability Company (PLICO), the state's largest medical liability carrier, from being closed down by the insurance commissioner for failing to have the required reserves.<sup>116</sup> PLICO's failure to survive this critical time period could have catastrophic effects on the medical liability system in Oklahoma.

#### *IV. Conclusion: Something Is Better Than Nothing*

While Governor Henry used Texas's reform efforts as a model in his initial proposal, it is probably not entirely fair to compare Oklahoma and Texas's recent tort reform packages. The Texas statute was backed by a Republican governor, drafted by a Republican legislature, and supported by a unified business, insurance, and health care lobby.<sup>117</sup> In contrast, Oklahoma's effort was backed by a Democratic governor, drafted by a Democratic legislature, and supported by a strong trial lawyers' lobby.<sup>118</sup> Although the Oklahoma State Medical Association Executive Committee supported this bill, after it passed, the committee commented in a letter to its members that "[i]f you feel this bill needed much more . . . WE AGREE."<sup>119</sup>

Oklahoma's new provisions may not go as far as Texas's tort reform or the health care lobby had hoped, but they should have some impact on the number of lawsuits filed in Oklahoma. Although many of Oklahoma's health care providers and lawmakers are not particularly satisfied with the legislation, the possibility existed that no reforms would get passed without some compromise and, considering the state of the medical liability system in Oklahoma, something is better than nothing. It is, of course, too early to determine the new

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115. *Id.*; see also S.B. 1430, § 1, 49th Leg., 2d Sess. (Okla. 2004) (codified at 12 OKLA. STAT. § 2011.1 (Supp. 2005)) (defining a lawsuit as frivolous when "the action was knowingly asserted in bad faith, was unsupported by any credible evidence, was not grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law").

116. OSMA Message, *supra* note 110; see H.B. 2261, § 57, 49th Leg., 2d Sess. (codified at 36 OKLA. STAT. § 1530). In light of Hospital Casualty Company's recent demise, should PLICO suffer a similar fate, the impact on health care in Oklahoma would be devastating.

117. Hon. Rick Perry, Address to the Manhattan Institute Center for Legal Policy Forum (Oct. 8, 2003) (transcript available at <http://www.manhattaninstitute.org/html/clp10-8-03.htm>).

118. Krehbiel, *supra* note 5.

119. OSMA Message, *supra* note 110. In that same letter, the committee noted that in the last two legislative sessions, there have been fourteen medical lawsuit reforms. *Id.*

statute's true effect on medical malpractice premiums and the number of lawsuits filed, which will be better judged two to four years down the road when the majority of claims filed will actually fall under the new law.