

SCALPEL, PLEASE: WHY THE DEFINITION OF “HEALTH CARE LIABILITY CLAIM” IN CHAPTER 74 OF THE CIVIL PRACTICE AND REMEDIES CODE IS NOT AS CLEAN-CUT AS IT COULD BE

Comment*

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I. INTRODUCTION

For some people, the term "medical malpractice" conjures up images of the most horrific kind: a surgeon operating on the wrong part of the body; a physician reading the wrong patient's x-ray; or an infection arising from surgical instruments left in the body. While these errors sound equally painful, they also share another common trait: any reasonable person would agree that the injury in each case resulted from medical malpractice. But medical malpractice is not always the culprit in injuries that arise out of a health care provider's negligence.¹ Indeed, many cases against a health care provider walk a fine line between alleging common-law negligence and medical malpractice.² The importance in distinguishing a medical malpractice claim from a common law negligence claim begs two questions. First, why does the distinction make a difference? Second, if the distinction is important, what is the framework of analysis used to distinguish a medical malpractice claim from a non-medical malpractice claim?

The answers to both questions lie within Chapter 74 of the Texas Civil Practice and Remedies Code (Chapter 74).³ Entitled "Medical Liability," Chapter 74 governs all medical malpractice claims in Texas.⁴ The Texas

1. See, e.g., *Shults v. Baptist St. Anthony's Hosp. Corp.*, 166 S.W.3d 502, 505 (Tex. App.—Amarillo 2005, pet. denied) (holding that the patient's injury arising from a cut from a paint chip in the hospital's shower is a premises liability claim).

2. Compare *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010) (plurality opinion) (holding that a hospital bed's footboard is "an integral and inseparable part of the health care services provided"), with *Christus Health v. Beal*, 240 S.W.3d 282, 291 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("We hold, therefore, that the provision of a safe bed by Christus does not directly relate to Christus's treatment of Beal . . .").

3. TEX. CIV. PRAC. & REM. CODE ANN. § 74 (West 2011).

4. See § 74.001(a)(13).

Legislature created Chapter 74 in 2003 in response to a "medical malpractice insurance crisis" sweeping through the state.⁵ Chapter 74's provisions are designed to filter frivolous claims from meritorious malpractice claims by requiring that plaintiffs subject to Chapter 74 follow certain statutory procedures prior to trial.⁶ In addition, Chapter 74 includes a damages cap that limits a plaintiff's recovery upon a successful jury verdict.⁷ Because of these requirements and limitations, it is no surprise that often the most contentious issue in litigation involving a health care provider is whether Chapter 74 applies to the underlying claim.⁸

Chapter 74 does not actually employ the term "medical malpractice"; instead, it governs claims that fall within its definition of "health care liability claim."⁹ Unfortunately, this definition contains ambiguous language, and the Texas Supreme Court has yet to rule on how the definition should be interpreted.¹⁰ To further complicate the dilemma, Chapter 74's precursor, Article 4590i of Vernon's Texas Revised Civil Statutes (Article 4590i), has a history of case law interpreting its definition of "health care liability claim."¹¹ But because Chapter 74's definition is not exactly the same, some courts have held that Article 4590i's case law is not controlling.¹² Without more clarification from the legislature, the interpretation of Chapter 74's definition of "health care liability claim" will remain unsettled, and its case law will continue to fracture.¹³ The end result of this confusion is that the ambiguous definition will create, and exacerbate, the very problems that Chapter 74's provisions were designed to prevent.¹⁴

5. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(5), 2003 Tex. Gen. Laws 847, 884.

6. See Casey L. Moore, Note, "In the Wake of the Rose" and "Life After Romero": The Viability of a Cause of Action for Negligent Credentialing in Texas in Light of Recent Texas Supreme Court Decisions, 58 BAYLOR L. REV. 549, 558-59 (Spring 2006) (stating that Chapter 74's requirements make asserting a health care liability claim a "more tedious task for plaintiffs").

7. TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301-.303.

8. See generally Glen M. Wilkerson et al., *Analysis of Recent Attempts to Assert Medical Negligence Claims "Outside" Texas's Article 4590i*, 20 REV. LITIG. 657, 664-79 (2001) (discussing the various techniques plaintiffs use to circumvent Chapter 74's precursor, Article 4590i).

9. § 74.001(a)(13).

10. See *Appell v. Muguerza*, 329 S.W.3d 104, 114 (Tex. App.—Houston [14th Dist.] 2010, pet. filed). The Texas Supreme Court recently had the opportunity, but declined, to resolve this issue in *Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 n.2 (Tex. Dec. 17, 2010), stating, "Our decision makes it unnecessary to consider whether the court of appeals properly construed [Chapter 74's] language regarding breaches of accepted standards of safety."

11. Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039-64, *repealed* by Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884; see discussion *infra* Part VI.

12. E.g., *Appell*, 329 S.W.3d at 114 ("Therefore, cases regarding the construction of [Article 4590i's definition] are not on point and do not govern the construction of the part of [Chapter 74's definition] dealing with safety standards.").

13. See *infra* Part V.

14. See *infra* Part V.

This Comment outlines the history of Article 4590i and Chapter 74.¹⁵ Part II will describe the medical malpractice insurance crisis that developed in the years leading up to 2003, and it will highlight the history of House Bill 4, which is the bill that created Chapter 74. Next, Part III will take a closer examination of Article 4590i's and Chapter 74's definitions of "health care liability claim." After examining the definitions, Part IV will introduce the "safety ambiguity," which refers to the ambiguous language within Chapter 74's definition that has caused the most confusion among Texas courts. Part V will explain why this ambiguity, if not clarified, will create problems that Chapter 74 was designed to prevent. Next, Part VI examines how the Texas Supreme Court dealt with the same ambiguous language in Article 4590i. Part VII will discuss how the legislature's intent behind Chapter 74's enactment does little to clarify the ambiguous language within Chapter 74's definition. Part VIII will offer three simple ways that the legislature can clarify its ambiguous language. Part IX will conclude that, regardless of how the legislature decides to clarify the ambiguous language, the point is that the legislature simply needs to act in order for Chapter 74 to continue as an effective statute.

II. LET'S TAKE A LOOK AT YOUR RECORDS: THE HISTORY OF HEALTH CARE LIABILITY STATUTES IN TEXAS

Before analyzing the definition of "health care liability claim," it is helpful to first understand Chapter 74's history. The events giving rise to its enactment and the shortfalls of the statute that it replaced shed light on the goals the legislature contemplated for Chapter 74.¹⁶ Understanding Chapter 74's history also proves useful as courts attempt to extract meaning from its provisions by tracking the changes from Article 4590i to Chapter 74.¹⁷

A. Article 4590i of Vernon's Texas Revised Civil Statutes

The codification of health care liability laws in Texas began in 1977 with Chapter 74's precursor, Article 4590i of Vernon's Texas Revised Civil Statutes.¹⁸ Entitled the "Medical Liability and Insurance Improvement Act" (MLIIA), the Texas Legislature enacted Article 4590i in response to a medical malpractice insurance crisis that swept through Texas in the early

15. See *infra* Part II.

16. See TEX. GOV'T CODE ANN. § 311.023(2) (West 2005) (stating that a court may consider the "circumstances under which the statute was enacted" when construing a statute).

17. See § 311.023(4) (stating that a court may consider the "common law or former statutory provisions, including laws on the same or similar subjects" when construing a statute).

18. Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039-64 (repealed 2003).

1970s.¹⁹ The crisis emerged as a result of a number of factors, most of which related to medical malpractice lawsuits within the state.²⁰

For example, the legislature noted that from 1972 to 1977, “the [frequency] of health care liability claims . . . increased . . . inordinately.”²¹ In turn, the amounts “paid out by insurers in judgments and settlements . . . likewise increased inordinately in the same short period of time.”²² The crisis stung hospitals and physicians in the form of increased medical professional liability rates, which are determined, in part, by the number of health care liability claims filed.²³ Hospitals and physicians did not absorb the sting alone; the increased medical professional liability rates caused a direct increase in the cost of medical care to patients.²⁴ In addition, defensive medicine increased the costs of medical care to patients and private insurers.²⁵

The legislature expressed concern about the effect that increased health care liability claims and rising insurance premiums had on the availability of medical care in Texas.²⁶ In contemplating Article 4590i, the legislature stated, “this crisis has had a material adverse effect on the delivery of medical and health care in Texas, including significant reductions of availability of medical and health care services to the people of Texas and a likelihood of further reductions in the future.”²⁷ The legislature also outlined the relationship between medical care, insurance, and the law:

[T]he combined effect of the defects in the medical, insurance, and legal systems has caused a serious public problem both with respect to the availability of coverage and to the high rates being charged by insurers for

19. See TEX. GOV'T CODE ANN. § 1.02(a)(5) (West 2005); Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 218-19 (2005) [hereinafter Hull et al., *Part Three*]. In 1975, the Texas Legislature created the Texas Medical Professional Liability Study Commission (Commission) to “study the health care liability crisis, explore solutions, and report back to the 65th Legislature.” *Id.* at 218-19. Chaired by tort law expert W. Page Keeton, the Commission consisted of “representatives from a variety of interests, including legislators, medical professionals and organizations, consumer unions, insurers, and the Texas Bar.” *Id.* at 219. The Commission held meetings and conducted interviews to study the effects of the state’s health care liability crisis. *Id.* After seventeen months of research, the Commission gave the legislature extensive testimony about the Commission’s findings, which formed the basis for many of Article 4590i’s provisions. Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part One*, 36 TEX. TECH L. REV. 1, 4 (2005) [hereinafter Hull et al., *Part One*].

20. See Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(a)(1)-(5), 1977 Tex. Gen. Laws 2039, 2039-40 (repealed 2003).

21. *Id.* § 1.02(a)(1).

22. *Id.* § 1.02(a)(3).

23. *Id.* § 1.02(a)(2).

24. *Id.* § 1.02(a)(8) (“[T]he direct cost of medical care to the patient and public of Texas has materially increased due to [the] rising cost of malpractice insurance protection for physicians and hospitals in Texas.”).

25. *Id.* § 1.02(a)(9). The Act does not define “defensive medicine”; however, the clause preceding the term implies a definition: “services provided for protection against future suits or claims.” *Id.*

26. *Id.* § 1.02(a)(6).

27. *Id.*

medical professional liability insurance to some physicians, health care providers, and hospitals.²⁸

When it passed in 1977, Article 4590i used the phrase “health care liability claim” instead of “medical malpractice” to define the claims that fell within its ambit.²⁹ If a claim fell within Article 4590i’s definition of “health care liability claim,” that claim was subject to its provisions, which, among others, included a statute of limitations for minors and a total civil liability damages cap of \$500,000.³⁰

In 1995, the legislature amended Article 4590i by adding a requirement that the plaintiff in a health care liability claim file an expert report within 180 days of filing suit.³¹ Additionally, the amendment mandated that a plaintiff file a cost bond of \$5,000 for each health care provider or physician defendant.³² The expert report was designed to create an “opportunity for meaningful review prior to the parties expending substantial effort in discovery.”³³ But courts rarely enforced the 180-day requirement, and the content of the expert report was hardly scrutinized.³⁴ The upshot of the added provisions was that the cost-bond requirement simply became “a procedural hurdle for plaintiff and defense lawyers to argue about,” and the expert report failed to stand as a barrier for plaintiffs determined to bring claims against physicians or hospitals.³⁵

28. *Id.* § 1.02(a)(11).

29. *See id.* § 1.03(a)(4).

30. *Id.* §§ 10.01 (statute of limitations), 11.02(a) (total civil liability cap), 11.03 (noneconomic damages cap). The cap provision states, in pertinent part:

(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000.

(b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

Id. § 11.02(a)-(b).

31. Act of May 5, 1995, 74th Leg., R.S., ch. 140, 1995 Tex. Gen. Laws 985, 985-88, *repealed by* Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. If the expert report was not timely furnished, Article 4590i called for dismissal of the plaintiff’s claim. *Id.* § 1, sec. 13.01(e) (“If a claimant has failed, for any defendant physician or health care provider, to comply with [the expert report requirement] within the time required, the court shall, on the motion of the affected physician or health care provider, enter an order awarding as sanctions against the claimant or the claimant’s attorney: . . . (3) the dismissal of the action of the claimant against that defendant with prejudice to the claim’s refiling.”).

32. *Id.* § 1, sec. 13.01(a)(1). In lieu of the bond, the plaintiff could place \$5,000 cash in an escrow account for each health care provider or physician defendant. *Id.* § 1, sec. 13.01(a)(2). Additionally, the plaintiff could “file an expert report for each physician or health care provider with respect to whom a cost bond has not been filed and cash in lieu of the bond has not been deposited under [the first two subdivisions of subsection of 13.01(a)].” *Id.* § 1, sec. 13.01(a)(3).

33. Hull et al., *Part One*, *supra* note 19, at 5.

34. *Id.*

35. *Id.*

In addition to amendments, Article 4590i faced many court challenges. Most notably, the Texas Supreme Court struck down as unconstitutional both Article 4590i's cap on damages for certain health care liability causes of actions and the statute of limitations for minors.³⁶ The end result was a statute unable to protect the health care industry the way it was originally designed.³⁷ Not only did court challenges render much of Article 4590i's strongest provisions moot, but plaintiffs increasingly found ways around the provisions still intact by claiming exceptions to Article 4590i's applicability.³⁸ By 2003, the need for a stronger health care liability statute became evident.³⁹

B. Chapter 74 of the Texas Civil Practice and Remedies Code

During the years leading up to 2003, Article 4590i's shortfalls manifested themselves in the grim outlook of the health care industry in Texas.⁴⁰ Doctors began closing their practices or stopped performing high-risk procedures.⁴¹ Hospitals discontinued certain services and nursing homes across the state filed for bankruptcy.⁴² These health care providers all cited rising medical malpractice insurance premiums as the reason for

36. *Id.* at 4. The Texas Supreme Court struck down the damages cap, in part, in *Lucas v. United States*. *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988). The court deemed the cap unconstitutional as it applies to common-law causes of actions. *Id.* Thus, claims brought under the state's wrongful death statute are still subject to Article 4590i's cap. *See id.* The Texas Supreme Court struck down the statute of limitations for claims brought by minors in *Weiner v. Wasson*, 900 S.W.2d 316, 320-21 (Tex. 1995). Chapter 74's damages cap circumvents *Lucas* through a state constitutional amendment. *See infra* text accompanying note 53.

37. Hull et al., *Part One*, *supra* note 19, at 5.

38. *See id.* (discussing how plaintiffs circumvented Article 4590i's punitive damages cap); Hull et al., *Part Three*, *supra* note 19, at 182 (noting that Article 4590i's definition of "health care provider" did not use the word "including," causing some courts to view the list as exhaustive). *But cf.* Wilkerson et al., *supra* note 8, at 658 (explaining how some plaintiffs succeeded in circumventing Article 4590i completely, but to a large extent, "the court[s] rejected efforts by plaintiffs' to circumvent the restrictions of the statute by alleging causes that fall outside the scope of Article 4590i").

39. Hull et al., *Part One*, *supra* note 19, at 5.

40. *See id.* at 10-31. The cause of the crisis culminating in 2003—and whether a crisis even existed—was, and is, hotly contested. *See id.* at 21-30 (providing an overview of the arguments on both sides). Compare D. Michael Wallach & J. Wade Birdwell, *House Bill 4 After Five Years—A Defense Perspective*, 44 THE ADVOC. (TEX.) 53, 53-69 (Fall 2008) (arguing that House Bill 4, five years after its enactment, is successfully accomplishing the legislature's goals of decreasing medical malpractice insurance rates and increasing patient access to health care in Texas), with Paula Sweeney & Jim M. Perdue Jr., *HB4—Medical Malpractice—Plaintiffs' Perspective*, 44 THE ADVOC. (TEX.) 42, 42-52 (Fall 2008) (refuting the contention that a health care crisis existed prior to 2003 and arguing that health care providers in Texas are now a "constitutionally prohibited 'special class'"), and Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DEPAUL L. REV. 675, 694 (Winter 2010) ("Contrary to the common rhetoric heard during tort reform debates, evidence suggests that the connection between the liability system and insurance markets is tenuous, which makes it unsurprising that tort reform has little to no impact on insurance markets.").

41. Hull et al., *Part One*, *supra* note 19, at 13.

42. *Id.* at 18-19 (hospitals), 20-21 (nursing homes).

their actions.⁴³ The decreasing number of health care providers, along with increasing costs of medical care, threatened Texans' access to health care.⁴⁴

When the 78th Legislative Session began in 2003, legislators sought to tackle the issue head-on.⁴⁵ The evidence presented revealed a health care system in need of reform.⁴⁶ Michael S. Hull, R. Brent Cooper, Charles W. Bailey, Donald P. Wilcox, Gavin J. Gadberry, and D. Michael Wallach (Hull et al.), in their analysis on House Bill 4 (H.B. 4), the bill that created Chapter 74, described the data presented to the legislature:

Data from the Texas State Board of Medical Examiners (BME) indicated that in 2003 over two thirds of the counties in the state did not have obstetrician-gynecologists, a majority of the counties did not have pediatricians, and almost one third of the counties did not have family physicians. Hospitals and nursing homes faced substantial increases in their liability insurance costs, which inhibited their ability to maintain or expand needed health care to the communities they served.⁴⁷

Similar to Article 4590i, the legislature declared a medical malpractice insurance crisis in Texas.⁴⁸ H.B. 4 described the crisis using the same language as Article 4590i; in short, it stated that "the crisis has had a substantial impact on the physicians and hospitals of Texas and the cost to physicians and hospitals for adequate medical malpractice insurance has dramatically risen, with cost impact on patients and the public."⁴⁹ The legislature resolved to fix the crisis with Chapter 74, which was designed to reduce the number of health care liability claims filed in Texas.⁵⁰ Additionally, the legislature sought to "make affordable medical and health care more accessible and available to the citizens of Texas."⁵¹ After scores of floor debates, Governor Rick Perry signed H.B. 4 into law in 2003.⁵² H.B. 4 called for the repeal of Article 4590i, replacing it with Chapter 74.⁵³

43. See *id.* at 21.

44. *Id.* at 10-11; Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(6)-(8), 2003 Tex. Gen. Laws 847, 884.

45. See Hull et al., *Part One*, *supra* note 19, at 2-3, 12.

46. *Id.* at 3.

47. *Id.* at 3 (internal citations omitted).

48. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(5), 2003 Tex. Gen. Laws 847, 884.

49. *Id.* § 10.11(a)(7).

50. *Id.* § 10.11(b)(1).

51. *Id.* § 10.11(b)(5).

52. Hull et al., *Part One*, *supra* note 19, at 5-7.

53. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.09, 2003 Tex. Gen. Laws 847, 864, 884. In addition to the passage of H.B. 4, the proponents of tort reform scored a victory when Texas voters amended the Texas Constitution to authorize the legislature to place damage caps on health care liability claims. Wallach & Birdwell, *supra* note 40, at 54. The amendment states, in pertinent part, the following:

Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than

Chapter 74 applies to any claim arising on or after September 1, 2003.⁵⁴ If a claim arose before September 1, 2003, Article 4590i's provisions apply.⁵⁵

Because the legislature designed Chapter 74, in part, to reduce the frequency of health care liability claims filed in Texas, Chapter 74 includes many limitations that attach to claims that fall within its ambit.⁵⁶ Three of the most powerful limitations are a shortened statute of limitations, an expert report requirement, and statutory caps on damages.⁵⁷

First, § 74.251 places a two-year statute of limitations, with a ten-year statute of repose, on health care liability claims:

(a) Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; . . . Except as herein provided this section applies to all persons regardless of minority or other legal disability.

(b) A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.⁵⁸

Second, § 74.351 mandates that, "not later than the 120th day after the date the claim was filed, [a claimant shall] serve on each party or the party's

economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability. The claim or cause of action includes a medical or health care liability claim as defined by the legislature.

TEX. CONST. art. III, § 66(b). The proponents of tort reform sought this amendment to protect Chapter 74's caps on damages from being stuck down as unconstitutional. Wallach & Birdwell, *supra* note 40, at 54. Prior to the passage of H.B. 4, the Texas Supreme Court held that Article 4590i's caps were unconstitutional as applied to common-law personal injury actions; however, the court upheld the caps as applied to statutory claims, including survival and wrongful death actions. *See id.*

54. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 23.02, 2003 Tex. Gen. Laws 847, 898-99.

55. *Id.* § 23.02(d).

56. *See id.* § 10.11(b)(1).

57. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.251 (statute of limitations), 74.351 (expert report), 74.301 (cap on noneconomic damages) (West 2011). Chapter 74 includes additional limitations not discussed in this Comment. These include a sixty-day notice to each defendant physician or health care provider before filing suit and compliance with discovery-procedure mandates. *See id.* §§ 74.051(a), 74.352(a)-(h).

58. § 74.251(a)-(b). This section, however, has been declared unconstitutional in its application to minors. *See Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex. App.—San Antonio 2005, pet. denied).

attorney one or more expert reports”⁵⁹ The expert report must provide “a fair summary of the expert’s opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.”⁶⁰ If the plaintiff fails to timely file an expert report, the defendant health care provider or physician may move the court for a dismissal with prejudice and ask for attorney’s fees and costs of court.⁶¹

Third, when Chapter 74 governs a cause of action, the damage awards are subject to caps.⁶² For noneconomic damages against a health care provider or physician, the liability is capped at “\$250,000 for each claimant, regardless of the number of defendant physicians or health care providers”⁶³ Noneconomic damages against a single health care institution are capped at \$250,000 per claimant, and noneconomic damages against multiple health care institutions cannot exceed \$500,000 per claimant.⁶⁴

Needless to say, Chapter 74’s sweeping provisions evoke a wide range of opinions. Proponents of tort reform hail H.B. 4 and Chapter 74’s provisions as the fulfillment of the “promise of healing our health care delivery system,”⁶⁵ while critics label H.B. 4 a successful “politically driven public relations campaign[] [aimed at] altering citizens’ thinking and

59. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West 2011).

60. § 74.351(r)(6).

61. § 74.351(b)(1)-(2). Even if a plaintiff files an expert report, the defendant may challenge the adequacy of the report “if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report” § 74.351(l).

62. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a) (West 2011).

63. *Id.* Critics have challenged the constitutionality of Chapter 74’s caps on noneconomic damages in a class action lawsuit filed in federal court for the Eastern District of Texas in 2008. See *Watson v. Hortman*, 2:08-CV-81-TJW-CE, 2010 WL 3566736, at *1 (E.D. Tex. Sept. 13, 2010). In his slip opinion, U.S. Magistrate Judge Charles Everingham IV held that the caps do not violate the plaintiffs’ right of access to the courts, and the caps do not violate the Fifth Amendment’s Takings Clause. See *id.* at *3, *6; Mary Alice Robbins, *Challenge to H.B. 4’s Cap on Non-Economic Damages a No-Go in Eastern District of Texas Case*, TEX. LAWYER BLOG (Sept. 15, 2010, 11:22 AM), http://texaslawyer.typepad.com/texas_lawyer_blog/2010/09/challenge-to-hb-4s-cap-on-non-economic-damages-a-no-go-in-eastern-district-of-texas-case.html (discussing the slip opinion in *Watson*). This Comment does not discuss the constitutionality and effects of statutory caps on damages. For a discussion on the negative effects that noneconomic damages caps have on Texas attorneys and medical malpractice litigation in Texas, see generally Stephen Daniels & Joanne Martin, *Texas Plaintiffs’ Practice in the Age of Tort Reform: Survival of the Fittest—It’s Even More True Now*, 51 N.Y.L. SCH. L. REV. 285 (2006-2007) (arguing that plaintiffs’ access to the courts in Texas has diminished because of the lack of willing representation, which is a function of attorneys’ inability to remain profitable when pursuing a case subject to a damages cap). But see Wallach & Birdwell, *supra* note 40, at 53-55 (arguing that Chapter 74’s damages cap, among other provisions, has positively affected the health care industry and increased patients’ access to health care in Texas).

64. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(b)-(c).

65. Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform in Texas*, 44 ADVOC. (TEX.) 9, 18 (Fall 2008).

judgments regarding tort damages, especially punitive damages.”⁶⁶ But because of Chapter 74’s requirements and limitations on claims that fall within its ambit, both plaintiffs and defendants have an interest in knowing whether the claim at issue is a health care liability claim.⁶⁷

III. SAY AHHH: A DEEPER LOOK AT ARTICLE 4590i’S AND CHAPTER 74’S DEFINITIONS OF “HEALTH CARE LIABILITY CLAIM”

At first blush, the definition of “health care liability claim” in Chapter 74 does not appear significantly different from Article 4590i’s definition.⁶⁸ Although the two definitions are similar, their differing language carries serious implications.⁶⁹ Essentially, the legislature identified the shortfalls of Article 4590i’s definition and made appropriate changes for Chapter 74.⁷⁰ The end result reveals that the legislature intended to expand the reach of Chapter 74, thereby subjecting more claims to its provisions.⁷¹

A. Article 4590i

Article 4590i defines a health care liability claim as the following:

[A] cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient’s claim or cause of action sounds in tort or contract.⁷²

This definition can be broken down into three elements.⁷³ First, the defendant must be a health care provider or physician.⁷⁴ Second, the claim must arise out of the defendant’s “treatment, lack of treatment, or some

66. Randall O. Sorrels & Benny Agosto Jr., *Effects of Punitive Damages Post HB4, 5 Years Later: Are Great Trial Lawyers Becoming Extinct In Texas?*, 44 ADVOC. (TEX.) 84, 84 (Fall 2008).

67. See Wilkerson et al., *supra* note 8, at 658 (describing the vast number of case law opinions interpreting Chapter 74’s precursor, Article 4590i). Generally, plaintiffs attempt to circumvent Chapter 74’s provisions, while defendant health care providers and physicians attempt to sweep all of the claims against them under Chapter 74’s purview. E.g. Valley Baptist Med. Ctr. v. Stradley, 210 S.W.3d 770, 772, 775-76 (Tex. App.—Corpus Christi 2006, pet. denied) (denying hospital’s claim that an injury arising from a treadmill malfunction is a health care liability claim). But see Shults v. Baptist St. Anthony’s Hosp. Corp., 166 S.W.3d 502, 504 (Tex. App.—Amarillo 2005, pet. denied) (affirming defendant health care provider’s assertion that the underlying claim was *not* a health care liability claim).

68. Compare Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (repealed 2003), with TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011).

69. See *infra* Part V.

70. See Hull et al., *Part One*, *supra* note 19, at 5.

71. See *infra* Part III.B.

72. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (repealed 2003).

73. See Marks v. St. Luke’s Episcopal Hosp., 319 S.W.3d 658, 662 (Tex. 2010) (plurality opinion).

74. *Id.*

other departure from accepted standards of medical care or health care or safety.”⁷⁵ Third, the defendant’s error, omission, or departure must proximately cause the patient’s death or injury.⁷⁶ The first two elements include terms that are further defined by the statute.⁷⁷

1. Health Care Provider or Physician

To be a health care liability claim under Article 4590i, the claim must allege a cause of action against a health care provider or physician.⁷⁸ Article 4590i defines “health care provider” as “any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.”⁷⁹ Because this definition does not employ the term “including,” many courts interpreted this definition as an exhaustive list of qualifying health care providers, which denied “many who might professionally be considered health care providers . . . the benefits of Article 4590i.”⁸⁰ The term “physician” means “a person licensed to practice medicine in the state.”⁸¹

2. Medical Care or Health Care or Safety

Once it is determined that the defendant is a health care provider or physician, the claim must allege that the defendant’s “treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety” proximately caused the plaintiff’s injury or death.⁸² Because the terms within this phrase are separated by the conjunction “or,” the phrase can be broken down further into prongs.

First, the plaintiff can claim that his or her injury resulted from the defendant’s act or omission—that is, the defendant’s “treatment” or “lack of treatment.”⁸³ Alternatively, the plaintiff can assert that the defendant’s departure from “accepted standards of medical care or health care or safety”

75. *Id.*

76. *Id.*

77. *See infra* Part II.A.1-2.

78. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (repealed 2003).

79. *Id.* § 1.03(a)(3).

80. Russell G. Thornton, *What Is a Health Care Liability Claim Under Texas Law?*, 21 BAYLOR UNIV. MED. CTR. PROCEEDINGS 342, 342 (2008), http://www.baylorhealth.edu/proceedings/21_3/21_3_thornton.pdf.

81. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(8) (repealed 2003); *see* discussion *infra* Part B.1.

82. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (repealed 2003).

83. *Id.*

caused the plaintiff's injury.⁸⁴ “Health care” means “any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.”⁸⁵ “Medical care” is the practice of medicine “performed or furnished, or which should have been performed, by one licensed to practice medicine in Texas for, to, or on behalf of a patient during the patient's care, treatment, or confinement.”⁸⁶ The word “safety” is undefined by the statute.⁸⁷

B. Chapter 74

Chapter 74 defines “health care liability claim” as the following:

“Health care liability claim” means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.⁸⁸

Like Article 4590i, Chapter 74's definition can be broken down into three elements.⁸⁹ First, the defendant must be a health care provider or physician.⁹⁰ Second, the claim must arise out of the patient's “treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care.”⁹¹ Third, the defendant's error, omission, or departure must proximately cause the claimant's death or injury.⁹²

The notable changes from Article 4590i's definition to Chapter 74's definition include the addition of the phrase “professional or administrative services directly related to health care” and the substitution of Article 4590i's word “patient” with Chapter 74's word “claimant.”⁹³ The

84. *Id.*

85. *Id.* § 1.03(a)(2).

86. *Id.* § 1.03(a)(6).

87. *But see id.* § 1.03(b) (“Any legal term or word of art used in this part, not otherwise defined in this part, shall have such meaning as is consistent with the common law.”).

88. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011) (emphasis added).

89. *See Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 327 (Tex. App.—San Antonio 2006, pet. denied); Thornton, *supra* note 80, at 342 (outlining the elements of Chapter 74's definition of “health care liability claim”).

90. § 74.001(a)(13).

91. *Id.*

92. *Id.*

93. *Compare* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (repealed 2003), with TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13).

legislature implemented these changes to address loopholes that existed within Article 4590i's definition.⁹⁴ Specifically, parties circumvented Article 4590i by pleading different legal theories that caused the parties' claims to fall outside the definition of health care liability claim.⁹⁵ Chapter 74's definition is designed to hinder these attempts.⁹⁶ These changes and additions will be explained further in the relevant sections below.

1. Health Care Provider or Physician

Like Article 4590i, the defendant in a health care liability claim under Chapter 74 must be a health care provider or physician.⁹⁷ Chapter 74 employs expansive language in its definitions of "health care provider" and "physician" so that more defendants fall within its ambit.⁹⁸ Chapter 74's definition of "health care provider" is broken down into two subparts.⁹⁹ Subpart (A) defines "health care provider" as the following:

[A]ny person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, *including*:

- (i) a registered nurse;
- (ii) a dentist;
- (iii) a podiatrist;
- (iv) a pharmacist;
- (v) a chiropractor;
- (vi) an optometrist; or
- (vii) a health care institution.¹⁰⁰

The term "health care institution" is defined by Chapter 74 as the following:

"Health care institution" includes:

- (A) an ambulatory surgical center;
- (B) an assisted living facility licensed under Chapter 247, Health and Safety Code;
- (C) an emergency medical services provider;
- (D) a health services district created under Chapter 287, Health and Safety Code;
- (E) a home and community support services agency;
- (F) a hospice;
- (G) a hospital;

94. See Hull et al., *Part Three*, *supra* note 19, at 176.

95. See sources cited *supra* note 38.

96. See Hull et al., *Part Three*, *supra* note 19, at 175-79.

97. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13).

98. See Hull et al., *Part Three*, *supra* note 19, at 182-85.

99. See § 74.001(a)(12)(A)-(B).

100. § 74.001(a)(12)(A) (emphasis added).

- (H) a hospital system;
- (I) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended;
- (J) a nursing home; or
- (K) an end stage renal disease facility licensed under Section 251.011, Health and Safety Code.¹⁰¹

By adding the term "health care institution" to the definition of "health care provider," the legislature expanded the scope of a health care liability claim.¹⁰² In addition, Chapter 74's use of the words "including" and "includes" indicates that the lists within each definition are not exhaustive.¹⁰³ Because Article 4590i's definition of "health care provider" did not use the word "including," plaintiffs attempted to re-characterize the nature of the defendant so that the defendant did not fall within any of the enumerated types of health care providers listed in Article 4590i.¹⁰⁴ If successful, the plaintiff's claim was not subject to Article 4590i's provisions.¹⁰⁵ But because of Chapter 74's expansive language, the court is not bound by an enumerated list.¹⁰⁶

Subpart (B) to the definition of "health care provider" allows Chapter 74 to reach beyond the actual health care entities and professionals themselves.¹⁰⁷ It states that a health care provider "includes: (i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and (ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship."¹⁰⁸ Article 4590i's equivalent language was much less expansive, applying only to "an officer, employee, or agent thereof acting in the course and scope of his employment."¹⁰⁹ The legislature created Chapter 74's subpart (B) and employed its expansive language so that plaintiffs could not circumvent the applicability of Chapter 74's provisions by directing lawsuits at specific individuals or entities that did not fall within the definition of a "health care provider."¹¹⁰

101. § 74.001(a)(11)(A)-(K).

102. Hull et al., *Part Three*, *supra* note 19, at 182.

103. *See id.*; Christus Health v. Beal, 240 S.W.3d 282, 286 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

104. *See* Hull et al., *Part Three*, *supra* note 19, at 182.

105. *See* Wilkerson et al., *supra* note 8, at 678-79.

106. *See* Beal, 240 S.W.3d at 286.

107. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(B) (West 2011).

108. *Id.*

109. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(3), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003).

110. *See* Hull et al., *Part Three*, *supra* note 19, at 182-83.

The legislature also added language to the definition of the term “physician,” which is defined as the following:

“Physician” means:

- (A) an individual licensed to practice medicine in this state;
- (B) *a professional association organized under the Texas Professional Association Act (Article 1528f, Vernon’s Texas Civil Statutes) by an individual physician or group of physicians;*
- (C) *a partnership or limited liability partnership formed by a group of physicians;*
- (D) *a nonprofit health corporation certified under Section 162.001, Occupations Code; or*
- (E) *a company formed by a group of physicians under the Texas Limited Liability Company Act (Article 1528n, Vernon’s Texas Civil Statutes).*¹¹¹

Like Chapter 74’s definition of “health care provider,” the legislature included additional language in the definition of “physician” so that more defendants fall within its ambit; in turn, more claims fall within Chapter 74’s definition of “health care liability claim,” which triggers the application of Chapter 74’s provisions to the claim.¹¹² During debate about the definition, the House considered keeping Chapter 74’s definition of physician the same as Article 4590i’s definition, which would have excluded partnerships and other entities from Chapter 74’s reach.¹¹³ The amendment limiting the definition, however, was voted down.¹¹⁴

2. Claimant

Under Chapter 74, only a “claimant” can bring a health care liability claim.¹¹⁵ Chapter 74 defines “claimant” as “a person, including a decedent’s estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.”¹¹⁶ Chapter 74’s inclusion of the word “claimant” is distinguishable from Article 4590i’s use of the word “patient.”¹¹⁷ In their commentary on the enactment of Chapter 74, Michael S. Hull et al. identified the difference by stating the following:

111. § 74.001(a)(23)(A)–(E) (emphasis added).

112. See Hull et al., *Part Three*, *supra* note 19, at 184.

113. *Id.* at 185.

114. *Id.*

115. See § 74.001(a)(13).

116. § 74.001(a)(2).

117. See Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003).

In cases that involved claims brought pursuant to Chapter 74’s predecessor, Article 4590i, courts calculated damages on a per defendant basis. Now, the limitations on damages found in Section 74.301, capping noneconomic damages, and 74.303, capping damages in wrongful death and survival actions, each apply on a per claimant basis. As a result, the caps effectively apply on a per occurrence basis. Most importantly, the last sentence of the definition of “claimant” clearly encompasses the claims of all potential plaintiffs claiming damages for a particular injury. Thus, any attempts to stack or multiply the claims by the number of potential plaintiffs or defendants should be precluded.¹¹⁸

Thus, it is clear that the legislature substituted “patient” with “claimant” so that Chapter 74’s damages caps could be more effective at limiting defendant health care providers’ liability.¹¹⁹

Additionally, at least one court has held that Chapter 74’s substitution of the word “patient” with “claimant” demonstrates the legislature’s intent to expand Chapter 74’s reach beyond just patients.¹²⁰ In *Wilson N. Jones Memorial Hospital v. Ammons*, the Fifth District Court of Appeals in Dallas held that “[p]atient” is not included within the definition of “claimant” in [Chapter 74], as it was in [Article 4590i].”¹²¹ It concluded further that because the legislature used the word “including” in defining “claimant,” the legislature did not intend to “limit who can be claimants under [C]hapter 74 to a particular group.”¹²²

3. Medical Care, or Health Care, or Safety or Professional or Administrative Services Directly Related to Health Care

Chapter 74’s definition of the terms “medical care” and “health care” are the same as Article 4590i’s definitions.¹²³ Like Article 4590i, the word “safety” is undefined.¹²⁴ Following the word “safety” is the phrase “professional or administrative services.”¹²⁵ This phrase is defined in Chapter 74 as “those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician’s or health care provider’s license, accreditation status, or certification to

118. Hull et al., *Part Three*, *supra* note 19, at 178.

119. *See id.*

120. *See Wilson N. Jones Mem’l Hosp. v. Ammons*, 266 S.W.3d 51, 60-62 (Tex. App.—Dallas 2008, pet. denied).

121. *Id.* at 61.

122. *Id.*

123. *Compare* Act of May 30, 1977, 65th Leg., R.S., ch. 817, §§ 1.03(a)(6), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (medical care), 1.03(a)(2) (health care), *with* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001(a)(19) (medical care), 74.001(a)(10) (health care) (West 2011).

124. *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) (“Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.”).

125. § 74.001(a)(13).

participate in state or federal health care programs.”¹²⁶ The legislature also added the phrase “directly related to health care.”¹²⁷ It is this phrase that has caused the most confusion among courts about the interpretation of Chapter 74’s definition of “health care liability claim.”¹²⁸

IV. DIAGNOSIS: THE EMERGENCE OF THE “SAFETY AMBIGUITY”

When analyzing whether Chapter 74 applies to a claim, the determination generally turns on the court’s interpretation of the phrase “other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care”—or simply put, the “departure phrase.”¹²⁹ To aid in the interpretation of the departure phrase, Chapter 74 includes definitions for the terms “medical care,” “health care,” and “professional or administrative services.”¹³⁰ Although it does not define the word “safety,” Texas courts have generally agreed that safety means “secure from danger.”¹³¹ Yet, even with specific definitions provided, confusion remains about how claims should be analyzed when they implicate the safety prong of the departure phrase.¹³²

Specifically, when one party asserts that the underlying claim of the lawsuit alleges a departure from accepted standards of safety, the dilemma reduces to the following issue: To fall within the definition of “health care liability claim,” must a claim assert a departure from accepted standards of *safety in general* or *safety as the term relates to the provision of health care*?¹³³ For the remainder of this Comment, this dilemma is referred to as the “safety ambiguity.”

A representation of the safety ambiguity can be illustrated by breaking down the departure phrase in two different ways. First, a broad reading of the safety ambiguity can be illustrated the following way:

126. § 74.001(a)(24).

127. See § 74.001(a)(13).

128. See discussion *infra* Part IV.

129. E.g., *Dual D Healthcare Operations, Inc., Inc. v. Kenyon*, 291 S.W.3d 486, 488-89 (Tex. App.—Dallas 2009, no pet.).

130. See *infra* Part III.B.3.

131. E.g., *Diversicare Gen. Partner v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005). Like Article 4590i, Chapter 74 includes a provision for undefined terms. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) (West 2011) (“Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.”).

132. *Compare* *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 774-75 (Tex. App.—Corpus Christi 2006, pet. denied) (holding that “directly related to health care” modifies “safety” within the definition of health care liability claim), *with* *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 328 (Tex. App.—San Antonio 2006, pet. denied) (“[A] claim may be a ‘health care liability claim’ under the safety definition even if it does not ‘directly relate[] to healthcare.’”).

133. See *Christus Health v. Beal*, 240 S.W.3d 282, 288-89 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Stradley*, 210 S.W.3d at 774-75.

Other claimed departure from accepted standards of:

- (a) medical care, or
- (b) health care, or
- (c) safety or
- (d) professional or administrative services directly related to health care.

Second, a narrow reading of the safety ambiguity can be illustrated the following way:

Other claimed departure from accepted standards of:

- (a) medical care, or
- (b) health care, or
- (c) safety or professional or administrative services directly related to health care.

These representations reveal that the resolution of the safety ambiguity turns on the issue of whether “directly related to health care” only modifies “professional or administrative services” or whether it modifies both “safety” and “professional or administrative services.”¹³⁴ Because the Texas Supreme Court has yet to rule on the issue, the safety ambiguity is creating problems for potential plaintiffs and health care providers.¹³⁵

V. THE SIDE EFFECTS OF UNCERTAINTY: HOW THE “SAFETY AMBIGUITY” CAN CAUSE PROBLEMS THAT CHAPTER 74 WAS DESIGNED TO PREVENT

The analysis involved in distinguishing a health care liability claim from a common-law negligence claim sometimes turns on excruciatingly small details.¹³⁶ These small distinctions, however, carry significant implications. The expert report requirement and the statutory damage caps that govern health care liability claims do not apply in general negligence claims.¹³⁷ Because of the added cost of filing an expert report, along with the knowledge that any favorable jury verdict is subject to a cap, plaintiffs generally attempt to circumvent Chapter 74’s applicability by asserting that their claim does not fall within the definition of “health care liability

134. *Omaha Healthcare Ctr., L.L.C. v. Johnson*, 246 S.W.3d 278, 281 (Tex. App.—Texarkana 2008, pet. filed).

135. *See infra* Part V.

136. *See supra* text accompanying note 2.

137. *See, e.g., Omaha*, 246 S.W.3d at 287 (holding that plaintiff’s “claims are not safety claims directly related to health care . . . and not subject to the expert report requirements . . .”); *Stradley*, 210 S.W.3d at 775-76 (holding that plaintiff’s claim was premises liability claim and “do[es] not constitute [a] health care liability claim[] under the statute”).

claim.”¹³⁸ Alternatively, defendant health care providers generally attempt to sweep all claims against them within Chapter 74’s purview.¹³⁹ By defending claims within the confines of Chapter 74’s provisions, health care providers and their insurers benefit because they know that their exposure to liability is limited.¹⁴⁰ Because of the implications that accompany the applicability of Chapter 74, plaintiffs and defendants have a strong interest in knowing the reach of the definition of “health care liability claim.”¹⁴¹

When considering the interests from both sides, the problem of the safety ambiguity magnifies further. For health care providers and physicians, the safety ambiguity can lead to increased costs, which was one of the very problems Chapter 74 was designed to prevent.¹⁴² Without a clear definition and consistent interpretation of “health care liability claim,” insurers cannot fully identify their exposure to risk.¹⁴³ Because insurance premiums “are a function of calculated risk,” it follows that the uncertainty of Chapter 74’s reach will increase insurers’ risk, which in turn will lead to higher premiums owed by health care providers.¹⁴⁴ In addition to addressing insurance rate issues, the legislature also intended for Chapter 74 to “make affordable medical and health care more accessible and available to the citizens of Texas.”¹⁴⁵ Because the safety ambiguity is currently a source of much litigation, it is reasonable to assume that health care providers and their insurers are spending money in court that could be spent in other areas.¹⁴⁶ Specifically, the more money spent on litigation translates into less money that health care providers can spend on their operations, staff, and overall care.¹⁴⁷

138. See Wilkerson et al., *supra* note 8, at 671 (labeling the provisions of Chapter 74’s precursor, Article 4590i, “onerous” and explaining that “plaintiffs’ counsel have made numerous attempts to circumvent Article 4590i”). But see Shults v. Baptist St. Anthony’s Hosp. Corp., 166 S.W.3d 502, 504 (Tex. App.—Amarillo 2005, pet. denied) (affirming defendant health care provider’s assertion that the underlying claim was *not* a health care liability claim).

139. See, e.g., *Stradley*, 210 S.W.3d at 776 (defendant health care provider attempted to argue that an injury arising out of a treadmill malfunction was a health care liability claim, to which the court labeled “absurd”).

140. See Hull et al., *Part One*, *supra* note 19, at 7 (discussing the early positive effects of Chapter 74 on the insurance industry in Texas).

141. See Thornton, *supra* note 80, at 342 (discussing the implications for both sides and, because of the interests involved, predicting that Chapter 74 will continue to be a source of legislative debate and litigation).

142. See Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(4), 2003 Tex. Gen. Laws 847, 884 (stating that one of the goals of Chapter 74 is to “make available to physicians, hospitals, and other health care providers protection against potential liability through the insurance mechanism at reasonably affordable rates”).

143. See *In re Tex. Ass’n of Sch. Bds., Inc.*, 169 S.W.3d 653, 659 (Tex. 2005).

144. *Id.*

145. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(4), 2003 Tex. Gen. Laws 847, 884.

146. See sources cited *infra* note 147.

147. See Wallach & Birdwell, *supra* note 40, at 53-54 (describing how Chapter 74, five years after its creation, has decreased medical malpractice insurance rates, which has given health care providers in

Turning to the other side, the safety ambiguity leaves plaintiffs unsure about the merit of their potential claim. In weighing the costs and benefits of bringing an action that may or may not be subject to Chapter 74, a plaintiff's attorney may conclude that bringing the claim as a common-law-negligence cause of action is advisable, but bringing the claim under Chapter 74 is not.¹⁴⁸ Without an unambiguous definition of “health care liability claim” or a predictable expectation of how a court will interpret the definition, the plaintiff's attorney cannot advise the client with certainty how the claim will be identified.¹⁴⁹ This could cause plaintiffs with meritorious claims to forego the risk and decide against a lawsuit altogether.¹⁵⁰ The end result is the aggravation of another one of the problems that Chapter 74 was designed to prevent—that a claimant's rights will not be unduly restricted “any more than necessary to deal with the crisis.”¹⁵¹

In sum, the safety ambiguity has the ability to thwart many of the goals envisioned by the legislature when it created Chapter 74. In the long run, without clarification of the safety ambiguity, Chapter 74 will negatively impact all of the interests involved—that is, the interests of health care providers, physicians, insurance companies, patients, and potential plaintiffs.

Texas the ability to “expand their services to provide better patient care”). To be sure, Wallach and Birdwell concluded that Chapter 74 has drastically decreased medical malpractice rates in spite of the presence of the safety ambiguity. *See id.* But the upshot of the argument is that if the safety ambiguity no longer existed as a source of contention during litigation, then health care providers would have even more resources at their disposal to “make affordable medical and health care more accessible and available to the citizens of Texas.” Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(4), 2003 Tex. Gen. Laws 847, 884.

148. *See Daniels & Martin, supra* note 63, at 298-319 (describing the effect of tort reform on plaintiffs' attorneys' business model).

149. *See Sorrels & Agosto Jr., supra* note 66, at 86 (describing how Chapter 74's damages cap “has forced many attorneys to substantially alter the way they evaluate and accept their cases”).

150. *See id.* at 86-87 (describing the decreasing number of cases pursued by plaintiffs in Texas). Critics attribute the decrease in the number of claims filed by plaintiffs to plaintiffs' attorneys' economics—that is, because of Chapter 74's limitations on punitive damages and because of the costs of pursuing a claim subject to Chapter 74, it is simply economically unsound to pursue health care liability claims. *E.g., id.* This assertion illustrates the point that plaintiffs' attorneys who are unsure about whether a claim is subject to Chapter 74 might err on the side of declining representation simply because it is not economically feasible to take the risk with hopes that the claim will fall outside Chapter 74's ambit. *See Daniels & Martin, supra* note 63, at 316-20 (arguing that, because plaintiffs' attorneys in Texas can no longer profit from medical malpractice cases, plaintiffs' access to the courts is diminished). *But see Nixon, supra* note 65, at 15 (“No one is precluded from filing a lawsuit. The courts of the state are still open.”).

151. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(3), 2003 Tex. Gen. Laws 847, 884.

VI. SEEKING A SECOND OPINION: HOW THE TEXAS SUPREME COURT'S
INTERPRETATION OF ARTICLE 4590I'S "SAFETY AMBIGUITY" OFFERS
GUIDANCE FOR THE INTERPRETATION OF CHAPTER 74'S "SAFETY
AMBIGUITY"

The courts in Texas have had plenty of opportunities to hone their analysis skills on health care liability claims, or in the alternative, claims that purport to be health care liability claims.¹⁵² Case law and statutory text guide courts in their endeavor to construe a statute.¹⁵³ Additionally, in the area of health care liability claims, the Texas Supreme Court has weighed in, offering its analysis and interpretation of Article 4590i's safety ambiguity.¹⁵⁴

A. Statutory Construction

When construing a statute, courts in Texas are guided by settled common-law and statutory principles of interpretation. Courts "look first to the plain, simple, and unambiguous language of the statute"¹⁵⁵ to "try to give effect to legislative intent."¹⁵⁶ The Texas Government Code offers guidance as well. Not only does it direct courts to "diligently attempt to ascertain legislative intent,"¹⁵⁷ but it urges courts to be mindful of reading the words and phrases in context and in accordance with the rules of grammar and common usage.¹⁵⁸ Additionally, courts may consider "former statutory provisions, including laws on the same or similar subjects."¹⁵⁹ This guidepost is especially helpful when construing Chapter 74 because of the existence of its precursor, Article 4590i.¹⁶⁰ The Texas Supreme Court has ruled on Article 4590i's safety ambiguity, but questions remain about the ruling's effect on Chapter 74.¹⁶¹

152. See Wilkerson et al., *supra* note 8, at 658 (noting the vast number of opinions addressing Chapter 74's precursor, Article 4590i).

153. See *infra* Part VI.A.

154. See *infra* Part VI.B.

155. Omaha Healthcare Ctr. v. Johnson, 246 S.W.3d 278, 282 (Tex. App.—Texarkana 2008, pet. filed) (citing City of San Antonio v. Tex. Attorney Gen., 851 S.W.2d 946, 951 (Tex. App.—Austin 1993, writ denied)).

156. *Id.* (quoting Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 865 (Tex. 1999)).

157. TEX. GOV'T CODE ANN. § 312.005 (West 2005).

158. *Id.* § 311.011(a).

159. *Id.* § 311.023(4).

160. Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039-64 (repealed 2003).

161. See *infra* Part VII.

B. Texas Supreme Court Weighs In

The Texas Supreme Court has opined that Article 4590i's safety ambiguity should be narrowly interpreted to mean safety as the term relates to the provision of health care.¹⁶² This reasoning was first espoused in *Diversicare General Partner, Inc. v. Rubio* and later clarified in *Marks v. St. Luke's Episcopal Hospital*.¹⁶³ Although Article 4590i's definition of "health care liability claim" is different from Chapter 74's, the court's analysis can be useful in analyzing the relevant factors to be considered when construing Chapter 74's safety ambiguity.

In *Diversicare*, the court considered whether a claim against a nursing home for failure to prevent one of its residents from sexually assaulting another resident was a health care liability claim under Article 4590i.¹⁶⁴ The court determined that the nursing home's decisions about resident safety constituted health care, and thus, the underlying claim asserted a departure from accepted standards of health care.¹⁶⁵ Before concluding its opinion, however, the court briefly mentioned that the claims may also "be characterized as departures from accepted standards of safety."¹⁶⁶ The court stated that the legislature used the word "safety" in the definition of "health care liability claim" to extend the reach of Article 4590i "beyond what it would be if it only covered medical and health care."¹⁶⁷ The court clarified the extent of that reach five years later in *Marks*.¹⁶⁸

In *Marks*, the plaintiff was recovering from back surgery in a hospital bed.¹⁶⁹ As he attempted to stand up, he pushed off on the bed's footboard, which gave way under his weight.¹⁷⁰ He brought suit against the hospital for the injuries he sustained after falling to the ground.¹⁷¹ In addressing the safety ambiguity, the Texas Supreme Court issued a plurality opinion, authored by Justice Medina, holding that "standards of safety must be construed in light of the other standards of medical and health care, standards that are directly related to the patient's care and treatment."¹⁷² Justice Medina reached this conclusion after determining that the legislature's purpose in enacting Article 4590i was to address the medical malpractice crisis in Texas, stating that "[t]his concern pervades the statute

162. See *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010) (plurality opinion).

163. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005); *Marks*, 319 S.W.3d at 664.

164. *Diversicare*, 185 S.W.3d at 845.

165. *Id.* at 853.

166. *Id.* at 855.

167. *Id.*

168. See *Marks*, 319 S.W.3d at 664.

169. *Id.* at 660.

170. *Id.*

171. *Id.*

172. *Id.* at 664.

which is replete with references to medical liability, health care, and malpractice, all of which implicate medical or health care judgments made by professionals.”¹⁷³ Justice Medina concluded that the safety ambiguity must directly relate to health care by reasoning that the legislature “could not have intended that standards of safety encompass all negligent injuries to patients.”¹⁷⁴ The court concluded that the claim fell within Article 4590i’s ambit, holding that the injury resulted from a failure of a piece of medical equipment provided for Marks’s recovery.¹⁷⁵ As such, it reasoned that “[m]edical equipment specific to a particular patient’s care or treatment is an integral and inseparable part of the health care services provided.”¹⁷⁶

The court’s holdings in *Diversicare* and *Marks* are instructive insofar as they shed light on the relevant factors that lower courts should consider when deciding whether to broadly or narrowly interpret the safety ambiguity. The court based its holding in each case on what can be labeled broadly as legislative intent.¹⁷⁷ Shifting this reasoning to Chapter 74, the relevant analysis appears simple, but it is filled with complexity: What was the legislature’s intent behind Chapter 74, and how can comparing Article 4590i and Chapter 74 shed light on how the legislature intended for the safety ambiguity to be read?

VII. LEGISLATIVE INTENT OR A DOCTOR’S HANDWRITING?: WHY THE LEGISLATURE’S INTENT BEHIND CHAPTER 74’S DEFINITION OF “HEALTH CARE LIABILITY CLAIM” IS UNCLEAR

Following the Texas Supreme Court’s lead, the Texas appellate courts that have interpreted Chapter 74’s safety ambiguity have based their reasoning on legislative intent.¹⁷⁸ Most of these courts have determined that, within the definition of “health care liability claim,” the phrase “directly related to health care” modifies the term “safety.”¹⁷⁹ This interpretation rests on two conclusions. The first conclusion is that the legislature could not have intended for Chapter 74 to reach as far as *safety*

173. *Id.* at 663.

174. *Id.*

175. *Id.*

176. *Id.* at 664.

177. *See Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005); *Marks*, 319 S.W.3d at 664.

178. *E.g.*, *Omaha Healthcare Ctr., L.L.C. v. Johnson*, 246 S.W.3d 278, 282 (Tex. App.—Texarkana 2008, pet. filed)

179. *See St. David’s Healthcare P’ship v. Esparza*, 315 S.W.3d 601, 605 (Tex. App.—Austin 2010, pet. filed); *Dual D Healthcare Operations, Inc. v. Kenyon*, 291 S.W.3d 486, 489-90 (Tex. App.—Dallas 2009, no pet.); *Omaha*, 246 S.W.3d at 281-84; *Christus Health v. Beal*, 240 S.W.3d 282, 287-89 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 774-75 (Tex. App.—Corpus Christi 2006, pet. denied). *But see Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 328 (Tex. App.—San Antonio 2006, pet. denied) (“[A] claim may be a ‘health care liability claim’ under the safety definition even if it does not ‘directly relate[] to healthcare.’”).

in general would allow it to reach.¹⁸⁰ The second conclusion is based on the addition of the phrase "directly related to health care" to Chapter 74's definition of "health care liability claim."¹⁸¹ But, upon closer inspection of these two conclusions, it is not so clear that the legislature intended to encumber the word "safety" with "directly related to health care" within its definition of "health care liability claim."¹⁸²

A. Did the Legislature Intend for Chapter 74 to Have a Broad or Narrow Reach?

The first appellate court to interpret Chapter 74's safety ambiguity was the Thirteenth Court of Appeals in Corpus Christi with *Valley Baptist Medical Center v. Stradley*.¹⁸³ In *Stradley*, the plaintiff, Margaret Stradley, sought medical assistance for weight, hypertension, and mobility issues she had been experiencing.¹⁸⁴ Her doctor "prescribed" her to exercise on a treadmill at the hospital's wellness center.¹⁸⁵ While Stradley was walking on the treadmill, it accelerated rapidly.¹⁸⁶ Although Stradley pulled the emergency stop cord, it did not stop.¹⁸⁷ She sued the hospital for the injuries she sustained from her fall from the treadmill.¹⁸⁸ The hospital contended that Chapter 74 applied to Stradley's claim because the word "safety" within its definition of "health care liability claim" means that "every safety claim against a health care provider or physician [is a] health care liability claim."¹⁸⁹ The court disagreed, holding that, within the definition of "health care liability claim," the phrase "directly related to health care" modifies the word "safety."¹⁹⁰ The court concluded that the legislature could not have meant for all claims against a health care provider to fall within Chapter 74's ambit.¹⁹¹ It stated, "holding otherwise and finding all safety claims against health care providers or physicians to be health care liability claims regardless of whether they directly relate to health care, would be an arbitrary and legislatively unauthorized expansion of the health care liability statute."¹⁹² Most of the appellate courts that have

180. *E.g., Stradley*, 210 S.W.3d at 775; see discussion *infra* Part VII.A.

181. *E.g., Beal*, 240 S.W.3d at 289; see discussion *infra* Part VII.B.

182. See discussion *infra* Parts VII.A-B.

183. *Stradley*, 210 S.W.3d at 770.

184. *Id.* at 772.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 773.

190. *Id.* at 775.

191. *Id.*

192. *Id.*

interpreted Chapter 74's safety ambiguity have followed the *Stradley* court's reasoning.¹⁹³

While the *Stradley* court's conclusion about the legislature's intent is consistent with the Texas Supreme Court's reasoning in *Diversicare* and *Marks*, it may be too narrow. This is because the *Stradley* court did not consider the events leading up to the enactment of Chapter 74 and the reasons for Chapter 74's modified definitions. Specifically, it is clear that the legislature modified the language within the definition of "health care liability claim" so that Chapter 74 would apply to more claims.¹⁹⁴ For example, as noted earlier, the legislature expanded the term "health care provider" by employing the word "including" in its definition, thereby avoiding an interpretation that the list of health care entities described was an exhaustive list.¹⁹⁵ Additionally, one appellate court in Texas has concluded that the legislature intended for Chapter 74 to apply to more than just causes of actions brought by patients.¹⁹⁶ By using the word "claimant" instead of Article 4590i's word "patient," the Dallas appellate court read Chapter 74 to expand its reach to cover visitors of patients.¹⁹⁷ By looking at Chapter 74 from this perspective, it is not unreasonable to conclude that the legislature *did* intend for "all safety claims against health care providers or physicians to be health care liability claims."¹⁹⁸ In fact, because the legislature enacted Chapter 74's provisions to decrease the costs for health care providers in order that those costs not pass to patients, it follows that more claims subject to Chapter 74 translates into lower costs to health care providers, and in turn, patients.¹⁹⁹ This would seem aligned with one of the legislature's stated goals behind Chapter 74: to "make affordable medical and health care more accessible and available to the citizens of Texas."²⁰⁰

Furthermore, proponents of tort reform have lauded the success of Chapter 74, citing decreasing medical malpractice insurance rates and increasing availability of doctors as indications that Chapter 74's provisions are working according to the legislature's design.²⁰¹ If these accolades have

193. See sources cited *supra* note 179.

194. See discussion *supra* Part III.B.

195. See discussion *supra* Part III.B.1.

196. See source cited *supra* notes 120-22.

197. See source cited *supra* notes 120-22.

198. See *Diversicare Gen. Partner v. Rubio*, 185 S.W.3d 842, 861 n.4 (Tex. 2005) (Jefferson, C.J., concurring) (reading Chapter 74's definition of health care liability claim as "requiring only that claims for 'professional or administrative services' be 'directly related to health care'").

199. Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(8), 2003 Tex. Gen. Laws 847, 884.

200. *Id.* § 10.11(b)(5).

201. See generally Wallach & Birdwell, *supra* note 40, at 53-69 (arguing that H.B. 4, five years after its enactment, is successfully accomplishing the legislature's goals of decreasing medical malpractice insurance rates and increasing patient access to health care in Texas). But see Sweeney & Perdue Jr., *supra* note 40, at 50-52 (contending that no "crisis" existed prior to H.B. 4, and after the passage of H.B. 4, the number of doctors and availability of health care to Texans did not increase).

merit, one logical conclusion is that the more claims subject to Chapter 74, the more likely the legislature's intent behind Chapter 74 will prevail. This reasoning is certainly in line with the legislature's goal of addressing the "medical malpractice insurance crisis," and it stands contrary to the *Stradley* court's conclusion that interpreting the safety ambiguity to mean safety in general is an "arbitrary and legislatively unauthorized expansion of the health care liability statute."²⁰²

The argument against this premise was outlined by then-Texas Supreme Court Justice Harriet O'Neill in her dissent in *Diversicare*.²⁰³ In analyzing Article 4590i's reach, she cautioned that an overly broad interpretation—that is, interpreting the safety ambiguity to mean safety in general—would thwart the legislature's goal of reducing medical malpractice insurance rates.²⁰⁴ This is because health care providers carry two types of insurance policies.²⁰⁵ The first type is a general liability policy designed to cover ordinary negligence.²⁰⁶ The second type is a malpractice policy, which covers "obligations arising from the rendering of professional services."²⁰⁷ Thus, Justice O'Neill reasoned that if a claim alleges a breach of accepted standards of care for health care providers, then the malpractice policy, rather than the general insurance policy, applies.²⁰⁸ Because of this outcome, "malpractice insurers benefit when a claim is characterized as ordinary negligence, and general-liability insurers benefit when a claim is characterized as a health care liability claim."²⁰⁹ Based on these findings, Justice O'Neill described the problem that arises:

Consequently, the adoption of an overly broad interpretation of "health care liability claim" could also hinder the Legislature's goal of ensuring that medical malpractice insurance is available at a reasonable cost: if courts sweep even ordinary negligence claims into the ambit of [Article 4590i], then malpractice insurers may end up covering more of those

202. See Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(5), 2003 Tex. Gen. Laws 847, 884; *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 775 (Tex. App.—Corpus Christi 2006, pet. denied). Certainly, some critics of the 2003 tort reform measures would agree—albeit sarcastically—that the legislature, in fact, intended for the safety ambiguity to have a broad, sweeping effect. See *Sweeney & Perdue Jr., supra* note 40, at 42 ("In 2003 the combined forces of the insurance, medical and tort reform lobbies succeeded in destroying access to the courts for large segments of the Texas population. The Republican hegemony, with control of the offices of Speaker of the House, Lt. Governor and Governor, prevented any meaningful dialogue or compromise on the enactment of all of the industry's wishes."). But see *Nixon, supra* note 65, at 15 (describing the extensive legislative history behind H.B. 4 and asserting that "[h]ouse members from both parties supported the strong reforms and passed HB4").

203. *Diversicare*, 185 S.W.3d at 861 (O'Neill, J., dissenting).

204. *Id.* at 862.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

claims. Malpractice insurance rates would then continue to rise as those insurance policies are required to cover claims that were not contemplated under the insurance contracts.²¹⁰

While Justice O'Neill's analysis is correct in that medical malpractice rates may increase if the "health care liability claim" definition is construed broadly, her conclusion is based on a flawed assumption. The problem with Justice O'Neill's reasoning is that it is based on the assumption that when medical malpractice insurance rates increase, general liability insurance rates remain the same. But if more claims are swept within the definition of "health care liability claim," then fewer claims will fall under the general liability insurance policy.²¹¹ Fewer claims mean that general liability insurance carriers are exposed to less risk, which can in turn lead to lower insurance premiums.²¹² The net result, then, is that medical malpractice insurance premiums may increase, but they will be offset by decreasing general liability insurance premiums.²¹³ Thus, health care providers are no worse off financially, which means the savings enjoyed from Chapter 74's protections will continue to pass on to patients in Texas.²¹⁴

The competing theories about the scope of the legislature's intent reveal the complexity involved in interpreting ambiguous statutory language. In addressing this complexity as it applies to the safety ambiguity, the Texas appellate courts have not based their interpretations solely on the legislature's purpose in enacting Chapter 74.²¹⁵ They have also gleaned the legislature's intent by comparing Article 4590i and Chapter 74.²¹⁶

B. Changes from Article 4590i to Chapter 74 as an Indication of Legislative Intent

Because of the uncertainty associated with speculating about the legislature's intent when it enacted Chapter 74, some Texas appellate courts have found another way to glean legislative intent: tracking the changes from Article 4590i to Chapter 74.²¹⁷ Indeed, the Code Construction Act

210. *Id.* at 863.

211. *See id.* at 862.

212. *See In re Tex. Ass'n of Sch. Bds., Inc.*, 169 S.W.3d 653, 659 (Tex. 2005) (stating that insurance premiums "are a function of calculated risk").

213. *See Diversicare*, 185 S.W.3d at 862 (O'Neill, J., dissenting).

214. *See Medical Malpractice & Tort Reform Act of 2003*, 78th Leg., R.S., ch. 204, § 10.11(a)(6)-(9), 2003 Tex. Gen. Laws 847, 884.

215. *E.g.*, *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 775 (Tex. App.—Corpus Christi 2006, pet. denied) (analyzing the grammar of Chapter 74's definition of "health care liability claim").

216. *E.g.*, *Christus Health v. Beal*, 240 S.W.3d 282, 287-89 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (discussing the differences in the safety ambiguity between Article 4590i and Chapter 74).

217. *See Omaha Healthcare Ctr. v. Johnson*, 246 S.W.3d 278, 281-84 (Tex. App.—Texarkana 2008, pet. filed).

encourages this practice, stating, "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . common law or former statutory provisions, including laws on the same or similar subjects."²¹⁸

Applying this analysis to the safety ambiguity, Texas courts have been quick to point out Chapter 74's added phrase, "directly related to health care," as an indication that the legislature intended for "safety" to be modified by "directly related to health care."²¹⁹ In fact, Justice O'Neill, in her dissent in *Diversicare*, cited Chapter 74's added language to justify her position that Article 4590i's safety ambiguity should be narrowly interpreted.²²⁰ In reference to Chapter 74, she stated, "[w]hen [the legislature] recently amended the definition of 'health care liability claim,' [it] clarified that claims falling under the statute must relate to the actual provision of health care."²²¹ But Chief Justice Jefferson was unconvinced with Justice O'Neill's conclusion.²²² In a footnote in his concurrence in *Diversicare*, he stated that, if Justice O'Neill's reasoning were adopted, then the phrase "directly related to health care" applies to the entire preceding passage—that is "accepted standards of medical care, or health care, or safety."²²³ Based on this reading, a health care liability claim would include an assertion of a "departure from accepted standards of . . . health care . . . directly related to health care."²²⁴ Chief Justice Jefferson concluded, "[t]o avoid this redundancy, I read the amended statute as requiring only that claims of 'professional or administrative services' be 'directly related to health care.'"²²⁵

The disagreement between Chief Justice Jefferson and Justice O'Neill represents the fundamental dilemma that arises when considering what the legislature intended when it included additional language to Chapter 74's definition. Did the court add "directly related to health care" to modify only "professional or administrative services" or "safety or professional or administrative services"?²²⁶

While it may sound redundant, the argument favoring the notion that the legislature intended for "directly related to health care" to modify only "professional or administrative services" turns on the very fact that the legislature sought to bring in "professional or administrative services"

218. TEX. GOV'T CODE ANN. § 311.023(4) (West 2005).

219. See sources cited *supra* note 179.

220. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 867 (Tex. 2005) (O'Neill, J., dissenting).

221. *Id.*

222. See *id.* at 861 n.4 (Jefferson, C.J., concurring).

223. *Id.*

224. *Id.*

225. *Id.*

226. See *Christus Health v. Beal*, 240 S.W.3d 282, 287-89 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (discussing the differences in the safety ambiguity between Article 4590i and Chapter 74).

within the Chapter 74's ambit.²²⁷ The legislature's desire to add the phrase into the definition arose out of an appellate court ruling that held that Article 4590i did not apply when a claim asserted that a hospital negligently credentialed a physician.²²⁸ Because the legislature did not want this holding to extend to claims for negligently staffing or equipping a facility—that is, the legislature did not want these claims to fall outside the definition of “health care liability claim”—the legislature added the “professional or administrative services” phrase to Chapter 74's definition.²²⁹ Michael S. Hull et al. explained how the legislature wrestled with this term:

The House version of health care liability claim included “professional or administrative” decisions made by a health care provider, such as policies on facility staffing or utilization of equipment; it also provided that an alleged action or omission would fall within the new law if it was “arising out of or related to” the treatment of a patient. The Senate version removed both of the new phrases: “professional or administrative services” and “arising out of or related to.” In Conference Committee, however, the phrase “professional or administrative services” was added back, *but was narrowed in scope, affecting only those services “directly related to health care.”*²³⁰

Thus, it is clear that, when the legislature contemplated adding the phrase “directly related to health care,” it did so only within the context of the phrase “professional or administrative services.”²³¹ Based on these facts, it follows that absent the addition of “professional or administrative services,” the phrase “directly related to health care” would not have been similarly added. Thus, the legislature had no intention of applying the phrase “directly related to health care” to the word “safety” within the definition.²³²

On the other hand, the argument that the legislature intended for “directly related to health care” to apply to “safety” is based on the rules of grammar.²³³ In the transition from Article 4590i to Chapter 74, the legislature not only included additional words, it also included additional punctuation—specifically, commas.²³⁴ The Court of Appeals at Texarkana tracked these changes in *Omaha Healthcare Center, L.L.C. v. Johnson* and concluded that the inclusion and placement of the commas indicate the

227. See Hull et al., *Part Three*, *supra* note 19, at 176-77.

228. See *Rose v. Garland Cmty. Hosp.*, 87 S.W.3d 188, 194 (Tex. App.—Dallas 2002), *rev'd*, 156 S.W.3d 541 (Tex. 2004).

229. See Hull et al., *Part Three*, *supra* note 19, at 176-77.

230. *Id.* at 177 (citations omitted) (emphasis added).

231. *Id.*

232. See *id.*

233. See *Omaha Healthcare Ctr. v. Johnson*, 246 S.W.3d 278, 281-83 (Tex. App.—Texarkana 2008, *pet. filed*).

234. Compare Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (repealed 2003), with TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011).

legislature's intent that "directly related to health care" modifies "professional or administrative services" and "safety."²³⁵ In *Omaha*, the court addressed the safety ambiguity in determining whether the plaintiff's claim for a spider bite at the defendant's facility constituted a health care liability claim.²³⁶ In applying the rules of grammar, the court noted that Chapter 74's definition of "health care liability claim" included commas where Article 4590i's definition did not: after the words "medical care" and "health care."²³⁷ Thus, the Chapter 74's departure phrase reads the following way: "departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care"²³⁸ The court pointed out the fact that a comma is missing after the word "safety."²³⁹ Without the comma after "safety," the court determined that "safety" and "professional or administrative services" should be "read as one category."²⁴⁰ This conclusion avoids the redundant reading that Chief Justice Jefferson sought to avoid in his footnote in *Diversicare*.²⁴¹ But the court conceded that reading the entire phrase preceding "directly related to health care" as "one category" is not the only correct way of interpreting Chapter 74's use of commas.²⁴² The court stated, "some grammarians disagree that the penultimate entry in a series should be followed by a comma."²⁴³ In resolving this conflict, the court reasoned that "when list elements themselves contain two or more items, the 'last two elements are muddled if the comma is omitted.'"²⁴⁴ Because the definition of "health care liability claim" employs a list consisting of more than two items, and because a comma is omitted after "safety," the court concluded that the legislature intended for "directly related to health care" to modify the joined phrase "safety or professional or administrative services."²⁴⁵

In sum, while legislative intent can serve as a useful tool in interpreting ambiguous statutory language, it can also create more ambiguity. In the case of Chapter 74, legitimate arguments exist that support both a narrow and broad interpretation of the safety ambiguity. As a result, it is incumbent upon the legislature to clarify this ambiguous language.

235. *Omaha*, 246 S.W.3d at 283.

236. *Id.* at 280.

237. *Id.* at 282-83.

238. § 74.001(a)(13).

239. *Omaha*, 246 S.W.3d at 282.

240. *Id.* at 283 (citing BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 654 (2003)).

241. See *supra* notes 222-25 and accompanying text.

242. *Omaha*, 246 S.W.3d at 282.

243. *Id.* (citing GARNER, *supra* note 240, at 654).

244. *Id.* at 283 (citing GARNER, *supra* note 240, at 303-04).

245. *Id.*

VIII. THE PRESCRIPTION: CURES FOR CLARIFYING THE "SAFETY AMBIGUITY"

The following solutions suggest ways in which the legislature can address the safety ambiguity. The first "solution" is not conditioned on whether the legislature intended a broad or narrow interpretation of the safety ambiguity; rather, it leaves the interpretation to the courts. The second and third solutions, however, will clarify the safety ambiguity, depending on the legislature's intent. The legislature can follow the second suggestion if it desires the safety ambiguity to take on a broad interpretation. The third suggestion offers a modification that will result in a narrow interpretation of the safety ambiguity. These solutions are simple modifications, but they will result in certainty and consistency. The end result is a system that the legislature envisioned when it enacted Chapter 74 in 2003.²⁴⁶

A. Leave the Definition Unchanged

Although it is not technically a solution, the legislature can choose to leave the definition of "health care liability claim" unchanged. This will place the interpretation of the safety ambiguity squarely within the power of the courts. The argument in favor of this action is that a majority of the appellate courts in Texas have already interpreted the safety ambiguity in the same way: "directly related to health care" modifies "safety."²⁴⁷ In considering a cost-benefit analysis, the cost of the legislature's time and effort in passing a bill that affirms what most of the Texas appellate courts have already concluded outweighs the marginal effect that a clarification will have on any disagreeing appellate courts.

On the other hand, the argument against leaving the definition unchanged is that the Texas Supreme Court has not ruled on the issue, and the existence of at least one appellate court disagreement about the interpretation of the safety ambiguity means the issue is still unsettled.²⁴⁸ Additionally, the fact that a disagreement exists shows that the definition, left unchanged, is not wholly unambiguous. The legislature should also consider that, if the Texas Supreme Court refuses to rule on the issue, the safety ambiguity will remain unsettled throughout Texas, which can lead to inconsistent and unfair results. This inconsistency might cause insurers to

246. See Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1)-(7), 2003 Tex. Gen. Laws 847, 884.

247. See sources cited *supra* note 179.

248. See *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 327 (Tex. App.—San Antonio 2006, pet. denied).

question their exposure to risk, which could lead to increasing insurance rates for health care providers.²⁴⁹

In sum, leaving the definition unchanged frees up time and energy for the legislature to focus on other pressing issues of state concern. But by placing the interpretation in the power of the courts, the legislature runs the risk of an interpretation that stands contrary to the legislature’s intent of Chapter 74. By affirmatively addressing the safety ambiguity, the legislature will have more control and certainty over the interpretation of the safety ambiguity.

B. Clarify a Broad Interpretation of the Safety Ambiguity

If the legislature intends for “directly related to health care” to modify only “professional or administrative services” and not “safety,” then one simple solution is to precede “directly related to health care” with the words “that are” and change the sentence structure of the definition of “health care liability claim” to read the following way:

“Health care liability claim” means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or *professional or administrative services that are* directly related to health care, or safety, which proximately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract.²⁵⁰

This solution makes it clear that “directly related to health care” does not modify “safety.” One problem that might arise, however, is that courts will interpret this definition the same way the Texas Supreme Court interpreted Article 4590i’s definition in *Diversicare* and *Marks*.²⁵¹ In both cases, the court determined that a claim asserts a departure from “accepted standards of safety” only if “safety” is directly related to health care, despite the fact that the term “directly related to health care” was not included in Article 4590i’s definition.²⁵²

To avoid this situation, the legislature can divide the definition of “health care liability claim” into two subparts. Subpart (A) uses the revised

249. See discussion *supra* Part V.

250. Cf. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011) (“‘Health care liability claim’ means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or *professional or administrative services directly related to health care*, which proximately results in injury to or death of a claimant, whether the *claimant’s* claim or cause of action sounds in tort or contract.”) (emphasis added).

251. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005); *Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010).

252. *Diversicare*, 185 S.W.3d at 855; *Marks*, 319 S.W.3d at 664.

definition above, followed by subpart (B), which will clarify the legislature's intent regarding the word "safety":

(B) The word "safety" within subpart (A) shall not be read to apply only to safety claims directly related to health care, thereby limiting its scope.

If the Texas courts disagree about how to interpret the safety ambiguity, this subsection removes all doubt. But most appellate courts have held that the legislature never intended for the safety ambiguity to possess such a broad reach.²⁵³ Therefore, the legislature has another option to ensure a limited reading of the safety ambiguity.

C. Remove the Word "Safety" from the Definition

In attempting to clarify that the legislature intends for "directly related to health care" to modify "safety," a normal reaction might be to change the sentence structure, add more words, or add punctuation marks to clarify how the definition should be read. But a simpler solution—albeit counter intuitive—is to completely take the word "safety" out of the health care liability claim definition. The new definition would read the following way:

"Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

This solution is based on the assumption that a claim for the "departure from accepted standards of . . . safety . . . directly related to health care" is inherently a claim for the "departure from accepted standards of . . . health care."²⁵⁴ Justice Johnson affirmed this assumption in his concurrence in *Marks*, stating the following:

If a health care provider furnishes unsafe materials or creates an unsafe condition as an integral and inseparable part of a patient's health care or treatment, the health care provider's acts or omission would already fall within the category of claims based on departures from accepted standards of health care and there would be no need for the Act to include the word "safety."²⁵⁵

253. See sources cited *supra* note 179.

254. Cf. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011).

255. *Marks*, 319 S.W.3d at 673.

Put this way, it is clear that a safety claim directly related to health care is simply one type of claim that falls within the phrase “departure from accepted standards of . . . health care”²⁵⁶ Thus, the word “safety” is unnecessary and redundant.²⁵⁷

Applying the new definition to cases already decided reveals that the new definition would yield the same results. For example, consider two cases implicating the safety prong within the definition of health care liability claim: *Christus Health v. Beal* and *Espinosa v. Baptist Health System*.²⁵⁸

In *Beal*, the plaintiff was a resident of a drug and alcohol treatment center.²⁵⁹ One night while he was asleep, the bed the plaintiff was sleeping in collapsed and caused him injury.²⁶⁰ The First District Court of Appeals in Houston first interpreted the safety ambiguity narrowly, then turned to the issue of whether the defective bed implicated a “departure from accepted standards of . . . safety . . . directly related to health care.”²⁶¹ The court held that the claim did not implicate the standards of safety related to health care, stating “[h]ere, [plaintiff] is complaining about an ordinary bed that gave way under his weight, a circumstance that gives rise to a premises liability claim in a health care setting that may not be properly classified as a health care liability claim.”²⁶² Applying the new definition to the claim, the court’s holding would not have changed. Because the court held that the claim was a premises liability claim, it would not have implicated standards of “medical care, health care, or professional or administrative services directly related to health care.”²⁶³

256. *See id.*

257. *See id.* To be sure, the conclusion that the word “safety” is redundant and unnecessary stands contrary to the majority’s statement in *Diversicare* that “the Legislature’s inclusion within the scope of [Article 4590i] of claims based on breaches of accepted standards of ‘safety’ expands the scope of the statute beyond what it would be if it only covered medical and health care.” *Diversicare*, 185 S.W.3d at 855. But the majority’s reasoning is simply unworkable with a narrow interpretation of the safety ambiguity—that is, it is impossible for a claim to assert a departure from accepted standards of safety directly related to *health care* without asserting a departure from accepted standards of *health care*. *See Marks*, 319 S.W.3d at 673 (Johnson, J., concurring) (“Applying the plurality’s ‘inseparable or integral part of the patient’s care or treatment’ standard to ‘safety’ effectively reads safety out of the statute instead of properly giving it meaning as an additional category of claims.”); TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011). This is the reasoning that led Justice Johnson to read Article 4590i’s safety ambiguity broadly. *See Marks*, 319 S.W.3d at 673-74 (Johnson, J., concurring) (“[T]he Court should construe the Legislature’s inclusion of ‘safety’ claims in [Article 4590i] as expanding the scope of health care liability claims beyond what it would be if the statute only covered medical and health care claims, not confining those claims to be the same as claims already coming within the statute’s coverage as health care claims.”).

258. *Christus Health v. Beal*, 240 S.W.3d 282 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Espinosa v. Baptist Health Sys.*, 2006 WL 2871262 (N.J.A.G. Oct. 11, 2006).

259. *Beal*, 240 S.W.3d at 284.

260. *Id.*

261. *Id.* at 289 (emphasis omitted).

262. *Id.* at 291.

263. *Cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2011).

In *Espinosa v. Baptist Health System*, the claim arose after a post-surgery patient was injured when “the ‘hospital bed trapeze-patient lift device’ [over his hospital bed] suddenly became detached as he was holding onto it, causing him to fall back on the bed.”²⁶⁴ The Fourth District Court of Appeals in San Antonio held that the “trapeze bar . . . was authorized as part of Espinosa's medical care by his physician in both the physician's written order and the Orthopedic Surgery Initial Evaluation.”²⁶⁵ Because a doctor had authorized that Espinosa use the trapeze bar, the court concluded that the failure of the equipment implicated a departure from “accepted standards of care for the care or treatment of Espinosa in the assembly, maintenance and use of the trapeze in question.”²⁶⁶ Applying the new definition, it is again clear that the court would have reached the same result. Chapter 74 defines “health care” as “any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.”²⁶⁷ Thus, even with the word “safety” absent from the definition of “health care liability claim,” the claim would still fall within Chapter 74 because it asserts a “departure from accepted standards of . . . health care.”²⁶⁸

One argument against taking out the word “safety” is that the phrase “professional or administrative services directly related to health care” should be excluded for the same reason. But the terms “safety” and “professional or administrative services” are distinguishable. Because “safety” means “free from injury,” and because a claim implicates Chapter 74 when it asserts a “departure from accepted standards of . . . health care . . . which proximately results in injury to or death of a claimant,” a safety claim directly related to health care inherently falls within the definition.²⁶⁹ On the other hand, “professional or administrative services” refers to the satisfaction of statutory requirements so that a health care provider can remain licensed, accredited, and certified to participate in federal or state health care programs.²⁷⁰ Not all of these statutory requirements implicate the term “health care” as it is used in Chapter 74.²⁷¹ Thus, “professional or administrative services directly related to health care” needs to remain in the definition, while the word “safety” does not.²⁷²

The upshot of the new definition is that parties will not waste time quarreling over the interpretation of the safety ambiguity. This will save

264. *Espinosa*, 2006 WL at *1.

265. *Id.* at *4.

266. *Id.*

267. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10) (West 2011).

268. § 74.001(a)(13).

269. *Id.*

270. See § 74.001(a)(24).

271. See *supra* notes 227-32 and accompanying text.

272. See *supra* notes 227-32 and accompanying text.

time and effort for judges and attorneys alike, and it will bring into focus the more important issue in resolving Chapter 74’s applicability—whether the underlying claim relates to health care.

IX. CONCLUSION

When H.B. 4 passed in 2003, it was clear that the legislature intended for Chapter 74’s reach to extend further than Article 4590i’s reach.²⁷³ Indeed, Chapter 74 was established precisely for the purpose of addressing Article 4590i’s shortfalls.²⁷⁴ Although many of its provisions and definitions have proven successful in carrying out this mission, Chapter 74’s definition of “health care liability claim” has fallen short.²⁷⁵ The additional language included in Chapter 74’s definition has done nothing but create more confusion.²⁷⁶ And despite the Texas courts’ best effort, extracting legislative intent for the purpose of interpreting ambiguous language has proven complex and time-consuming.²⁷⁷

The good news is that simple solutions exist.²⁷⁸ Depending on what the legislature intends for the safety ambiguity, it can solve the dilemma by simply adding a few words to the definition or taking a single word out.²⁷⁹ Although debate may arise regarding the legislature’s decision on which solution to choose, the point is that the legislature needs to make a decision.

Although medical malpractice horror stories will never cease to exist, the legislature has the ability to quell any safety ambiguity horror stories that might arise in the near future. If uncertainty continues to prevail within the health care liability claim arena, Chapter 74 might end up in the same position as Article 4590i—that is, powerless to address the problems it was designed to prevent.²⁸⁰

273. See discussion *supra* Part II.B.

274. See discussion *supra* Part II.

275. See discussion *supra* Part IV.

276. See discussion *supra* Part IV.

277. See discussion *supra* Part VII.

278. See discussion *supra* Part VIII.

279. See discussion *supra* Part VIII.

280. See discussion *supra* Parts II, V.