SMU | Dedman School of Law

SMU Law Review

Volume 62 | Issue 3 Article 18

January 2009

Health Care Law

Tara Kepler

Lewis A. Lefko

Thomas Wm. Mayo
Southern Methodist University, Dedman School of Law

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*Tara Kepler**
*Lewis A. Lefko***
*Thomas Wm. Mayo****

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* B.A., University of Texas; M.P.A., University of Colorado; J.D., Texas Wesleyan University. Attorney at Law, Epstein Becker & Green, P.C., San Francisco, California.
** B.A., Northwestern University; M.P.H., University of Texas; J.D., University of Houston. Attorney at Law, Haynes and Boone, L.L.P., Richardson, Texas.
*** B.A., Amherst College; J.D., Syracuse University. Associate Professor, SMU/ Dedman School of Law; Of Counsel, Haynes and Boone, L.L.P., Dallas, Texas.

I. INTRODUCTION

IT is often remarked that the United States does not have an actual health care "system," but rather a patchwork of financing and delivery systems more remarkable for their lack of real coordination than anything else. Similarly, health law cannot help but resemble this non-system for which it provides the infrastructure. With the passing of another year, Texas has again expanded the practice of health law by adding to the patchwork of new legal considerations that the health care industry must track and manage. This article presents the key health law developments from the Survey period under four topic areas: physician and facility liability; contractual obligations; government investigations and enforcement; and public health and indigent care.

II. PHYSICIAN AND FACILITY LIABILITY

With respect to the liability of health providers, there were four key cases from the Texas Supreme Court and one from the United States Court of Appeals for the Fifth Circuit. The opinion in the federal case—in which the appellate court reversed an infamous multimillion-dollar verdict against a hospital and the physicians who temporarily restricted another physician's privileges during a peer-review investigation—may prove to have the greatest impact of the five cases discussed in this section.

A. GROSS NEGLIGENCE IN HOSPITAL OUTSOURCING

In *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, the Texas Supreme Court affirmed the Dallas Court of Appeals' holding that a hospital was grossly negligent in the death of a man who was presented to the hospital in the morning with difficultly breathing and died later that night due to an acute mitral valve leakage.[1] After initially arriving at the hospital, the treating physician ordered a "stat" echocardiogram (echo) for the patient.[2] The mitral valve problem was identified as soon as the

1. 271 S.W.3d 238, 243-45 (Tex. 2008).
2. *Id.* at 244.

echo was completed.[3] However, it was not completed until almost three hours after it was ordered, and the patient died shortly thereafter.[4] Unbeknownst to the physician; the hospital, Columbia Medical Center of Las Colinas, had outsourced its echo services and had elected by contract not to pay an additional fee for guaranteed echo response times in emergency situations.[5]

Ultimately, the supreme court found that Columbia's conduct deviated so far from the standard of care as to create an extreme risk of harm, and that Columbia was subjectively aware of, but consciously indifferent to, this risk because Columbia: "[(1)] had actual knowledge of the necessity for emergency echo services . . . [(2)] declined to make such services available, and [(3)] failed to communicate the limitation on its echo services to its physicians or nursing staff."[6] Columbia argued that it could not be held grossly negligent because echo services were not required hospital services.[7] The supreme court explained that this argument was irrelevant because the hospital chose to provide such services.[8] The supreme court further explained that the physician could have referred the patient to a facility with capability to provide the echo in a timely manner if he had known that Columbia did not have such capabilities.[9] The majority opinion of the supreme court upheld the jury's findings of gross negligence despite the dissenting opinion of Justices Green and Hecht, who argued there was no evidence that Columbia recognized, at the time it was negotiating the echo services contract, that the lack of a guaranteed response time "would pose an extreme risk of harm to its patients."[10]

As outsourcing contracts become more common, they inherently introduce novel liability risks. The opinion in *Hogue* demonstrates the supreme court's concern over outsourcing arrangements for hospital services through its insistence that the ultimate responsibility of patient care at the hospital remains with the hospital, regardless of outsourcing.

B. Proving Proximate Cause in Suicide Cases

In *Providence Health Center v. Dowell*, a divided Texas Supreme Court addressed the causation parameters of hospital and physician liability when a patient commits suicide shortly after an emergency room visit for an attempted suicide.[11] The parents of the deceased patient, the Dowells, brought a wrongful death and survival action against the hospital, the hospital's psychiatric treatment center, and the emergency room physi-

3. *Id.* at 245.
4. *Id.* at 244-45.
5. *Id.* at 249-50.
6. *Id.* at 250, 253.
7. *Id.* at 249.
8. *Id.* at 253.
9. *Id.* at 251.
10. *Id.* at 257, 259 (Green, J., dissenting).
11. 262 S.W.3d 324, 325 (Tex. 2008).

cian who saw the patient.[12] The Dowells argued that the physician's brief interaction with the patient fell below the standard of care because the physician did not conduct a comprehensive assessment of the patient's suicide risk before allowing the patient to be released from the hospital.[13] The Waco Court of Appeals agreed with the Dowells and affirmed the jury's finding that the hospital and the psychiatric center were both liable for forty percent of the damages, and that the physician was liable for the remaining twenty percent.[14]

The supreme court reversed the court of appeals' decision and disagreed with the Dowells' argument that the health care providers' incomplete suicide assessment and failure to hospitalize the patient were the proximate cause of the patient's subsequent death.[15] The supreme court explained that even if the health care providers were negligent, "their negligence was not, as a matter of law, a proximate cause of [the patient's] death a day and a half later" because "the defendants' negligence was too attenuated from the suicide to have been a substantial factor in bringing it about."[16] The supreme court listed the following facts in support of its conclusion: (1) the patient likely would not have consented to hospitalization even if a more thorough assessment had been performed, (2) there was no evidence that the patient could have been involuntarily hospitalized, (3) there was no evidence that hospitalization would have prevented the suicide, and (4) the time and intervening events between the release and the suicide were too remote.[17] As described by the supreme court, "[the patient's] inability to cope with personal crises led to his death,"[18] not the health care providers' negligence.

Justice Wainwright concurred in part and dissented in part. He agreed with the majority's decision to reverse the appellate court's judgment but preferred remanding the case for a new trial because the jury did not address the question of the *patient's* proportionate liability.[19] The dissenting opinion, written by Justice O'Neil, and joined by Justices Jefferson and Medina, expressed concern over the majority's creation of "new legal hurdles that are insurmountable" and the implication that "suicide is simply not preventable."[20] The majority rebutted these assertions by stating, "[t]he dissent seems to imply that a health care provider who is negligent in treating a patient's mental health is liable regardless of whether the negligence caused a subsequent suicide, thereby becoming in effect an insurer of the patient's conduct, whatever it might be."[21]

12. *Id.* at 327.
13. *Id.* at 328.
14. *Id.* at 327-28.
15. *Id.* at 325.
16. *Id.* at 328, 330.
17. *Id.* at 328-30.
18. *Id.* at 329.
19. *Id.* at 330-32 (Wainright, J., concurring).
20. *Id.* at 333, 336 (Oneill, J., dissenting).
21. *Id.* at 330.

In essence, the opinion in *Providence* requires plaintiffs in suicide cases to prove that the health care provider's failure to perform an act required by the standard of care was a substantial factor in causing the subsequent suicide. In assessing substantiality, Texas courts ask whether the suicide would still have occurred even if the health care provider had performed the expected act. If the answer is "likely not," then the plaintiff will have successfully proven the causation element, but if the answer is "likely yes," then the plaintiff's claim will fail.

C. Inadequate Expert Reports

In *Lewis v. Funderburk*[22] and *Leland v. Brandal*,[23] the Texas Supreme Court reviewed statutory procedure issues related to inadequate expert reports in medical malpractice cases governed by section 74.351 of the Texas Civil Practice and Remedies Code.[24] In *Funderburk*, the supreme court resolved a split among the appellate courts regarding appellate jurisdiction over interlocutory appeals of expert reports governed by the statute.[25] The dispute in *Funderburk* arose when the defendant, Dr. Lewis, allegedly provided negligent treatment of a child's broken wrist.[26] The supreme court was asked to review the Waco Court of Appeals' refusal, for want of jurisdiction, of Dr. Lewis' interlocutory appeal of a denied motion to dismiss due to an inadequate expert report.[27] At the time of the decision, the majority of Texas appellate courts had held that they had jurisdiction over interlocutory appeals of this nature because the statutory provision allowing interlocutory appeals when the plaintiff *does not file* an expert report implicitly also applies to situations in which the plaintiff files an *allegedly inadequate* expert report.[28]

The supreme court agreed with the majority of the appeals courts and reversed the Waco Court of Appeals.[29] The supreme court explained that the Texas Legislature intended the interlocutory appeal option to apply to inadequate reports, though not explicitly stated in section 74.351, because another provision in the statute, section 74.351(c), specifies that a plaintiff will be held to have not filed an expert report under the statute if the plaintiff files a report that is later determined to be inadequate.[30] Thus, the supreme court remanded the case to the court of appeals to consider the interlocutory appeal of the trial court's denial of Dr. Lewis' motion to dismiss.[31]

22. 253 S.W.3d 204, 207 (Tex. 2008).
23. 257 S.W.3d 204 (Tex. 2008).
24. Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon Supp. 2008).
25. *Funderburk*, 253 S.W.3d at 205-06.
26. *Id.* at 206.
27. *Id.* at 206-07.
28. *Id.* at 205-06.
29. *Id.* at 208.
30. *Id.* at 207.
31. *Id.* at 208.

In another dispute over an inadequate expert report, the supreme court in *Leland* interpreted a provision of the medical malpractice statute that addresses court discretion in granting extensions to cure inadequate reports.[32] The dispute arose when the defendant, Dr. Leland, allegedly caused the plaintiff's stroke, resulting in paralysis and inability to speak, by ordering the patient to stop taking his anticoagulant medication prior to a dental procedure.[33] When the plaintiff filed suit, Dr. Leland argued that the plaintiff's expert report was inadequate under the statute.[34] The trial court disagreed, and Dr. Leland filed an interlocutory appeal of the decision to the San Antonio Court of Appeals.[35] The court of appeals agreed with Dr. Leland, but gave the trial court the discretion to allow the plaintiff a thirty-day window to correct the inadequate expert report.[36] Dr. Leland then appealed to the supreme court, arguing that the thirty-day extension at section 74.351(c) of the Texas Civil Practice and Remedies Code only applies to trial court determinations of report inadequacy, not appellate-level determinations.[37] The statutory provision in question permits "the court" to allow the thirty-day extension, but the provision does not specify the courts to which it refers.[38] The supreme court agreed with the appellate court's holding that the statute applies to both trial court and appellate court determinations that an expert's report is inadequate because the legislature did not insert language into the statute that would limit "the court[s]" to which the thirty-day-extension provision applied.[39]

The dissent in *Leland* argued that the legislature did not intend the thirty-day extension to apply at the appellate level, because it would result in protracted litigation that the legislature had intended to curb with the statutory expert-report requirements.[40] However, the majority concluded that holding otherwise would foreclose the plaintiff's opportunity to cure expert-report deficiencies, which the legislature clearly intended to allow at section 74.351(c) of the statute.[41] Thus, the supreme court upheld the appellate court's decision that the trial court could allow the plaintiff a thirty-day window to correct the report's inadequacies under section 74.351(c) of the statute.[42]

D. Peer Review Immunity in State Defamation Action

In *Poliner v. Texas Health Systems*, the United States Court of Appeals for the Fifth Circuit reversed an infamous $33.5 million defamation judg-

32. *Leland*, 257 S.W.3d 204.
33. *Id.* at 205.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 207.
38. *Id.*; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(c).
39. *Id.* at 208.
40. *Id.* at 210.
41. *Id.* at 208.
42. *Id.*

ment against a hospital and the physicians who temporarily restricted Dr. Poliner's privileges during a peer review investigation.[43] Though rejected by the district court, the Fifth Circuit allowed the federal Health Care Quality Improvement Act's (HCQIA)[44] peer review immunity defense to bar monetary damages for a defamation claim.[45] Dr. Poliner argued that the review actions did not qualify for HCQIA immunity because the reviewers were maliciously motivated and driven by financial reasons rather than by concern for quality patient care.[46] The appellate court rejected this argument because it found that the reviewers had ample, objective reasons for the privilege restriction and, thus, the court could not look to subjective reasons under the HCQIA immunity standard.[47] The court explained that physicians have access to injunctive and declaratory relief, but not monetary relief, if subjected to malicious peer review actions, and that Congress intended this result because the "system-wide benefit of robust peer review" outweighs the burdens of these "occasional harsh results."[48]

The court also rejected Dr. Poliner's argument that the reviewers could not avail themselves of the immunity defense because they had not complied with the peer review provisions of the hospital's medical staff bylaws, which required evidence of a "present danger" to patients before suspending privileges.[49] The court explained that HCQIA does not require compliance with hospital bylaws to be eligible for the peer review immunity.[50] In all, the court held that Dr. Poliner failed to rebut the statutory presumption that the defendants were entitled to HCQIA peer review immunity.[51]

Dr. Poliner submitted a petition to the United States Supreme Court to review the Fifth Circuit's decision, but the petition was denied on January 21, 2009.[52] Hospitals and peer reviewers are now able to breathe a sigh of relief in Texas, although the tradeoff is that the *Poliner* opinion leaves physicians who are subjected to egregious or ill-motivated peer reviews with injunctive relief as their only available legal remedy, unless the hospital's actions lacked any reasonable and objective basis.

III. CONTRACTUAL OBLIGATIONS

In the contract enforcement arena, two courts of appeals provided opinions that should catch the attention of health care lawyers across the

43. 537 F.3d 368, 369-70 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009). As unusual as a $33.5 million judgment is in a peer-review case, that amount was much less than the jury's award of more than $360 million. *Id.* at 375.
44. 42 U.S.C. § 11101-11152. (2000).
45. *Poliner*, 537 F.3d at 369-70.
46. *Id.* at 375.
47. *Id.* at 379-80.
48. *Id.* at 381.
49. *Id.* at 380-81.
50. *Id.*
51. *Id.* at 385.
52. Poliner v. Tex. Health Sys., 129 S. Ct. 1002 (2009).

state. In one, the court upheld a jury's damages award to a hospital for a physician's breach of a recruiting agreement, despite the physician's defense that the hospital also breached the agreement. In the second case, the court upheld a patient-recruiting contract with a novel interpretation of the advertising exception to the Texas Patient Solicitation law.

A. No Excused Performance Under Recruiting Agreement

In *Hovorka v. Community Health Systems, Inc.*, the El Paso Court of Appeals upheld the lower court's ruling that a surgeon, Dr. Hovorka, owed a hospital, Big Bend Regional Medial Center (BBRMC), almost $200,000 in damages, interest, and attorney's fees for violating the terms of a recruiting agreement.[53]

BBRMC claimed that Dr. Hovorka breached the recruiting agreement by resigning from BBRMC and moving to another city prior to the end of the three-year term of the agreement.[54] In response to BBRMC's breach of contract claim, Dr. Hovorka asserted the affirmative defense of excused performance for prior material breach.[55] Dr. Hovorka also brought his own breach of contract and fraud claims against BBRMC.[56] In support of his claims and affirmative defense, Dr. Hovorka specifically alleged that BBRMC promised, but failed to do the following: (1) maintain accreditation from the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), (2) maintain Medicare and Medicaid certifications, (3) provide two million dollars worth of hospital operating equipment, (4) provide a medical office for Dr. Hovorka, and (5) provide locum tenens coverage for Dr. Hovorka while he prepared and tested for board certification.[57]

The recruiting agreement explicitly stated that BBRMC would be JCAHO accredited and Medicare and Medicaid certified, as well as provide *locum tenens* coverage but it did not include any promises of operating equipment or a medical office.[58] Dr. Hovorka alleged that these promises were made to him orally around the time of the contract negotiations, but the appeals court held that Dr. Hovorka did not present sufficient evidence to create a material issue of fact on these alleged promises to support a breach of contract claim, fraud claim, or affirmative defense.[59] On the accreditation and certification issue, BBRMC argued that those statements in the contract were not material terms because they were mere "recitals" explaining the nature and context of the agreement.[60] The court of appeals rejected this argument, but still upheld the

53. 262 S.W.3d 503, 507-08 (Tex. App.—El Paso 2008, no pet.).
54. *Id.* at 507.
55. *Id.* at 509.
56. *Id.* at 507.
57. *Id.* at 509-10.
58. *Id.*
59. *Id.* at 510.
60. *Id.*

lower court's summary judgment in favor of BBRMC on this issue.[61] The court explained that Dr. Hovorka's breach of contract claim and prior material breach affirmative defenses both failed because Dr. Hovorka did not present any evidence, other than conclusory statements, of the damages he suffered as a result of BBRMC's breach of these terms of the agreement.[62] Dr. Hovorka's damages evidence was limited to his unsubstantiated statements that he lost around $104,000 a month because people did not want to go to a hospital that was not certified or accredited.[63]

On the fraud claim, the appeals court chose not to disturb the jury's findings that Dr. Hovorka ratified the alleged misrepresentations about certification and accreditation when he chose to continue performing under the agreement after learning that BBRMC was not certified or accredited.[64] The court was not persuaded by Dr. Hovorka's argument that the jury should have received an additional instruction that ratification could not have occurred if Dr. Hovorka tried to stop the fraud, as such an instruction was not supported under the law.[65] Thus, the court ultimately held BBRMC not liable for fraud or breach of contract and Dr. Hovorka fully liable for breach of contract because: (1) Dr. Hovorka ratified the agreement after learning of the alleged fraud and (2) Dr. Hovorka could not prove the damages element of his breach of contract claim and prior material breach defense.[66] The court affirmed the lower court's damages award for contract breach and required Dr. Hovorka to return all monies to BBRMC that he received while he was working for BBRMC in compliance with the recruiting agreement, in addition to paying interest and attorney's fees.[67]

While the *Hovorka* opinion appears to allow hospitals wide latitude in negotiations and performance of recruiting agreements with physicians in Texas, the court used a novel analytical framework to support its holding regarding Dr. Hovorka's affirmative defense of excused performance for prior material breach. The court analyzed Dr. Hovorka's breach of contract claim together with his prior material breach defense and treated both as having the same elements of proof—including proof that Dr. Hovorka suffered damages as a result of BBRMC's alleged breach.[68] Surely, Dr. Hovorka was required to prove damages to succeed on his breach of contract claim to obtain damages from BBRMC, but it is unclear why the court required Dr. Hovorka to prove damages to support his prior material breach defense for excused performance on *BBRMC's* breach of contract claim. In *Mustang Pipeline Co. v. Driver Pipeline Co.*, the most recent Texas Supreme Court opinion to discuss prior material

61. *Id.*
62. *Id.* at 511-12.
63. *Id.* at 511.
64. *Id.* at 513-14.
65. *Id.*
66. *Id.* at 511-14.
67. *Id.* at 507-08.
68. *Id.* at 508-09.

breach as an affirmative defense, the court did not require proof of resulting damages to excuse performance.[69] Rather, the supreme court required the pleading party to prove that the other party had breached the agreement and that the breach was material.[70] In *Hovorka*, the El Paso Court of Appeals did not apply a similar independent analysis of Dr. Hovorka's prior material breach defense.[71] Further, the court in *Hovorka* rejected BBRMC's argument that the accreditation and certification provisions of the contract were immaterial terms.[72] Thus, it would appear that Dr. Hovorka proved his prior material breach defense under the analytical framework provided by the supreme court in *Mustang Pipeline* when Dr. Hovorka presented evidence of the express terms of the contract requiring BBRMC to maintain the JCAHO accreditation and Medicare and Medicaid certifications.

The *Hovorka* opinion supports the argument that a breaching physician must return all monies received under a recruiting agreement, despite breaches by the hospital, if the physician cannot prove any damages resulting from the hospital's breach. However, the supreme court opinion in *Mustang Pipeline* ought to support an argument that, regardless of the physician's ability to prove any resulting damages, the physician should not be liable for all payments received under the agreement if the physician has proven a *material* breach by the hospital as a defense to contract enforcement.

B. Contract Not Illegal Under Patient Solicitation Law

The Dallas Court of Appeals' decision in *Plano Surgery Center v. New You Weight Management Center* is the first to interpret the current version of the Texas Patient Solicitation Law.[73] Originally enacted in 1991,[74] the Patient Solicitation Law is modeled after the federal anti-kickback statute,[75] which prohibits the payment or acceptance of remuneration in return for the referral of medical services or products reimbursable under

69. 134 S.W.3d 195, 198-99 (Tex. 2004).

70. *Id.*

71. *See Hovorka*, 262 S.W.3d at 508-12.

72. *See id.* at 510.

73. 265 S.W.3d 496, 501 (Tex. App.—Dallas 2008, no pet.); Tex. Occ. Code Ann. §§ 102.001-.011 (Vernon Supp. 2008) (current version of the Texas Patient Solicitation Law). In *New Boston Gen. Hosp., Inc. v. Tex. Workforce Comm'n*, 47 S.W.3d 34, 38-39 (Tex. App.—Texarkana 2001, no pet.), the court of appeals held a contract enforceable under a *prior* version of the Patient Solicitation Law that excepted advertising arrangements if payments were "not based on the volume or value of referrals" generated by the advertising.

74. The Patient Solicitation Law was originally codified in the Health and Safety Code at sections 161.091 through 161.094 under the "Illegal Remuneration" subchapter but was re-codified in the Texas Occupations Code at sections 102.001 through 102.011 under the "Solicitation of Patients" chapter in 1999. *Compare* Tex. H.B. 7, 72nd Leg., 1st C.S. (1991), *with* Tex. H.B. 3155, 76th Leg., R.S. (1999), *and* Tex. Occ. Code Ann. §§ 102.001-.011.

75. *See* 42 U.S.C. § 1320a-7b(b)(1) (2006); *see also* Tex. H.B. 7, 72nd Leg., 1st C.S. (1991).

Medicare or Medicaid.[76] The Texas Patient Solicitation Law is broader than its federal counterpart in that the former prohibits illegal remuneration to or from *any Texas-licensed health practitioner*, regardless of whether the practitioner requests Medicare or Medicaid reimbursement for the services.[77] Thus, while profit-based incentive payments for recruiting new clients are common in most industries, the United States Congress and the Texas Legislature have prohibited this practice in the health care industry through these laws.[78]

The dispute in *Plano Surgery Center* arose between a laparoscopic gastric banding (lap-band) surgical services advertising and management company, New You Weight Management Center (New You), and an ambulatory surgical center, Plano Surgery Center (PSC).[79] PSC allegedly breached an agreement with New You in which New You provided "marketing services" for lap-band procedures performed at PSC, and, in return, PSC paid New You 66.66% of the profits realized by PSC for each patient New You referred to PSC for the procedure.[80] The "marketing services" New You provided were: (1) running radio, Internet, and print advertisements to recruit prospective patients for the procedure; (2) recruiting and training surgeons to perform the procedure; (3) conducting informational seminars for prospective patients; (4) collecting medical and financial information from prospective patients who expressed interest in the procedure; (5) forwarding the prospective patient's information to a surgeon selected by New You; (6) counseling the patient before and after the procedure; and (7) counseling for the family during the procedure.[81]

Prior to the termination of the original agreement, attorneys for PSC and New You met to discuss the legality of the arrangement, but no new agreement was memorialized in writing.[82] PSC's attorneys later proposed that, going forward, PSC would pay New You a flat fee for its services rather than the 66.66% profit fee.[83] However, shortly thereafter, PSC's director told New You's director that there would be no change in their payment arrangement.[84] Subsequently, when PSC did not pay the 66.66% profit fee, New You sued PSC for breach of contract and various

76. *Compare* 42 U.S.C. § 1320a-7b(b)(1) (the federal anti-kickback statute), *with* TEX. OCC. CODE ANN. §§ 102.001–102.011 (the Texas Patient Solicitation Law); *see also* TEX. OCC. CODE ANN. § 102.003 (specifying that interpretation of the Patient Solicitation Law should be consistent with the federal anti-kickback statute and the implementing regulations); Op. Tex. Att'y Gen. No. DM-0138 (1992); Letter Op. Tex. Att'y Gen. No. 93-84 (1993) (interpreting the Texas Patient Solicitation Law in light of the federal anti-kickback statute and the implementing regulations).

77. *Compare* 42 U.S.C. § 1320a-7b(b)(1), *with* TEX. OCC. CODE ANN. § 102.001(a).

78. *See New Boston*, 47 S.W.3d at 38-39; Op. Tex. Att'y Gen. No. DM-0138; Letter Op. Tex. Att'y Gen. No. 93-84.

79. Plano Surgery Ctr. v. New You Weight Mgmt. Ctr., 265 S.W.3d 496, 498-99 (Tex. App.—Dallas 2008, no pet.).

80. *Id.* at 499-500.

81. *Id.*

82. *Id.* at 500.

83. *Id.*

84. *Id.*

other equitable claims.[85] PSC argued that the contract was unenforceable because it was illegal under the Patient Solicitation Law and violated public policy.[86]

The Dallas Court of Appeals ultimately upheld the lower court's holding in favor of New You and rejected PSC's argument that the contract was unenforceable under the law.[87] The court concluded that the contract could have been legally performed as an "advertising" contract because, as the court interpreted the law, payments for advertising services are generally excepted under the advertising provision at section 102.004 of the law, so long as the advertising was not deceptive or misleading.[88] Based on this presumption, the court then concluded that New You and PSC presented conflicting material evidence during the trial.[89] Specifically, PSC presented evidence that New You received prohibited remuneration for soliciting patients under the law, and New You presented evidence that its services constituted permissible advertising under the law.[90] The court explained that if the evidence at trial does not conclusively establish a defense, then the defending party must request that the jury receive an instruction on the defense to avoid waiver on appeal.[91] The court held that PSC had waived the illegal contract defense by not requesting a defense instruction as required, based on the court's conclusion that New You's services could be excepted from the law as permissible advertising.[92]

The court's analysis neglected to address four key weaknesses in the presumption that New You's services could be excepted from the law under the advertising provision at section 102.004. First, it is difficult to understand how the advertising provision alone could exempt New You's services and payment arrangement when many of New You's services appear not to be related to advertising at all, such as: (1) training surgeons to perform the procedure, (2) counseling the patient before and after the procedure, and (3) counseling the family during the procedure.[93] It was undisputed that New You provided these services to the patients and received per-patient profit fees from PSC in return for providing these services.[94] However, the court neglected to discuss how these non-advertising services were permissible under the advertising provision or any other provision of the law.[95]

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85. *Id.*
86. *Id.*
87. *Id.* at 502.
88. *Id.* at 501-02.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*; TEX. OCC. CODE ANN. § 102.004 (Vernon Supp. 2008) ("Section 102.001 does not prohibit advertising, unless the advertising is: (1) false, misleading, or deceptive; or (2) not readily subject to verification, if the advertising claims professional superiority or the performance of a professional service in a superior manner.").
93. *See Plano Surgery Ctr.*, 265 S.W.3d at 499-500.
94. *See id.* at 500.
95. *See id.* at 502.

Second, it is arguable that the court misinterpreted the advertising provision by reading it to be a comprehensive exception for any patient solicitation activity related to advertising so long as the advertising was not deceptive or misleading.[96] Though the advertising provision could be independently read to have this meaning, it is unlikely that this meaning was intended by the legislature when the provision is read in the context of the statute as a whole. Such an interpretation of the advertising provision would essentially defeat the purpose of the law, because it would permit health care providers to pay for otherwise improper patient solicitation services, so long as the services were accomplished in conjunction with advertising. For example, according to the court's interpretation of the advertising provision, the law would prohibit a dermatologist from paying a nursing home employee for each nursing home resident he could convince to visit the physician for a mole biopsy, but the law would allow the same arrangement under the advertising provision if the employee posted advertising flyers around the nursing home to recruit the residents for the biopsy. Thus, this advertising "exception," as interpreted by the court in *Plano Surgery Center*, would essentially swallow the law.

Further, reading the advertising provision as a comprehensive advertising exception is inconsistent with section 102.007 of the law, which excepts a specific type of suspect advertising arrangement—health care provider advertising through information call centers—from the law.[97] This type of advertising arrangement is expressly exempted from the law if the arrangement complies with numerous limitations to reduce the risk of improper patient solicitation.[98] Such an exception would not be necessary if section 102.004, as interpreted by the court in *Plano Surgery Center*, created a comprehensive exception for any advertising-related activities that were not deceptive or misleading.

Finally, the court's broad interpretation of the advertising provision is inconsistent with the legislative history of the law, as well as the statute, regulations, and cases interpreting the parallel federal anti-kickback statute on which the law was modeled. The federal anti-kickback regulations create a safe harbor applicable to advertising contracts, which requires that the aggregate compensation paid to an advertiser be set in advance and not be determined in a manner that takes into account the volume or value of any referrals or business generated by the advertising.[99] The New You compensation arrangement would not fit within this federal exception, because the 66.66% profit payment was not set in advance and was directly related to the value of the business that New You's "advertising" activities generated for PSC.[100] Furthermore, *Nursing Home Consultants, Inc. v. Quantum Health Services Inc.* is a federal case with facts

96. *See id.* at 501-02.
97. *Compare* TEX. OCC. CODE ANN. § 102.004 *with* TEX. OCC. CODE ANN. § 102.007.
98. *See* TEX. OCC. CODE ANN. § 102.007.
99. 42 C.F.R. § 1001.952(d)(5) (2006). This safe harbor is not limited to advertising contracts and applies more generally to any personal services or management contracts.
100. *See Plano Surgery Ctr.*, 265 S.W.3d at 500.

almost identical to those in *Plano Surgery Center* in which the court refused to enforce a contract between a medical equipment provider and a marketing company because the contract was illegal and against public policy under the federal anti-kickback statute.[101] The court in *Nursing Home Consultants*, held that the health care marketing contract was unenforceable because it based contract payments on the value of Medicare business generated by the marketing.[102] The key difference between *Plano Surgery Center* and *Nursing Home Consultants* is that the Texas version of the advertising provision does not include the language of the federal exception, which expressly prohibits payments based on the value of referrals generated by the advertising activities.[103] Clearly, if the Texas advertising provision included this language, it is unlikely that the court in *Plano Surgery Center* could have held the contract enforceable based on a plain reading of the law and New You's 66.66% profit fee.

The original 1991 version of the Texas advertising provision included the exact language of its federal counterpart regarding prohibited payments based on the value of referrals.[104] But in 1993, the Texas Legislature amended the law for the stated purpose of strengthening and broadening the scope of the law, and, incidentally, the language prohibiting payments that take into account the volume or value of referrals was deleted from the general advertising provision and moved to the narrower advertising exception for health care information call centers.[105] The legislative history describes this change to the general advertising provision as a "nonsubstantive" change.[106]

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101. 926 F. Supp. 835, 842-44 (E.D. Ark. 1996).

102. *Id.*

103. *Compare* TEX. OCC. CODE ANN. § 102.004, *with* 42 C.F.R. § 1001.952(d)(5).

104. *Compare* Tex. H.B. 7, 72nd Leg., 1st C.S. (1991) (original codification of the advertising exception stating "[t]his section shall not be construed to prohibit remuneration for advertising, marketing, or other services that are provided for the purpose of securing or soliciting patients provided the remuneration is set in advance, is consistent with the fair market value of the services, and is not based on the volume or value of any patient referrals or business otherwise generated between the parties."), *with* 42 C.F.R. § 1001.952(d)(5) (federal Anti-Kickback safe harbor for personal services contracts requiring that "[t]he aggregate compensation paid to the agent over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties.").

105. *See* Tex. S.B. 211, 73rd Leg., R.S. (1993); Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 211, 73rd Leg., R.S., at 1 (1993) ("At the time the current remuneration law was adopted, allegations involving payment for patient referrals centered on various health-related professions. Since then, a steady stream of new allegations have arisen involving individuals who are not regulated by state health care agencies and, as a result, are not subject to the provisions of current law. The allegations have included probation officers, ministers, school counselors, and private businesses set up to recruit patients and employee assistance programs . . . . As enrolled, S.B. 211 expands the authority of the illegal remuneration law and provides penalties for violations of this Act.").

106. Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 210, 73rd Leg., R.S., at 9 (1993) ("Redesignates existing Subsection (f), deletes existing Subsections (d) and (e). Makes nonsubstantive changes."). Both S.B. 210 and S.B. 211 were enacted during the 73rd Legislative Session and contained identical amendments to the Patient Solicitation Law.

The court in *Plano Surgery Center* did not discuss this legislative history, but it is unlikely that the legislature intended that this "nonsubstantive" change to the general advertising provision, as part of a set of amendments aimed at strengthening the law would have the opposite effect of allowing an advertising company to solicit patients for a medical procedure in return for payments based on the value of the medical business generated by the advertising.

Texas health law practitioners structuring advertising and marketing contracts for health care services reimbursed by private health insurance companies are now faced with more questions than answers about the scope of the Texas Patient Solicitation Law in light of the *Plano Surgery Center* opinion, which was based on statutory language that resulted from amendments aimed at strengthening and broadening the scope of the law.

IV. GOVERNMENT INVESTIGATIONS AND ENFORCEMENT

A. Discovery Protections when Cooperating with the Government

In *In re Memorial Hermann Healthcare System*, the Houston Fourteenth Court of Appeals rejected an expansive interpretation of the privilege protections outlined in the Texas Free Enterprise and Antitrust Act's civil investigative demand (CID) provisions.[107] Memorial Hermann Healthcare System sought to use the statutory CID privilege protections[108] to resist production of documents requested by a private antitrust plaintiff, Stealth, L.P.[109] Memorial Hermann asserted that the requested documents were protected from disclosure in the private antitrust suit because it had previously produced the documents to the Texas attorney general pursuant to a CID for possible antitrust violations.[110] Specifically, Memorial Hermann argued that the statutory privilege was "a 'blanket privilege' under which a defendant may decline to turn over CID materials unless its opponent can demonstrate 'good cause' for such production."[111] Memorial Hermann explained that "the Legislature intended to create a statutory privilege in businesses' favor to encourage candid cooperation with a CID."[112]

The court rejected Memorial Hermann's argument based on a plain reading of the statute.[113] The court held that the statutory privilege "precludes the attorney general—but nobody else—from disclosing CID materials"[114] and that it "does not extend to CID materials held by the defendant in private antitrust litigation."[115] The court rejected Memorial

107. 274 S.W.3d 195 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
108. Tex. Bus. & Com. Code Ann. § 15.10(i) (Vernon Supp. 2008).
109. *Memorial*, 274 S.W.3d at 197.
110. *Id.*
111. *Id.* at 197-98.
112. *Id.* at 200.
113. *Id.*
114. *Id.* at 199.
115. *Id.* at 197.

Hermann's argument that the purpose of the privilege was to encourage candid cooperation during a government investigation because: (1) such cooperation is required by law, and (2) deliberate withholding of information requested under a CID is a criminal violation.[116]

While the court's opinion is straightforward and well-reasoned, it neglects to address a key dimension of government investigations and prosecutions. Corporations are encouraged to cooperate with the government's investigation beyond what is required by law in return for leniency from the government.[117] By effectively granting private litigants access to those documents released to the government in the spirit of cooperation, the court's holding puts defendants in a tenuous position of balancing the benefits of government leniency with the risks of civil litigation damages. Thus, an unintended consequence of the holding in *Memorial Hermann* could be a reduction in voluntary cooperation by health care providers and an increase in government investigation and prosecution costs.

B. Penalties and Compliance Programs for Medical Records Disposal

In almost identical cases, *Texas v. CVS*[118] and *Texas v. Select Medical Corp.*,[119] Texas Attorney General Gregg Abbott succeeded in enforcing Texas' recently enacted identity theft protection laws[120] against two health care companies, CVS Pharmacy, Inc. and Select Medical Corporation, for discarding sensitive patient medical records and financial information in dumpsters.[121] In both petitions against the health care companies, Abbott alleged that the companies violated the laws when they: (1) failed to safeguard personal identifying information by not shredding, erasing, or otherwise making the information unreadable or undecipherable before disposal, (2) failed to implement and maintain

116. *Id.* at 200.

117. *See, e.g.*, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008), http://www.usdoj.gov/atr/public/criminal/239583.htm ("Through the Division's leniency program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.").

118. 2008 WL 1894881 253rd Dist. Ct., Liberty County, Tex., Mar. 25, 2008).

119. No. CV-72881, Plaintiff's Original Petition, Texas v. Select Medical Corp. et al., No. 08-01-21154 (Hockley Co. Dist. Ct., July 16, 2008) (copy on file with *SMU Law Review*).

120. Tex. Bus. & Com. Code Ann. §§ 35.48, 48.102, 48.201 (Vernon Supp. 2008) (enacted under Tex. H.B. 698, 79th Leg., R.S. (2005) and Tex. S.B. 122, 79th Leg., R.S., at § 2 (2005)). It is important to note these statutes have been repealed and recodified at Tex. Bus. & Com. Code Ann. §§ 72.004, 521.052, 521.151 effective April 1, 2009, respectively. Tex. H.B. 2278, 80th Leg., R.S., at 71-74, 267-68, 273-74 (2007).

121. Plaintiff's Original Petition at 3, Texas v. CVS Pharmacy, Inc., No. CV-72881 (253rd Dist. Ct., Liberty County, Tex. Apr. 16, 2007); Agreed Final Judgment at 1, Texas v. CVS Pharmacy, Inc., No. CV-72881 (253rd Dist. Ct., Liberty County, Tex. Mar. 25, 2008); Plaintiff's Original Petition at 5-6, Texas v. Select Medical Corp., No. 08-01-21154 (286th Dist. Ct., Hockley County, Tex. Jan. 10, 2008); Agreed Final Judgment at 1, Texas v. Select Medical Corp., No. 08-01-21154 (286th Dist. Ct., Hockley County, Tex. July 16, 2008).

reasonable procedures to protect and safeguard personal identifying information from unlawful use or disclosure, and (3) failed to destroy or arrange for the destruction of personal identifying information within its control that it did not retain control over.[122]

Abbott requested injunctive relief to prevent Select Medical and CVS from committing future acts in violation of the laws, or, alternatively, injunctive relief requiring the companies to contract with a business that provides document disposal services in compliance with the laws.[123] Abbott also requested that the courts fine the companies $500 in civil penalties per document that was improperly discarded under section 35.48 of the Business and Commerce Code and $2,000 to $50,000 for each violation under section 48.201 of the code.[124] Ultimately, the Liberty County District Court ordered CVS to pay the state $315,000 in penalties[125] and the Hockley County District Court ordered Select Medical to pay $990,000 in penalties.[126] The courts also enjoined the health care companies from future acts in violation of the laws and required the companies to implement a detailed compliance program to ensure proper disposal of sensitive patient information in the future.[127]

In the judgments, the courts provided almost identical, lengthy requirements for the health care companies' medical record disposal compliance programs,[128] and these judgments offer a wealth of information to Texas health care companies. The medical record disposal compliance programs from the judgments include requirements such as: written documentation of the compliance program, designation of a committed compliance officer, procedures for initially assessing and periodically evaluating the company's compliance risks, policies governing employee retention and evaluation related to program compliance, procedures for monitoring program implementation and effectiveness, and employee training on the compliance program, relevant laws, and how to report program violations.[129] To minimize the risk of similar claims and large fines, health care companies with Texas locations might consider re-evaluating their document disposal compliance programs in light of the minimum program requirements outlined in the *CVS* and *Select Medical* judgments.

122. Plaintiff's Original Petition at 4, *CVS*, No. CV-72881; Plaintiff's Original Petition at 6-7, *Select Medical*, No. 08-01-21154.

123. Plaintiff's Original Petition at 4, *CVS*, No. CV-72881; Plaintiff's Original Petition at 7, *Select Medical*, No. 08-01-21154.

124. Plaintiff's Original Petition at 5, *CVS*, No. CV-72881; Plaintiff's Original Petition at 8, *Select Medical*, No. 08-01-21154.

125. Agreed Final Judgment at 7, *CVS*, No. CV-72881.

126. Agreed Final Judgment at 11, *Select Medical*, No. 08-01-21154.

127. *Id.* at 4-10; Agreed Final Judgment at 3-7, *CVS*, No. CV-72881.

128. Agreed Final Judgment at 3-7, *CVS*, No. CV-72881.

129. *Id.*

V. PUBLIC HEALTH AND INDIGENT CARE

Public health and indigent care issues were hot topics this year. The Texas Supreme Court held that the Texas Health and Human Services Commission's (HHSC) data-collection method for determining state Medicaid payment rates to hospitals was an invalidly promulgated rule under the Texas Administrative Procedures Act (APA). In addition, the Texas attorney general ruled that a county government could not pay certain health care claims submitted by health care providers because the claims resulted in unconstitutional local government debt. In another opinion, the attorney general concluded that implementation of Bexar County's recently enacted pilot needle-exchange program would likely violate Texas controlled substances laws that prohibit the possession or delivery of drug paraphernalia.

A. THE AUTHORITY OF INFORMAL MEDICAID REIMBURSEMENT PROCEDURES

In *El Paso Hospital District v. Texas Health and Human Services Commission*, the hospital sought a declaratory judgment that the HHSC's data-collection method for determining Medicaid payment rates to hospitals was an invalid rule under the APA.[130] HHSC sets Medicaid payment rates using a prospective payment system that bases future payment rates on average costs and claims data from prior years.[131] Medicaid statutes and regulations require HHSC to use claims and cost data from twelve-month periods that run concurrently with the state government's fiscal year.[132] However, HHSC had an internal policy of limiting the annual claims data to those claims that had been paid within six months of the end of the twelve-month period.[133]

The hospital argued that this policy inappropriately reduced the payment rate by excluding more costly claims from the twelve-month period because these more costly claims often took longer for HHSC to adjudicate and pay.[134] The hospital also argued that this policy was invalid because it was not promulgated as an HHSC rule and open to public comment as required by the APA.[135] In response, HHSC argued that its policy was not a rule subject to the APA because it was merely an interpretation of a rule.[136] The court agreed with the hospital and held the policy to be an invalid rule under the APA.[137] The court explained that the policy fit squarely within the definition of a rule under the APA be-

130. El Paso Hosp. Dist. v. Texas Health and Human Servs. Comm'n, 247 S.W.3d 709, 711 (Tex. 2008). The Texas Administrative Procedure Act is codified at TEX. GOV'T CODE ANN. §§ 2001.001-.902 (Vernon 2008).
131. *Id.* at 712.
132. *Id.* at 713.
133. *Id.*
134. *Id.* at 713, 715.
135. *Id.* at 713-14.
136. *Id.* at 714.
137. *Id.*

cause it was an agency statement that: (1) affected the interest of the public at large, (2) implemented law or policy or amended or repealed a prior rule, and (3) affected a private right or procedure rather than only the internal management or organization of a state agency.[138] According to the court, the policy affected the public at large because the prospective payment system and its calculations affect all hospitals receiving reimbursement for inpatient Medicaid services.[139] Further, the policy effectively amended the prior rule defining how HHSC would calculate Medicaid payment rates by essentially limiting the claims data that HHSC would use from the required twelve-month period.[140] Finally, the policy affected the hospital's private rights, rather than only the internal management of HHSC, because the claims-limiting policy directly affected the prospective payment-rate formula and the hospital's right to reimbursement.[141]

The supreme court's ruling in favor of the hospital in *El Paso Hospital District* gives Texas health care providers more certainty regarding the authority of novel Medicaid claims and reimbursement requirements from various guidance documents and manuals published by HHSC and Medicaid contractors, such as TMHP (Texas Medicaid Healthcare Partnership). Usually, these manuals and resource documents simply reiterate or rephrase Medicaid statutes or regulations. However, these resources sometimes contain new hurdles or limitations that are not otherwise present in any statutes or regulations. *El Paso Hospital District* provides health care providers with a new tool for disputing the validity of these informal sources of Medicaid rules and requirements in the event that a requirement infringes on a provider's right to Medicaid reimbursement.

B. Unconstitutional Debt for Indigent Care

Texas Attorney General Greg Abbott recently issued an opinion concluding that the Cameron County Commissioners Court could not direct the county to pay certain indigent health care claims because the claims were likely unconstitutional debt.[142] Cameron County allocates a certain percentage of the current year's tax revenues to the payment of indigent health care services through contracts with health care providers.[143] In the event that the claims exceed the allocated budget for the year, the county pays the claims from the general tax revenues of the following year.[144] Under the Texas Constitution, city and county governments are prohibited from incurring any debt without levying a tax to pay the inter-

138. *Id.* (citing Tex. Gov't Code Ann. § 2001.003(6)(A)-(C)).
139. *Id.*
140. *Id.*
141. *Id.* at 714-15.
142. Op. Tex. Att'y Gen. No. GA-0652 (2008).
143. *Id.* at 2.
144. *Id.* at 5.

est on the obligation and two percent of the principal.[145] Abbott concluded that the payment of the excess claims from future tax revenues was a county debt and that such debt was unconstitutional because it was incurred without the required additional tax to pay the interest and principal portion.[146] Thus, Abbott stated that the Cameron County Commissioners Court could not order the county to pay these claims because they were not "just and legal demands" under the Texas Constitution.[147] Abbott also stated that he was not asked to write and was not offering an opinion on any legal remedies the health care providers may have on the outstanding claims.[148]

Abbott's opinion is interesting in light of the current climate of local government budget shortfalls, the growing uninsured population, and the steady rise in health care costs. It is unclear how the Cameron County health care providers will address this specific payment refusal, but, going forward, health care providers may need to be more attentive to the revenue sources and allocated budgets of Texas local and county governments when contracting for health care services payment.

C. Clean Needles Pilot Program Could Violate Controlled Substances Laws

In another attorney general opinion, Abbott concluded that the recently enacted Bexar County pilot needle exchange program (the Pilot Program)[149] could result in violations of the Texas controlled substances law,[150] which prohibits the possession or delivery of drug paraphernalia. The opinion requestor, Senator Jeff Wentworth, argued that the Pilot Program statute implicitly exempted program participants from prosecution under the controlled substances law because: (1) that was the legislature's intent, and (2) the legislature clearly did not intend to create a program that was effectively illegal.[151] Abbott disagreed with Senator Wentworth's arguments. The attorney general's opinion began by explaining that the statute permitted, but did not require, Bexar County to implement the Pilot Program.[152] Thus, on its face, the Pilot Program statute was not inconsistent with the controlled substances law prohibiting the possession or delivery of drug paraphernalia.[153] Abbott further explained that it must be assumed that the legislature was aware of the law prohibiting the possession of drug paraphernalia but chose not to include an express provision exempting the Pilot Program from the law.[154]

145. *Id.* at 2-3 (referencing Tex. Const. art XI, § 7).
146. *Id.* at 5.
147. *Id.* at 6-7.
148. *Id.* at 7 n.6.
149. Tex. Gov't Code Ann. § 531.0972 (Vernon Supp. 2008).
150. *See generally* Tex. Health & Safety Code Ann. § 481.125 (Vernon Supp. 2008).
151. Op. Tex. Att'y Gen. No. GA-0622 at 3 (2008).
152. *Id.*
153. *Id.*
154. *Id.* at 5.

In support of this argument, Abbott discussed numerous, express statutory exceptions to the controlled substances laws that the legislature had chosen to include in similar public health program statutes in the past.[155] To summarize, Abbott stated, "we must take the statutes as we find them and allow the Legislature, if it wishes, to remedy any alleged defects."[156] Abbott took his argument a step further by providing an itemized list of numerous other state and federal laws that the Pilot Program could implicate if implemented by Bexar County under the current version of the statute.[157] Abbott also commented that it would be an issue of prosecutorial discretion on whether or not Pilot Program participants would be prosecuted under any laws.[158]

Of note, Texas legislators have already filed three bills in the 81st Legislative Session that would exempt state disease control program activities, such as the needle exchange activities of the Pilot Program, from the drug paraphernalia law at section 481.125 of the Texas Health and Safety Code.[159] It will be interesting to see if the legislature decides to pass any of these laws in response to the attorney general's opinion on the legality of the needle exchange program.

VI. CONCLUSION

Clearly, this Survey period has given attorneys a wide range of new legal issues and developments to consider when advising Texas health care clients. In addition to the opinions selected for discussion in this article, Texas health care attorneys might also be interested in the following cases decided during the survey period that are worth noting: *Texas ex rel Ven-A-Care v. Abbott Laboratories Inc.*, which resulted in multimillion-dollar settlements with the pharmaceutical manufacturers Abbott Laboratories and GlaxoSmithKline over allegations that they inflated Medicaid price reports and overcharged the Texas Medicaid program,[160] *Boren v. Texoma Medical Center*, holding that a hospital did not have a duty to warn third parties that a patient might harm his family after the

155. *Id.* (referring to TEX. HEALTH & SAFETY CODE ANN. § 481.111(c) (Vernon Supp. 2008) ("Similarly, the Legislature has expressly excepted from specified provisions of the Texas Controlled Substances Act a person who 'possesses or delivers . . . drug paraphernalia to be used to introduce tetrahydrocannabinols or their derivatives into the human body, for use in a federally approved therapeutic research program.'").

156. *Id.*

157. *Id.* at 7 Examples provided included state felony conspiracy under TEX. PENAL CODE ANN. § 15.02 (Vernon Supp. 2008), state felony dispensing of drug paraphernalia to a minor under TEX. HEALTH & SAFETY CODE ANN. § 481.125(c) (Vernon Supp. 2008), federal criminal drug paraphernalia possession under 21 U.S.C. § 863(a) (2000), and federal criminal conspiracy under 18 U.S.C. § 371 (2000) *Id.*

158. *Id.* at 6-7.

159. Tex. H.B. 272, 81st Leg., R.S., at § 2 (2009); Tex. H.B. 142, 81st Leg., R.S., at § 2 (2009); Tex. S.B. 188, 81st Leg., R.S., at § 2 (2009).

160. Settlement Agreement and Release with Abbott Labs., Texas v. Abbott Labs., Inc., No. D-1-GV-04-01286 (201st Dist. Ct., Travis County, Tex. Sep. 8, 2008); Settlement Agreement and Release with GlaxoSmithKline, Texas v. Abbott Labs., Inc., No. D-1-GV-04-01286 (201st Dist. Ct., Travis County, Tex. Oct. 11, 2007).

hospital refused to admit the patient with self-inflicted wounds and suicidal ideations,[161] and *Merck & Co. v. Garza*, which partially reversed and remanded a multimillion-dollar products liability verdict against Merck alleging that one of its drugs, Vioxx, caused the death of a patient suffering from a heart condition.[162]

161. 258 S.W.3d 224, 225-27 (Tex. App.—Dallas 2008, no pet.).

162. 277 S.W.3d 430 (Tex. App.—San Antonio 2008, pet. filed) (the original opinion issued on May 14, 2008 was withdrawn and superseded with a Dec. 10, 2008 opinion based on a rehearing regarding jury misconduct).