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The MLIIA: Bad Medicine and Bad Law Is a Costly Combination for Texas Minors with Medical Death Claims

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INTRODUCTION

The disability of a person . . . is not only the lack of access to the courts, but also the inability to participate in, control, or even understand the progression and disposition of their lawsuit.

. . . .

"The tolling statute reflects a considered legislative judgment that in enumerated circumstances the strong policy in favor of prompt disposition of disputes must give way to the need to protect a plaintiff who is unable to protect himself or herself."[1]

The Texas Legislature promulgated the Medical Liability and Insurance Improvement Act ("MLIIA")[2] in 1977.[3] Legislators passed the MLIIA in response to a perceived health care liability crisis manifested by a shortage of affordable medical malpractice insurance.[4] The MLIIA includes measures to reduce the number and size of medical malpractice awards,[5] such as a pre-suit notice requirement, informed consent restraints, limitations on the use of res ipsa loquitur, a short statute of limitations period and a damages cap.[6] In passing the MLIIA, legislators theorized that such measures would allow insurers to predict their liability which would stabilize or reduce medical malpractice insurance rates.[7]

Although the MLIIA may have curbed medical liability insurance rates, today, twenty years after the Act's enactment, securing affordable medical liability insurance remains a challenge for health care providers as insurance costs continue to rise.[8] This result likely occurs

1. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 755-56 (Tex. 1993) (quoting Tzolar v. International Jet Leasing, Inc., 283 Cal. Rptr. 314, 317 (Cal. Ct. App. 1991).

2. TEX. REV. CIV. STAT. ANN. art. 4590i (West Supp. 1996).

3. *See* Darrell L. Keith, *The Texas Medical Liability and Insurance Improvement Act—A Survey and Analysis of Its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266 (1984).

4. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (West Supp. 1996). *See also* Keith, *supra* note 3, at 266 (stating health care providers were confronted with a so-called medical malpractice insurance crisis resulting in unreasonably high insurance rates); Max Sherman & Michael L. Pate, *The Texas Legislature and Medical Malpractice*, 10 TEX. TECH L. REV. 339, 339 (1979) (stating that Texas legislators were concerned that medical malpractice insurance rates were drastically increasing and available coverage declining); Thea Andrews, *Infant Tolling Statues in Medical Malpractice Cases*, 5 J. LEGAL MED., 469, 469 n.4 (1984) (citing AMERICAN OSTEOPATHIC ASSOCIATION, FIRST NATIONAL CONFERENCE ON MEDICAL MALPRACTICE 5-6 (1970)) (stating that medical malpractice litigation exploded in the mid-1960's and dramatically affected the health care profession).

5. *See* Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. R. 759, 761 (1977).

6. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 4.01, 6.02, 7.01, 10.01, 11.02-11.05 (West Supp. 1996).

7. *See* Redish, *supra* note 5, at 761.

8. Scientific research on diseases, such as HIV, cancer and heart disease, combined with an aging population, a stymied economy, inflation, patients' lawsuits, physicians practicing defensive medicine and withdrawal of commercial insurers from the

because the insurance crisis involves "a complex of problems involving interacting medical, legal, sociological, psychological, and economic factors."[9]

In addition to insurance rates remaining high, victims of medical malpractice, whose rights have been restricted by the tort reform, challenge that the MLIIA is unconstitutional.[10] In response, some courts have held specific MLIIA provisions are unconstitutional because they unduly restrict plaintiffs' rights to recover compensation for injuries.[11] Thus, while Texas courts agree that lowering medical

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market are factors blamed for the large increases in health care costs. *See generally* Page Keeton, *Medical Negligence—The Standard of Care*, 10 TEX. TECH L. REV. 351, 360 n.19 (1979) (citing factors blamed for the increase in claims as: technological and scientific developments, a change in the doctor-patient relationship, a litigious society, unmeritorious law suits, the rules of damages, and changes in the substantive law of torts); Stephen Zuckerman et al., *Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums*, 27 INQUIRY 167, 167 (1990) (stating "Despite the widespread interest in tort reforms, little published empirical evidence suggests that any of them have resulted in lower premiums for physicians").

Regardless of the causes, reducing malpractice insurance rates remains an important goal today as patients typically rely on insurance to pay health care expenses. *See* Larry A. "Max" Maxwell, *An Annual Survey of Texas Law: Health Care Law*, 48 SMU L. REV. 1303, 1322-23 (1995) (stating "The payment of health care most often involves an insurance company, health maintenance organization (HMO), preferred provider organization (PPO), or some other network arrangement that includes payors and providers."). Not surprisingly, increased premium costs limit health care providers' access to affordable coverage which in turn, limits patients' access to quality health care services. *See* Redish, *supra* note 5, at 761.

> The effects of the malpractice insurance crisis are not limited to physicians; the crisis affects the entire health care system. To the extent that physicians are forced to avoid high-risk specialities or to relocate in areas with lower insurance rates, patients are seriously prejudiced by the resulting maldistribution of medical care. Patients who remain able to obtain adequate medical care also pay for the insurance crisis in the form of higher costs passed on to them by the physicians.

Id. (citations omitted).

9. Redish, *supra* note 5, at 760 n.10 (quoting U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. (OS) 73-88 MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 4 (1973)).

10. *See* Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. App.—Corpus Christ 1985, no writ) (challenging the damages cap violates the open courts provision); Phillips v. Sharpstown Gen. Hosp., 664 S.W.2d 162 (Tex. App.—Houston [1st Dist.] 1983, no writ) (challenging the statute of limitations violates the state and federal equal protection clauses and grants special privileges and immunities to health care providers); Neagle v. Nelson, 658 S.W.2d 258 (Tex. App.—Corpus Christi 1983) (challenging the statute of limitations violates the due process and equal protection provisions), *rev'd on other grounds*, 685 S.W.2d 11 (Tex. 1985).

11. *See* Wheat v. United States, 860 F.2d 1256 (5th Cir. 1988) (holding the medical malpractice statute's damages cap violates the Texas Constitution, as applied to plaintiffs with common law causes of action); Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986) (holding the medical malpractice statute's damages cap imposed on plaintiffs with personal injury claims violated the federal and state equal protection clauses); Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995) (holding the medical malpractice statute's limitations period was unconstitutional as applied to minors with common law causes of action); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (holding the

insurance rates is a legitimate state goal, courts have also endeavored to assure that victims receive compensation for injuries caused by medical malpractice. In balancing these interests, courts have found some of the means adopted by MLIIA legislators unnecessarily burden certain groups of plaintiffs.[12]

One group unfairly burdened by the MLIIA is minor medical wrongful death claimants.[13] The MLIIA requires minors to file wrongful death claims by age fourteen or their claims will be barred.[14] This result occurs because the current MLIIA minority tolling provision, contained in the limitations provision, only provides that minors under the age of twelve have until their fourteenth birthdays to file, or have filed on their behalf, a medical claim.[15]

Lower courts agree that barring minors' medical wrongful death claims not filed by age fourteen is inequitable and illogical.[16] Nevertheless, lower courts feel bound to apply the MLIIA as written and feel confined by the Texas Supreme Court's decision in *Rose v. Doctors Hospital*,[17] upholding the authority of the Texas Legislature to limit damage awards for medical wrongful *death* claims.[18]

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medical malpractice statute's limitations period violated the open courts provision of the Texas Constitution as applied to minors with common law causes of action).

12. *See Weiner*, 900 S.W.2d at 318-19 (holding minors' claims are unreasonably restricted); *Sax*, 648 S.W.2d at 667 (Tex. 1983) (holding the statute of limitations unreasonably restricted minors' causes of action); Felan v. Ramos, 857 S.W.2d 113 (Tex. App.—Corpus Christi 1993, writ denied) (holding the statute of limitations violated the open courts provision as applied to mentally incompetent patients).

13. *See* Povolish v. Bethania Reg'l Health Care Ctr., 905 S.W.2d 66 (Tex. App.—Fort Worth 1995, no writ) (barring the plaintiffs' medical wrongful death claim before they reached ages eighteen and nineteen because the decedent mother died over two years before the children filed a claim); Hogan v. Hallman, 889 S.W.2d 332 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding eighteen year old twin sons' medical wrongful death claim was barred because they failed to file suit by age fourteen); Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (barring the plaintiff's medical wrongful death claim because he failed to file suit by age fourteen). Notably,

> Many states have reduced the number of allowable years between the time of injury or discovery of injury and the date suit is filed. Special concerns have been to limit the traditional rights of children to wait until they achieve the age of majority and to restrict broad interpretations of the 'discovery' of injury and responsibility for it.

Zuckerman et al., *supra* note 8, at 171.

14. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

15. *See id.*

16. *See Povolish*, 905 S.W.2d at 68; *Hogan*, 889 S.W.2d at 339-40.

17. 801 S.W.2d 841 (Tex. 1990).

18. *See id.* at 846. *See also Povolish*, 905 S.W.2d at 68 (stating the court felt bound to bar a medical wrongful death claim because of the Texas Supreme Court's decision in *Rose*, and urging the court to reassess its position regarding minors' claims); *Hogan*, 889 S.W.2d at 339 (barring minors' medical wrongful death claims but stating, "But for the rationale in *Rose*, we would be hard pressed to justify the constitutionality of article 4590i, §10 under an equal protection analysis" and urging the Texas Supreme Court to revisit the issue of whether the MLIIA's statute of limitations vio-

The Texas Supreme Court, however, in *Sax v. Votteler*,[19] unanimously held that requiring minors to file *personal injury* suits by age eight was unconstitutional.[20] The court found the requirement unreasonably restricted minors' rights to receive compensation for medical injuries and found it unreasonable to assume that an adult would always institute suit on a minor's behalf before statutes of limitations run.[21] Thereafter, the Texas Legislature amended the minority tolling provision to permit minors with medical claims to institute suits until they reach age fourteen.[22] Again, the Texas Supreme Court, in *Weiner*

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lates the equal protection clause by unreasonably restricting the class of minors from instituting medical wrongful death suits).

19. 648 S.W.2d 661 (Tex. 1983).

20. *See id.* at 667.

21. *See id.* at 665-67.

22. The *Sax* court specifically held that article 5.82, § 4 of the Texas Insurance Code was unconstitutional as applied to minors. *See Sax*, 658 S.W.2d at 667. *See* Act of June 3, 1975, ch. 330 § 1, 1975 Tex. Gen. Laws 864, *repealed by* Medical Liability and Insurance Improvement Act, ch. 817, pt. 4, § 41.03, 1977 Tex. Gen. Laws 2039, 2064. The MLIIA minority tolling provision is identical to that contained in the Physicians, Podiatrists and Hospitals Act, the MLIIA's precursor, except that the MLIIA allows minors under the age of twelve until their fourteenth birthdays to file claims, whereas the Physicians, Podiatrists and Hospitals Act only allowed minors under the age of six until their eighth birthday to file claims. *See Sax*, 648 S.W.2d at 663 n.1; Nelson v. Krusen, 678 S.W.2d 918, 920 (Tex. 1984) (explaining that the provisions found in the MLIIA are essentially the same as those in the Physicians, Podiatrists and Hospitals Act); Weiner v. Wasson, 900 S.W.2d 316, 318 (Tex. 1995) (noting that "the only significant difference between article 5.82 and section 10.01 is that section 10.01 extends the tolling period [for minors] from age six to age twelve.").

The first minority tolling clause, contained in the statute of limitations provision of the Texas Insurance Code § 4, stated:

> Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Article 4437f, Vernon's Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, *except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim.* Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

TEX. INS. CODE ANN. art. 5.82, § 4 (West 1976) (emphasis added) *repealed by* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996). The current minority tolling provision provides:

> Notwithstanding any other law, 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; *provided that, minors under the age of 12 shall have until their 14th birthday in which to file, or have filed on their behalf, the claim.* Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

v. Wasson,[23] held the limitations period was unconstitutional, as applied to minors instituting personal injury claims, because it prematurely cut off their causes of action and failed to afford them adequate opportunities to institute suits.[24] The *Weiner* court concluded that limitations are tolled on minors' personal injury claims until they reach majority.[25]

Similarly, the MLIIA arbitrarily restricts minors' rights to institute medical wrongful death suits and prematurely cuts off their causes of action. Notably, neither MLIIA adult beneficiaries nor minors asserting nonmedical wrongful death claims are required to institute suit while under a disability. In fact, under the Wrongful Death Act, similarly situated minors filing nonmedical wrongful death claims may toll limitations until they reach majority.[26] Further, the MLIIA allows adult medical wrongful death beneficiaries two years from the date of the defendant's tort to institute suit.[27] Thus, minors filing *medical wrongful death* claims are the only class of plaintiffs whose rights are prematurely terminated.

The Texas Supreme Court's holding in *Rose v. Doctors Hospital* may be distinguished from cases involving minors asserting medical wrongful death claims on the basis that the restriction imposed by the

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TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996) (emphasis added). Notably, the Physicians, Podiatrists and Hospitals Act established a two-year limitations period, "altered the tolling provisions traditionally applied to minors," and only sought to restrict minors' rights. *See* Keith, *supra* note 3, at 267. The Act also sought to abolish the discovery rule in medical malpractice claims only in cases where the physician, podiatrist, anesthetist, or hospital was insured. *See id.*

23. 900 S.W.2d 316 (Tex. 1995).

24. *See id.* at 319. Stating that the MLIIA's statute of limitations, as applied to minors with personal injury claims, violated the open courts provision of the Texas Constitution, the court explained that the legislature's amendment of the minority tolling provision from age eight to age fourteen was inadequate. *See id.* at 318-19. The court stated:

> This one change in section 10.01 does not cure the constitutional infirmity that we identified in article 5.82 in *Sax*. Whether a statute compels a child to bring suit by age eight or by age fourteen is inconsequential because in either instance a minor child is legally disabled from pursuing a suit on his own. We do not doubt the Legislature's power to remove a minor's legal disabilities and thus lower below eighteen the age at which a person may sue on his or her own behalf, but the Court unanimously agrees that the Legislature did not do so in section 10.01.

Id. at 318-19.

25. *See id.* at 321.

26. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986); TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-.031 (Vernon 1986). *See also* Lubaway v. City of McLean, 355 F. Supp. 1109 (N.D. Tex. 1973) (holding that under Texas law, the two-year statute of limitations contained in section 5526 (now section 16.003) applies to wrongful death actions).

27. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

MLIIA on the *Rose* plaintiffs was reasonable.[28] In contrast, the restriction placed on minors with medical wrongful death claims is arbitrary and unreasonable. In *Rose*, the wrongful death beneficiaries were not under a disability, had adequate time to institute suit, and were not precluded from receiving compensation.[29] Rather, the amount of compensation they could receive was limited.[30] In contrast, the unreasonable time bar imposed on minors asserting medical wrongful death claims precludes them from receiving any compensation.[31] While the *Rose* court correctly held the Texas Legislature may constitutionally limit damage awards for statutory causes of action,[32] Texas courts have also held the legislature may not arbitrarily single out a class of plaintiffs and unreasonably restrict their rights to institute suits.[33] Thus, the legislative rationale in singling out a class of disabled plaintiffs, minors asserting medical wrongful death claims, and unreasonably restricting their rights to institute suit, is constitutionally suspect.

Not surprisingly, the Texas Supreme Court has resolved many issues regarding how the MLIIA applies to wrongful death claims. For example, the Texas Supreme Court has addressed whether the MLIIA or the Wrongful Death Act controls when medical negligence causes death, whether limitations commence pursuant to the MLIIA or the Wrongful Death Act, whether application of the MLIIA's limitations period commencing when the defendant commits malpractice violates the open courts provision of the Texas Constitution, and whether the minority tolling provision applies when a decedent is a child, rather

28. In *Rose*, the statutory limit in question involved the amount of damages the plaintiffs could recover, rather than whether they had an adequate time to institute suit. *See Rose*, 801 S.W.2d at 843.

29. *See id.*

30. *See id.* at 846-47.

31. *See* Povolish v. Bethania Reg'l Health Care Ctr., 905 S.W.2d 66 (Tex. App.—Fort Worth 1995, no writ); Hogan v. Hallman, 889 S.W.2d 332 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

32. *See Rose,* 801 S.W.2d at 842.

33. *See* Sax v. Votteler, 648 S.W.2d 666 (Tex. 1983) (holding the Texas Legislature may not arbitrarily restrict minors' rights to file personal injury claims arising from alleged medical malpractice); San Antonio Retail Grocers, Inc. v. Lafferty, 297 S.W.2d 813 (Tex. 1957) (holding a statute providing for the exclusion of grazing lands and tracts of not less than six hundred forty acres from the water conservation district and not excluding grazing lands under six hundred forty acres lacked a reasonable basis for the discrimination against small landowners, and thus violated the equal protection clause); Lossing v. Hughes, 244 S.W. 556, 559 (Tex. Civ. App.—Dallas 1922, no writ) (holding that a statute prohibiting Texas counties from issuing licenses to commercial motor vehicles with net carrying capacities over eight thousand pounds, while exempting the same vehicles engaged in agricultural purposes from the statutory requirements violated the equal protection provision because "[t]he Legislature cannot by its arbitrary fiat create such a classification" when no rational relationship exists between the classification and the statutory purposes).

than a beneficiary.[34]

The Texas Supreme Court, in *Bala v. Maxwell*,[35] held the MLIIA applies to death claims arising from medical malpractice, that limitations on such claims commence pursuant to the MLIIA, and that application of the MLIIA limitations period does not violate the open courts provision of the Texas Constitution.[36] In *Baptist Memorial Hospital System v. Arredondo*,[37] the court addressed whether the MLIIA could constitutionally bar an adult's wrongful death claim because she failed to institute suit within two years of the defendant's alleged act of medical malpractice, or whether the MLIIA minority tolling provision preserved her claim because the decedent was a child.[38] The court held the MLIIA minority tolling provision applies only to claims filed by a minor or on a minor's behalf, not to an adult's claim and that the time restriction did not violate the open courts provision.[39]

In sum, the Texas Supreme Court has held that the MLIIA and its limitations provision applies to wrongful death claims premised on medical malpractice, its minority tolling provision applies only to claims filed by minors, and minors filing *personal injury* claims may toll the commencement of limitations until they reach majority even though the minority tolling provision states that it preserves minors' claims only until they reach age fourteen.[40] However, the Texas Supreme Court has not addressed whether the MLIIA may constitutionally terminate minors' rights to institute suits for *statutory wrongful death* claims at age fourteen or whether limitations are tolled until they reach majority.

This comment explains how the derivative nature of death claims, combined with the MLIIA's accrual dates and its minority tolling provision, result in premature termination of minors' rights to file wrongful death claims caused by medical malpractice. Section I of this comment provides a brief explanation of events prompting the Texas Legislature to enact the MLIIA and the provisions legislators included in the statute to alleviate the perceived health care liability crisis. Sec-

34. *See* Bala v. Maxwell, 909 S.W.2d 889 (Tex. 1995) (per curiam) (holding the MLIIA and its limitation provision, not the Wrongful Death Act and its limitations provision, applies to medical wrongful death claims); Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam) (holding the MLIIA could constitutionally bar an adult's medical wrongful death claim because she failed to file suit within two years of the health care provider's alleged negligence, even though she filed suit within two years of the date of death).

35. 909 S.W.2d 889 (Tex. 1995) (per curiam).

36. *See id.* at 892-93.

37. 922 S.W.2d 120 (Tex. 1996).

38. *See id.* at 121.

39. *See id.* at 121-22.

40. *See, e.g.*, Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam); Bala v. Maxwell, 909 S.W.2d 889 (Tex. 1995) (per curiam); Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995).

tion II discusses wrongful death causes of action and compares death causes of action brought under the Wrongful Death Act with death causes of action brought under the MLIIA. Section II also reviews Texas Supreme Court decisions applying the MLIIA to wrongful death claims. Section III surveys federal and state case law holding specific provisions or applications of the MLIIA are unconstitutional. Section IV reviews Texas case law interpreting and applying the MLIIA minority tolling provision to medical wrongful death claims brought by minor beneficiaries and by adult beneficiaries when minors are the decedents. In Section V, the author urges the Texas Legislature to amend the MLIIA minority tolling provision so that limitations commence on all minors' claims at age eighteen. Alternatively, the author urges the Texas Supreme Court to hold the current MLIIA minority tolling provision is unconstitutional, as applied to minors asserting medical wrongful death claims, because it violates the equal protection clause of the Texas Constitution.

I. THE HEALTH CARE LIABILITY INSURANCE CRISIS

A. *Increasing Medical Liability Insurance Rates*

In the 1970's many people claimed an insurance crisis existed because health care providers' insurance rates increased while available coverage declined.[41] Notably, many commentators blamed the increased insurance rates on increased malpractice litigation and related high damage awards.[42]

41. *See* Russell B. Power & Karl O. Wyler, III, *Patients' Compensation Fund And The Bad Faith Cause Of Action: Two Proposed Amendments To The Medical Liability And Insurance Improvement Act Of Texas*, 17 TEX. TECH L. REV. 1603, 1603-04 (1986).

42. *See* Keith, *supra* note 3, at 266-67. Commentators generally blamed "one or another of the key players in the malpractice system: the physicians, the juries, the court system as a whole, the plaintiffs' attorneys, or the cultural expectations about medical care within the United States." James R. Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 LAW & CONTEMP. PROBS. 37, 37 (1986).

"What was also unclear in 1975, however, was the cause of this rise in medical liability insurance rates. While there was unquestionably a problem in the medical profession, it was unclear whether the insurance industry was actually facing a 'crisis' *caused by malpractice litigation*." Keith, *supra* note 3, at 268 (citation omitted) (emphasis added). In fact, several commentators noted:

> The causes of these [insurance] problems have been widely disputed. Some groups, including insurance companies, have blamed the rising premiums and reductions in coverage on rapidly rising and unpredictable liability claims costs and have argued for tort reform to control escalating insurance costs. . . . Others, such as consumer organizations, have pointed to insurance company mismanagement and even have suggested that insurers colluded to raise rates when the industry faced declining investment income due to reductions in interest rates . . . .

Scott Harrington & Robert E. Litan, *Causes of the Liability Insurance Crisis*, SCIENCE, Feb. 12, 1988, at 737 (citations omitted). Still other commentators blamed the malpractice insurance crisis on the way that insurance companies conducted business and contended that the solution to the medical liability insurance crisis lay with improved

Regardless of the cause of the cost increases, the perceived insurance crisis dramatically affected every facet of the health care profession.[43] In attempting to reduce their liability, physicians responded to the crisis by: (1) changing fields of practice to avoid high risk medical insurance categories;[44] (2) limiting the scope of their practices;[45] (3) entering early retirement;[46] (4) refusing to treat high risk patients;[47] (5) instituting countersuits against patients filing nuisance claims;[48]

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regulatory control over insurers. *See* J. Robert Hunter & Thomas C. Borzilleri, *The Liability Insurance Crisis*, TRIAL, Apr. 1986, at 43-46. Yet others conceded that the number of compensable injuries may cause malpractice insurance rates to rise, but questioned whether such rises in medical liability insurance rates actually amounted to a crisis. The noted legal economist James Posner explained:

> The major underlying force driving malpractice costs is the number of "compensable injuries" that occur. Many more injuries occur than are ever compensated. Indeed, the liability system acts effectively to reduce the total payments. . . .
>
> Every serious observer of the malpractice situation will concede that large numbers of injuries . . . occur, and that society deems many of these to be "compensable." . . .
>
> Even while acknowledging the frequency and severity of serious injuries, most observers would probably also agree that the quality of medical care on an aggregate level in the United States is rather good. The probability of a serious mistake that leads to damages over $1 million is about one in 100,000 hospital patients, and even lower in the doctor's office. For high risk areas of medical care, such as obstetrics, there is a probability of approximately one in 10,000 pregnancies leading to serious claims. In everyday life, people faced with such probabilities will often assume the risk without calling it a "crisis," or feeling that the quality is essentially flawed.

Posner, *supra* at 52-53 (citations omitted).

43. *See* Andrews, *supra* note 4, at 469 n.4.

> Pressure from malpractice insurance lobbyists, doctors and hospitals convinced the Texas Legislature that a medical malpractice insurance crisis existed, and that if immediate action was not taken skyrocketing insurance rates would put malpractice insurance out of the reach of many Texas doctors and hospitals. As a result, some physicians or health care providers either ceased or reduced the scope of their practice of medicine, thus making medical care unavailable to thousands of Texans.

Keith, *supra* note 3, at 267 (citations omitted).

44. *See* Power & Wyler, *supra* note 41, at 1605.

45. *See id.* at 1604-05.

46. *See id.* Proclaiming the medical liability insurance crisis was his top legislative priority in 1977, Texas Governor Dolph Briscoe stated:

> Older doctors are encouraged, if not forced, to retire prematurely because of high insurance rates and lack of availability of insurance (to protect doctors against claims for medical malpractice).
>
> Many doctors in rural areas who occasionally perform surgical procedures as adjuncts to their general practice cannot afford the rates and have ceased the service. Care of indigents and emergency patients is threatened because of the high increase in insurance rates for doctors who traditionally have volunteered much of this service.

Sherman & Pate, *supra* note 4, at 341 (quoting Tex. H.R.J. 111 (1977)).

47. *See* Power & Wyler, *supra* note 41, at 1605.

48. *See id.*

> Increased numbers of medical malpractice suits, damage awards and malpractice insurance premiums during the 1970's intensified the medical pro-

and (6) practicing defensive medicine.[49] As insurance rates rose, the

fession's concern and search for a legal remedy available to physicians subjected to allegedly "wrongful" "meritless," "frivolous," or "bad faith" medical malpractice suits. . . . Physicians considered these suits were instituted by former patients for several groundless reasons, including mere general principles arising solely from a bad medical result and breakdown in the physician-patient relationship, unreasonable patient expectations of the physician, creation of a nuisance or harassment, to extract settlements, to prevent physicians from suing on an unpaid bill, or only to obtain a physician's testimony against another physician, rather than seeking damages for alleged malpractice. In addition, a medical profession paranoia developed among physicians who believed doctors were sued too frequently, plaintiffs were easily successful in malpractice cases, jury verdicts against doctors were universally large, and defendant-physicians' reputations were always damaged by the suit.

Convinced that successfully defending or forcing plaintiff-patients to dismiss malpractice cases were inadequate remedies and deterrents to meritless or bad faith malpractice suits, physicians who considered themselves wrongfully sued strategically developed an active means of counter attack to discourage patients and their lawyers from filing or prosecuting such lawsuits, and to establish a remedy for the so-called "wrongfully sued" physician. This legal tactic became popularly known as the "physician countersuit" to malpractice actions. In some parts of the country, state and local medical societies established or planned organized funding for physician countersuits. At the national level, the American Medical Association's House of Delegates resolved that "appropriate assistance should be given to the physicians who countersue following frivolous malpractice suits. [sic] Physician countersuits are commonly based upon legal theories of malicious prosecution, abuse of process, defamation, prima facie tort, barratry, third party attorney negligence or legal malpractice, constructive contempt of court, frivolous suit filing, invasion of privacy, and violation of physician's federal constitutional rights under the Civil Rights Act.

Keith, *supra* note 3, at 310-12 (citations omitted). However, most physician's countersuits have been unsuccessful because physicians failed to allege proper damages, to prove causation, or to state a claim upon which relief could be granted. *See id.* at 314-16. Further, physician's rights to file countersuits against patients must be weighed against a patient's right to free access to courts. *See id.* at 318. Moreover, Texas courts have been concerned that these types of countersuits are against public policy and will deter patients from filing valid claims. *See id.* Finally,

> Claims by the medical profession that substantial numbers of meritless malpractice suits contributed to the alleged malpractice 'crisis' have not been borne out statistically, and serious doubt exists as to the impact of malpractice actions on physicians' reputations. Insufficient evidence exists to relate meritless or groundless suits to increased litigation, damage awards and malpractice insurance rates or other burdens associated with defending lawsuits.

Id. (citations omitted). *See also* Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (holding that the physician's countersuit against a patient and the patient's attorney for malicious prosecution and abuse of process against patient did not state a cause of action); Moiel v. Sanlin, 571 S.W.2d 567 (Tex. Civ. App.—Corpus Christi 1978, no writ) (holding the physician had no cause of action for malicious prosecution, barratry, abuse of process, and negligence against patient and patient's attorney for instituting malpractice suit).

49. *See* Power & Wyler, *supra* note 41, at 1604-05. The medical liability crisis "led many physicians to practice defensive medicine which subjects the patient to repetitive diagnostic tests and x-rays and fails to make use of newly developed but successful medical techniques." Andrews, *supra* note 4, at 469 n.4. The sole purpose of defensive medicine is corroboration of the physicians treatment, diagnosis and proce-

public experienced a decline in the number of physicians willing to practice in areas that insurance companies designated high risk.[50] Over time, health care became more expensive and less accessible as physicians decreased the scope of their practices and passed along rising insurance fees to the general public.[51]

B. *Controlling Statutes Before the Health Care Liability Insurance Crisis*

In Texas, before 1975, medical malpractice claims were pursued under contract or tort theories, such as oral contract to cure, breach of warranty, negligence, assault, battery, and wrongful death.[52] Plaintiffs filing medical malpractice claims had two years from the accrual of an action to file claims.[53] Further, plaintiffs filing medical malpractice claims could employ the discovery rule to file claims within two years of the date they knew or should have known they were injured[54] and a disability tolling[55] provision permitted minors to toll the commence-

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dures. *See* Power & Wyler, *supra* note 41, at 1604. Corroboration may provide protection for physicians sued for malpractice by negating the breach of duty element in a negligence case. Through corroboration, a physician attempts to show he acted in conformity with a reasonable physician standard and did not breach the duty of care owed a patient. Ironically, the practice of defensive medicine actually increased the costs of medical care, which in turn, raised insurance rates. *See id.* Thus, medical liability insurance rates increased as a consequence of physicians' and insurers' heightened *fear* of liability. *See id.*

50. *See* Power & Wyler, *supra* note 41, at 1605. High risk areas included obstetrics-gynecology, orthopedics, and neurosurgery. *See* Zuckerman et al., *supra* note 8, at 169; Posner, *supra* note 42, at 46.

51. *See* Andrews, *supra* note 4, at 469 n.4.

52. *See* Craig M. Van De Mark et al., *Limitations*, 22 HOUS. L. REV. 319, 320 (1985). "The curtailment of such [patients'] rights has steadily increased since 1975, with special protection from liability being granted to tortfeasors if they are within the definition of 'physicians' or 'health care providers' found in section 1.03(3) of the Medical Liability Act." Keith, *supra* note 3, at 267.

53. *See* TEX. REV. CIV. STAT. ANN. art. 5526 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986)).

54. *See* Joseph P. Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 421 (1979). At common law and before the MLIIA became effective, Texas courts applied the discovery rule to toll statutes of limitations on medical malpractice claims until the patient discovered, or should have discovered, the alleged malpractice. *See* Robinson v. Weaver, 550 S.W.2d 18, 19-20 (Tex. 1977); Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967). Although the Keeton Study Commission recommended a modified discovery rule be included in the MLIIA to grant plaintiffs one year to institute suit from the date they discover or reasonably should discover their injuries, the legislature rejected the recommendation, opting instead for the two-year absolute limitations period currently contained in the Act. *See* Witherspoon, *supra* at 421-22. Once the MLIIA was enacted, medical malpractice plaintiffs have been held to an absolute two-year limitations period. *See* Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985). Further, limitations generally run from the date of injury, regardless of when the injured patient discovers his injuries. *See id.* at 208.

55. *See* TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1985) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1986). "Tolling is the process whereby a legislature or a court will provide that a statute of limitations is

ment of limitations until attaining majority.[56]

C. *The Professional Liability Insurance for Physicians, Podiatrists and Hospitals Act and the Keeton Study Commission*

During the 1970's, legislators around the country were warned that a medical liability insurance crisis existed.[57] Insurance companies, physicians' organizations, and health care providers began lobbying for substantive and procedural tort reform to curb the crisis.[58] As a temporary solution, the Texas Legislature passed the Physicians, Podiatrists and Hospitals Act in 1975.[59] Simultaneously, the legislature created the Texas Medical Professional Study Commission ("Commission") to evaluate the problem, compile a report, and make recommendations for long-term solutions to the Sixty-fifth Texas Legislature.[60]

By the end of 1976, the Commission's completed report was presented to the legislature.[61] The Commission suggested a plan for

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temporarily suspended or stopped. Often, tolling provisions are allowed for insanity, infancy, incapacity, fraud, or discovery." Susan S. Septimus, *The Concept of Continuous Tort As Applied to Medical Malpractice: Sleeping Beauty or Slumbering Beast for Defendant*, 22 TORT & INS. L.J. 71, 76 n.28 (1986).

56. *See* Van De Mark, *supra* note 52, at 320 (citing TEX. REV. CIV. STAT. ANN. art. 5535 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1986))). Article 5535 provided:

> If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues . . . a minor . . . the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

Id. In Texas, majority is attained at age eighteen. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (Vernon 1986) (formerly TEX. REV. CIV. STAT. ANN. art. 5923(b) § 1).

57. *See* Power & Wyler, *supra* note 41, at 1603. State legislators, in response to the rising cost and unavailability of medical malpractice insurance, passed tort reform laws in every state except West Virginia. *See* David Randolph Smith, *Battling A Receding Tort Frontier: Constitutional Attacks On Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 200-01 (1985).

58. *See* Power & Wyler, *supra* note 41, at 1603-04.

59. TEX. INS. CODE ANN. art. 5.82 (Vernon 1976) (Ch. 330, 1975 Tex. Gen. Laws 864), *repealed by* TEX. REV. CIV. STAT. ANN. art. 4590i (West Supp. 1996). The Legislature specifically provided that the Act would be temporary and allowed it to expire by its own terms on December 31, 1977. *See* Schepps v. Presbyterian Hosp., 652 S.W.2d 934, 936 (Tex. 1983).

60. *See* Power & Wyler, *supra* note 41, at 1605-06.

> The Study Commission had a threefold purpose: to recommend steps that would insure the availability of professional liability insurance for Texas health care providers; to investigate the reasons for the mounting premium costs for medical liability insurance; and to make recommendations to the legislature designed to lower the costs of this insurance to more acceptable levels.

Keith, *supra* note 3, at 269.

61. *See* Power & Wyler, *supra* note 41, at 1606. The Commission became commonly known as the Keeton Commission, named after its Chairman, W. Page Keeton,

early identification of unmeritorious claims through negotiation, mandatory screening boards to encourage early settlements and to filter out nuisance suits, and a pre-suit notice requirement of sixty days.[62] These suggestions resulted from Commission findings that a large percentage of malpractice claims were unmeritorious.[63] Moreover, the Commission concluded the cost associated with handling, processing, and defending claims was largely responsible for the increased insurance rates.[64] The Commission's recommendations, in large part, were incorporated into the MLIIA's purposes and findings

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the Dean of the University of Texas School of Law. *See* Keith, *supra* note 3, at 268. Interestingly, the Commission found several problems at the core of the medical malpractice crisis: medical and hospital negligence, a litigious society and a need for insurance reform. *See id.* at 269.

62. *See* Keith, *supra* note 3, at 271-78. *See also Schepps*, 652 S.W.2d at 936-37.

63. *See Schepps*, 652 S.W.2d at 936-37. Notably, while the Keeton Report focused on tort reform as the solution to the medical malpractice insurance crisis, it "also recommended changes in the medical and insurance industries." Keith, *supra* note 3, at 270. For example, the Commission suggested that malpractice occurs when physicians attempt to treat too many patients and suggested a reduction in physician-patient ratios. *See id.* at 277 (citing *Final Report of the Texas Medical Professional Liability Study Commission to the 65th Texas Legislature,* December 1976 at 27) [hereinafter Keeton Report]. In addition, the Commission's evidence indicated that state medical boards were sometimes lax in permanently stripping a negligent physician of his license. *See id.* at 279. Further, the Committee's Minority and Majority Report documented the insurance industry's failure to cooperate with the Commission's attempt to solve the insurance crisis. *See id.* at 269 (citing Keeton Report, *supra* at 45). As a result, "The Study Commission admitted that its investigation of the effects of the malpractice insurance 'crisis' on the availability of health care services to Texas was hampered by the unavailability or absence of reliable statistics concerning the availability of such services in general." *Id.* at 271. The Majority Report even stated that the data was inconclusive and failed to substantiate the insurance industry's allegation that it suffered losses due to the filing of medical malpractice claims, rather than by poor investments. *See id.* at 270. Moreover, "there was some evidence before the Study Commission indicating that losses suffered by medical malpractice insurance companies in the mid-1970's were the culmination of a series of bad investments in 1973 and 1974." *Id.* (citing Keeton Report, *supra* at 38). Not surprisingly, some critics questioned the accuracy of the legislative findings concerning the existence of significant reductions in available health care based on the Keeton Commission's Report because of the absence of statistical data proving that a causal connection existed between medical malpractice insurance premiums and the continued availability of health care services. *See id.* at 271.

Nevertheless, the Texas Legislature chose to justify the Act's shortened statute of limitations upon data presented to other state legislatures by the medical profession, hospitals, and insurance companies. *See* Witherspoon, *supra* note 54, at 429. Even more surprisingly,

> The legislature did not focus upon whether the two year 'absolute statute of limitations provided a reasonable time within which medical malpractice claims could be initiated." Neither did the legislature focus upon the nature of the country's medical malpractice crisis or consider how the majority of the patients affected by the foreshortened statute of limitations could bear the great economic and personal losses that would result. The legislature did not establish that the radical modification of the tort law system was required over other alternative measures available.

Id. (citations omitted).

64. *See Schepps*, 652 S.W.2d at 937.

section[65] and have provided guidance to courts interpreting and applying the statute.[66]

D. *The Medical Liability and Insurance Improvement Act of Texas*

The MLIIA became effective on September 1, 1977.[67] The stated purposes of the MLIIA include: (1) reducing the frequency and severity of health care liability claims; (2) decreasing the costs of malpractice insurance; (3) protecting health care providers from liability through affordable insurance; and (4) ensuring the public access to affordable health care.[68] In passing the MLIIA, the Texas Legislature recognized that "rising insurance premiums, along with soaring malpractice claims and skyrocketing damage awards, adversely affect the quality and cost of health care in Texas."[69] Legislators included the following procedural and substantive changes in the MLIIA: (1) a pre-suit notice requirement;[70] (2) limitation of the use of res ipsa lo-

65. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(1)-(13) (West Supp. 1996).

66. *See* Roger M. Baron, *Knee-Deep in the Hoopla: A Decade of Litigation Under the 1977 Texas Statute of Limitations on Medical Malpractice Claims*, 51 TEX. B. J. 258 (1988).

67. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (West Supp. 1996).

68. *See id.* § 1.02(b)(1)-(7) (West Supp. 1996). *See also* Battaille v. Yoffe, 882 S.W.2d 13, 15 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983).

69. Power & Wyler, *supra* note 41, at 1607.

70. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (West Supp. 1996). *See also* Burdett v. Methodist Hosp., 484 F. Supp. 1338, 1340-41 (N.D. Tex. 1980) (stating the sixty-day written pre-suit notice requirement was intended to encourage settlement of disputes without litigation and not as a condition precedent to filing suit and thus failure to give notice prior to suit does not bar an otherwise meritorious claim); Thompson v. Community Health Inv. Corp., 923 S.W.2d 569 (Tex. 1996) (holding proper pre-suit notice given within the two-year limitations period tolls the running of limitations for seventy-five days as to health care providers who actually receive notice as well as to all potential parties); Hutchinson v. Wood, 657 S.W.2d 782 (Tex. 1983) (holding the failure to comply with the sixty-day pre-suit notice requirement requires suspension of a cause of action until the plaintiff complies); *Schepps*, 652 S.W.2d at 938 (holding plaintiffs must give sixty days written notice prior to filing suit); Rhodes v. McCarron, 763 S.W.2d 518 (Tex. App.—Amarillo 1988, writ denied) (holding a health care liability claim filed within statutes of limitations may be maintained despite non-compliance with the sixty-day written notice requirement, but the cause of action is abated for sixty days to allow compliance); Wilbourn v. University Hosp., 642 S.W.2d 50 (Tex. App.—Amarillo 1982, no writ) (holding compliance with the notice requirement is mandatory); McClung v. Komorom, 629 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (holding notice by certified mail, return receipt requested, becomes effective when mailed and tolls statutes of limitations for seventy-five days). Interestingly, "The effect of section 4.01 of the Medical Liability Act is to make 'health care providers' the only private class of tortfeasors who must be given sixty days advance notice of a claim prior to filing of suit." Keith, *supra* note 3, at 286. Furthermore, while the sixty-day written pre-suit notice requirement was intended to encourage settlement negotiations, it failed to impose sanctions on health care providers failing to comply with plaintiffs' requests for medical records. *See id.* at 285-86.

quitur;[71] (3) informed consent constraints;[72] (4) a cap on damage awards;[73] (5) abolition of the discovery rule;[74] and (6) inclusion of an

71. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 7.01-.02 (West Supp. 1996). *See also* Westerlund v. Naaman, 883 S.W.2d 725 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding the MLIIA limited the application of the common law doctrine of res ipsa loquitur to types of health care liability claims in which the doctrine had already been applied by Texas appellate courts); Haddock v. Arnspiger, 763 S.W.2d 948 (Tex. App.—Dallas 1990, no writ) (holding the doctrine of res ipsa loquitur only applies in medical malpractice actions when alleged negligent action and injuries are within the common knowledge of laymen); Miller v. Hardy, 564 S.W.2d 102 (Tex. Civ. App.— El Paso 1978, writ ref'd n.r.e.) (holding an instrumentality causing injury must be proved to have been under the control and management of the health care defendant); Williford v. Banowsky, 563 S.W.2d 702 (Tex. Civ. App.—Eastland 1978, ref'd n.r.e.) (holding the doctrine of res ipsa loquitur is generally inapplicable to medical malpractice actions but may be employed when the alleged malpractice and the injury are within common knowledge and may be proved without expert testimony, such as operating on the wrong body part, leaving sponges or instruments within the body or negligent operation of mechanical instruments); Forney v. Memorial Hosp., 543 S.W.2d 705 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (holding the doctrine of res ipsa loquitur only applies in medical malpractice actions when both the malpractice and the injuries are plainly within the common knowledge of laymen).

72. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 6.01-.07 (West Supp. 1996). *See also*, Penick v. Christensen, 912 S.W.2d 276, 286 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (finding MLIIA procedures for obtaining informed consent are rationally related to the state's legitimate interest in controlling costs of malpractice litigation); Green v. Thiet, 846 S.W.2d 26 (Tex. App.—San Antonio 1992, writ denied) (holding the purpose of the disclosure rule is protecting patients against unknown injuries resulting from treatment which, if known, the patient could have avoided through non-treatment and holding that informed consent issues are determined on a negligence theory, not on assault and battery theories); Melissinos v. Phamanivong, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied) (defining informed consent as including only a negligence theory of recovery and not including a common law cause of action for fraud or misrepresentation, which forms a separate basis for recovery and must be plead and proved independently); *Forney*, 543 S.W.2d at 706 (holding a plaintiff must prove that obtaining informed consent was an accepted practice in the community where the cause of action arose). Notably, the MLIIA "redefined the theory of recovery in informed consent cases and established the Texas Medical Disclosure Panel" that evaluates medical and surgical disclosures and procedures. Keith, *supra* note 3, at 291.

73. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.01-.05 (West Supp. 1996). *See also* Wheat v. United States, 860 F.2d 1256, 1259 (5th Cir. 1988) (holding the MLIIA statutory cap on damage awards violated the open courts provision of the Texas Constitution); Lucas v. United States, 757 S.W.2d 687, 690-92 (Tex. 1988) (holding the MLIIA could not constitutionally limit a patient's damages recovery to alleviate the malpractice insurance crisis and that the statute violated the open courts provision of the Texas Constitution); Waggoner v. Gibson, 647 F. Supp. 1102, 1105-06 (N.D. Tex. 1986) (holding the MLIIA's $500,000 damages cap violated both state and federal equal protection and due process clauses because it discriminated against classes of litigants and operated to restrict their rights to receive full redress for injuries); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359, 366 (Tex. App.—Corpus Christi 1985, no writ) (holding the MLIIA's damages cap is unconstitutional as it unreasonably restricts plaintiffs' redress for injuries).

74. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996). *See also* Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985) (holding the failure to file a medical malpractice claim within the MLIIA's two-year limitations period barred recovery as the legislature intended to abolish the discovery rule when it eliminated the word "accrual" from the language of the statute); Robinson v. Weaver, 550 S.W.2d 18, 22

absolute[75] two-year statute of limitation.[76] Further, legislators defined health care broadly to encompass any care or treatment that was or should have been furnished by a health care provider.[77] Likewise, leg-

(Tex. 1977) (holding a plaintiff filing a malpractice suit for negligent diagnosis was time-barred by the MLIIA two-year statute of limitations because the discovery rule did not apply to misdiagnosis claims); Allen v. Tolon, 918 S.W.2d 605, 607-08 (Tex. App.—Eastland 1996, no writ) (noting the MLIIA abolished the discovery rule); Winkle v. Tullos, 917 S.W.2d 304, 311 (Tex. App.—Houston [14th Dist.] 1995, writ denied) ("The discovery rule has been abolished in cases governed by the Act."); Lamar v. Graham, 598 S.W.2d 727, 729 (Tex. App.—Waco 1980), *writ dism'd, improvidently granted*, 639 S.W.2d 303 (Tex. 1982) (holding a plaintiff filing a malpractice suit for negligent diagnosis was time-barred because his cause of action accrued at the time of the alleged misdiagnosis and the plaintiff failed to file a claim within two years of the diagnosis). *But see* Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984) (holding the MLIIA's limitations period unconstitutional when it cuts off an injured person's right to sue before he has a reasonable opportunity to discover the wrong and file suit); LeGesse v. Primacare, 899 S.W.2d 43, 47 (Tex. App.—Eastland 1995, writ denied) (holding that while the open courts provision permits plaintiffs to have a reasonable time to sue after discovering their injuries, their actions will nonetheless be barred when they fail to timely file suit, such as waiting one year to file a claim after discovering their injuries); Deluna v. Rizkallah, 754 S.W.2d 366, 368 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (holding MLIIA's two-year statute of limitations barring a plaintiff's right of redress in the courts for medical malpractice claims was an unconstitutional violation of the open courts provision where the plaintiff could not discover his injury within the two-year limitation period); Tsai v. Wells, 725 S.W.2d 271, 273 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding the open courts provision creates a modified discovery rule and prevents a plaintiff's cause of action from being barred by the two-year limitation period of the MLIIA when he lacked a reasonable opportunity to discover the wrong); Neagle v. Nelson, 658 S.W.2d 258, 261 (Tex. App.—Corpus Christi 1983), *rev'd on other grounds*, 685 S.W.2d 11 (Tex. 1985) (holding statute of limitations restricting a plaintiff's right of redress for a sponge left in his abdomen was unconstitutional as violative of the open courts provision).

75. Section 10.01 of the MLIIA "is 'absolute' because the provision eliminates the right to commence an action for medical malpractice although the patient did not know and could not reasonably have discovered within the two year period that he or she had suffered a medical injury due to malpractice." Witherspoon, *supra* note 54, at 427. However, a number of states, such as Washington, have refused to adopt an absolute limitations period, choosing instead to allow a patient at least one year from the time he discovers or should have discovered his injuries to file suit. *See id.*

76. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996). *See also* Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987) (holding a plaintiff who failed to bring suit within two years from the date of the medical tort was time-barred because the statute of limitations commences on the date of the tort when the specific date is known, rather than on the last date of treatment); Morrison v. Chan, 699 S.W.2d 205, 207 (Tex. 1985) (upholding the constitutionality of the MLIIA's two-year statute of limitations where the plaintiff discovered his injuries within two years following the tort); Weatherby v. Scenic Mountain Med. Ctr., 896 S.W.2d 852 (Tex. App.—Eastland 1995, writ denied) (holding MLIIA's absolute two-year statute of limitations period abolishes the discovery rule); Adkins v. Tafel, 871 S.W.2d 289, 295 (Tex. App.—Fort Worth 1994, no writ) (holding the statutes of limitations contained in the MLIIA did not violate the open courts provision where the plaintiff was aware of his injury before the two year limitations period expired).

77. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(4) (West Supp. 1996). Health care is defined as "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." *Id.* § 1.03(2).

islators defined health care liability claims as:

> 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.[78]

Nevertheless, legislators set out three possible dates for aiding plaintiffs in ascertaining when limitations commence.[79] Under the Act, a suit must be filed within two years of one of three dates: "(1) the occurrence of the breach or tort; (2) the date the health care treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed."[80] However, the general rule is that limitations commence on the date of the tort's occurrence.[81] Only if the date of the tort is unknown may limitations commence on the last date of treatment or hospitalization.[82] In sum, legislators enacted the MLIIA theorizing that reducing the number and size of malpractice awards would allow the insurance industry to predict recoveries which would lead to reasonable premium rates.[83]

Medical care is defined as "any act defined as practicing medicine in Article 4510, Revised Civil Statutes of Texas, 1925, as amended, 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." *Id.* § 1.03(6). A health care provider includes, "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." *Id.* § 1.03(3).

78. TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(4) (West Supp. 1996) (emphasis added).

79. *See id.* § 10.01. *See also* Osborne v. St. Luke's Episcopal Hosp., 915 S.W.2d 906 (Tex. App.—Houston [1st Dist.] 1996, writ denied); Magness v. Hauser, 918 S.W.2d 5 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Casey v. Methodist Hosp., 907 S.W.2d 898 (Tex. App.—Houston [1st Dist.] 1995, no writ); Gomez v. Carreras, 904 S.W.2d 750 (Tex. App.—Corpus Christi 1995, no writ); Adkins v. Tafel, 871 S.W.2d 289 (Tex. App.—Fort Worth 1994, no writ); Damron v. Ornish, 862 S.W.2d 683 (Tex. App.—Dallas 1993, writ denied); Rivera v. Mitchell, 764 S.W.2d 393 (Tex. App.—El Paso 1989, no writ); Reed v. Wershba, 698 S.W.2d 369 (Tex. App.—Houston [14th Dist.] 1985, no writ); Vinklarek v. Cane, 691 S.W.2d 108 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

80. *Adkins*, 871 S.W.2d at 292 (citing TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. Pamph. 1994)).

81. *See* Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987).

82. *See id.*; Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996) ("When the precise date of the tort is known, the statutory two-year period begins on that date."); Ericson v. Roberts, 910 S.W.2d 608, 611 (Tex. App.—Tyler 1995, no writ) ("Should a specific date for the negligent act be capable of being ascertained, that date is the one from which the limitations period begins to run.").

83. *See* Redish, *supra* note 5, at 761.

II. DEATH CAUSES OF ACTION

A. *Wrongful Death Act and MLIIA Wrongful Death Causes of Action*

Virtually all death causes of action are created by statute.[84] At common law, a personal injury action did not survive death.[85] Hence, no cause of action could be brought for the death of another person and no recovery existed once a tort victim died.[86] "The result was that it was cheaper for the defendant to kill the plaintiff than to injure him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy."[87] Because such an outcome was intolerable, every state has since enacted wrongful death statutes permitting victims' families to obtain compensation for wrongful acts causing death.[88] Texas enacted its wrongful

84. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 127, at 945-46 (5th ed. 1984). While virtually all causes of action for wrongful death are created by federal or state statutes, courts created a cause of action for wrongful death in admiralty law. *See id.*

85. *See id. See also* Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 344 (Tex. 1992) ("At common law, an individual's action for personal injuries did not survive his death."); Young v. Jones Lumber Co., 784 S.W.2d 949, 950 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (stating Texas never had a common law cause of action for wrongful death).

86. *See* KEETON, ET AL., *supra* note 84, at 945-46.

87. *See id.* at 945. *See also In re* McCoy, 373 F. Supp. 870, 875 (W.D. Tex. 1974) (stating that death statutes are intended to compensate statutory beneficiaries for their own losses resulting from the death).

88. *See* KEETON ET AL., *supra* note 84, at 945-46. *See* ALA. CODE § 6-5-410 (1996); ALASKA STAT. § 09.55.580 (Michie 1996); ARIZ. REV. STAT. ANN. § 12-612 (West 1996); ARK. CODE ANN. § 16-62-112 (Michie 1995); CAL. CIV. PROC. CODE § 377.60 (West 1996); COLO. REV. STAT. ANN. § 9-6-104 (West 1996); CONN. GEN. STAT. ANN. § 52-555 (West 1995); DEL. CODE ANN. tit. 10, § 3701 (West 1996); D.C. CODE ANN. § 16-2701 (West 1996); FLA. STAT. ANN. § 768.19 (West 1996); GA. CODE ANN. § 51-4-2 (West 1996); HAW. REV. STAT. ANN. § 663-3 (Michie 1996); IDAHO CODE § 5-311 (West 1996); 740 ILL. COMP. STAT. ANN. 180/0.01 (West 1996); IND. CODE ANN. § 34-1-1-2 (West 1996); IOWA CODE ANN. § 633.336 (West 1996); KAN. STAT. ANN. § 60-1901 (1995); KY. REV. STAT. ANN. § 411.130 (West 1996); LA. CIV. CODE ANN. art. 2315.2 (West 1996); ME. REV. STAT. ANN. tit. 14, § 8104-C (West 1996); MD. CODE ANN., CTS. & JUD. PRO. § 3-904 (West 1996); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1996); MICH. COMP. LAWS ANN. § 600.2922 (West 1996); MINN. STAT. ANN. § 573.02 (West 1996); MISS. CODE ANN. § 11-7-13 (West 1996); MO. ANN. STAT. § 11-7-13 (West 1996); MONT. CODE ANN. § 27-1-501, -513 (West 1995); NEB. REV. STAT. § 30-809 (1996); NEV. REV. STAT. § 41.085 (1995); N.H. REV. STAT. ANN. § 556:12 (1995); N.J. STAT. ANN. § 2A: 15-97 (West 1996); N.M. STAT. ANN. § 41-2-1 (Michie 1996); N.Y. EST. POWERS & TRUST LAW § 5-4.1 (McKinney 1996); N.C. GEN. STAT. § 28A-18-2 (Michie 1996); N.D. CENT. CODE § 32-21-01 (West 1995); OHIO REV. CODE ANN. § 2125.01 (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 12, § 1053 (West 1996); OR. REV. STAT. § 30.020 (West 1995); PA. STAT. ANN. tit. 42, § 8301 (West 1996); R.I. GEN. LAWS § 10-7-1 (West 1996); S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1995); S.D. CODIFIED LAWS § 21-5-1 (Michie 1996); TENN. CODE ANN. § 20-5-106 (West 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (West 1995); UTAH CODE ANN. § 78-11-12 (West 1996); VT. STAT. ANN. tit. 14, § 1491 (West 1995); VA. CODE ANN. § 8.01-50 (Michie 1996); WASH. REV. CODE ANN. § 4.20.010 (West 1996); W.

death statute in 1860.[89]

Nonetheless, the MLIIA creates a separate statutory cause of action for death caused by *medical malpractice*.[90] Thus, a MLIIA death claim and a Wrongful Death Act claim are separate and independent statutory causes of action.[91] Accordingly, the Texas Supreme Court holds the Wrongful Death Act does not apply to wrongful death actions stemming from medical malpractice because the MLIIA is preemptory.[92] Thus, the rights of wrongful death beneficiaries vary

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VA. CODE § 55-7-5 (West 1996); WIS. STAT. ANN. § 895.03 (West 1996); WYO. STAT. ANN. § 1-38-101 (Michie 1996).

89. *See* Max E. Roesch & Warren Wayne Harris, *The Statutory Shield to a Beneficiary's Cause of Action Under The Texas Wrongful Death Statute*, 54 TEX. B. J. 1010 (1991).

> The Texas scheme for death actions includes a survival cause of action and a wrongful death cause of action. The difference between the two actions lies in the beneficiaries and the damages. A survival action is brought by the decedent's estate to redress the decedent's own injuries. A wrongful death action is brought by the statutory beneficiaries to compensate them for their loss of future care, maintenance, and support.

Russell v. Ingersoll-Rand Co., 795 S.W.2d 243, 244 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 841 S.W.2d 343, 344 (Tex. 1992).

90. *See, e.g.*, Bala v. Maxwell, 909 S.W.2d 889, 892 (Tex. 1995) (per curiam).

91. *See id.*

92. *See id.* at 892-93. Under the MLIIA, the same accrual dates and limitations periods that apply to plaintiffs' personal injury claims likewise apply to plaintiffs' wrongful death claims. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996). Like the Texas Supreme Court the Arizona Supreme Court has attempted to reconcile its medical malpractice statute with its wrongful death statute. *See* James v. Phoenix Gen. Hosp., Inc., 744 P.2d 695, 701-03 (Ariz. 1987). The *James* court noted that other states have addressed similar problems, stating:

> We note that other state courts have been asked to reconcile legislation aimed at curtailing medical malpractice claims with pre-existing statutes governing the cause of action for wrongful death. The uncertainity usually arises because the medical malpractice legislation did not expressly amend the wrongful death statute, yet made reference to actions for death resulting from medical malpractice. The state courts have recognized that the issue must be decided by construing the intent of the state legislature in enacting the restrictive medical malpractice statute and the effect of such a statute, if any, upon the right to bring a wrongful death action. Although no clear weight of authority has developed in these other jurisdictions as to whether the medical malpractice accrual date and statute of limitations should apply or the wrongful death accrual date and statute of limitations should apply when the genesis of the wrongful death action was medical malpractice, two general trends are discernible.
>
> In one direction are those states that adhere to their prior interpretations of the wrongful death statutes and hold that the cause of action for wrongful death is separate and independent from the decedent's action for personal injury and therefore controlled exclusively by the statutory procedures of the wrongful death statute. As a claim independent from the decedent's personal injury claim, the cause of action for wrongful death in most of these states would not be time-barred by the expiration of the statute of limitations for the personal injury claim before the date of death.
>
> In the other direction are courts which interpret the medical malpractice statute consistent with legislative intent to impose constraints on malpractice actions so that wrongful death actions arising from medical malpractice are

according to which statute governs their claims.

Under the Texas Wrongful Death Act, a death cause of action is derivative.[93] A derivative status confers a wrongful death right of action upon the decedent's beneficiaries only if the decedent could have maintained a personal injury action if he had lived.[94] Conversely, if the decedent's claim was time-barred, the beneficiary's claim will likewise be time-barred.[95] Thus, a beneficiary steps into the shoes of the decedent. Under the Wrongful Death Act, a death cause of action accrues and limitations commence upon *death* rather than upon the occurrence of a tort.[96] Further, beneficiaries have two years from the date of death to institute suit, provided the decedent could have maintained a personal injury action.[97] However, when the beneficiary is a

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procedurally controlled by the malpractice provisions. In many of these states, causes of action for wrongful death derive from the decedent's personal injury action so that the failure to file a personal injury claim within the statute of limitations period would subsequently time-bar a wrongful death action. The application of the medical malpractice statute of limitations to the wrongful death claim is consistent with an accrual date as the date of the injury.

Id. (citations omitted).

93. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (Vernon 1986). *See also Russell*, 841 S.W.2d at 345 (stating wrongful death actions are derivative of the decedent's rights).

94. The Texas Wrongful Death Act provides:

(a) An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.

(b) A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (Vernon 1986). The Act further provides: "This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if he had lived." *Id.* § 71.003(a). Designating beneficiaries, the Act states: "An action to recover damages as provided in this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased." *Id.* § 71.004(a).

95. *See Russell*, 841 S.W.2d at 348. A beneficiary is subject to the same defenses that could have been asserted against the decedent. *See id.*

96. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon 1986). *See also* Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex. 1990).

97. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 1986). "A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person." *Id.* § 16.003(b). The two-year limitations period is only applied if the decedent could have instituted suit if he had lived. *See* Russell v. Ingersoll-Rand Co., 795 S.W.2d 243 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 841 S.W.2d 343 (Tex. 1992) (reconciling two provisions governing wrongful death claims and reading § 71.003(a) as governing the right to file a wrongful death suit and § 16.003(b) as governing the time period for filing a wrongful death suit, such that if no right to file a wrongful death suit exists under § 71.003(a) because limitations would have barred the decedent's personal injury claim if he had lived, then § 16.003(b), conferring two years to file a wrongful death claim upon the decedent's beneficiaries, is not applicable). *See id.* at 248 (holding the decedent's beneficiaries wrongful death suit was

child, limitations are tolled until he reaches majority.[98] Therefore, under the Wrongful Death Act, limitations commence on a minor's wrongful death claim when his disability is removed.[99]

Under the MLIIA, a wrongful death cause of action is considered derivative, but a beneficiary has two years from the date a health care provider injures the decedent to institute suit, whether or not the injury immediately causes death.[100] The general rule under the MLIIA's three-date accrual schedule is that limitations commence upon the occurrence of a medical tort, not at the time of death.[101] Noticeably absent from the MLIIA's three-date accrual schedule is any language referring to limitations commencing at the time of death.[102] Furthermore, the legislature delineated exceptions within the Act where tolling may apply.[103] While minority is a delineated exception,[104] death is not listed as an exception conferring additional filing time. In contrast to the Wrongful Death Act, the MLIIA only allows a child to toll the commencement of limitations until he reaches age twelve.[105] Hence, unlike a minor with a nonmedical death claim, a minor with a medical death claim may be foreclosed from filing suit while he remains under a disability.

B. *MLIIA Wrongful Death Cases*

Texas courts hold the Wrongful Death Act is preempted by the MLIIA based on the MLIIA's preemptory language stating it applies

barred because limitations had run on the decedent's personal injury claim before his death).

98. *See* Cox v. McDonnell-Douglas Corp., 665 F.2d 566, 572 (5th Cir. 1982) "Although Texas has a two-year statute of limitations covering wrongful death actions . . . that statute does not run during the period of a plaintiff's minority." *Id.*; Bangert v. Baylor College of Med., 881 S.W.2d 564, 566 n.3 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (noting that under the wrongful death statute, the statute of limitations is tolled for minors); Texas Utils. Co. v. West, 59 S.W.2d 459, 460-61 (Tex. App.—Amarillo 1933, writ ref'd n.r.e.) (holding a minor may bring a wrongful death action even if the surviving parent's claim is time-barred).

99. *See* Texas Utils. Co. v. West, 59 S.W.2d 459, 460-61 (Tex. App.—Amarillo 1933, writ ref'd n.r.e.).

100. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996). *See also* Shidaker v. Winsett, 805 S.W.2d 941, 943 (Tex. App.—Amarillo 1991, writ denied) (holding "when an action is founded on a health care liability claim of misdiagnosis or mistreatment, the operative limitations period for redress is the one specified by the Medical Liability Act, irrespective of the alleged extent of the health care injury").

101. *See* Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996); Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1988); Ericson v. Roberts, 910 S.W.2d 608, 611 (Tex. App.—Tyler 1995, no writ).

102. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

103. *See id.*

104. *See id.*

105. *See id.*

notwithstanding any other law.[106] Nevertheless, plaintiffs have attempted to circumvent the MLIIA's strict damages cap and limitations provision, arguing the MLIIA does not control death claims.[107] Rather, plaintiffs advocate the more liberal Wrongful Death Act applies to all death causes of action.[108]

In the seminal case of *Rose v. Doctors Hospital*,[109] the Texas Supreme Court addressed whether the MLIIA's damages cap was unconstitutional as applied to a plaintiff asserting a wrongful death claim.[110] In *Rose*, the decedent's widow and parents filed a wrongful death action against a hospital after the decedent received a fatal dose of morphine.[111] At trial, the jury returned a damages award exceeding the MLIIA's damages cap.[112] The trial judge entered a judgment notwithstanding the verdict, which the court of appeals reversed, rendering judgment for the plaintiffs, subject to remitturs.[113] The plaintiffs challenged the MLIIA damages cap was unconstitutional, alleging it violated the open courts and equal protection provisions of the Texas Constitution.[114] The Texas Supreme Court, however, rejected both constitutional challenges, holding that the Texas Legislature was within its power to limit damage awards for *statutory* causes of action.[115]

In *Bala v. Maxwell*,[116] the Texas Supreme Court held the MLIIA limitations provision, not the Wrongful Death Act limitations provision, applies to *medical* wrongful death claims.[117] In *Bala*, a patient

106. *See* Johnson v. United States, 85 F.3d 217, 223 (5th Cir. 1996); Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam); Bala v. Maxwell, 909 S.W.2d 889, 892-93 (Tex. 1995) (per curiam).

107. *See, e.g.*, Arredondo v. Hilliard, 904 S.W.2d 754 (Tex. App.—San Antonio 1995), *rev'd sub nom.* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam); *Bala*, 909 S.W.2d at 891-92.

108. *See, e.g., Bala*, 909 S.W.2d at 891-92.

109. 801 S.W.2d 841 (Tex. 1990).

110. *See id.* at 842.

111. *See id.* at 843.

112. *See id.*

113. *See id.*

114. *See id.* at 843, 845.

115. *See id.* at 845-46.

116. 909 S.W.2d 889 (Tex. 1995).

117. *See id.* at 893. Prior to the court's holding in *Bala*, Texas courts of appeals were not uniformly holding that the MLIIA limitations period applied to death claims caused by medical malpractice. For example, in *Rascoe v. Anabtawi*, 730 S.W.2d 460 (Tex. App.—Beaumont 1987, no writ), a plaintiff with a medical death claim argued that a tolling provision of the Wrongful Death Act conferred upon him a twelve-month extension and that the MLIIA's statute of limitations did not control his claim. *See id.* at 461 (citing TEX. REV. CIV. STAT. ANN. art. 5538 [current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (West 1986)]). The tolling statute, art. 5538, provided:

> In case of the death of any person against whom or in whose favor there may be a cause of action, the law of limitation shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased

> person's estate; in which case the law of limitation shall cease to run until such qualification.

TEX. REV. CIV. STAT. ANN. art. 5538 [current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (West 1986)]. The Beaumont Court of Appeals rejected the plaintiff's argument, holding the general tolling provision was inapplicable and that the MLIIA's limitation provision was peremptory and controlling. *See Rascoe*, 730 S.W.2d at 461. The *Rascoe* court relied on *Hill v. Milani*, 686 S.W.2d 610 (Tex. 1985), a Texas Supreme Court decision holding that a general tolling provision, operating to suspend the running of limitations when a person is out of the state, did not apply to toll limitations in *medical* malpractice cases because it was part of the *other law* preempted by the MLIIA. *See Rascoe*, 730 S.W.2d at 461 (citing *Hill*, 686 S.W.2d at 610-11 and TEX. REV. CIV. STAT. ANN. art. 5537 (Vernon 1958) [current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon 1986)]). Therefore, the *Rascoe* court, following *Hill*, stated, "[The *Hill* court] emphatically approved only those provisions of the Medical Liability Insurance Improvement Act specifically tolling limitations, and held that Article 5537 was not part of the statutory scheme but was part of the 'other law.' Certainly this would apply as well to Article 5538." *Rascoe*, 730 S.W.2d at 461. *See* TEX. REV. CIV. STAT. ANN. art. 5537 (Vernon 1958) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon 1986)). Consequently, the *Rascoe* court held article 5538 was also part of the other law expressly preempted by the MLIIA and did not apply to *medical* wrongful death claims. *See Rascoe*, 730 S.W.2d at 461.

Similarly, in *Sanchez v. Memorial Medical Center Hospital*, 769 S.W.2d 656 (Tex. App.—Corpus Christi 1989, no writ), the Corpus Christi Court of Appeals held the MLIIA's statute of limitations controls *medical* death claims and confers only two years from the last date of treatment to file health care liability claims, despite the appellants' assertion that the Wrongful Death Act applied and conferred an additional twelve months following death to file a claim. *See Sanchez*, 769 S.W.2d at 659-60. The Sanchez court explained:

> We disagree with appellants' arguments and hold that sections 16.003 and 16.062 do not act to invalidate the absolute two-year limitations period contained within article 4590i, section 10.01 [MLIIA limitations provision]. . . . We believe the language of this statute to be clear and exclusive. The Medical Liability and Insurance Improvement Act contains limited tolling provisions, suspending the two-year limitations statute during minority, s 10.01, and upon the giving of notice, s 4.01(a).

Id. at 660. *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.062(a) (Vernon 1986). Section 16.062 provides: "The death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for 12 months after the death." *Id.* The *Sanchez* court concluded that unless an exception specifically delineated within the MLIIA applied, such as the giving of notice or minority, then, the MLIIA's general two-year limitations period controls. *See Sanchez*, 769 S.W.2d at 660.

In *Shidaker v. Winsett*, 805 S.W.2d 941 (Tex. App.—Amarillo 1991, writ denied), the Amarillo Court of Appeals held that the MLIIA's limitations period controls "[n]otwithstanding any other law" and that the limitations provision of the Wrongful Death Act was part of the "other law" expressly made inapplicable by the MLIIA. *Id.* at 943. Rejecting the appellant's contention that the Wrongful Death Act's limitations period controlled and thus the statute of limitations commenced on his death claim upon the date of death, the *Shidaker* court reasoned:

> [T]o follow the Shidakers' rationale to its logical conclusion would nullify the period of limitations for a health care liability claim of misdiagnosis or mistreatment by extending it indefinitely until the patient died and for two years thereafter. This result would be the antithesis of the legislative purpose in enacting the Medical Liability and Insurance Improvement Act to alleviate a perceived medical malpractice insurance crisis, a part of which was the adoption of the absolute two-year limitations period.

was hospitalized for anemia[118] when an esophagogastroduodenoscopy ("EGD") revealed a lesion in his stomach.[119] A cell biopsy indicated the lesion was probably benign, but failed to foreclose the possibility the cells were malignant.[120] Subsequent cell stains also indicated the tumor was benign.[121] However, during a follow-up visit occurring over a year later, another EGD revealed the stomach lesion was ulcerated.[122] A new cell biopsy indicated the presence of malignant cells.[123] Further tests revealed cancer in the stomach and lungs.[124] After treatment failed to save the patient's life, the family filed a wrongful death suit within two years of his death, alleging the initial physician negligently failed to diagnose the cancer.[125]

Reversing the Houston Fourteenth District Court of Appeals' holding that the plaintiffs timely filed suit under the two-year limitations

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Id. Following the Texas Supreme Court's reasoning in *Hill*, 686 S.W.2d at 611-13, the *Shidaker* court applied the MLIIA's limitations period to *medical* death claims, holding the MLIIA controls all actions based on medical malpractice regardless of the extent of a patient's injuries. *See Shidaker*, 805 S.W.2d at 943.

In contrast, in *Wilson v. Rudd*, 814 S.W.2d 818 (Tex. App.—Houston [14th Dist.] 1991, writ denied), *overruled by Bala v. Maxwell*, 909 S.W.2d 889, 892 (Tex. 1995) (per curiam), the Houston Fourteenth District Court of Appeals refused to bar a medical death action after recognizing that the claim was filed over two years after the occurrence of the underlying medical tort and in spite of the fact that under *Hill*, *Shidaker*, and *Sanchez*, the claim would be barred. *See id.* at 822-23. Instead, the court held the Wrongful Death Act's limitations provision was *not* part of the "other law" expressly preempted by the MLIIA. *See id.* at 822. Rather, the *Wilson* court held the Wrongful Death Act applies to all death claims. *See id.* The *Wilson* court refused to distinguish medical wrongful death plaintiffs from nonmedical wrongful death plaintiffs, reasoning that the plain language of the Wrongful Death Act illustrated a legislative intent that wrongful death plaintiffs should receive two years from the date of death to institute suit. *See id.* at 822-23. However, the court did attempt to harmonize the limitations periods of both statutes, holding that limitations commence upon the date of death, pursuant to the Wrongful Death Act, but that a plaintiff then has two years to institute suit, pursuant to the MLIIA. *See id.*

Subsequent courts faced with the same issue have refused to follow *Wilson* and have instead applied the MLIIA's limitations provision to medical death claims. For example, in *Blackmon v. Hollimon*, 847 S.W.2d 614 (Tex. App.—San Antonio 1992, writ denied), the San Antonio Court of Appeals specifically rejected *Wilson* and noted the *Wilson* court's refusal to follow *Shidaker* and *Sanchez*. *See id.* at 616-17. The *Blackmon* court held the plaintiff's medical death claim was time-barred because he failed to institute suit within two years of the occurrence of the defendant's negligence, as required by the MLIIA. *See id.* at 617. Likewise, in *Todd v. Planned Parenthood*, 853 S.W.2d 124 (Tex. App.—Dallas 1993, writ denied), the Dallas Court of Appeals barred a plaintiff's death claim because he failed to file suit within two years of the occurrence of the medical tort, concluding that the clear language of the MLIIA indicates it controls all *medical* claims. *See id.* at 127-28.

118. *See Bala*, 909 S.W.2d at 890.
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.*
125. *See id.*

provision of the Wrongful Death Act,[126] the Texas Supreme Court explained,

> Generally, wrongful death claims are subject to a two-year limitations period that begins on the date of death. However, when a wrongful death action is based on medical negligence, the medical malpractice limitations statute, Article 4590i, section 10.01 conflicts with section 16.003 [Wrongful Death Act limitation provision]. Section 10.01 provides that health care liability claims must be filed within two years of the alleged breach.[127]

Pursuant to the plain language of the MLIIA, the court held plaintiffs asserting *medical* wrongful death claims have two years from the occurrence of a defendant's malpractice to file suit and not two years from the date of death.[128] The *Bala* court reasoned the language of the MLIIA clearly illustrated a legislative intent for the MLIIA to exclusively control *medical* negligence claims.[129] Thus, Texas courts generally apply the MLIIA and its stringent provisions to wrongful death causes of action premised on medical malpractice despite the harsh outcomes inconsistent with the goals of the Wrongful Death Act.

III. Constitutional Limits On MLIIA Personal Injury Causes of Action

Notwithstanding the MLIIA's stated goals of lowering medical malpractice insurance rates and increasing public access to health care, the Act has been challenged and criticized from its inception.[130] Not surprisingly, cases have arisen where courts are unwilling to bar plaintiffs' medical malpractice claims. Typically, such cases involve either a nondiscoverable injury, or an incapacity to institute timely suit.[131] Ju-

126. *See id.* at 891-93.

127. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 16.003(b) (Vernon 1986) and Tex. Rev. Civ. Stat. Ann. art. 4590i, § 10.01 (West Supp. 1996)) (citations omitted).

128. *See id.* at 892-93.

129. *See id.*

130. *See* Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Wheat v. United States, 860 F.2d 1256 (5th Cir. 1988); Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. App.—Corpus Christi 1985, no writ).

131. *See* Weiner v. Wasson, 900 S.W.2d 316, 321 (Tex. 1995); Felan v. Ramos, 857 S.W.2d 113, 117 (Tex. App.—Corpus Christi 1993, writ denied). Notably, the discovery rule and special disability provisions for minors were alleged to be contributing to the rise in insurance rates because the longer the statute of limitations period, the longer the period of risk for insurers. *See* Redish, *supra* note 5, at 765. One commentator explained the relationship between malpractice insurance rates, statutes of limitations, the discovery rule, and the disability of minors, stating:

> The rate-setting problem is further aggravated by two related doctrines employed by certain states: the discovery rule and special disability provisions for minors. The discovery rule provides that the statute of limitations will not begin to run until the victim discovers or should have discovered his injury, rather than from the time the injury was inflicted. The purpose of the

dicial justifications for refusing to permit limitations to bar plaintiffs' claims include fraudulent concealment,[132] impossibility of discovery,[133] a continuing treatment,[134] disability,[135] and constitutional re-

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discovery rule is to prevent the statute of limitations from depriving injured patients of their causes of action before the harmful effects arising from treatment become manifest. Although the discovery rule prevents unfair procedural denial of malpractice claims, it is inconsistent with the policies that the statute of limitations is designed to foster—repose and the avoidance of stale claims—and thus may impose severe hardship on the health care provider.

The special disability period for minors is also intended to prevent the unfair loss of claims. Under this practice a minor is considered disabled, tolling the statute of limitations, until he reaches the age of majority, apparently on the theory that until that time there is no assurance that the child's interests will be protected. Because of this rule, however, injured young children retain viable claims for periods of time greatly in excess of the traditional limitations period. The extended period of liability exposure resulting from application of the discovery rule and special disability provision has prompted passage of statutes of limitation that reject or modify these doctrines.

Id. at 765-66 (citations omitted).

132. *See* Thames v. Dennison, 821 S.W.2d 380 (Tex. App.—Austin 1991, writ ref'd n.r.e.) (recognizing the equitable doctrine of fraudulent concealment estops a medical malpractice defendant from claiming the statutes of limitations affirmative defense); Warner v. Sunkavalli, 795 S.W.2d 326 (Tex. App.—Eastland 1990, no writ) (holding the limitation period contained in the MLIIA does not invalidate the effect of equitable estoppel, such that fraudulent concealment may defeat an affirmative defense of limitations); Borderlawn v. Peck, 661 S.W.2d 907 (Tex. 1983) (holding the two-year limitations period contained in the MLIIA does not abolish the use of fraudulent concealment to defeat the affirmative defense of limitations); Weaver v. Witt, 552 S.W.2d 565 (Tex. Civ. App.—Houston [14th Dist.]), *rev'd on other grounds*, 561 S.W.2d 792 (Tex. 1977) (holding plaintiffs can plead the doctrine of fraudulent concealment to avoid the affirmative defense of limitations and to avoid summary judgment); Fitzpatrick v. Marlowe, 553 S.W.2d 190 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (holding public policy dictates permitting the equitable doctrine of fraudulent concealment to avoid a statute of limitations defense in a medical malpractice action because it would be unjust to allow wrongdoers to benefit from their actions by barring injured plaintiffs' claims).

133. *See* Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985) (holding statutes of limitation restricting a plaintiff's right of redress for a sponge left in his abdomen was unconstitutional as violative of the open courts provision); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (holding the two-year statute of limitations applied to medical actions violated the open courts provision of the Texas Constitution by cutting off a cause of action before the plaintiff knew or reasonably should have known that he is injured); Tsai v. Wells, 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding application of two-year statute of limitation contained in the MLIIA violated the open courts provision of the Texas Constitution when the patient lacked a reasonable opportunity to discover the medical malpractice within the allotted time period); Melendez v. Beal, 683 S.W.2d 869 (Tex. App.—Houston [1st Dist.] 1984, no writ) (holding the MLIIA does not abrogate the discovery rule where the absolute two-year limitation period would be unreasonable, absurd and unjust as in cases where the patient could not know or reasonably know of the medical negligence before limitations run); Newberry v. Tarvin, 594 S.W.2d 204 (Tex. Civ. App.—Corpus Christi 1980, no writ) (holding a patient's cause of action accrues against a medical defendant when the patient discovers or reasonably should discover an injury, rather than on the date of the alleged wrongful act). *Contra* Morrison v. Chan, 699 S.W.2d 205 (Tex. 1985)

quirements.[136] Thus, in some cases, courts hold plaintiffs' rights to institute suits to obtain compensation for injuries outweigh the need to lower medical insurance rates.[137]

(holding failure to file a medical malpractice claim within the two-year limitations period contained within the MLIIA barred recovery as the legislature intended to abolish the discovery rule when it eliminated the word "accrued" from the language of the statute); Lamar v. Graham, 639 S.W.2d 303 (Tex. 1982) (holding a plaintiff filing a malpractice suit for negligent diagnosis was time-barred because his cause of action accrued at the time of the alleged misdiagnosis and the plaintiff failed to file a claim within two years of the diagnosis); Robinson v. Weaver, 550 S.W.2d 18 (Tex. 1977) (holding a plaintiff filing a malpractice suit for negligent diagnosis was time-barred by the MLIIA two-year statute of limitations because the discovery rule did not apply to misdiagnosis claims); Phillips v. Sharpstown Gen. Hosp., 664 S.W.2d 162 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding the discovery rule, operating to commence limitations on the date the patient discovers or reasonably should discover his injury, rather than the date the alleged tort occurred, is not applicable in cases governed by the MLIIA).

134. *See* Desiga v. Scheffey, 874 S.W.2d 244 (Tex. App.—Houston [14th Dist.] 1994, no writ) (holding the continuous treatment exception whereby limitations commence on the last date of treatment, is only used when no other ascertainable date exists to determine precisely when the tort occurs); Chambers v. Conaway, 883 S.W.2d 156 (Tex. 1993) (holding follow-up treatment constitutes continuing treatment).

135. *See Weiner*, 900 S.W.2d at 318-19 (holding the MLIIA's statute of limitation period requiring a minor to file suit for medical negligence while still under the legal disability of minority is unconstitutional because it impermissively cuts off the minor's cause of action before he could sue on his own behalf); Felan v. Ramos, 857 S.W.2d 113 (Tex. App.—Corpus Christi 1993, writ denied) (holding the two-year statute of limitation period contained in the MLIIA violates the open courts provision of the Texas Constitution when applied to a mental incompetent's common law personal injury action).

136. *See Weiner*, 900 S.W.2d at 318-19 (holding the MLIIA violated the open courts provision by prematurely cutting off a minor's cause of action); *Nelson*, 678 S.W.2d at 923 (holding the two-year statute of limitations contained in the MLIIA violated the open courts provision of the Texas Constitution because it cut off the plaintiff's cause of action before he knew or could reasonably have known he was injured); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (holding the medical liability act's two-year statute of limitation provision that barred a minor's claim after he reached age six violated the due process guarantee of the Texas Constitution because it eliminated a minor's right to bring a common law cause of action, yet failed to provide a substitute remedy).

137. *See* Wheat v. United States, 860 F.2d 1256 (5th Cir. 1988) (holding the MLIIA's damages provision violates the open courts provision of the Texas Constitution); Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986) (holding the MLIIA damages cap, limiting the recovery of deserving victims of malpractice, violates the open courts provision of the Texas Constitution and the equal protection clauses of both the Texas and United States Constitutions as the restriction on the right of redress for common law tort actions was unreasonable and arbitrary when balanced against the purpose of the classification); *Weiner*, 900 S.W.2d at 318-19 (holding the MLIIA's limitations period unduly restricts minors' rights to file common law claims for medical malpractice); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) (holding the statutory limitation on medical malpractice damages violates the open courts provision of the Texas Constitution); *Sax*, 648 S.W.2d at 667 (holding the MLIIA violated the open courts provision of the Texas Constitution as applied to minors); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. App.—Corpus Christi 1985, no writ) (holding the MLIIA damages cap unreasonably and arbitrarily restricts a plaintiff's

A. *Reducing the Size of Damage Awards: The Damages Cap*

Federal and state courts hold the MLIIA damages cap is unconstitutional as applied to plaintiffs instituting personal injury suits. For example, in *Waggoner v. Gibson*,[138] the United States District Court held the MLIIA damages cap violated the equal protection provisions of both the United States and Texas Constitutions, as applied to a patient who became completely disabled, suffering severe and irreversible brain damage during a routine medical operation.[139] The court found the legislative goals supporting the cap were not legitimate and held the cap was invalid because it discriminated between classes of tort victims and between seriously injured and non-seriously injured classes of victims.[140] The court also held the cap violated the open courts provision of the Texas Constitution because it displaced victims' common law causes of action yet failed to provide an adequate substitute remedy.[141] Furthermore, after noting that much debate existed as to whether a medical malpractice insurance crisis actually existed in Texas,[142] the court stated, "Even assuming that such a 'crisis' has a basis in fact, it is indisputable that constitutional protections are not suspended in time of even the most legitimate crises."[143]

In *Lucas v. United States*,[144] the Texas Supreme Court held the MLIIA damages cap violated the open courts provision of the Texas Constitution because the restriction on victims' recoveries was unreasonable and arbitrary when balanced against the purpose and basis of the statute.[145] In *Lucas*, a fourteen-month-old child became permanently paralyzed after a hospital nurse negligently injected penicillin directly into an artery.[146] The court refused to enforce the MLIIA damages cap, finding the Act fails to assure a rational relationship exists between actual damages and amounts awarded because the cap applies to all claimants without regard to the severity of their inju-

constitutional right to redress in the courts for injuries due to another's wrongful conduct).

138. 647 F. Supp. 1102 (N.D. Tex. 1986).

139. *See id.* at 1104, 1107.

140. *See id.*, at 1106-07 & n.8.

141. *See id.* at 1108.

142. *See id.* at 1104. The court stated, "one of the legal profession's foremost empirical analysts has concluded that the entire 'litigation explosion' that has precipitated 'tort reform' measures (like the Medical Liability and Insurance Improvement Act of Texas) is nonexistent." *Id.* at 1104 n.2 (citing Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983)).

143. *Waggoner*, 647 F. Supp. at 1107 (citations omitted).

144. 757 S.W.2d 687 (Tex. 1988). *Lucas* was brought in federal court and the Fifth Circuit Court of Appeals certified to the Texas Supreme Court the question of whether the statutory limitation on medical malpractice damages violated the Texas Constitution. *See* Lucas v. United States, 811 F.2d 270 (5th Cir. 1987).

145. *See Lucas*, 757 S.W.2d at 690.

146. *See id.* at 688.

ries.[147] The court explained: "In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative [legislative] experiment to determine whether liability insurance rates will decrease."[148]

In *Wheat v. United States*,[149] the Fifth Circuit followed the *Lucas* decision, and held the MLIIA's damages cap violated the open courts provision of the Texas Constitution as applied to *common law* personal injury claims.[150] In *Wheat*, a patient's family brought a medical malpractice action against the United States and a private physician after the patient's cervical cancer remained undiagnosed and untreated for a four-year period, leading to her death.[151] The *Wheat* court upheld the lower court's damages award to the decedent's estate, even though it exceeded the MLIIA damages cap.[152] Furthermore, the *Wheat* court upheld the one million dollar award to the decedent's minor daughter for loss of care, maintenance, support, services, education, advise, counsel, love, companionship, pecuniary support and mental anguish, finding the award was not disproportionate to the deprivation the child suffered.[153] Following these landmark judicial decisions, plaintiffs injured by medical malpractice may receive compensation proportional to their injuries.

B. *Reducing the Number of Damage Awards: The Limitations Provision*

MLIIA legislators, in an effort to lower the number of medical malpractice claims, implemented an absolute two-year limitations period and abolished the discovery rule.[154] The MLIIA limitations period commences at the time the medical tort occurs.[155] However, if that date is not ascertainable, limitations commence on the last date of

147. *See id.* at 690-91.

148. *Id.* at 691. The court found the damages cap particularly offensive in light of the fact that "Even the Keeton Commission could not conclude there was any correlation between a damage cap and the stated purpose of improved health care, stating that adequate data was lacking." *Id.* (citing Keeton Report at 7). Furthermore, the *Lucas* court noted that the Texas Legislature choose not to follow Dean Keeton's recommendation that a victim's compensation fund be adopted as a statutory substitute for limitations on medical victims' recoveries. *See Lucas*, 757 S.W.2d at 690 (citing FINAL REPORT OF THE TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION TO THE 65TH TEXAS LEGISLATURE, December 1976 at 51-52). Moreover, the *Lucas* court questioned "whether the drafters of the Texas Constitution intended for the legislature to enact special laws for the protection of specified classes of tortfeasors." *Lucas*, 757 S.W.2d at 689 n.1.

149. 860 F.2d 1256 (5th Cir. 1988).

150. *See id.* at 1259.

151. *See id.* at 1257-58.

152. *See id.* at 1262.

153. *See id.*

154. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996); Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987).

155. *See Kimball*, 741 S.W.2d at 372.

treatment or hospitalization.[156] Therefore, if a plaintiff fails to institute a claim against a health care provider within two years of either the occurrence of the tort, the last date of treatment, or the last date of hospitalization, his claim is barred.[157] However, Texas courts have held the MLIIA statute of limitations period is unconstitutional when it cuts off an injured person's right to sue before he has a reasonable opportunity to institute suit.[158]

For instance, in *Nelson v. Krusen*,[159] the court permitted the parents of a child born with muscular dystrophy to recover damages from a physician and a hospital for wrongful birth, after the physician failed to advise them the mother was a carrier of the genetic disease.[160] The court held the two-year statute of limitations contained in the Medical Act violated the open courts provision of the Texas Constitution, as it applied to the parent's claim, because the symptoms of muscular dystrophy do not become apparent until several years after birth.[161] Consequently, the court found it impossible to discover the child had inherited the disease or the cause of action until after the two-year limitations period expired.[162] The court thus found the time limitation was unconstitutional because it prematurely cut off the parents' right to file a claim and failed to provide them with an alternative remedy.[163] The *Nelson* court found the Act required the plaintiffs "to do

156. *See id.*; Adkins v. Tafel, 871 S.W.2d 289, 292 (Tex. App.—Fort Worth 1994, no writ).

157. *See* Rivera v. Mitchell, 764 S.W.2d 393, 394-95 (Tex. App.—El Paso 1989, no writ) (barring a patient's medical malpractice claim because he failed to file his lawsuit within the time required).

158. *See* Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985) (holding the MLIIA's two year statute of limitations is unconstitutional under the open courts provision when it cuts off an injured person's right to bring suit before he has a reasonable opportunity to discover the wrong); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (holding statutes of limitations that cut off a plaintiff's cause of action before he has a reasonable opportunity to discover the wrong and bring suit violates the open courts provision of the Texas Constitution); Legesse v. Primacare, 899 S.W.2d 43 (Tex. App.—Eastland 1995, writ denied) (stating the open courts provision of the Texas Constitution protects plaintiffs from the two-year limitations period that would cut off their right to sue before they have a reasonable opportunity to discover their injuries); Deluna v. Rizkallah, 754 S.W.2d 366, 368 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("The constitutionality of article 4590i has been upheld so long as the statute does not cut off the cause of action before the plaintiff has a reasonable opportunity to discover the wrong and bring suit within the two-year period."); Tsai v. Wells, 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding the open courts provision prevents a patient's cause of action from being barred when she did not have a reasonable opportunity to discover the wrong within the absolute two-year limitation period).

159. 678 S.W.2d 918 (Tex. 1984).

160. *See id.* at 919.

161. *See id.* at 919, 922, 925. Although the Nelson court specifically held that article 5.82, § 4 of the Texas Insurance Code was unconstitutional, essentially the same provision was enacted in the MLIIA. *See Nelson*, 678 S.W.2d at 920 n.1.

162. *See id.* at 923.

163. *See id.*

the impossible—to sue before they had any reason to know they should sue."[164] The court concluded "Such a result is rightly described as 'shocking' and is so absurd and so unjust that it ought not be possible."[165]

Similarly, the Texas Supreme Court and a court of appeals have held that the limitations provision contained in the Medical Liability Act violated the open courts and due process provisions of the Texas Constitution because the provision unduly restricted minors' rights to obtain compensation for medical injuries.[166] In *Sax v. Votteler*,[167] the Texas Supreme Court first addressed whether the limitations period in the Medical Liability Act and its minority tolling provision, requiring minors to file personal injury claims by age eight, was unconstitutional.[168] In *Sax*, the parents of a minor brought suit against a physician for mistakenly removing one of the minor's fallopian tubes instead of her appendix.[169] Because the suit was brought when the minor was fourteen-years old, and three years after the defendant committed malpractice, the physician argued the claim was barred by limitations.[170]

The *Sax* court, however, unanimously held that barring a minor's claim at age eight violated the open courts and due process provisions of the Texas Constitution.[171] The court concluded the limitations provision unreasonably restricted the minor's cause of action, because it cut off that cause of action before the minor was legally able to assert it, without providing an adequate substitute remedy.[172] The court explained: "the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial

164. *Id.*

165. *Id.*

166. *See* Weiner v. Wasson, 900 S.W.2d 316, 318-19 (Tex. 1995); *Nelson*, 678 S.W.2d at 922-23; Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983); Battaile v. Yoffe, 882 S.W.2d 13 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

167. 648 S.W.2d 661 (Tex. 1983).

168. *See id.* at 663. Specifically, *Sax* held that article 5.82, § 4 of the Texas Insurance Code was unconstitutional. *See id.* at 667. Notably, the minority tolling provision contained in the Physicians, Podiatrists and Hospitals Act, codified in the Texas Insurance Code, required minors to institute suit by age eight. *See id.* at 663. Article 5.82, § 4 stated, "[M]inors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim." TEX. INS. CODE ANN. art. 5.82, § 4 (Vernon 1976) (current version at TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01). However, following the Texas Supreme Court's decision in *Sax*, the Texas Legislature enacted the MLIIA and its minority tolling provision that requires minors to institute suit by age fourteen. *See Sax,* 648 S.W.2d at 663 n.1; TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

169. *See Sax,* 648 S.W.2d at 662.

170. *See id.*

171. *See id.* at 667 (citing TEX. CONST. art. I, § 13).

172. *See Sax*, 648 S.W.2d at 667.

of the constitutionally-guaranteed right of redress."[173]

Finding it unreasonable either to assume parents will always protect minors' rights or to bar minors' remedies if parents fail to enforce minors' rights before limitations run, the *Sax* court found the legislative means employed to limit the number of malpractice claims was unreasonable when weighed against the abrogation of a child's right to obtain a remedy.[174] Thus, the court refused to bar the minor's cause of action while she remained under a disability.[175]

Similarly, in *Battaile v. Yoffe*,[176] a mother sued a physician on behalf of her minor daughter, alleging the physician failed to properly diagnose and treat her daughter for apnea (abnormal cessation of breathing during sleep) during the first three days after birth.[177] The suit was filed when the daughter was fifteen-years old.[178] However, the physician argued that the MLIIA required that suit be brought within two years of the tort's occurrence or by the time a minor reaches age fourteen.[179] The lower court agreed, holding that under the plain wording of the Act, the minor's claim was barred.[180]

The appellate court reversed, finding the limitation period unreasonably restricted the minor's common law cause of action, impermissively cut off her right to file a claim before she was legally capable of asserting it, and failed to offer her an alternative remedy.[181] Therefore, as applied to the minor's claim, the court held the statute violated the open courts provision of the Texas Constitution.[182]

More recently, in *Weiner v. Wasson*,[183] the Texas Supreme Court again held the limitations provision contained in the MLIIA was unconstitutional as applied to minors.[184] In *Weiner*, a fifteen-year old minor underwent surgery to have a surgical pin implanted into the femur of his right leg.[185] After the minor continued to incur problems, another physician discovered the surgical pin implant was impermissively protruding into the hip joint.[186] The minor underwent numerous surgeries including a total hip replacement to repair the damage

173. *See id.* at 665-66. *See also* Waites v. Sondock, 561 S.W.2d 772 (Tex. 1977); Lebohm v. City of Galveston, 275 S.W.2d 951 (Tex. 1955); Hanks v. City of Port Authur, 48 S.W.2d 944 (Tex. 1932).

174. *See Sax*, 648 S.W.2d at 665-67.

175. *See id.* at 667. Notably, the court upheld the bar on the parent's claim for medical costs, holding that the child's disability, and therefore the minority tolling benefit, did not extend to their claim. *See id.*

176. 882 S.W.2d 13 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

177. *See id.* at 14.

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.* at 16.

182. *See id.*

183. 900 S.W.2d 316 (Tex. 1995).

184. *See id.* at 317.

185. *See id.*

186. *See id.*

caused by the protruding pin.[187] The minor filed a malpractice suit against the original treating physician four years after the surgical pin was implanted.[188]

The *Weiner* court held the MLIIA limitations period and its revised minority tolling provision, requiring a minor to institute suit by his fourteenth birthday,[189] violated the open courts provision of the Texas Constitution by impermissibly cutting off his cause of action.[190] Following *Sax*, the *Weiner* court struck down the age restrictions and held that a minor, whose medical malpractice action accrues while he is still a minor, has until his twentieth birthday to bring suit against a physician.[191]

In sum, the Texas Supreme Court holds the MLIIA may not cut off an injured person's right to sue before he has a reasonable opportunity to institute suit. The court thus refuses to permit the MLIIA to prematurely cut off minors' causes of action.[192] Pursuant to the Supreme Court's holding in *Weiner*, minors injured by medical malpractice who assert personal injury claims may toll limitations until they reach age eighteen and have until their twentieth birthdays to institute suit.

The holdings of the *Nelson, Sax, Battaile* and *Weiner* courts is congruous with the holding of *Rose*. Although the *Rose* court held the legislature may constitutionally limit damage awards for *statutory* causes of action, it conceded the same provision could be held unconstitutional as applied to *common law* causes of action.[193] Not surprisingly, however, plaintiffs with statutory wrongful death claims, as well as plaintiffs with common law personal injury claims, have challenged the MLIIA is unconstitutional, asserting it violates the open courts provision,[194] due process provision,[195] equal protection provision,[196]

187. *See id.*

188. *See id.*

189. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

190. *See Weiner*, 900 S.W.2d at 318-19.

191. *See id.* at 321. The *Weiner* court, in determining the limitations period that should apply to minors filing personal injury claims, chose to look to the general limitations period enacted by the legislature in the Texas Civil Practice and Remedies Code in sections 16.001 and 16.003, which exclude the time a person is under a disability from the limitations period. *See id.*

192. The Texas Supreme Court has held unconstitutional several limitations provisions contained in medical liability acts as unduly restrictive of a minor's right to file a common law personal injury claim. *See Weiner*, 900 S.W.2d at 318-19; Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

193. *See* Rose v. Doctors Hosp., 801 S.W.2d 841, 844 (Tex. 1990).

194. *See* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam); *Weiner*, 900 S.W.2d at 317; *Rose*, 801 S.W.2d at 845; Morrison v. Chan, 699 S.W.2d 205 (Tex. 1985); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983); Winkle v. Tullos, 917 S.W.2d 304 (Tex. App.—Houston [14th Dist.] 1995, writ denied); Penick v. Christensen, 912 S.W.2d 276 (Tex. App.—Houston [14th Dist.] 1995, writ denied); Burgess v. Jennings, 903 S.W.2d 388 (Tex. App.—Dallas 1995, no writ); Weatherby v. Scenic Mountain Med. Ctr., 896 S.W.2d 852 (Tex. App.—Eastland 1995, writ denied); Holt v. Epley, 894 S.W.2d 511 (Tex. App.—Amarillo 1995, writ denied); Hogan v. Hallman,

889 S.W.2d 332 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Palla v. McDonald, 877 S.W.2d 472 (Tex. App.—Houston [1st Dist.] 1994, no writ); Todd v. Planned Parenthood, 853 S.W.2d 124 (Tex. App.—Dallas 1993, writ denied); Liggett v. Blocher, 849 S.W.2d 846 (Tex. App.—Houston [1st Dist.] 1993, no writ); Wilson v. Rudd, 814 S.W.2d 818 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Work v. Duval, 809 S.W.2d 351 (Tex. App.—Houston [14th Dist.] 1991, no writ); Shidaker v. Winsett, 805 S.W.2d 941 (Tex. App.—Amarillo 1991, writ denied); Tinkle v. Henderson, 730 S.W.2d 163 (Tex. App.—Tyler 1987, writ refused); Melendez v. Beal, 683 S.W.2d 869 (Tex. App.—Houston [1st Dist.] 1984, no writ).

Article I, § 13 of the Texas Constitution [Texas open courts provision] provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. The open courts provision "guarantees that 'the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress.'" *Weiner*, 900 S.W.2d at 318 (quoting *Sax*, 648 S.W.2d at 665-66). The open courts provision provides two distinct guarantees: that courts shall be open and that persons shall have remedies by due course of law. *See* Lucas v. United States, 757 S.W.2d 687, 696 (Tex. 1988). The due process guarantee of the open courts provision ensures that citizens bringing common law claims will not unreasonably be denied access to the courts. *See Sax*, 648 S.W.2d at 665. Pursuant to the open courts provision, several cases have established an open courts defense to the application of the MLIIA limitations defense. *See Weiner*, 900 S.W.2d at 318; *Sax*, 648 S.W.2d at 667. In sum, "the party seeking to rely on the [MLIIA] limitations statute must negate the open courts defense." *Holt*, 894 S.W.2d at 516.

195. *See* Arredondo v. Hilliard, 904 S.W.2d 754 (Tex. App.—San Antonio 1995), *rev'd sub. nom.* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Hogan v. Hallman, 889 S.W.2d 332 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Article I § 19 of the Texas Constitution [due process provision] provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. In assessing due process challenges, courts balance the public's gain resulting from legislation against its effect on personal and property rights. *See Arredondo*, 904 S.W.2d at 760. The *Arredondo* court stated: "A law is unconstitutional as violating due process [only] when it is arbitrary or unreasonable, and the latter occurs when the social necessity the law is meant to serve is not a sufficient justification of the restriction or the liberty or rights involved." *See id.* (quoting Pedraza v. Tibbs, 826 S.W.2d 695, 698 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.)).

> Due process requires that a limitations period be of adequate length to permit a party to enforce his rights. When the party has free access to the courts for a period of time sufficient for an ordinarily diligent person to commence legal proceedings to protect his rights, the limitations period is reasonable and adequate.

Id. (citing Nelson v. Krusen, 678 S.W.2d 918, 918 (Tex. 1984)).

196. *See* Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986); Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Penick v. Christensen, 912 S.W.2d 276 (Tex. App.—Houston [14th Dist.] 1995, writ denied); Povolish v. Bethania Reg'l Health Care Ctr., 905 S.W.2d 66 (Tex. App.—Fort Worth 1995, no writ); Hogan v. Hallman, 889 S.W.2d 332 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Phillips v. Sharpstown Gen. Hosp., 664 S.W.2d 162 (Tex. App.—Houston [1st Dist.] 1983, no writ); Neagle v. Nelson, 658 S.W.2d 258 (Tex. App.—Corpus Christi 1983), *rev'd on other grounds*, 685 S.W.2d 11 (Tex. 1985).

and constitutes special legislation granting privileges and immunities to a particular class of defendants.[197] However, despite successful constitutional attacks, the MLIIA's severability clause permits specific provisions or applications of the Act to be annulled while the statute remains law.[198]

Nevertheless, the precise constitutional boundaries of a twenty-year-old statute have yet to be completely prescribed by the Texas Supreme Court. What is clear from the court's decisions, however, is that the MLIIA may not constitutionally place unreasonable time restrictions on plaintiffs asserting *common law* causes of action. Specifically, the MLIIA may not constitutionally place unreasonable restrictions on minors filing personal injury actions. What remains unclear is whether the court will hold the same MLIIA time restriction is constitutionally permissible as applied to minors asserting *statutory* wrongful death causes of action.

IV. MEDICAL WRONGFUL DEATH CAUSES OF ACTION AND MINORITY TOLLING PROVISIONS

Virtually all states enacted medical statutes to combat the perceived national[199] medical liability insurance crisis.[200] These statutes generally include strict limitations provisions.[201] However, some states per-

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Article I, § 3 of the Texas Constitution [equal protection provision] provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. art. I, § 3.

197. *See Lucas*, 757 S.W.2d at 700; *Neagle*, 658 S.W.2d at 260; *Phillips*, 664 S.W.2d at 168-69.

198. *See Rose*, 801 S.W.2d at 844. The MLIIA's severability clause "states in part that if the application of the statute to any person or circumstance is held unconstitutional, then the effect of the invalidation shall be confined to the portion of the statute adjudged to be unconstitutional." *Id.*

199. Many commentators disputed whether a *national* crisis ever really existed. For instance, James Posner noted, "In the aggregate, even after adding an increment for self-insurance's contribution, malpractice costs are not a major cost factor for most hospitals, or even for many doctors." *See* Posner, *supra* note 42, at 49; *supra* notes 42, 63.

200. *See* Smith, *supra* note 57, at 221-22.

201. *See* ALA. CODE § 6-5-682 (West 1996); ALASKA STAT. § 09.10.010 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 12-561 (West 1996); ARK. CODE ANN. § 16-114-203 (Michie 1995); CAL. CODE CIV. PRAC. § 340.5 (West 1996); COLO. REV. STAT. ANN. § 13-80-102.5 (West 1996); CONN. GEN. STAT. ANN. § 52-584 (West 1991); DEL. CODE ANN. tit. 18, § 6856 (West 1996); FLA. STAT. ANN. § 95.11(4) (West 1996); GA. CODE ANN. § 9-3-71 (West 1996); HAW. REV. STAT. ANN. § 657-7.3 (Michie 1996); IDAHO CODE § 5-219 (West 1996); 735 ILL. COMP. STAT. ANN. 5/13-212 (West 1992); IND. CODE ANN. § 27-12-7-1 (West 1996); IOWA CODE ANN. § 614.1 (West 1996); KAN. STAT. ANN. § 60-513 (West 1995); KY. REV. STAT. ANN. § 413.140(e) (Banks-Baldwin 1996); LA. REV. STAT. ANN. § 5628 (West 1996); ME. REV. STAT. ANN. tit. 24, ch. 21, § 2902 (West 1990); MD. ANN. CODE § 5-109, 5-201 (1996); MASS. GEN. LAWS ANN. ch. 260, § 4 (West 1996); MICH. COMP. LAWS ANN. § 600.5838 (West 1996); MINN. STAT. ANN. § 541.07 (1) (West 1996); MISS. CODE ANN. § 15-1-36 (West 1996); MO. ANN. STAT. § 561.1051 (West 1996); MONT. CODE. ANN. § 27-2-205 (West 1995); NEB.

mit minors asserting medical wrongful death claims to toll limitations until they reach majority.[202] Further, in some jurisdictions, limitations commence on medical wrongful death claims upon death[203] and death actions are not considered derivative claims.[204] In contrast, death claims are considered derivative actions in Texas and medical death claims fall under the MLIIA. The Act has a two-year statute of limitations commencing when the defendant commits a tort and the Act only preserves minors' claims until they reach age fourteen.[205] Not surprisingly, the interaction of these factors have caused issues to arise regarding when minors' medical death claims become time-

REV. STAT. § 25-208 (West 1996); NEV. REV. STAT. § 41A.097 (West 1995); N.H. REV. STAT. ANN. § 507-C:4 (West 1995); N.J. STAT. ANN. §§ 2A:14-2.1, 2A:14-2.2 (West 1996); N.M. STAT. ANN. § 41-5-13 (Michie 1996); N.Y. INS. LAW § 214-a (McKinney 1996); N.C. GEN. STAT. §§ 1-17, 90-21.11 (West 1996); N.D. CENT. CODE §§ 28-01-18, 28-01-25 (West 1995); OHIO REV. STAT. § 2305.11 (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 76, § 18 (West 1996); OR. REV. STAT. § 12.110 (West 1995); PA. STAT. ANN. tit. 40, § 1301.605 (West 1996); R.I. GEN. LAWS § 9-1-14.1 (West 1996); S.C. CODE ANN. § 15-3-545 (Law. Co-op. 1996); S.D. CODIFIED LAWS § 15-2-14.1 (Michie 1996); TENN. CODE ANN. § 29-26-116 (West 1996); TEX. REV. CIV. STAT. art. 4590i (West 1996); UTAH CODE ANN. § 78-14-4 (West 1996); VT. STAT. ANN. § 521 (West 1996); VA. CODE ANN. 1950 § 8.01-243.1 (Michie 1996); WASH. REV. CODE ANN. § 4.16.350 (West 1996); W. VA. CODE § 55-7-5 (West 1986); WIS. STAT. ANN. § 893.55 (West 1996); WYO. STAT. ANN. § 1-3-107 (Michie 1996).

202. *See* Taylor v. Giddens, 618 So. 2d 834, 841-42 (La. 1993) (holding a minor's wrongful death action fell outside the prescriptive limitations period of the medical act); Moncor Trust Co. *ex rel.* Flynn v. Feil, 733 P.2d 1327 (N.M. Ct. App. 1987) (holding the limitations statute contained in the medical act inapplicable to minor wrongful death beneficiaries); Dachs v. Louis A. Weiss Mem'l Hosp., 509 N.E.2d 489, 491-93 (Ill. App. Ct. 1987) (holding that "Illinois public policy favors protecting minors and refuses to bar claims by minors not timely pursued by their personal representatives," and that limitations of the medical malpractice statute are tolled during minority, thus, medical malpractice wrongful death claims of deceased patient's minor children are tolled during their minority); Kohrt v. Yetter, 344 N.W.2d 245, 246-48 (Iowa 1984) (holding the minority tolling provision operated to extend limitations on death actions until one year after a minor attains majority). *See also* Smith, *supra* note 57, at 221-22.

203. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-562 (West 1996); KAN. STAT. ANN. § 60-3401 (West 1995).

204. There are two lines of authority on whether a wrongful death action is genuinely derivative, or whether it must merely be based on an actionable wrong. *See* Russell v. Ingersoll-Rand Co., 795 S.W.2d 243, 247 (Tex. App.—Houston [1st Dist.] 1990), *aff'd*, 841 S.W.2d 343 (Tex. 1992). Some states regard the wrongful death suit as derivative. *See id.* Those states construe the clause *if death had not ensued* or *if he had lived*, as rendering a death action genuinely derivative. *See id.* If the statute of limitation runs against the decedent at the time of his death, those states hold that beneficiaries may not bring a suit for wrongful death. *See id.* Other states regard the wrongful death suit as a new and independent cause of action. *See id.* They interpret the clause *if death had not ensued* as requiring simply an actionable tort as the underlying basis for the suit. *See id.* Thus, under these states' interpretation, even if the statute of limitations has run on a decedent's personal injury claim against the decedent at the time of his death, a cause of action for wrongful death will not be barred. *See id. See generally* F. HARPER ET AL., THE LAW OF TORTS § 24.1 (2d ed. 1986).

205. *See, e.g., Russell*, 841 S.W.2d at 345-48; Bala v. Maxwell, 909 S.W.2d 889 (Tex. 1995) (per curiam).

barred and whether adults may use a decedent child's disability status to obtain additional time to file medical death claims.

A. *Texas*

The MLIIA contains a two-year limitations period that generally commences upon the date of injury.[206] In addition, the statute contains a minority tolling provision whereby minors may gain additional time to institute suit.[207] It provides that "minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim."[208] When medical death claims involve minors, two situations typically arise: medical malpractice either causes the death of a child or a child's parent.

Based on the derivative nature of a death claim and the MLIIA's two-year limitations period, minor beneficiaries will attempt to file medical wrongful death claims in one of three situations: (1) an adult dies within two years of his injury without filing a personal injury claim; (2) an adult files a personal injury claim within two years of his injury but subsequently dies before the suit is resolved; or (3) an adult fails to institute a personal injury suit within two years of his injury and subsequently dies with his personal injury claim already barred by limitations. In all three scenarios, the factors determining whether a minor may institute a medical wrongful death suit is whether the adult instituted suit within the limitations period, whether the adult died within the limitations period, and whether the minor is over age fourteen. However, in all scenarios, if more than two years has passed since the adult was injured and if a child reaches age fourteen before a claim is filed, the minority tolling provision will *not* preserve the child's wrongful death claim. Rather, the MLIIA will bar his claim before he attains majority. Thus, if a claim is not filed on a minor's behalf by the time he reaches age fourteen, the MLIIA, as written, will bar his cause of action.

In contrast, when a parent loses a child and attempts to file a medical wrongful death claim, the factor determining whether he may institute suit is whether limitations have run. However, the issue of whether the minority tolling provision confers upon adult beneficiaries additional filing time arises when the date of a child's injury and the date of his death are not the same. Until recently, the issue of whether an adult could toll the commencement of limitations based on the minor's disability remained unresolved. However, the Texas Supreme Court, in *Baptist Memorial Hospital v. Arredondo*, recently held the MLIIA minority tolling provision does not apply to an adult

206. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996); Kimball v. Brothers, 741 S.W.2d 370 (Tex. 1987).

207. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996); Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995).

208. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

beneficiary's wrongful death claim.[209] Nonetheless, the following analysis of the minority tolling provision, as applied to adult beneficiaries' wrongful death claims, may aid in illustrating how the tolling provision should be applied to minor beneficiaries' wrongful death claims.

The Texas Supreme Court, in determining whether the MLIIA minority tolling provision should apply to an adult beneficiary's wrongful death claim could have reached three possible results based upon the derivative nature of a death claim: (1) limitations never commence on the adult beneficiary's claim because the minor died before reaching the age triggering the commencement of limitations; (2) limitations commence on the adult beneficiary's wrongful death claim on the date of the minor's death because the adult steps directly into the shoes of the minor and the minor could have tolled limitations on his personal injury claim until his death; or (3) limitations commence on the adult beneficiary's wrongful death claim when the defendant commits the act of malpractice because the disability of minority is not considered derivative.

Under the first interpretation, both the death claim and the disability of minority could be interpreted as derivative, permitting the adult to step into the shoes of the minor. However, under this interpretation, the parent could *theoretically* maintain a death action indefinitely as limitations never commence on a child's claim because the child never reaches the age triggering the commencement of limitations. But, such an interpretation defeats the purposes of statutes of limitation.[210]

Under the second interpretation, both the death claim and the disability of minority could be interpreted as derivative, but limitations could commence on an adult's claim upon the child's death.[211] In other words, the child's death may be viewed as ending the disability of minority, along with its related tolling benefit. Thus, limitations could commence on an adult's wrongful death claim the same as they do under the Wrongful Death Act, that is, upon death. In this case, a claimant has two years from the date of death to institute suit under both the Wrongful Death Act and the MLIIA. Yet, this interpretation conflicts with the MLIIA's three-date commencement of limitations

209. 922 S.W.2d at 921.

210. Statutes of limitations are used to compel plaintiffs to enforce their rights of action within reasonable time periods and afford "defendants a fair opportunity to defend while witnesses are available and the circumstances are fresh in their minds." Van De Mark et al., *supra* note 52, at 319 (citing Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977); Price v. Estate of Anderson, 522 S.W.2d 690, 692 (Tex. 1975); Hallaway v. Thompson, 226 S.W.2d 816, 820 (Tex. 1950); Cox v. Rosser, 579 S.W.2d 73, 77 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.)).

211. *See* Arredondo v. Hilliard, 904 S.W.2d 754 (Tex. App.—San Antonio 1995), *rev'd sub nom.* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam).

schedule, where limitations commence upon the occurrence of the underlying medical injury.

Under the third interpretation, a death claim is derivative, but the minority tolling provision is seen as a personal right, only belonging to, benefitting, and claimable by a minor. Absent tolling for minority, limitations commence on the adult's death claim on the date of injury. Consequently, if an adult fails to institute a personal injury action on behalf of a minor within two years of the date of injury, the adult's death claim is barred. Alternatively, if an adult institutes a personal injury suit on behalf of a child within two years of injury and the child subsequently dies, the adult may tack the death claim onto the existing personal injury claim. This interpretation coincides with the supreme court's recent decision in *Baptist Memorial Hospital System*, holding an adult beneficiary's wrongful death claim was time-barred, even though she instituted suit within two years of the child's death, because she failed to institute suit within two years of the physician's negligence.[212]

The confusion regarding when limitations commence on MLIIA wrongful death actions results in large part because Texas courts apply a Wrongful Death Act derivative rationale to death claims. The application of a derivative rationale does not present a conflict for death claims falling under the Wrongful Death Act because limitations commence on the date of death[213] and limitations are tolled on minors' death claims until they reach majority.[214] However, a derivative interpretation poses problems when death claims fall under the MLIIA because limitations commence on the date of the health care provider's negligence,[215] which may not be the date of death. Further, MLIIA minors are not permitted to toll limitations until they reach majority.[216] As previously illustrated, if the disability of minority is interpreted as derivative, an adult could toll the commencement of limitations on a death claim if a minor is the decedent because the minor could have utilized the minority tolling provision to toll the commencement of limitations on his personal injury claim if he had lived. Such an interpretation would enable an adult to effectively obtain two years from the date of a child's death to institute suit, thereby circumventing the MLIIA's two-year limitations provision that commences on the occurrence of the defendant's negligence. In fact, MLIIA adult wrongful death beneficiaries have attempted to obtain

212. 922 S.W.2d at 121-22.

213. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 1986). "A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person." *Id.* § 16.003(b).

214. *See* Texas Utils. Co. v. West, 59 S.W.2d 459, 460-61 (Tex. App.—Amarillo 1933, writ ref'd n.r.e.).

215. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

216. *See id.*

two years from the date of a child's death to file claims by alleging that under a derivative rationale, the minority tolling provision tolls the commencement of limitations for the interim period between the date of a child's injury and his death.[217]

In contrast, a child, legally incapable of instituting a claim until he reaches majority, may be barred from filing a medical wrongful death suit before he escapes disability, despite the fact that tolling provisions are intended to preserve disabled plaintiffs' claims in the interest of equity. Indeed, the foregoing discussion illustrating that the disability of minority should not be interpreted as derivative serves to highlight the true purpose of the provision—to preserve minors' claims. Yet, the provision remains inadequate to accomplish this result. For instance, if an adult's claim is barred because he fails to file a personal injury claim within two years of his injury and subsequently dies, then a minor over the age of fourteen cannot utilize the minority tolling provision to toll the commencement of limitations in order to file a death claim because the adult's inaction bars all claims.

Not surprisingly, courts confronted with the issue of how the MLIIA minority tolling provision applies to medical wrongful death claims have reached conflicting results. One lower court, presented with the question of when limitations commence on an adult's claim for the death of a minor, applied the Wrongful Death Act's derivative rationale, holding limitations were tolled based on the child's minority and that limitations commenced upon the date of the child's death.[218] However, the Texas Supreme Court, in *Baptist Memorial Hospital System*, held limitations commence on medical death claims on the date of the occurrence of the defendant's negligence because the minority tolling provision only benefits minors.[219]

Yet as previously mentioned, the minority tolling provision is inadequate because it only benefits minors if an adult institutes a suit on a minors' behalf before the minor reaches age fourteen. Otherwise, the MLIIA will bar his claim while he remains under a disability. To illustrate the inequity of judicial decisions addressing the interplay of *medical* wrongful death claims, limitations periods, and the disability of minority, the following survey of recent case law examining adults' and minors' medical wrongful death claims may prove helpful.

217. *See Baptist Mem'l Hosp. Sys.*, 922 S.W.2d at 120-21; Cestro v. Medina, 781 S.W.2d 640 (Tex. App.—Eastland 1989, no writ); Valdez v. Texas Children's Hosp., 673 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1984, no writ).

218. *See* Arredondo v. Hilliard, 904 S.W.2d 754 (Tex. App.—San Antonio 1995), *rev'd sub nom.* Baptist Mem'l Hosp. Sys v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam).

219. *Baptist Mem'l Hosp. Sys.*, 922 S.W.2d at 121.

1. Minors' Causes of Action

While the Texas Supreme Court holds that minors with *medical personal injury* claims are constitutionally guaranteed a right of redress in the courts, and thus may toll the commencement of limitations until they attain majority, it remains disputed whether minors with *medical wrongful death* claims will be afforded the same protection. Because the MLIIA fails to distinguish personal injury claims from death claims, and because the Texas Supreme Court has yet to address the issue, appellate courts have been left to dispose of the issue. While courts generally recognize the MLIIA treats minors with medical wrongful death claims unfairly by barring their suits while they remain under a disability, they feel bound by the Texas Supreme Court's decision in *Rose v. Doctors Hospital*,[220] holding the legislature may constitutionally limit damage awards for statutory causes of action. Consequently, it remains uncertain whether minors asserting medical wrongful death actions may toll limitations until they attain majority. In fact, lower courts hold to the contrary.

For instance, in *Wallace v. Homan & Crimen, Inc.*,[221] the El Paso Court of Civil Appeals barred a nineteen year old plaintiff's suit against a physician and hospital for causing the death of his father when the plaintiff was age three.[222] Although the court noted the MLIIA and its limitations provision, requiring minors to file suit before they reach majority, was not in effect when the plaintiff's father died and that but for the MLIIA his suit would not be barred, the court held limitations had run on the claim.[223] As a result, the plaintiff had no redress for the loss of his father because he failed to file suit before turning fourteen years old.

In *Bradley v. Etessam*,[224] the Dallas Court of Appeals refused to bar a wrongful death claim instituted by twins against a physician over two years after their mother's death.[225] However, the court only refused to bar the claim because it was filed before the children reached age fourteen and because the decedent had filed a personal injury action

220. 801 S.W.2d 841 (Tex. 1990).

221. 584 S.W.2d 322 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

222. *See id.* at 324.

223. *See id.* at 323-24. The *Wallace* court noted that until enactment of the MLIIA, a plaintiff's cause of action was governed by TEX. REV. CIV. STAT. ANN. art. 5526, which provided plaintiffs two years to institute suit, and art. 5535, which tolled statutes of limitations until a minor reached the age of majority. *See id.* at 323. Thus the plaintiff would obtain two years after reaching majority to file a wrongful death claim. *See id.*

224. 703 S.W.2d 237 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Interestingly, in reversing the trial court's decision granting summary judgment in favor of the defendant physician on a limitations defense, the court explained that the definition of a health care liability *claim* under the MLIIA is not limited to *personal injury* causes of action filed by or on behalf of minors for medical injuries, but rather includes minors' wrongful *death* claims. *See id.* at 240-43.

225. *See id.* at 238-39, 243.

within two years of the occurrence of the medical tort.[226] Following the mother's death, the court permitted the father to amend the original complaint to include the children's wrongful death claim, stating, "the plaintiff may later amend to assert additional causes of action arising out of the same transaction or occurrence, and these added causes of action will 'relate back' to the original filing."[227] The Dallas Court of Appeals held that because the parents filed a medical malpractice suit within two years of the tort, all causes of action stemming from the malpractice were preserved.[228] As a result, the children's subsequent death suit was not barred.[229]

In *Bangert v. Baylor College of Medicine*,[230] a death action was brought against a physician and a medical school on behalf of a thirteen year old minor more than two years after his mother's death.[231] The Houston Fourteenth District Court of Appeals reversed the summary judgment granted in favor of the defendants on a limitations defense and remanded the case, holding that a minor's cause of action, once accrued, is a personal cause of action and is independently subject to limitations.[232] The *Bangert* court reasoned that a death suit is derivative in nature and that the defendants failed to prove that the minor's death claim was extinguished or never accrued, or that once accrued, it was barred by limitations.[233] Thus, the appellate court held the trial court erred in granting summary judgment.[234] The appelate court concluded the mother had a viable personal injury cause of action at the time of her death because she died within two years of the occurrence of the medical tort.[235] Therefore, the court reasoned, the minor also had a viable death action, provided his action was not independently barred by limitations.[236] Because the minor was less than fourteen-years old when the suit was filed, the court stated his action was not independently barred by limitations as the minority tolling provision preserved his claim until he reached age fourteen.[237] The majority, however, rejected the dissent's argument that the minor had

226. *See id.* at 238-39, 242.
227. *Id.* at 240.
228. *See id.* at 240, 242.
229. *See id.* at 239.
230. 881 S.W.2d 564 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
231. *See id.* at 565 & n.1.
232. *See id.* at 566-67 & n.4.
233. *See id.* at 567.
234. *See id.* at 565-67. A party moving for summary judgment based on a limitations defense must conclusively prove that limitations have run. *See* Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996). However, "If the nonmovant asserts that a tolling provision applies, the movant must conclusively negate the tolling provision's application to show his entitlement to summary judgment." *Id.* (citations omitted).
235. *See Bangert*, 881 S.W.2d at 566.
236. *See id.* at 566-67.
237. *See id.* Under the MLIIA statute of limitations, minors currently have two years after reaching their twelfth birthday to file a claim. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

a derivative claim falling under the Wrongful Death Act because he was not the person directly injured.[238] Nevertheless, the majority noted that the minor's claim would likewise not be barred under the Wrongful Death Act, because it permits minors to toll limitations until they reach majority.[239]

In *Povolish v. Bethania Regional Health Care Center*,[240] two young adults, alleging medical malpractice caused the death of their mother, brought suit against several physicians and a health care center.[241] At the time of their mother's death, the children were sixteen and seventeen-years old.[242] At the time they filed suit, the children were eighteen and nineteen years old.[243] Although the Fort Worth Court of Appeals upheld the trial court's ruling that limitations had run on the claim, the court regretfully stated it did so only because it felt bound by the Texas Supreme Court's decision in *Rose*,[244] upholding the legislature's authority to limit statutory causes of action.[245] However, the *Pavolish* court urged the Texas Supreme Court to revisit the issue of whether the MLIIA's limitations period violates minors' constitutional rights by prematurely cutting off their causes of action for wrongful death, stating:

> If minors are to be given full protection as to the time they are allowed to bring suit for their personal injuries, appellants who have lost a parent due to the same type of negligence should be even equally, if not more, deserving of legal protection.
>
> We are unable to discern why there is such a narrow exception to the general provision that a minor child has until two years after their eighteenth birthday to bring suit. We urge the Supreme Court to revisit whether the statute of limitation provision of the Medical Liability and Insurance Improvement Act, as it applies to minor claimants, violates the Equal Protection Clause of the Texas Constitution.[246]

In *Hogan v. Hallman*,[247] the Houston Fourteenth District Court of Appeals questioned the equity of barring minors' medical wrongful death claims before they reach majority. In *Hogan,* twin sons, upon turning age eighteen, immediately filed a wrongful death suit against a

238. *See id.* at 566 & n.3.
239. *See id.*
240. 905 S.W.2d 66 (Tex. App.—Fort Worth 1995, no writ).
241. *See id.* at 67.
242. *See id.*
243. *See id.*
244. *See id.* at 68 (citations omitted).
245. *See* Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990) (holding the Legislature may limit damages in wrongful death actions under the Medical Liability and Insurance Improvement Act).
246. *Povolish*, 905 S.W.2d at 68 (citing Hogan v. Hallman, 889 S.W.2d 332, 339 (Tex. App.—Houston [14th Dist.] 1994, writ denied)). *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1986).
247. 889 S.W.2d 332 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

physician and a hospital for causing the death of their mother.[248]

The trial court granted summary judgment for the defendants based on a limitations defense because the mother had died thirteen years earlier, following a pulmonary lobectomy (a surgical removal of a lobe of the lung) when the twin boys were age five.[249] On appeal, the twin sons argued their claim was viable at the time of filing because their mother had a viable claim for medical malpractice at the time of her death and that their mother's viable health care liability claim preserved their claim until they reached majority.[250] Alternatively, they argued the general tolling provision of the Wrongful Death Act controlled and gave them one year after reaching majority to institute suit.[251] The court, however, held the MLIIA controlled and its minority tolling provision did not preserve their claim because the provision, as written, only tolls the commencement of limitations until minors reach age fourteen.[252]

The sons further asserted that the MLIIA was unconstitutional because the short limitations period violated the due process, equal protection, and open courts provisions of the United States and Texas Constitutions by imposing on them an impossible burden.[253] They argued they could not legally file a claim in their own right until they attained majority and could not possibly comply with the statute's filing requirements before turning age eighteen.[254] Yet, upon reaching majority, when first capable of instituting a claim, their claim was already barred.[255]

The *Hogan* court held the MLIIA did not violate the Texas open courts provision and was not unconstitutional as applied to their claim because the twins asserted a *statutory* death claim, not a *common law* claim for personal injury.[256] Furthermore, the court found no violation of the due process or equal protection provisions of the United States and Texas Constitutions because of the presumption favoring legislative acts as rationally related to legitimate state interests.[257] The *Hogan* court reasoned that because the legislature creates statutory causes of action, it is free to limit, modify, or extinguish them as long as the statute limiting a claimant's right has a legitimate purpose.[258] Nonetheless, the court showed sympathy for the sons' plight stating:

248. *See id.* at 335.
249. *See id.*
250. *See id.*
251. *See id.* at 335-36.
252. *See id.* at 336.
253. *See id.* at 337.
254. *See id.* at 336-37.
255. *See id.*
256. *See id.* at 338-39.
257. *See id.*
258. *See id.* at 339-40.

> But for the rationale of *Rose*, we would be hard pressed to justify the constitutionality of article 4590i, § 10 under an equal protection analysis. The application of this act to require minors who lose a parent to alleged medical malpractice to bring their suits by the time they reach fourteen years of age, while minors whose parents were killed due to other types of negligence have until their twentieth birthday, seem to us an unequal application of the law.[259]

The court expressed reservations about whether the distinction between common law and statutory causes of action should preclude minors with medical wrongful death claims from obtaining compensation.[260] Recognizing an injustice, the *Hogan* court urged the Texas Supreme Court to revisit the issue of whether the MLIIA statute of limitations effectively restricts a class of minors from instituting *medical wrongful death* suits, and whether this restriction violates the equal protection clause because minors with *nonmedical* wrongful death claims have until their twentieth birthdays to institute suits, while minors with *medical* wrongful death suits have only until their fourteenth birthdays to file similar claims.[261] Nevertheless, the *Hogan* court, feeling bound by the Texas Supreme Court's decision in *Rose*, reluctantly held the minors' medical wrongful death claim was barred because limitations had run.[262] Thus, because the twins did not file a claim until they reached majority, the court held their suit was barred.[263]

2. Adults' Causes of Action

The issue of whether an adult medical wrongful death beneficiary may employ the minority tolling provision to toll the commencement of limitations because the decedent was a child initially proved problematic for Texas courts, largely because of the derivative nature of a death claim.[264] Because the minority tolling provision tolled the commencement of limitations on a minor's personal injury claim before his death, courts debated whether the provision also tolled the commencement of limitations on an adult's subsequent wrongful death claim or whether limitations commenced on an adult beneficiary's claim upon the occurrence of the underlying medical tort because the benefit of tolling inures only to the disabled minor child.[265]

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259. *Id.* at 339.
260. *See id.* at 339-40.
261. *See id.*
262. *See id.* at 340.
263. *See id.*
264. *See* Arredondo v. Hilliard, 904 S.W.2d 754 (Tex. App.—San Antonio 1995), *rev'd sub nom.* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam).
265. *See Baptist Mem'l Hosp. Sys.*, 922 S.W.2d at 121; Cestro v. Medina, 781 S.W.2d 640 (Tex. App.—Eastland 1989, no writ); Valdez v. Texas Children's Hosp., 673 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1984, no writ).

The first court to address the issue of whether an adult MLIIA wrongful death beneficiary gained additional filing time based on a decedent child's disability was *Valdez v. Texas Children's Hospital.*[266] In *Valdez*, a mother brought a medical malpractice action against a hospital over two years after her minor child's death, arguing the child's death suspended the commencement of limitations for one year.[267] The Houston First District Court of Appeals held the adult's medical death claim was barred because a health care liability claim must be filed within two years of the occurrence of the medical tort.[268] However, addressing how the MLIIA relates to the Wrongful Death Act, the *Valdez* court concluded that because the purposes and goals of the two statutes are separate and distinct, the statutes should be harmonized.[269] Therefore, although the Houston court refused to toll limitations on the mother's death claim, it allowed a one year tolling extension on the decedent's estate's survival claim.[270]

The Eastland Court of Appeals, however, reached a different result in *Cestro v. Medina.*[271] In *Cestro*, a mother sued a physician for the death of her minor son.[272] On appeal from a summary judgment in favor of the defendant physician based on a limitations defense, the mother contended the MLIIA's limitations provision violated the open courts provision of the Texas Constitution as applied to a minor's cause of action.[273] In effect, the plaintiff sought to use her deceased son's minor status to toll the commencement of limitations from the time of the occurrence of the defendant's malpractice until the time of her minor son's death because the additional time would prevent her claim from being time-barred.

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266. 673 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1984, no writ).

267. *See id.* at 343. Not surprisingly, after extensive research, the author failed to find any case law where an adult wrongful death beneficiary has argued limitations should be tolled indefinitely because the minor decedent will never reach majority.

268. *See id.* at 345.

269. *See id.* at 344-45. *Valdez* specifically addressed whether the limitations period contained in article 5538 of the Texas Civil Practice and Remedies Code (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.062 (Vernon 1986)) suspended the running the MLIIA limitations period. *See Valdez*, 673 S.W.2d at 344.

270. *See id.* at 345. In Texas, a survival claim is a claim asserted on the decedent's behalf and is wholly derivative of the decedent's right to sue for an actionable wrong suffered prior to death. *See* TEX. CIV. PRAC. & REM. CODE § 71.021 (Vernon 1986); Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992). Recoverable damages include damages sustained by the decedent before death, but not any damages claimed by the beneficiaries for their own loss. *See id.* Further, with survival actions,

> Any recovery obtained flows to those who would have received it had he obtained it immediately prior to his death—that is, his heirs, legal representatives and estate. Defenses that could have been raised against a claim by the injured person may also be raised against the same claim asserted by the person's heirs and estate.

Id. at 345 (citation omitted).

271. 781 S.W.2d 640 (Tex. App.—Eastland 1989, no writ).

272. *See id.* at 641 & nn.1-2.

273. *See id.* at 641.

The Eastland Court of Appeals held that because the minor was deceased, the minority tolling provision did not preserve her claim.[274] Further, the court concluded the MLIIA statute of limitations was not unconstitutional, as applied to adult litigants, because adults have an adequate opportunity to discover injuries and causes of action while reasonable time remains to bring suit.[275] Consequently, the mother was prohibited from using her son's minority status to toll the commencement of limitations on her death claim.[276]

In *Arredondo v. Hilliard*,[277] a mother sued a physician and a hospital for the death of her infant son.[278] Although the mother filed the claim exactly two years after her son's death, two years and two days had passed since the physician treated the minor child.[279] The trial court granted the defendant's motion for summary judgment based on a limitations defense, which subsequently became the sole point of error on appeal.[280] On appeal, the mother alleged the limitations pro-

274. *See id. See also* Campos v. Ysleta Gen. Hosp., Inc., 879 S.W.2d 67, 73 (Tex. App.—El Paso 1994, writ denied) ("[T]he statute of limitations would never run in a situation where a child dies and therefore never reaches the age of fourteen.").

275. *See Cestro*, 781 S.W.2d at 642. *See also* Radloff v. Dorman, 924 S.W.2d 416 (Tex. App.—Amarillo 1996, writ filed) (holding four months between the plaintiff's discovery of the cause of action and expiration of two-year limitations period was a reasonable time to bring suit); Neagle v. Theard, 917 S.W.2d 287 (Tex. App.—El Paso 1995, writ denied) (holding the plaintiff's cause of action was time-barred because she failed to file suit within one year of discovering her injury); Fiore v. HCA Serv. of Tex., Inc., 915 S.W.2d 233 (Tex. App.—Fort Worth 1996, writ denied) (holding, as a matter of law, that the plaintiff's failure to file suit within a year after learning of her misdiagnosis barred her claim); LaGesse v. Primacare, Inc., 899 S.W.2d 43 (Tex. App.—Eastland 1995, writ denied) (holding the plaintiff's action was barred because she did not file her claim within one year of discovering her injury); Holt v. Epley, 894 S.W.2d 511 (Tex. App.—Amarillo 1995, writ denied) (holding the plaintiff's action was time-barred because she was aware of her injury, its cause and the defendant's identity within eight months of the accrual of her cause of action); Adkins v. Tafel, 871 S.W.2d 289 (Tex. App.—Fort Worth 1994, no writ) (holding eighteen months was a sufficient time period to file a cause of action under the MLIIA when a plaintiff was aware of his injury and cause of action); Work v. Duvall, 809 S.W.2d 351 (Tex. App.—Houston [14th Dist.] 1991, no writ) (holding four months was a sufficient time to file suit for a medical malpractice claim under the MLIIA when the plaintiff had discovered his injury and cause of action); Shidaker v. Winsett, 805 S.W.2d 941 (Tex. App.—Amarillo 1991, writ denied) (holding the MLIIA statute of limitations barred a beneficiary's medical wrongful death claim because the decedent was aware of his cause of action for thirteen months and he died four months before limitations ran, leaving the beneficiary a sufficient time to institute suit); Rivera v. Mitchell, 764 S.W.2d 393 (Tex. App.—El Paso 1989, no writ) (holding an eleven month period to file a claim was sufficient under the MLIIA as the plaintiff was aware of his cause of action); Reed v. Wershba, 698 S.W.2d 369 (Tex. App.—Houston [14th Dist.] 1985, no writ) (holding thirteen months was a reasonable time to file suit after the plaintiff discovered his injury).

276. *See Cestro*, 781 S.W.2d at 642.

277. 904 S.W.2d 754 (Tex. App.—San Antonio 1995), *rev'd sub nom.* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam).

278. *See id.* at 756.

279. *See id.*

280. *See id.*

vision violated the due process and open courts provisions of the Texas Constitution and that the statute of limitations on her death claim was tolled based on her son's minority.[281]

The San Antonio Court of Appeals reversed in a two-to-one decision.[282] The court held the defendants failed to sustain the burden of proof that limitations were not tolled due to the infant's minority status and that the infant's cause of action was not viable at the time of his death.[283] The court reasoned that because the minority tolling provision tolled the commencement of limitations on the minor's personal injury claim for the two days before his death, then due to the derivative nature of a death action, the adult mother also obtained the two day tolling benefit.[284] Consequently, under the court of appeal's reasoning, the mother could effectively obtain two years from the date of the child's death or two years and two days from the occurrence of the defendant's negligence to file her wrongful death suit.

The Texas Supreme Court, however, reversed in *Baptist Memorial Hospital System v. Arredondo*,[285] holding the mother's wrongful death claim was barred by limitations and that the appellate court had incorrectly applied the minority tolling provision.[286] The *Baptist Memorial* court explained:

> [*The minority tolling*] *provision tolls a claim's accrual only when it is filed by a minor or on a minor's behalf.* A statutory beneficiary files a wrongful death action to recover her own damages based on a minor's death. Therefore, the tolling provision of section 10.01 that applies to a minor does not apply to an adult's wrongful death claims.[287]

Consequently, the court held because the mother was an adult beneficiary, the MLIIA's minority tolling provision did not apply.[288] Therefore, because her claim was filed two years and two days following the defendant's act of malpractice, her wrongful death action was barred.[289]

B. *Other Jurisdictions*

Some jurisdictions toll limitations on minors' medical wrongful death claims until they reach majority.[290] Public policy considerations

281. *See id.*
282. *See id.* at 756, 761.
283. *See id.* at 761.
284. *See id.*
285. 922 S.W.2d 120 (Tex. 1996) (per curiam).
286. *See id.* at 121.
287. *Id.* (citation omitted) (emphasis added). *See also* Regents of the Univ. of N.M. v. Armijo, 704 P.2d 428, 430 (N.M. 1985) (holding the minority of a decedent does not inure to the benefit of an adult wrongful death beneficiary).
288. *See Baptist Mem'l Hosp. Sys.*, 922 S.W.2d at 121.
289. *See id.* at 120-21.
290. *See supra* note 202.

have motivated courts in jurisdictions outside Texas to find methods to provide children with legal protection and adequate time to institute suit to recover compensation for injuries.[291]

For example, in *Taylor v. Giddens*,[292] the Louisiana Supreme Court held a minor's medical wrongful death action fell outside the prescriptive limitations period of the Louisiana Medical Malpractice Act.[293] The court refused to hold children to the limitations period contained in the medical act and allowed them to sue for the death of their mother.[294] Citing public policy reasons for its decision, the Louisiana court reasoned that the state has an interest in protecting the family unit, in providing compensation for injuries, and in preventing constitutional challenges by ensuring that the class of medical wrongful death claimants have access to the courts for a reasonable time after a death occurs.[295] Therefore, the court interpreted death actions as falling outside the scope of the medical act.[296] The court noted that a Louisiana wrongful death action is not dependant upon the decedent having a viable cause of action at death and that limitations com-

291. *See supra* note 202.

292. 618 So. 2d 834 (La. 1993).

293. *See id.* at 841. The Louisiana medical statute, art. 5628, stated:

> No action for damages for injury or death against any physician, chiropractor, dentist, psychologist, hospital duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(a), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.
>
> The provisions of the Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

LSA-R.S. 9:5628.

294. *See Taylor*, 618 So. 2d at 841-42.

295. *See id.* at 841. The court explained:

> The interpretation that wrongful death actions are not within the ambit of LSA-R.S. 9:5628 also balances the interest of society, by allowing that class of tort claimants an opportunity to recover damages from the tortfeasor, against the interest of the public in controlling medical costs, since wrongful death actions have limited types of damages and, generally, the causal connection declines as the period between the alleged act of malpractice and the date of death lengthens.

Id. at 842.

296. *See id.* at 841. The court stated,

> Though it [a wrongful death action] may have its genesis in an act of [medical] malpractice, a wrongful death action is not a malpractice action. From its inception, the action exists only in favor of the victim's beneficiaries. Therefore, it is not controlled by the prescriptive period for medical malpractice actions. The reference to action for death in LSA-R.S. 9:5628 applies solely to survival actions as they are derivative of the malpractice victim's action.

Id. (citation omitted).

mence upon death because that is the date a beneficiary is injured.[297] The court reasoned such an interpretation "balances the interest of society, by allowing that class of tort claimants an opportunity to recover damages from the tortfeasor, against the interest of the public in controlling medical costs."[298]

Similarly, in *Kohrt v. Yetter*,[299] the Iowa Supreme Court interpreted two seemingly conflicting provisions of its medical malpractice act and held its minority tolling provision operated to extend limitations for personal injury and death actions until one year after a minor reaches majority.[300] The court found the minority tolling provision was not in conflict with the limitation provision in the medical act requiring actions to be brought within six years of the occurrence of the act or omission causing injury because minority was a delineated exception.[301] Moreover, the court held that the limitations provision related only to the type of action, a medical malpractice claim, while the tolling provision related to a class of claimants, minors.[302]

In short, in the interest of equity, other jurisdictions have endeavored to ensure minors receive adequate time to pursue legal actions after disabilities are removed. These jurisdictions refuse to bar minors' claims through short, strict limitations periods contained in med-

297. *See id.* at 840-41. The court explained that if the Louisiana Medical Statute controlled the prescriptive period for wrongful death actions, a certain class of wrongful death claimants would be time-barred from filing suit before their cause of action even arose. The statute would not equally affect all medical malpractice wrongful death claimants or treat them the same.

> Wrongful death claimants whose malpractice victim died within the prescriptive period would be allowed to seek damages, while those whose malpractice victim died after expiration of the malpractice action prescriptive period would be denied the right to seek damages. Their remedy to address their civil wrong would have been eliminated prior to the accrual of their cause of action. Such a result is intolerable, as it discriminates among wrongful death tort claimants.

Id. at 841.

298. *See id.* at 842.

299. 344 N.W.2d 245 (Iowa 1984).

300. *See id.* at 246-48.

301. *See id.* The Iowa medical act's statute of limitations provision provides,

> Those [claims] founded on injuries to the person or wrongful death against any physician . . . arising out of patient care, within two years after the date on which the claimant knew, or through reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first, but in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death.

Iowa Code § 614.1(9) (1981). The tolling provision for minors stated, "The times limited for actions herein, except those brought for penalties and forfeitures, shall be extended in favor of minors and mentally ill persons, so that they have one year from and after the termination of such disability within which to commence said action." *Id.*

302. *See Kohrt*, 344 N.W.2d at 248.

ical malpractice statutes.[303] Further, in some jurisdictions, medical death claims are deemed new causes of action arising at the time of death and are not interpreted as derivative claims.[304] In other jurisdictions, disability is recognized as a personal right.[305] Consequently, if a death claim is not derivative, there can be no bootstrapping of a minor's disability onto an adult's wrongful death claim, and a decedent's right to sue for his own injuries is separate from a beneficiary's right to sue for the decedent's death. Noticeably absent from other jurisdictions are cases where adults may use a medical statute's minority tolling provision to toll the commencement of limitations based on a decedent child's disability. Other states either employ the equitable doctrine of the discovery rule,[306] allow claimants to file medical wrongful death claims under wrongful death statutes instead of medical malpractice statutes,[307] or include separate limitations periods for medical claims resulting in death,[308] to ensure that medical malpractice victims' rights are not prematurely terminated.

V. THE MLIIA MINORITY TOLLING PROVISION SHOULD BE AMENDED OR HELD UNCONSTITUTIONAL

The Texas Legislature should amend the MLIIA minority tolling provision to preserve minors' claims until they reach majority. Tolling the commencement of limitations on minors' claims until they attain majority is consistent with the treatment minors historically receive in tort law, is equitable, and meets equal protection requirements. Alternatively, the Texas Supreme Court should hold that the MLIIA violates the equal protection clause of the Texas Constitution because it unreasonably and arbitrarily restricts minors' rights to assert medical wrongful death claims.

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303. *See supra* note 202.

304. *See supra* note 204.

305. *See, e.g.,* Regents of the Univ. of N.M. v. Armijo, 704 P.2d 428, 430 (N.M. 1985) (holding the minority of a decedent does not inure to the benefit of an adult wrongful death beneficiary and that the minority tolling benefit ends upon the death of the minor or upon the minor attaining the specified age because "minority savings clauses are enacted to allow time for the full scope of a child's injury to become apparent, to enable the child to become competent to testify, or to allow the child to act for himself after the disability has been removed.").

306. *See, e.g.,* Carter v. University of Med. and Dentistry, 838 F. Supp. 957 (D.N.J. 1993); Sweeney v. Preston, 642 So. 2d 332 (Miss. 1994); Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984) (en banc).

307. *See, e.g.,* Cramsey v. Knoblock, 547 N.E.2d 1358 (Ill. App. Ct. 1989); Fetterolf v. Hoffmann-LaRoche, Inc., 656 N.E.2d 1020 (Ohio Ct. App. 1995).

308. *See, e.g.,* James v. Phoenix Gen. Hosp., Inc., 744 P.2d 695 (Ariz. 1987) (en banc); *Armijo*, 704 P.2d at 429; Bruce v. Byer, 423 So. 2d 413 (Fla. Dist. Ct. App. 1982); MONT. CODE ANN. § 27-2-205 (1996) (three-year statute of limitations commence on an action for death of a minor who was under age four at the time of injury or on the minor's eighth birthday, or when the minor dies, whichever occurs first).

A. *Legislative and Judicial Treatment Of Minors Historically Includes Tolling Limitations Until Minors Reach Majority*

Texas has traditionally viewed minors as a group meriting special legal protection.[309] "Historically, Texas has always been protective of its minor children involved in the legal process. It has continuously provided statutory protection by deferring the time in which minors could file suit for injury to two years after attaining their majority."[310] In fact, the numerous Texas statutes allowing minors to toll the commencement of limitations until they attain majority evidence a legislative view that minors are incapable of filing claims while under a disability.[311]

309. The legal disability of minority has traditionally been recognized in Texas. "At one time, the Texas Constitution tolled limitations for minors for seven years after removal of disabilities." Hogan v. Hallman, 889 S.W.2d 332, 339 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing TEX. CONST. art. XII, § 14 (1869)). For instance, in *McDonald v. Proctor & Gamble Co.*, the court held that the Texas tolling statute, under which a person under age eighteen was considered to be under a legal disability, applied to wrongful death claims. *See* 748 F. Supp. at 474-75. The court stated: "[A] person is under a legal disability if the person is younger than eighteen (18) years of age and that if a person who is entitled to bring a personal action is under a legal disability when the cause of action accrues the time of disability is not included in the limitation period." *Id.*

310. *Hogan*, 889 S.W.2d at 339 (citing Act of February 5, 1841, Laws of the Republic of Texas, at 166; 2 H. GAMMEL, LAWS OF TEXAS 630 (1898); TEX. CONST. art. XII, § 14 (1869) and TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon 1958) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1986))). *See also* Flores v. Edinburg Consol. Indep. Sch. Dist., 554 F. Supp. 974, 983 (S.D. Tex. 1983) (holding the two year limitations period (TEX. REV. CIV. STAT. ANN. art. 5535 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (West 1995))) for a civil rights action was tolled due to the plaintiff's minority status until two years after a minor attains majority, age eighteen, to file a claim); Texas Utils. Co. v. West, 59 S.W.2d 459, 460-61 (Tex. Civ. App.—Amarillo 1933, writ ref'd n.r.e.) (tolling the commencement of limitations on children's death claim for the loss of their father).

311. The general tolling provision applicable to minors with tort claims is Texas Practice and Remedies Code 16.001. It provides:

> (a) For the purposes of this subchapter, a person is under a legal disability if the person is:
>
> (1) younger than 18 years of age, regardless of whether the person is married . . .
>
> (b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 1986). "[A tolling provision] simply gives a person under a legal disability an extension of time beyond accrual of the cause of action within which to bring his suit. . . ." *McDonald*, 748 F. Supp. at 475.

Interestingly, in *Johnston v. United States*, the Fifth Circuit recently held that, under the Federal Torts Claims Act, a mother and son's wrongful death claim, brought over two years after the patient's death and premised on medical malpractice was not barred by the MLIIA's limitations period. *See* Johnson v. United States, 85 F.3d 217, 224 (5th Cir. 1996). After noting that wrongful death actions are derivative suits in Texas, the court held that as a matter of law, a wrongful death claim cannot accrue prior to death. *See id.* at 224. In analyzing the interaction of the MLIIA, its limitations provision and wrongful death claims, the Fifth Circuit stated: "The legislature, by tinkering with the accrual date of one class of wrongful death claims, has in effect

The Texas judiciary likewise recognizes minors need legal protection. For example, in *Weiner v. Wasson*,[312] the Texas Supreme Court held limitations do not commence upon a minor's medical personal injury claim until he reaches majority, despite the MLIIA's requirement that minors institute suit by age fourteen.[313] The same public policy arguments that support tolling the commencement of limitations on minors' medical personal injury claims and on minors' non-medical wrongful death claims supports tolling the commencement of limitations on minors' medical wrongful death claims, because medical wrongful death minors suffer injuries and are likewise incapable of instituting suits while under a disability.

In enacting the MLIIA, the Texas Legislature clearly recognized that minors merit special legal protection and included the minority tolling provision in the Act.[314] However, in order to file a death claim, a child must be free of a legal disability. Thus, MLIIA legislators simply failed to afford minors adequate time to institute suits. Consequently, amending the statute to grant minors two years after attaining majority to file claims will afford them a reasonable amount of time to institute suit. In keeping with the Texas tradition of protecting minors by preserving their claims until they reach majority, the Texas Legislature and judiciary should not abandon injured children merely because tortfeasors are health care providers.

B. *Equity Dictates Tolling Limitations Until Minors Reach Majority*

Equity dictates tolling the commencement of limitations because "[a] child has no right to bring a cause of action on his own unless disability has been removed."[315] Yet, the MLIIA currently bars medical wrongful death minors' claims before they escape minority or places children wholly at the mercy of parents or guardians to pursue death claims within the prescribed time. As illustrated in *Bradley v.*

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shortened the period in which such plaintiffs can bring suit." *See id.* at 223. The Fifth Circuit, in refusing to bar the claim, cited the need for uniformity and equity in the law and held that while the MLIIA may determine whether a cause of action exists, federal law determines when the claim accrues. *See id.* at 219.

312. *See* Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995).

313. *See id.* at 321. In *Sax,* the Texas Supreme Court, using similar reasoning, struck down the statute of limitation of the MLIIA's predecessor, which required minors to file a medical negligence claim by age eight. *See* Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983). Further, in *Bradley v. Etessam*, the Dallas Court of Appeals reasoned that the MLIIA was not limited to personal injury causes of action filed by or on behalf of minors for medical injuries to themselves, but instead, extended to minors' death claims caused by medical malpractice. *See* Bradley v. Etessam, 703 S.W.2d 237, 243 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Moreover, the Corpus Christi Court of Appeals in *Westphal*, held that the minority tolling provision applies when children are under twelve and extends the time they may bring medical death claims. *See* Westphal v. Diaz, 918 S.W.2d 543, 546 (Tex. App.—Corpus Christi 1996, no writ).

314. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

315. *Sax*, 648 S.W.2d at 666 (citations omitted).

Etessam,[316] a MLIIA wrongful death minor is barred from suit unless a diligent adult files a claim on her behalf within the allotted time period.[317] Practically speaking, this means that *medical* wrongful death minors receive compensation only if a diligent adult pursues their claims within the prescribed time. A statute only granting a minor the right to institute suit to receive compensation for the loss of a parent or guardian if that minor can rely on a diligent adult to file suit on his behalf within the prescribed time, while foreclosing a minor from instituting suit who cannot rely on a diligent adult to pursue his claim within the prescribed time, is illogical and inequitable. The harsh reality is that some children will never receive an opportunity to institute a medical wrongful death suit if the legislature or the judiciary does not act to preserve childrens' rights. The MLIIA scheme is thus inadequate because minors are forced to rely on others to institute suit on their behalf. Minors are thereby placed in untenable positions, as the very person who provided for their basic needs may be the subject of a wrongful death suit. Furthermore, the Texas Supreme Court has already found it unrealistic and unreasonable to assume that all parents will act to preserve children's claims or that children have the sophistication required to file claims while still under the disability of minority.[318]

Admittedly, medical insurance rates may decrease if children are precluded from filing medical wrongful death suits. However, the long-term cost of such a policy is detrimental to society and is devastating for many children. The Texas Supreme Court, in *Sanchez v. Schindler*,[319] held injuries to the familial relationship are significant and thus allowed pecuniary compensation for wrongful death claims in the interest of equity.[320] In contrast, the MLIIA seeks to foreclose minors' medical wrongful death suits before they even obtain the legal right to file a claim. Thus, for medical wrongful death minors, the remedy may not only be inadequate, it may be non-existent. It is patently unfair that minors should suffer the most egregious injury—loss

316. 730 S.W.2d 237 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

317. *See id.* at 243.

318. *See, e.g., Sax*, 648 S.W.2d at 667. Furthermore, the Ohio Court of Appeals in *Young v. Napoleon Board of Education*, 637 N.E.2d 393 (Ohio Ct. App. 1994), reasoned that a child's parent or guardian will not always file suit on the child's behalf because parents may be lethargic, ignorant, lack concern or a child may effectively be without a parent or guardian. *See id.* at 395. The Ohio court concluded that the state statute requiring a minor to file suit when he has no standing to sue because he is under the legal disability of minority, and that foreclosed his right to sue thereafter "was totally unreasonable and patently unfair." *Id.* As one commentator noted, "[T]he interests of [minor] claimants, ostensibly protected by the legislature, should [not] be destructible by the apathy of others." *Developments In The Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1230 (1950).

319. 651 S.W.2d 249 (Tex. 1983).

320. *See id.* at 252. The *Sanchez* court stated, "This court has always endeavored to interpret the laws of Texas to avoid inequity." *Id.*

of a family member—and receive no opportunity to obtain compensation simply because health care providers insurance rates were construed as too high.

C. *Differential Treatment Of Medical Wrongful Death Minors Violates the Equal Protection Clause of the Texas Constitution*

"The United States Constitution provides that no state shall deny any person within its jurisdiction the equal protection of the laws. Our state constitution provides that all free men have equal rights."[321] The Texas equal protection clause requires that all persons similarly situated be treated alike.[322] The clause is intended to restrict legislative actions that conflict with elemental constitutional principles.[323] Specifically, the equal protection clause of the Texas Constitution is designed to prevent any person or class of persons from being singled out and subject to discriminatory treatment.[324] Thus, "The Equal Protection Clause requires a state . . . to apply its rules and regulations in a fair and equitable manner, and not to irrationally classify its citizens."[325]

Texas follows federal standards when determining whether a statute violates the equal protection guarantee.[326] A legislative classification that invidiously discriminates against a class of persons violates the equal protection clause.[327]

1. Classes of Persons

The MLIIA creates two classes of persons within the MLIIA: minors forced to rely on others to file claims on their behalf or be foreclosed from suit by age fourteen, and adults under no disability, who receive two years to file the same claim.[328] Likewise, two classes of persons are created through interstatutory comparison: minors with *medical* death claims who lose the right to file suit at age fourteen, and

321. *See* Rose v. Doctors Hosp., 801 S.W.2d 841, 846 (Tex. 1990) (citing U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 3). *See also* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that although there is not an equal protection of the laws clause in the Bill of Rights, unreasonable class discrimination violates due process). TEX. CONST. art. I, § 3 provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." *Id.*

322. *See* Pyler v. Doe, 457 U.S. 202, 215 (1981); Automaxx, Inc. v. Morales, 906 F. Supp. 394, 401 (S.D. Tex. 1995).

323. *See Pyler*, 457 U.S. at 216.

324. *See* Nelson v. Clements, 831 S.W.2d 587, 590 (Tex. App.—Austin 1992, writ denied).

325. Levine v. Maverick Co. Water & Imp. Dist. No. 1, 884 S.W.2d 790, 795 (Tex. App.—San Antonio 1994, writ denied).

326. *See Rose*, 801 S.W.2d at 846.

327. *See Automaxx*, 906 F. Supp. at 401; *Nelson*, 831 S.W.2d at 590.

328. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996).

minors with *nonmedical* death claims, who retain the right to file suit until reaching age twenty or until two years following the removal of the disability of minority.[329] Thus, the MLIIA discriminates against the class of children with medical death claims, as opposed to adults with medical death claims or minors with nonmedical death claims.[330]

However, discriminatory treatment does not itself violate the equal protection clause. Rather, "When analyzing a statute drawing a distinction between classes of persons, the standard of review depends upon the nature of the classification."[331] The constitutionality of statutes are evaluated under different levels of judicial scrutiny.[332] If a statutory classification involves a fundamental constitutional right or a *suspect* classification, the statute is evaluated under a strict scrutiny standard.[333] Conversely, if the classification does not involve a fundamental right or a *suspect* classification, the state must only show a *rational relationship* exists between the statutory restriction and the statute's stated purposes.[334] Neither age nor the right to recover in tort involve fundamental constitutional rights or suspect classifica-

329. *Compare* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West Supp. 1996) *with* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (West 1986).

330. No one disputes the fact that the medical malpractice statute discriminates against the class of medical malpractice tort claimants, as compared to the other classes of tort claimants. *See* Redish, *supra* note 5, at 769. Indeed, the primary inquiry is whether such discrimination is constitutionally permissible. *See id.* Critics view the MLIIA as vulnerable to constitutional challenges because the Act places "limits on plaintiff's recovery, thereby depriving medical malpractice victims of previously existing legal benefits and rights." Keith, *supra* note 3, at 319. In fact, the Texas Trial Lawyers Association publicly opposed the Keeton Commission's recommendations stating they "would have the effect of either placing the medical community in a preferential position before the law or to infringe upon a citizen's right to equal protection before the law." Sherman & Pate, *supra* note 4, at 342 (quoting the Texas Trial Lawyers Association News Release, December 8, 1976). Critics also alleged the

> changes seriously weakened the traditional tort system in two major respects. First, special treatment and immunities would be given to only one class of potential defendants (health care providers). Second, potential plaintiffs in medical malpractice cases would not have an equal opportunity for relief from negligence claims as other plaintiffs in nonmedical malpractice cases.

Id. at 342-43.

331. *See* Detar v. Estrada, 694 S.W.2d 359, 365 (Tex. App.—Corpus Christi 1985, no writ).

332. *See* Automaxx v. Morales, 906 F. Supp. 394, 401 (S.D. Tex. 1995).

333. *See id.* at 401.

334. *See* Waggoner v. Gibson, 647 F. Supp. 1102, 1106 (N.D. Tex. 1986). Traditionally, courts uphold legislative classifications under the rational basis standard. *See* Redish, *supra* note 5, at 770. However, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975). In fact, a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at 648 & n.16 (citation omitted).

tions.[335] Thus, to withstand constitutionality scrutiny, Texas must only show that the time limitation imposed by the MLIIA on medical wrongful death minors rationally relates to the MLIIA's stated purposes.[336] If a rational relationship is lacking, however, the MLIIA limitations provision must be held unconstitutional as it applies to minors asserting medical wrongful death claims.[337]

2. The Stated Purpose

The stated purposes of the MLIIA are contained in the findings and purposes section.[338] This section states:

> [I]t is the purpose of this Act to improve and modify the system by which health care liability claims are determined in order to:

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335. *See* Cunningham v. Beavers, 858 F.2d 269, 273 (5th Cir. 1988) (holding children are not a suspect class under the equal protection clause); Hatten v. Rains, 854 F.2d 687, 691 (5th Cir. 1988) (stating age is not a suspect classification for purposes of equal protection); Waggoner v. Gibson, 647 F. Supp. 1102, 1105 (N.D. Tex. 1986) (holding the right to recover in tort is not a suspect classification); Pavlovish v. Bethania Reg'l Health Care Ctr., 905 S.W.2d 66, 68 (Tex. App.—Fort Worth 1995, no writ) (stating age is not a suspect classification); Castillo v. Hidalgo Co. Water Dist. No. 1, 771 S.W.2d 633, 635 (Tex. App.—Corpus Christi 1989, no writ) (holding the right to sue under the Wrongful Death Act is not a fundamental right for purposes of equal protection analysis).

336. *See Waggoner*, 647 F. Supp. at 1106. The rational relationship test requires that a statute have a "legitimate state interest to rationalize a denial of equal protection." *Id.* "The question then is whether the differential treatment involved bears a rational or reasonable relationship to legitimate state interests." Keith, *supra* note 3, at 324.

> When courts evaluate legislative classifications for equal protection violations: the question for the court's determination becomes whether or not the litigant's right of redress is in some manner outweighed by the legislative basis for the statute imposing disabilities. In making such a determination, the courts should consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected.

Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359, 365 (Tex. App.—Corpus Christi 1985, no writ).

337. *See Waggoner*, 647 F. Supp. at 1107. A statute "which singles out a particular class, or makes distinctions . . . must bear a reasonable relationship to the underlying purpose of the statute, and that purpose must be legitimate." Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994). Further, "a statute based on pure favoritism which creates a closed class will likely be declared unconstitutional." *Id.* at 607-08 (citations omitted). Courts commenting on equal protection violations have explained, "equal protection is denied if the legislature has made an irrational or arbitrary classification." Miller v. Kretz, 531 N.W.2d 93, 96 (Wis. Ct. App. 1995). The inquiry in equal protection is "whether the connection between the benefit sought to be conferred on society and the means employed to accomplish it, when weighed against the inequalities created by the statute's classifications, is so attenuated and remote as to constitute an unreasonable exercise of police power." Smith v. Schulte, 670 So. 2d 1334, 1337 (Ala. 1995), *cert. denied*, 116 S. Ct. 1849 (1996) (quoting Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 167 (Ala. 1991)).

338. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(b) (West Supp. 1996).

> (1) reduce excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems;
>
> (2) decrease the cost of those claims and assure that awards are *rationally related* to actual damages;
>
> (3) do so in a manner that will *not unduly restrict* a claimant's rights any more than necessary to deal with the crisis;
>
> (4) make available to physicians, hospitals, and other health care providers protection against potential liability through the insurance mechanism at reasonably affordable rates;
>
> (5) make affordable medical and health care more accessible and available to the citizens of Texas;
>
> (6) make certain modifications in the medical, insurance, and legal systems in order to determine whether or not there will be an effect on rates charged by insurers for medical professional liability insurance; and
>
> (7) make certain modifications to the liability laws as they relate to health care liability claims only and with an intention of the legislature to not extend or apply such modifications of liability laws to any other area of the Texas legal system or tort law.[339]

As previously stated, a statute's stated purposes are presumptively legitimate. Thus, in determining the constitutionality of a statute, it is assumed the legislature did not act unreasonably or arbitrarily.[340] "However, the presumption of constitutionality is rebuttable on a showing that the legislation or regulation is arbitrary and unreasonable, having no substantial relation to the public health, morals, or general welfare."[341]

3. *The Legislative Means Adopted to Achieve the State Purpose*

To withstand constitutional scrutiny, the equal protection clause requires that the legislative means adopted to achieve the state purpose rationally relates to the statute's stated purposes.[342] In other words, the restriction—the time limit requiring minors to institute suit by age fourteen—must rationally relate to the statute's stated purposes.[343]

339. *Id.* (emphasis added). "The specific purpose of the [MLIIA] minority tolling provision was to limit the length of time that the insureds would be exposed to potential liability. The method by which the legislature chose to affect those [statute's] purposes is outlined in § 10.01, the minority tolling provision." Hogan v. Hallman, 889 S.W.2d 332, 339 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

340. *See* Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. App.—Corpus Christi 1985, no writ); Battaille v. Yoffe, 882 S.W.2d 13 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

341. Santos v. City of Houston, 852 F. Supp. 601, 607 (S.D. Tex. 1994).

342. *See* Pyler v. Doe, 457 U.S. 202, 216 (1981).

343. *See id.*

While Texas courts usually do not inquire into the legislature's wisdom in prescribing statutes of limitations, courts should invalidate statutes of limitations when time periods are so short that they amount to legal bars and denials of reasonable opportunities to bring claims.[344] Generally, "When the party has free access to the courts for a period of time sufficient for the ordinarily diligent person to commence legal proceedings to protect his rights, the limitations period is considered reasonable and adequate."[345] However, when limitations, in effect, abolish a cause of action, the restriction is not mere regulation, but rather, is an abrogation of a right.[346]

The MLIIA abrogates medical wrongful death minors' rights because it abolishes their causes of action before they may institute suit in their own right. MLIIA legislators, in an effort to lower medical malpractice insurance rates for health care providers, chose to cut off minor's rights to institute suit before they reach majority, when they can first legally institute suit. The MLIIA statute of limitations terminates minors' rights to file medical wrongful death claims at age fourteen and forces children to rely on adults to institute suit before

344. "Generally, a State is free to prescribe a period of limitations within which claims must be asserted or be barred and such limitation does not constitute a denial of due process unless the time period is so short as to amount to a denial of a reasonable opportunity to enforce a claim." Neagle v. Nelson, 658 S.W.2d 258, 262 (Tex. App.—Corpus Christi 1983), *rev'd on other grounds*, 685 S.W.2d 11 (Tex. 1985). However, statutes of limitations assume a party has an opportunity to institute suit. *See* Wilson v. Iseminger, 185 U.S. 55 (1902). Thus, if the time period is "manifestly so insufficient that the statute becomes a denial of justice" courts will hold them unconstitutional. *See id.*

One commentator noted that California appellate court, holding the California Medical Compensation Reform Act unconstitutional,

> if the medical profession is given special treatment by protective laws that render the profession less accountable, a consequential relaxation of medical standards would *not* benefit the general public because "[t]o find that the protection and special dispensation given to health care delivery tortfeasors by the challenged legislation is in the best interest of public health is illogical to the point of irrationality."

Keith, *supra* note 3, at 325 (quoting American Bank and Trust Co. v. Community Hosp., Inc., 660 P.2d 829, 841 (Ca. 1983)).

345. Arredondo v. Hilliard, 904 S.W.2d 754, 760 (Tex. App.—San Antonio 1995), *rev'd sub nom.* Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996) (per curiam) (citation omitted).

346. The *Nelson* court stated, "the legislature has no power to make a remedy by due course of law contingent on an impossible condition." Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984) (citation omitted). The *Nelson* court affirmed that requiring a child to file a claim while still a minor and prevented by incapacity was an impossible condition and violative of due process, stating: "Is the requirement of a thing impossible from an infant, or one incapacitated for any reason due process? We think not." *Id.* at 922 (quoting Hanks v. City of Port Arthur, 48 S.W.2d 944, 948 (Tex. 1932)). *See also* Kenyon v. Hammer, 688 P.2d 961, 967 (Ariz. 1984) (en banc) (refusing to hold a wrongful death claimant to the short statute of limitations period in Arizona's medical malpractice act and stating, "any statute which bars a cause of action before it could legitimately be brought abrogates rather than limits the cause of action and offends Article 18, § 6 of the Arizona Constitution.").

limitations run. As a result, any minor on whose behalf an adult does not institute suit before he reaches age fourteen will find his suit time-barred. Yet, a child barred from suit by an adult's failure to institute suit on his behalf before limitations run has no alternative remedy because the doctrine of parent-child immunity prevents a child from suing negligent parents.[347] Consequently, if a parent fails to institute suit on a minor's behalf, the parent effectively forfeits the child's right to obtain compensation. Such a result is intolerable, and Texas courts concur stating, "The law does not permit one to forfeit another's rights."[348]

The MLIIA's short statute of limitations period unduly restricts minors' rights to institute *medical* wrongful death claims more than is necessary to deal with the perceived medical crisis, denies them reasonable opportunities to bring claims and amounts to a legal bar. Barring all minors' medical wrongful death claims not filed by age fourteen fails to achieve the result of reducing excessive claims, fails to assure that awards are rationally related to the purpose of the statute, and does not constitute an improvement in the system by which health care liability claims are determined. Barring all minors' medical wrongful death claims not filed by age fourteen, before minors attain majority does not reduce merely excessive or frivolous claims, but instead, effectively eliminates *all* claims filed by minors in their own right, because no mechanism exists for determining which claims are meritorious and which are not. The state's interest in lowering medical malpractice insurance rates and ensuring public access to health care, standing alone, fails to justify denying injured minors any chance of receiving compensation.[349] A minor's right to institute suit in his

347. *See* Jilani v. Jilani, 767 S.W.2d 671 (Tex. 1988) (holding the exercise of parental authority under parent-child immunity doctrine includes discipline and supervision of a child); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971) (precluding a child from instituting suit against his parents for negligence due to parent-child immunity doctrine).

348. *In re* Miller, 605 S.W.2d 332, 336 (Tex. Civ. App.—Houston [14th Dist.] 1980), *aff'd sub nom. In re* JAM, 631 S.W.2d 730 (Tex. 1982).

349. In *Pyler v. Doe*, the United States Supreme Court stuck down a Texas statute that allowed the State to withhold education funds from school districts that enrolled illegal aliens, finding the statute inconsistent with the equal protection clause. *See* Pyler v. Doe, 457 U.S. 202 (1981). Although the Court conceded that the state had a legitimate interest in mitigating the potentially harsh economic effects of the influx of immigrants, the Court nevertheless held the statute did not offer an effective method of dealing with the problem. *See id.* at 228-29. The Court stated "even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that '[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.'" *Id.* at 228-29 (citation omitted).

After noting that the record failed to suggest that illegal entrants imposed a significant burden on the State's economy, the Court held the statute was unconstitutional, stating the State must "do more than justify its classification with a concise expression of an intention to discriminate." *Id.* at 27-28.

own right should not be outweighed by the legislative goal of lowering medical malpractice rates.

While no amount of money can fully compensate a child for suffering the immeasurable loss of a parent, a bar to legal redress imposed during minority is the antithesis of assuring that awards are rationally related to actual damages. Rather, the bar assures children left orphaned at the hands of a negligent health care provider receive no compensation. Thus, the MLIIA's age restriction works the greatest injustice upon those persons most severely injured by a health care provider's negligence—children left with no parent.[350] As the court aptly stated in *Waggoner v. Gibson*, "limiting the recovery of the most deserving victims of malpractice is not a legitimate interest of the state . . . ."[351]

Minors' claims have never been proven to be a predominant factor in causing the escalation of medical malpractice insurance rates or health care costs.[352] To the contrary, a minor's legal naivety, political powerlessness, and disability pose great barriers to suit. In fact, the correlation between the time limitation imposed on medical wrongful death minors and the reduction in health care insurance costs is too indirect and remote to justify the harsh restriction.[353] The medical

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The Court also noted the pivotal role of education and the "lasting impact of its deprivation on the life of the child." *Id.* at 221. The Court explained:

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education within the framework of equality embodied in the Equal Protection Clause.

Id. at 222. The Court also could "perceive no national policy that supports the State in denying these children an elementary education." *Id.* at 226. The court explained:

> [E]ven if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children.

Id. at 229. Finally, the Court found the statute especially unfair because the statute sought to punish children for their parents' illegal entry into the country, a matter over which the children had no control. *See id.* at 220. Thus, in sum, the Court found that the undocumented status of the children did not establish a sufficient rational basis for denying those children the benefits of public education. *See id.* at 224-25.

350. *See* Hogan v. Hallman, 889 S.W.2d 332, 339 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

351. Waggoner v. Gibson, 647 F. Supp. 1102, 1106 (N.D. Tex. 1986).

352. Critics have pointed out that "The statute was enacted to protect a particular class of tortfeasors—i.e., physicians, hospitals and other health care providers—without extending any of these beneficial reforms to other classes of tortfeasors." Keith, *supra* note 3, at 322. *See also supra* notes, 42, 61, 63, 142, 148, 199.

353. *See* Detar Hosp. Inc. v. Estrada, 694 S.W.2d 359, 366 (Tex. App.—Corpus Christi 1985, no writ). *Cf.* Smith, *supra* note 57, at 221-22. Professional liability insurers and the American Medical Association asserted that minors' claims create a long term potential for suit and advocated that limitations should require minors to bring

liability crisis does not necessitate barring all claims filed by minors in their own right any more than any other *crisis* necessitates imposing absolute bars on any one class of plaintiffs.[354] Indeed, elimination of all medical malpractice claims should surely result in the greatest reduction in medical liability insurance rates. However, such a result is clearly absurd. Similiarly, requiring MLIIA wrongful death minors to institute suit by the arbitrary age of fourteen is illogical, unreasonable, unjust, and not rationally related to reducing medical liability insurance rates.

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claims by age eight. *See id.* However, even discounting such inequitable restrictions, these groups have failed to prove that minors' claims are responsible for the large increases in medical malpractice insurance rates. *See* Keith, *supra* note 3, at 322. Further, economists have contended that short statute of limitations, in general, have failed to control the rising insurance rates, and thus, "the Texas Medical Liability Act is . . . based upon a fallacy, that there exists a direct cause and effect link between malpractice rate setting and litigation." *Id.*

> Probably the most difficult element to establish is the causal connection between a decrease in the number and amount of awards and the hoped-for reduction in malpractice insurance rates. Although sufficient evidence exists linking the increase in malpractice awards to the insurance crisis, various other possible causes exist that are unaffected by the reform legislation. It is therefore almost impossible to predict whether reform legislation will accomplish its goal.

Redish, *supra* note 5, at 781-82 (citations omitted). In fact, not all the causes of the malpractice insurance crisis are identifiable. Rather, the crisis involves "complex . . . problems involving interacting medical, legal, sociological, psychological, and economic factors." *Id.* at 760 n.10 (quoting U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. (OS) 73-8, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 22, 4 (1973)). In sum, while courts would likely not question the legislative wisdom in attempting to alleviate the medical malpractice insurance crisis, they should inquire whether the legislation in fact substantially alleviates the crisis. If no data exists to show that limiting minors' right before they reach majority would substantially lower medical malpractice insurance costs, courts should overturn the irrational classification. In fact,

> Arguments have successfully been made in other situations involving short limitation statutes affecting narrow classes of plaintiffs that, although the legislature has wide discretion in fixing time limitations, such must be 'reasonable in respect of the class' of persons and places involved. Otherwise, an injured party has in fact been deprived of any realistic opportunity to present his claim for damages. This situation occurs not because of any fault or negligence on the part of the would-be plaintiff, but because that plaintiff had the great misfortune to be injured by a medical or health care provider professional in the course of treatment, instead of by a reckless driver or other type of tortfeasor.

Keith, *supra* note 3, at 324 (citations omitted).

354. *See Detar*, 694 S.W.2d at 366. The *Detar* court explained,

> We do not believe that, as significantly demonstrated by the spiraling increases in the costs of medical care since the enactment of the statute, there has been a showing of sufficient societal quid pro quo (i.e. the loss of recovery potential to some malpractice victims as offset by lower insurance premiums and lower medical care costs for other recipients of medical care) to justify the limitation on liability imposed by the statute, as applied to seriously injured medical negligence victims. . . .

Id.

The MLIIA's requirement that medical wrongful death minors must institute suit while under disability constitutes an unreasonable restriction. First, the Act discriminates between classes of tort victims and between children and adults. Second, the ordinary diligent person standard applicable to persons commencing legal proceedings assumes persons are capable of compliance. Children must be free of disabilities before they are held to the ordinary diligent person standard. Third, the purpose of tolling provisions for minors and incompetent persons is to protect a person who has "no access to the courts, and to insure that his right to bring suit will not be precluded by the running of a limitations statute prior to the removal of his disability."[355]

Minors with medical wrongful death claims are the only group who are left in the untenable position of attempting to file claims while under the disability of minority and whose claims are barred before they escape disability. Such a result defeats the purpose of tolling for disability. The *Pavlovish* court aptly identified the dilemma:

> The Medical Liability and Insurance Improvement Act statute of limitation provision is the only current provision that imposes such a strict requirement on minors seeking to bring suit. Section 10.01 has been held unconstitutional as it applies to common-law causes of action. Yet, the Texas Supreme Court has refused to extend this rationale to statutorily created causes of action. We agree with our sister court in the Fourteenth District when it stated:
>
> "If minors are to be given full protection as to the time they are allowed to bring suit for their personal injuries, appellants who have lost a parent due to the same type of negligence should be even equally, if not more, deserving of legal protection."[356]

Minors with medical death claims, like minors with medical personal injury claims and minors with nonmedical death claims, should not be singled out merely because medical malpractice insurance rates and health care costs are increasing. As the *Waggoner* court explained when it held the MLIIA damages cap was unconstitutional,

> Even assuming that such a "crisis" has a basis in fact, it is indisputable that constitutional protections are not suspended in time of even the most legitimate crises. Constitutional protections exist for litigants regardless of market conditions for insurance companies and

355. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 755 (Tex. 1993) (quoting Tzolov v. International Jet Leasing, Inc., 283 Cal. Rptr. 314, 317-18 (Cal. Ct. App. 1991)). "Traditionally the interests of minors, incompetents, and other helpless persons are viewed in law as substantially similar, and both the substantive law and the rules of procedure accord them comparable treatment." *Id.*

356. Povolish v. Bethania Reg'l Health Care Ctr., 905 S.W.2d 66, 68 (Tex. App.—Fort Worth 1995, no writ) (quoting Hogan v. Hallman, 889 S.W.2d 332, 339 (Tex. App.—Houston [14th Dist.] 1994, writ denied)) and (citing Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983); Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995); Rose v. Doctors Hosp., 801 S.W.2d 841 (Tex. 1990)).

> the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those who . . . were most seriously injured by acts of malpractice.[357]

The *Pavlovish* court urged the Texas Supreme Court to reassess its decision in *Rose*, and to determine whether the MLIIA statute of limitations violates the equal protection clause of the Texas Constitution as it applies to minors.[358] The *Hogan* court likewise urged the Texas Supreme Court to re-visit its decision in *Rose*, stating, "The equal protection clause was, in our opinion, not fully fleshed out in *Rose*, and the court in *Sax* specifically declined to decide the issue before it on equal protection grounds."[359] The *Hogan* court also questioned the legislative wisdom in barring minors from instituting *medical* wrongful death claims sooner than are similarly situated *nonmedical* wrongful death minors whose claims fall outside the MLIIA, stating,

> While it is clear that the legislature has the right to amend and even abolish its statutory creations, such as the wrongful death statute involved here, it should not have the constitutional power to amend it in a manner that singles out and discriminates against a portion of a legally protected class such as minors. To single out minors aged twelve and under and limit them to age fourteen in which to bring their actions, while allowing minors of the same ages pursuing the same wrongful death action against a different type of tortfeasor to bring their suits by their twentieth birthday, seems unreasonable and arbitrary. If the legislature was limiting all minors who were asserting wrongful death claims, regardless of the source of the alleged negligence, the legislative power rationale would be on firmer constitutional ground. The purpose justifying this different treatment for certain minors also seems constitutionally suspect. To reduce medical liability insurance premiums is no doubt a worthy goal. But does not the same logic apply to the trucking industry when one of its vehicles driven negligently causes the death of a person with minor children? Instead, such minor children are given two years after their eighteenth birthday to bring their suit for the wrongful death of a parent, and the trucking industry tortfeasor pays the higher liability insurance premium. At best, article 4590i, § 10.01 seems selective in its legislative purpose, and discriminatory in its effect.[360]

Although the *Rose* court held that the legislature has the authority to limit damage awards for statutory causes of action, the legislature should not have the authority to premise a minor's recovery upon an impossible condition precedent, thereby effectively discriminating against minors filing *medical* wrongful death claims. Unreasonable

357. Waggoner v. Gibson, 647 F. Supp. 1102, 1107 (N.D. Tex. 1986) (citations omitted).

358. *See Povolish*, 905 S.W.2d at 68.

359. *Hogan*, 889 S.W.2d at 339.

360. *See id.* at 339-40. *See supra* notes 42, 61, 63, 142, 148, 199.

limitations periods imposed to preclude medical wrongful death minors from receiving compensation constitutes disparate treatment when other similarly situated plaintiffs with similar claims are not subject to similar restrictions. Public policy dictates that minors filing *medical* wrongful death claims should receive the same protections as minors whose parents are wrongfully killed on Texas highways. Because minors with medical wrongful death claims are similarly situated to minors with nonmedical wrongful death claims, the only apparent factor justifying this disparate treatment relates to the identity of the defendant. As such, the MLIIA invidiously discriminates against minors with medical death claims, and violates the equal protection guarantee of the Texas Constitution.

CONCLUSION

The MLIIA was passed to curb a perceived health care crisis manifested by dramatically increased malpractice insurance rates and decreased public access to affordable health care services. Texas legislators included an absolute two-year limitations period in the MLIIA, theorizing that reducing the number and size of malpractice awards would allow the insurance industry to predict liability which would lead to reasonable and stable medical malpractice insurance rates. Although the legislature intended to hold plaintiffs asserting medical malpractice claims to a strict two-year limitations period, legislators included limited exceptions whereby plaintiffs may gain additional time to institute suit. The disability of minority is one such exception delineated within the MLIIA. Nonetheless, legislators failed to provide minors adequate time to institute medical malpractice claims.

As currently written, the MLIIA only preserves minors' claims, both for personal injury or wrongful death, until age fourteen. However, the Texas Supreme Court, in *Weiner v. Wasson*, held the time restriction imposed on minors filing medical personal injury claims was unconstitutional because it cut off their causes of action prematurely. The time restriction imposed on minors filing medical wrongful death claims is similarly unreasonable. Thus, the Texas Legislature should amend the MLIIA minority tolling provision to grant minors two years after attaining majority to file both *personal injury* and *wrongful death* suits. Because the Texas Legislature created the cause of action, it retains the power to change it.[361] Legislative amendment of the MLIIA's minority tolling provision is necessary to protect minors with medical wrongful death claims. Such an amendment will produce uniform and equitable results, will avoid constitutional challenges, is consistent with the general treatment minors receive in tort law, and protects Texas' children. Alternatively, the Texas Supreme

361. *See id.*

Court should hold the MLIIA is unconstitutional as it applies to minors asserting claims because it violates the equal protection clause of the Texas Constitution by irrationally classifying minors, treating them inequitably as compared to similarly situated adult wrongful death beneficiaries or minors asserting nonmedical wrongful death claims and because the time restrictions imposed on the class of minors fails to rationally relate to lowering medical malpractice insurance rates, reducing excessive claims, and ensuring the public access to affordable health care.

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