



## Surgical Sponge Cases to Test Time Limits on Texas Medical Malpractice Lawsuits

Written On September 28, 2009 By [Bob Kraft](#)

An article in the [Austin American-Statesman](#) details two cases before the Texas Supreme Court. The cases will give the Court an opportunity to correct one glaring injustice in medical malpractice law. Many plaintiff lawyers are not too optimistic that our ultra-conservative, pro-insurance Supreme Court will even recognize that there is an injustice, much less take steps to correct it. Here are excerpts from the article:

Surgical sponges left inside two Texas women — but undiscovered for years — will test state laws that place fairly strict time limits on suing doctors and hospitals for malpractice.

One woman's lawsuit was thrown out because the sponge, so grown over with fibrous tissue that it could not immediately be identified, wasn't found for nine years, long after the two-year statute of limitations had expired.

The second woman's lawsuit survived, however, despite an 11-year gap between her hysterectomy and the sponge's discovery during exploratory surgery in 2006.

Both cases are before the Texas Supreme Court, which will decide whether their legal challenges should continue.

The women argue that enforcing the lawsuit deadlines would deny them access to the courts — a right guaranteed by the Texas Constitution — because they had no way of knowing that misplaced sponges were causing their health problems until a surgeon found and removed the objects.

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But doctors and hospitals say time limits for lawsuits — intended by the Legislature to lower malpractice insurance rates and attract more doctors to Texas — provide a public benefit that outweighs the rights of individual plaintiffs.

What's more, they say, the deadlines protect medical professionals from problems that bedevil old claims, from faded memories to dead or missing witnesses, while shielding retirees from lawsuits after many have stopped paying malpractice insurance.

The two Supreme Court cases belong to a special class of medical malpractice claims known in legal shorthand as “sponge cases” — foreign objects left inside patients after surgery.

Unlike many lawsuits about misdiagnoses or mistreatment, in sponge cases there is no question that a medical mistake was made and usually no question about who was responsible.

But like all medical malpractice lawsuits, sponge cases are subject to two legislatively created deadlines:

- The statute of limitations, which gives patients two years to file suit after a disputed treatment — unless they can prove they did not have a reasonable opportunity to discover the problem before the deadline. Because “reasonable” is subject to interpretation, this is not as easy as it may sound.
- The statute of repose, a lesser-known deadline that bars any malpractice lawsuit filed 10 years after treatment.

Each of the two sponge cases — argued before the Texas Supreme Court on Sept. 9 — challenges a different time-limit statute, giving the court's eight justices (minus Scott Brister, who recently resigned to return to private law practice) an opportunity to expand or shrink a patient's ability to sue.

A ruling isn't expected until next year. The cases are *Walters v. Cleveland Regional Medical Center*, 08-0169, and *Methodist Healthcare System v. Rankin*, 08-0316.