HOUSE BILL 4 - THE NEWEST VERSION OF TORT REFORM

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CHAPTER 28

Robert S. Davis

- Personal Information

Robert Davis was born in Dallas, Texas, on September 16, 1962.

- Professional Experience

After graduating from law school, Mr. Davis served as Briefing Attorney to the Honorable Justice Sue LaGarde, 5th Judicial District Court of Appeals in Dallas, Texas from 1988 to 1989. Thereafter, Mr. Davis was appointed as Law Clerk to United States District Judge William M. Steger from 1989 to 1991. Mr. Davis is a Regional Counsel for Texas Association of Counties and has extensive experience in representing governmental entities and government officials in all types of litigation. Mr. Davis also has extensive experience in first party and third party litigation for major insurance carriers, drafting coverage opinions for insurance carriers and in medical malpractice litigation for private practitioners as well as county health authorities. Since 1994, Mr. Davis has tried 66 lawsuits in state and federal court to verdict, and he has handled approximately 80 appellate cases during that same period. He was admitted to the Texas bar in November, 1988. Mr. Davis was also admitted to practice before the United States District Court for the Eastern District of Texas in 1990, the United States Court of Appeals for the 5th Circuit in 1991, the United States District Court for the Northern District of Texas in 1991, the United States District Court for the Western District of Texas in 1991, the United States District Court for the Southern District of Texas in 2001 and the Supreme Court of the United States in 1998.

- Educational Background

Mr. Davis received his preparatory education at Trinity University in San Antonio, Texas, where he received a Bachelor of Science Degree in History in 1985. Mr. Davis' legal education was at Southern Methodist University, where he graduated with a Juris Doctor Degree in 1988. During law school, Mr. Davis served as the assistant legislative liaison for Dallas District Attorney Henry Wade and his successor, Dallas District Attorney John Vance. During the period of time that Mr. Davis worked for Mr. Wade, the Texas Governor's Office published a paper written by Mr. Davis on recidivism and the need for increased prison capacity, and excerpts of the paper were published by the major news media in Texas.

- Professional Development

Mr. Davis served as President of the Smith County Young Lawyers Association from 1994 to 1995, Co-Chairman of the Eastern District of Texas Historical Committee from 1996 to 1997. Mr. Davis is currently a member of the Smith County Bar Association, Eastern District of Texas Bar Association, and the Defense Research Institute. Mr. Davis is the author or co-author of several publications and papers including: Co-Author, "Winning Writing: Summary Judgment Practice in Texas State Courts," Suing and Defending Governmental Entities 2004; "Bail Bonds: Emerging Liability Issues," 1999 Regional Law Enforcement Workshop Series, February 1999; Co-Author, "Jail Litigation: From Class Action Lawsuits to Pro Se Litigation," 1999 Fall Law Enforcement Regional Workshops - Mitigating Liability in County Jails, November 1999."Civil Rights Litigation Update," Texas Association of Counties, Northeast Texas Seminar, August 29, 1998; "Anatomy of a Law Enforcement Lawsuit," County Management Institute Seminar, April 8, 1998; "Jail Litigation: From Pro-Se Lawsuits to Class Actions," State Bar of Texas Seminar Suing and Defending Governmental Entities, 1997; "Bail-Bond Forfeitures," Northern and Eastern County Judges Association of Texas, 1997; "A Court Divided: The 5th Circuit Court of Appeals and the Politics of Judicial Reform," 52 TEX. B. J. 706 (1989)(book review); "The Choice: Increased Prison Capacity or Increased Recidivism," published by the Governor's Office of the State of Texas, 1986; "Using Abstract Questions to Develop Critical Thinking Skills in Social Studies," Holt, Rinehart & Winston, Inc. 1984; and "Selecting a United States President in 1984," MaGraw Hill Book Company, 1984.

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House Bill 4[1] - The Newest Version of Tort Reform

I. CLASS ACTIONS

1. *Class Actions Involving State Agencies*

HB 4 requires that the trial court must rule on any plea to the jurisdiction based upon whether a state agency has primary jurisdiction, prior to class certification. If the court finds that a state agency has primary jurisdiction, certification of the class must be denied; thus, allowing the state agency the opportunity to address the matter. If the plea is denied and a class is certified, a party may appeal interlocutory.

2. *Supreme Court Jurisdiction*

HB 4 gives the Supreme Court of Texas discretionary jurisdiction to review trial court orders certifying or refusing to certify a class action.

3. *Attorney's Fees in Class Actions*

When awarding attorney fees, the trial court must use a two pronged procedure. First, the Court must determine a "lodestar" figure by multiplying reasonable hours worked times a reasonable hourly rate. Second, the Court must select an attorney's fee award within 25% to 400% of that lodestar figure.

II. OFFERS OF SETTLEMENT

1. *General Provisions*

Litigation costs may be awarded against a party who rejects an offer made under this rule except in: a) a class action; b) a shareholder's derivative action; c) an action by or against the State, a unit of state government, or a political subdivision of the State; d) an action brought under the Family Code; e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or f) an action filed in a justice of the peace court or small claims court

2. *Timing of the Offer*

Defendant must make a declaration within the deadline required by the rule. A settlement offer under this rule may not be made until a defendant files a declaration invoking the rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle the claims by and/or against that defendant. The declaration must be filed no later than 45 days before the case is set for trial on the merits.

3. *Requirements of an offer*

A settlement offer must: a) be in writing; b) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code; c) identify the party or parties making the offer and the party or parties to whom the offer is made; d) state the terms by which all monetary claims, including attorney fees, interest, and costs would be recoverable up to the time of the offer; e) state a deadline for acceptance of the offer, which must be no sooner than 14 days after the offer is served; and f) be served on all parties to whom the offer is made.

4. *Conditions of offer*

An offer may be made subject to reasonable conditions, including the execution of releases, indemnity agreements, and other settlement documentation. An offeree may object to a condition by written notice served on the offerer before the deadline stated in the offer. If no objection is made, the condition is presumed to have been reasonable. If an offer is rejected based upon a condition that is determined by the Trial Court to have been unreasonable, the Offer cannot be the basis for an award of litigation costs under this rule.

5. *Non-monetary Claims*

An offer cannot include non-monetary claims and other claims to which this rule does not apply.

6. *When an Offer cannot be Made*

An offer may not be made: a) before a defendant's declaration is filed; b) within 60 days after the appearance in the case of the offerer or offeree; c) within 14 days of the date the case is set for a trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.

7. *Successive offers*

A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.

8. *Withdrawal, Acceptance and/or Rejection of an Offer*

An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule. An offer that has not been withdrawn can be accepted only by written notice served on the offerer by the deadline stated in the offer. When an offer is accepted, the offerer or offeree may file the offer and acceptance and may move the court to enforce the settlement. An offer that is not withdrawn or accepted is rejected. An offer may

[1]House Bill 4, 78th Regular Session, 2003.

also be rejected by written notice served on the offerer by the deadline stated in the offer.

9. *Objection to offer made before joinder or designation of responsible third party*

An offer made before an offerer joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offerer's pleading or designation.

10. *Determining Litigation Costs*

If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than the offer, the court must award the offerer litigation costs against the offeree from the time the offer was rejected to the time of judgment. A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if: a) the offeree is a claimant and the judgment would be less than 80 percent of the offer, or b) the offeree is a defendant and the judgment would be more than 120 percent of the offer. Litigation costs are the expenditures actually made and the obligations actually incurred directly in relation to the claims covered by a settlement offer under this rule. They include the following: a) court costs; b) reasonable fees for not more than two testifying expert witnesses; and c) reasonable attorney fees. The litigation costs awarded under this rule must not exceed the following amount: a) the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment less the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.

11. *No double recovery*

A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.

12. *Litigation costs as a setoff*

Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

13. *Modification of time limits*

On motion, and for good cause shown, the court may by written order made before commencement of trial on the merits — modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.

14. *Discovery permitted*

On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.

15. *Hearing required*

The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

16. *Evidence of Offer*

Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

III. REFERRAL FEES

1. *Referral Fee Defined*

A referral fee is a payment of money or anything of value:

a. made by any person in consideration of:

1. the referral of a client or case, or

2. the solicitation of a client or a case by any means that does not include the name of lead counsel or lead counsel's law firm; and

b. made to an attorney who does not, and is not reasonably expected to, provide professional services in the case:

1. that are substantial; and

2. for which the payment would be a reasonable fee apart from the referral.

2. *Disclosure*

The attorney in charge for a party must file with the court a notice disclosing every referral fee paid or agreed to be paid with respect to the party. The notice must:

a. state the amount and date of each payment made or agreed to be made;

b. state the name, address, telephone number, and state bar identification number of each attorney to whom a payment has been made or is to be made; and

c. state that the client has approved each such payment or agreement.

3. *Time for Disclosure*

An attorney in charge must make the disclosure required by Rule 8a.2 within 30 days of the attorney's first appearance as attorney in charge. Thereafter, an attorney in charge must disclose any previously undisclosed payment of a referral fee or agreement to pay a referral within 30 days of the date the payment or agreement is made.

4. *Sanctions*

a. *Grounds for sanctions*

The court must impose just sanctions on an attorney if the court finds that:

1. the attorney intentionally failed to make the disclosure required by Rule 8a.2; or

2. the attorney divided or agreed to divide a fee in violation of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct

b. *Unconscionable referral fee*

A referral fee is unconscionable within the meaning of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct if it exceeds $50,000 or 15% of the attorney fees for the party in the case, whichever is less. A lesser referral fee may also be determined to be unconscionable in the circumstances in which it is paid.

c. *Sanctions imposed*

If the court finds that grounds for imposing sanctions on an attorney exist, the court:

1. must disqualify the attorney from representing the party in me case unless disqualification would unfairly prejudice the party;

2. may permit the party to void the party's agreement to retain the attorney;

3. may order the forfeiture of all fees for the attorney in the case; and

4. may impose other appropriate sanctions in addition.

5. *Hearing*

The court must, on a party's motion, and may, on its own initiative, conduct an evidentiary hearing to determine whether there has been a violation of this rule.

IV. MULTIDISTRICT LITIGATION

HB4 Establishes the judicial panel on multidistrict litigation which may transfer actions for consolidated or coordinated pretrial proceedings, including summary judgment. The panel will operate in accordance with Supreme Court rules which must allow transfer only on the panel's written finding that transfer is for convenience of the parties and witnesses and will promote efficient resolution, require remand to transferor court for trial, and provide for appellate review by extraordinary writ. HB4 amends the Government Code to ensure that the Supreme Court has the authority to adopt rules on this subject. A "Judicial Panel on Multidistrict Litigation" may transfer factually related cases pending in multiple courts to a single district court for coordinated or consolidated pretrial proceedings. The Chief Justice appoints the Panel's 5 members, 3 of whom are needed to act On December 30, 2003, the Multidistrict Litigation Panel issued its first Order. The 3-2 decision involves the transfer of more than 20 asbestos cases.

V. VENUE IN MULTI-PLAINTIFF CASES

A defendant in a multi-plaintiff lawsuit may appeal, interlocutory, a trial court's determination that a plaintiff independently established venue or proper joinder. If a plaintiff cannot independently establish venue, that plaintiffs claim must be transferred or dismissed.

VI. FORUM NON CONVENIENS

HB 4 amends the *forum non conveniens* statute by allowing the trial court to transfer venue or dismiss when the convenience of the parties and ends of justice would be better served in another forum. Prior to HB 4, the *forum non conveniens* statute differentiated between plaintiffs who were residents of a state other than Texas and those who were residents of a foreign country.

VII. PROPORTIONATE RESPONSIBILITY

HB4 corrects a number of problems that defense counsel have complained about for years. Prior to HB4, responsible parties who were not party to the suit could not be considered by the jury in its determination of percentage of fault. HB4 creates a motion to "designate a responsible third party," which can include an employer to whom liability can be assigned. A motion to designate must be filed 60 days before trial. The court will grant leave to designate unless the objecting party establishes that the defendant didn't plead sufficient facts

to satisfy the pleading requirement in the Texas Civil Practice and Remedies Code.

1. *Fault Allocated to Non-parties*

HB 4 entitles a litigating party to designate any person or company as a potentially "responsible third party." The trial court must then submit the names of the persons or entities who may be responsible for the plaintiffs injury to the jury panel, whether or not they are parties to the suit.

2. *Percentage Basis Apportionment*

Payments by settling parties are credited to non-settling defendants on the basis of the settling party's allocated percentage of fault. However, defendants in health care liability cases may elect either dollar for dollar or percentage credit.

3. *Workers' Compensation Subrogation*

HB 4 provides that an insurance carrier's subrogation interest is limited to the amount of benefits paid by the carrier to the employee, based on the percentage of responsibility determined by the trier of fact to be attributable to the employer, if the employer maintained workers' compensation insurance.

4. *Sufficient Evidence*

HB4 does not allow submission of a Responsible Third Party to the jury without sufficient evidence to support the submission.

5. *Unknown Responsible Third Party*

A defendant may designate an unknown person as a Responsible Third Party, if the unknown person or entity, is alleged to have committed a criminal act.

6. *Motion to Strike*

A party may make a motion to strike an RTP after adequate time for discovery on no evidence grounds. Court shall grant the motion unless the defendant raises a fact issue regarding the RTP's responsibility.

VIII. PRODUCT LIABILITY

HB4 also made some sweeping changes in the treatment of product liability cases in State Court. Those changes can best be summarized as follows:

1. *Definition*

HB4 broadly defines a "products liability action" to include any action against a manufacturer or seller relating to an alleged defective product.

2. *Statute of Repose*

HB4 creates a 15-year statute of repose for all products. After 15 years have elapsed, a plaintiff cannot bring an action alleging a product defect, with three exceptions: 1) a written warranty that the product has a useful safe life longer than 15 years extends the statute of repose; 2) the statute of repose does not apply to the lease of a product; and 3) for products liability personal injury cases or wrongful death when: a) exposure to the product occurred 15 years after the product was first sold; b) exposure to the product caused the disease at issue; and c) symptoms of the disease within that 15 years period did not manifest themselves to a "degree and for a duration" that would put a reasonable person on notice of the injury. Additionally, HB4 exempts, from the statute of repose, any claim to which the General Aviation Revitalization Act of 1994 applies.

3. *Innocent Retailers*

HB4 states that a seller of a product is not liable for a defective product, except in limited circumstances such as the seller participating in product design or knowing of defect. HB4 provides that the seller of a product is not liable unless the claimant proves certain factors or unless the manufacturer is not solvent or subject to the jurisdiction of the court. HB4 may prohibit suits against a seller for breach of warranty. HB4 excludes car dealers covered under Chapter 2301 of the Texas Occupations Code.

4. *Medicine*

HB4 establishes a rebuttable presumption that defendants are immune from liability in failure to warn cases regarding pharmaceuticals, if the defendant includes warnings approved by FDA or warnings stated in monographs developed by the FDA. Factors to rebut the presumption for each defendant are: 1) the defendant, before or after premarket approval or licensing, withheld or misrepresented information to the FDA and that information was material and relevant to the performance of the product and was causally related to the injury; 2) the product was sold in the US after an order by the FDA to remove the product from the market; 3) the defendant recommended the product for a use not approved by the FDA; 4) the product was used as recommended and the injury was causally related to this use; 5) the defendant prescribed an off-label use not approved by the FDA and the claimant used it as prescribed and the injury was causally related to the prescribed off-label use; or 6) the defendant, before or after pre-market approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C. §201 and the conduct caused the warnings to be inadequate.

5. *Subsequent Remedial Measures*

HB4 also requires the Supreme Court to amend Texas Rule of Evidence 407(a) (evidence of subsequent remedial measures) to comport with Federal Rule of

Evidence 407. The Supreme Court of Texas, as required by HB 4, has amended Texas Rules of Evidence Rule 407(a) to conform with Federal Rules of Evidence Rule 407. The federal rule bars direct introduction of remedial measures. The new Texas rule is effective in all cases filed on or after July 1,2003. Prior to HB 4, a plaintiff could attempt to prove knowledge of a safer alternative design by showing the jury that the manufacturer had manufactured a later version of the product using a safer design.

6. *Government Standards Defense*

HB4 establishes a rebuttable presumption that manufacturers or sellers are not liable for suits alleging injury from the formulation, labeling or design of a product if they comply with mandatory federal standards governing the product risk that caused harm. HB4 establishes the factors to rebut the presumption: 1) the standards or regulations were inadequate to protect the public; or 2) the manufacturer withheld, concealed or misrepresented information material or relevant to the federal government's determination of compliance with the standards or regulations. The government standards provision gives no protection to the defendant for manufacturing flaws or defects.

IX. INTEREST

HB4 substantially impacts the award of pre-judgment and post judgment interest and prevents double dipping on awards for interest on future damages and excessive interest computations as follows:

1. *Prejudgment Interest*

HB4 prohibits the award of prejudgment interest on future damages. Pre-HB 4 law required that a court award prejudgment interest on future damages, except in medical malpractice cases.

2. *Postjudgment Interest*

Under HB 4, post judgment interest is based on the prime rate on the date of computation, but has a 5% floor and a 15% ceiling. Before HB 4, post judgment interest fluctuated between 10% and 20%, even though market-based interest rates were much lower than 10%.

X. APPEAL BONDS

HB4 substantially impacts the enforcement of out os state judgments and *supersedeas* bonds.

1. *Suspends Enforcement of Out-of-State Judgments*

Provides that enforcement efforts in Texas are stayed if the time to appeal has not expired and the judgment debtor has obtained, requested, or will request a stay of the judgment in the state in which the judgment was rendered.

2. *Limits the Setting Amount of Supersedeas Bond*

The Supreme Court of Texas, as required by HB 4, has amended Rule 24 of the Texas Rules of Appellate Procedure. HB4 limits the amount of the bond and gives the trial court flexibility to lower the bond amount in appropriate cases. The security will not exceed the lesser of: (l) 50% of the judgment debtor's net worth; or (2) $25,000,000. If the bond amount is set so high that the judgment debtor can show the trial court that it is likely to suffer "substantial economic harm," the trial court must lower the security to an amount that will not cause "substantial economic harm."

XI. SEAT BELT EVIDENCE

For years, Defense attorneys have complained of the unfair nature of the prior rule which prohibited introduction of evidence that a Plaintiff in an automobile accident was not wearing a seatbelt. Evidence of this nature can be a very important tool to establish some degree of negligence on the part of the Plaintiff. HB 4 removes the restriction against the introduction of seat belt evidence and allows evidence of the use or non-use of a seat belt to be admissible to the same extent as other acts that may have contributed to the injury.

XII. BENEVOLENT GESTURES

HB 4 clarifies the existing law that admits into evidence statements to prove liability of the communicator when, but only when, such statements concern negligence or culpable conduct pertaining to an accident or event. Other benevolent statements or gestures are not admitted into evidence. For example, a simple statement of sorrow for the occurrence of an accident, such as a statement of sympathy for someone injured in a motor vehicle accident or accidently injured during a search and seizure operation is not admissible.

XIII. HEALTH CARE

Health care litigation underwent the broadest and most sweeping revisions. HB4 had the following wide ranging impact:

1. *Codifies 4590i*

HB 4 Codifies the following current provisions of Article 4590i into Chapter 74 of the Civil Practice and Remedies Code:

Notice letters
Informed consent
Disclosure panel
Res ipsa loquitur
Set of uniform discovery questions
Arbitration agreement language
DTPA exemption for physicians & health care providers

2. *HB 4 Provides new Definitions:*

a. The term "Health care provider" includes R.N.s, dentists, podiatrists, pharmacists, chiropractors, optometrists or health care institutions only. This definition also includes independent contractors and all levels of owners/managers or affiliate of health care providers or physicians.

b. The term "Health care institution" includes hospitals, hospital systems, hospices, EMS providers, assisted living facilities, health services districts created under Ch. 287 of the Health and Safety Code, home/community support services agencies, nursing homes and homes for the mentally retarded.

c. The term "Physician" includes any business entity including nonprofit physician's groups and independent contractors.

d. "Claimant" includes all claimants from a single injury, including the estate.

e. "Emergency" includes "sudden onset" conditions, which could include conditions caused by negligence.

f. "Economic damages" includes damages to compensate a claimant for actual economic or pecuniary loss.

g. "Non-economic damages" includes past, present and future pain and suffering, mental anguish, loss of consortium, companionship and society, disfigurement, physical impairment and any other non-pecuniary loss or damage.

h. "Hospital system" includes a system of hospitals under a single corporate parent.

3. *HB 4 Controls in Conflicts*

In the case of any conflict between HB4 and the Texas Rules of Civil Procedure or the Texas Civil Practice and Remedies Code, HB4 controls over the Texas Rules of Civil Procedure and the Texas Civil Practice and remedies Code. The one exception is Civil Practice and Remedies Code section 101.023 (Tort Claims Act liability limit) and sovereign immunity is not waived by HB4.

4. *Notice and Forms*

A claimant must give written notice of a health care liability claim 60 days before filing suit and include a statutory Authorization Form for Release of Protected Health Information, construed in accordance with the federal health information privacy statute. The 60-day letter is analogous to the 60-day demand letter required under the Deceptive Trade Practices Act (Ch. 17, Bus. & Comm. Code). The duty to provide medical records is now required only as to the patient, not to any claimants. HB4 requires the use of a form release designed to comply with HIPPA, and the failure to use this release form abates the proceedings for 60 days.

5. *Discovery*

Discovery in a health care liability claim is stayed until the claimant has served the expert report and curriculum vitae except that the claimant may acquire information through written discovery, deposition on written questions, or discovery from non-parties. Prior to the filing of the expert report, two depositions are allowed.

6. *New Jury Instructions*

In any action on health care liability, HB4 provides language for two new mandatory written jury instructions:

a. Do not consider or speculate whether the liability of any party is limited by law; and

b. A finding of negligence may not be based solely on evidence of a bad result to the claimant, but a bad result may be given weight.

New jury instructions are also required for emergency care relating to the circumstances surrounding the delivery of the emergency care (i.e., lack of medical charts, pre-existing doctor/patient relationship or provider/patient relationship, etc.). This section is not applicable to care or treatment after stabilization of the patient or treatment unrelated to the original medical emergency. The instruction is also not applicable to an emergency caused by a defendant. The Standard of proof in an emergency care situation is a "*preponderance of the evidence* that the physician/provider, with willful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same of similar circumstances." The new jury instruction will state that the "Jury must consider whether provider had access to the patient's medical history, existence of preexisting relationship, and surrounding circumstances."

7. *Statute of Limitations*

The statute of limitations has remained at two years. A statute of limitations provides a time limit within which a party can bring a lawsuit. A person who suffers a personal injury generally has two years from the time that the cause of action accrues to file a lawsuit against the alleged offending party. The action accrues either when the injury occurs or when the injured party discovers the injury. A 10 year statute of repose now applies to health care liability cases. A statute of repose sets a maximum or outside time limit after which a cause of action cannot be brought. For example, if a patient was injured from a medical procedure 11 years ago, the patient would be barred from bringing a cause of action against the physician.

8. *Emergency Room Care Immunity*

HB4 Provides immunity for liability for emergency care provided even if such care is provided in a hospital or emergency room, so long as it is performed in good faith and without the expectation of remuneration.

9. *Caps on Non-Economic damages*

Non-economic damages cannot exceed $250,000 for all physicians or health care providers. Non-economic damages cannot exceed $250,000 for each health care institution (hospitals, hospital systems, nursing homes, etc.), and $250,000 for any additional institution, not to exceed $500,000 for all institutions. There is an aggregate cap not to exceed $750,000 regardless of the number of defendants. An alternative cap contains the same provisions with mandatory minimum insurance requirements. As previously stated: "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or non-economic damages; "Exemplary damages" means any damages awarded as a penalty or by way of punishment (includes punitive damages), but not for compensatory purposes; these damages are neither economic nor non-economic damages; "Non-economic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses of any kind other than exemplary damages. There is no cap on recovery of past or future health care expenses.

10. *Wrongful Death or Survival Action*

In HB 4, "claimant" is defined in section 74.001(a)(2) to mean a person, including a decedent's estate, who is or has sought recovery. The new definition also provides that "[a]ll persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant." Damages in a Wrongful Death Cause of Action cannot exceed $500,000, including punitive damages. However, the new section 74.303(c) expressly provides that the section 74.303(a) $500,000.00 cap on "all" damages in a wrongful death or survival action on a health care liability claim, "does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury."

11. *Stowers Doctrine*

Liability of an insurer under the Stowers Doctrine is limited by HB4 to the liability insurance amount of the insured. This is a specific abrogation of the common law theory.

12. *Expert Reports*

There is a 120 day deadline to file liability and causation reports for each defendant. The Defendant has 21 days to object; otherwise objections are waived. The parties may agree to extend the time for filing the reports. Failure to serve a report or failure to file an adequate report within 120 days may mean an award of defendant's attorney's fees and costs and dismissal with prejudice. The trial court has discretion to allow a 30 day extension to cure report deficiencies. HB4 provides an interlocutory appeal of the court's decision on the motion challenging the adequacy of expert report, and abolishes the cost bond requirement.

13. *Expert Witnesses*

HB4 creates new and more specific qualifications for expert witnesses. It allows the defendant doctors to testify on his or her own behalf, as an expert. In suits against a health care provider, an expert is qualified to testify on plaintiffs behalf only if the expert: (1) is practicing in the same field as the defendant when the testimony is given or when the claim arose; (2) has knowledge of the standards of care; and (3) is qualified on basis of training/experience, i.e. certified/licensed or other substantial training and is actively practicing in the health care field relevant to the claim. A trial court may depart from such criteria in determining the expert's qualification to testify if the court finds "good reason" to admit the testimony. Additionally, and medical causation experts are qualified only if such expert is a physician and is otherwise qualified. For dental causation experts, the expert can be a dentist or physician. For podiatric causation experts, the expert can be a podiatrist or physician.

14. *The Cap is indexed*

The $500,000 wrongful death or survival cap amount moves up and down depending upon the Consumer Price Index. Section 74.303(b) provides that the $500,000 is multiplied by the percentage increase and/or decrease in the Consumer Price Index from August 29, 1977, to the time of final judgment. Importantly, while the statute has a $500,000 cap, the figure today may well be somewhere over $1,000,000.

15. *Post Judgment Interest*

Interest must include prejudgment interest on past damages. There is no prejudgment interest on future damages.

16. *Periodic Payments*

HB4 allows future damages in health care liability cases to be paid through periodic payments rather than by lump-sum, at the option of either defendant or claimant. This periodic payment arrangement is Only available when present value exceeds $100,000. The trial court's judgment must specify how and when the periodic payments are made. Periodic payments terminate upon the death of the recipient, except for future loss of earnings. The Court will require defendant(s) to provide proof of adequate insurance or post security adequate to assure full payment of the periodic payment. The award of attorney fees at the time of the judgment are based on the present value of future damages.

17. *Arbitration Agreements*

HB4 provides that arbitration agreements may be allowed in health care cases if the agreement is accompanied with the statute's required written notice, in clear 10-point boldface type, that warns the prospective patient that rights are being waived and that an attorney should be consulted. The Arbitration Agreement must also be signed by an attorney for the patient.

XIII. CLAIMS AGAINST EMPLOYEES OR VOLUNTEERS OF A GOVERNMENTAL UNIT

HB4 repeals and eliminates references to Civil Practice and Remedies Code section 108.002, which is a list of health care providers excluded from local government immunity. HB4 amends the definition of "hospital district management contractor" to delete rural health qualifications and adds a provision regarding liability of "Nonprofit Management Contractor." The liability limitations under the Texas Tort Claims Act apply to a contractor and the employees of a contractor who operate a hospital for a governmental entity. HB4 also adds an election of remedies provision to the Texas Tort Claims Act, which bars the claimant from suing both a governmental unit and an employee of the governmental unit. A claimant must elect one or the other before the filing of suit. Functionally, this provision of HB4 operates so that claimants must always only sue a governmental unit. HB4 includes physician in the definition of public servant under governmental immunity if the physician provides emergency treatment in a hospital owned or operated by local government. Additionally, HB4:

1. extends the existing limit on personal liability of governmental employees contained within the parameters of the Texas Tort Claims Act to health care workers employed by a local governmental unit, such as County Health authorities and medical personnel working in correctional institutions; and

2. applies to and limits the liability of nonprofit organizations that manage city, county or hospital district hospitals.

Volunteer health care providers are also immune from liability if:1) they commit an act in the course and scope of their volunteer position; 2) they act within their license; 3) there is a statement signed by the patient acknowledging their volunteer status and acknowledging that the services are given in exchange for immunity (except that statement does not have to be signed if the patient is incapacitated or is a minor and the person responsible for the minor is unavailable). The definition of "Charitable Organization" includes primary and secondary schools if accredited by a member association of the Texas Private School Accreditation Commission, not including fraternities, sororities, and secret societies. A hospital's liability is limited to $500,000 if: 1) the patient signs a statement acknowledging that care is being provided with no expectation of compensation and that the limit is in exchange for the service.

XIV. EXEMPLARY DAMAGES AND OTHER MISCELLANEOUS DAMAGE PROVISIONS

1. HB4 amends the existing exemplary damages allowed by common law and Chapter 41 of the Texas Civil Practice and Remedies Code to create a new overarching chapter for all damages in all civil cases. HB4 adopts the former gross negligence standard for awarding exemplary damages. Exemplary damages now require: (1) clear and convincing proof; and (2) a unanimous jury verdict. HB4 requires a mandatory jury instruction: "You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous." HB4 also provides exceptions from the exemplary damages cap to exclude penal code injury to

a child, elderly or disabled individual if the injury occurred while providing health care.

2. HB4 contains definitions that apply to all civil cases for compensatory damages, future damages, future loss of earnings, gross negligence, non-economic damages, and periodic payments.

3. HB4 provides that if compensatory damages are sought, proof of loss of earning capacity, loss of inheritance, loss of contributions of a pecuniary value must be presented in the form of a net loss after reduction for taxes and the court shall instruct the jury whether or not the recovery would be subject to income tax.

XV. CLAIMS AGAINST SCHOOL DISTRICT TRUSTEES AND EMPLOYEES OF ELEMENTARY AND SECONDARY SCHOOLS

1. HB4 provides broad based immunity for individual employees. Professional employees are not personally liable for acts within the scope of their duties, except for excessive force in student discipline or negligence resulting in bodily injury to students. HB4 defines "professional employee of a school district" to include a superintendent, principal, teacher, substitute teacher, supervisor, social worker, counselor, nurse, teacher's aide, a teacher employed by a company that contracts with a school district, a student in an education preparation program participating in a field experience or internship, a school bus driver, a board member of an ISD; any other employee of a school district whose employment requires certification and the exercise of discretion; and direct service volunteers of a school district.

2. Additional new provisions include: 1) 90-day notice prior to suit; 2) required exhaustion of administrative remedies; 3) ADR at discretion of the judge; and 4) an employee may recover attorney's fees and costs if the employee is sued and found to be immune from liability.

3. Finally, teachers also have immunity afforded by the Paul D. Coverdell Teacher Protection Act of 2001.

XVI. ADMISSIBILITY OF EVIDENCE RELATING TO NURSING INSTITUTIONS

HB4 clarifies the admissibility of investigative and survey records of nursing homes by the Texas Department of Human Services. Specifically, it prohibits findings in DHS survey reports or monetary penalties assessed by DHS against nursing homes from being admitted as evidence. HB4 also places the requirement of mandatory liability insurance coverage for nursing homes under the Sunset Act for periodic reconsideration.

XVII. LIMITATIONS IN CIVIL ACTIONS OF LIABILITIES RELATING TO CERTAIN MERGERS OR CONSOLIDATIONS

HB4 has specific provisions relating to successor liability for asbestos related litigation. The cumulative successor asbestos-related liabilities of a corporation are limited to the fair market value of the total gross assets of the transferor corporation as of the time of the merger or consolidation, but only if the acquisition that generated the asbestos related liability took place before May 13, 1968.

XVIII. CHARITABLE IMMUNITY & LIABILITY

HB4 amends the Charitable Immunity and Liability Act by: 1) deleting the requirement that a volunteer be serving as an officer director or trustee; 2) deleting the requirement of good faith and acting in course and scope of duties for the volunteer health care provider; 3) deleting "wantonly" from the definition of acts to which the chapter does not apply; and 4) repealing definitions of good faith and the provision of volunteer liability for direct service volunteers.

XIX. LIABILITY OF VOLUNTEER FIRE DEPARTMENTS AND VOLUNTEER FIRE FIGHTERS

HB 4 specifically limits the liability of volunteer fire departments and fire fighters to that of counties and county employees under the Texas Tort Claims Act.

XX. DESIGN PROFESSIONALS

Design Professionals means a registered architect or licensed professional engineer. Under HB 4, in a suit against a design professional, the plaintiff is required, at the time suit is filed, to provide an affidavit by a third-party registered architect or licensed professional engineer setting forth the specific acts of negligence it is alleged the defendant committed, otherwise the action is dismissed with prejudice.

XXI. LIMITATIONS OF LIABILITY FOR AIR PARTICLES

Under HB4, property owners or occupants of premises are not liable for trespass of air particles unless the claimant can show actual and substantial damages. A trespass action for migration or transport of an air contaminant can only survive upon a showing of "actual and substantial damages" to the plaintiff.

XXII. COMMUNITY BENEFITS AND CHARITY CARE

Under HB4, nonprofit hospitals qualify for governmental immunity limits on non-economic damages if they provide charity care equal to at least eight percent of net patient revenue and 40% of the charity care is required by the county.

XXIII. HJR 3 CONSTITUTIONAL AMENDMENT ALLOWING CAP ON NON-ECONOMIC DAMAGES

HJR 3 approved a vote on a constitutional amendment adding a section to the Texas Constitution, authorizing the Texas Legislature to set limits on all damages, except economic damages in all civil cases. If approved by the voters of Texas, this amendment would apply to limitations on damages in medical liability cases enacted during this past session or subsequent sessions and to limitations on damages in all other types of civil cases after January 1, 2005. The election date for this constitutional amendment was September 13, 2003, and the Constitutional Amendment, as we all know, passed.

Sources

House Bill 4, 78th Regular Session, 2003

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Lone Star Network Continuing Legal Education Presentation, January 2004

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