SUBJECT: Medical malpractice and tort liability revisions

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 8 ayes — Nixon, Gattis, Capelo, Hartnett, King, Krusee, Rose, Woolley

1 nay — Y. Davis

[*CSHB 4 originally was two separate bills — HB 3 by Nixon, et al., dealing with medical liability, and HB 4 by Nixon, et al., dealing with tort liability. The committee substitute merged the two bills. Part One of this analysis covers the medical liability provisions in Article 10 of CSHB 4, originally HB 3, and Part Two covers the tort liability provisions.*]

Part One — Medical Liability

WITNESSES: *(On HB 3, original version:)*
For — Spencer Berthelsen, Antonio Falcon, M.D., and John Durand, M.D., Texas Medical Association; Michael Regier, Seton Healthcare Networks; Darlene Evans and Gavin Gadberry, Texas Health Care Association; Peggy Venable, Citizen for a Sound Economy; Jo Ann Howard, Texas Medical Liability Trust and American Physicians Insurance Exchange; Mike Hull, Texas Alliance for Patient Access; Thomas Permetti, CHRISTUS Health; Steve Wozrner, Corpus Christi Medical Center; Chris Spence, Texas Association of Homes and Services for the Aging; Joe Ewing, M.D., Primary Care Coalition; George Roberts, Lutheran Memorial Hospital; Robert Kottman, M.D., Bexar County Medical Society; Mary Dale Peterson; Vincente Juan, M.D.; Jerry Hunsaker.

Against — Reggie James, Consumers Union; David Bragg, AARP; Harvey Rosenfield, Foundation for Taxpayer and Consumer Rights; Paula Sweeney, Richard Mithoff, and Hartley Hampton, Texas Trial Lawyers Association; Tony Korioth, Texas Municipal League Intergovernmental Risk Pool; 13 individuals.

On — Donald Patrick, Texas State Board of Medical Examiners; C.H. Mah, Brian Ryder, Texas Department of Insurance; G.K. Sprinkle, Texas Ambulance Association

BACKGROUND: The Medical Liability and Insurance Improvement Act of Texas (Art. 4590i, V.T.C.S.) governs medical liability and recovery. Under Sec. 4.01. (a) of the act and written notice of a possible health care liability claim must be sent to each health care provider involved at least 60 days before the filing of a suit. This notice is referred to as a "4590i" letter.

Sec. 11.02-04 of art. 4590i limits total civil liability in a medical malpractice claim to $500,000, unless invalidated, then the limit is $150,000 on noneconomic damages. Both of the limits are indexed to the Consumer Price Index (CPI). This limitation does not apply to the liability of an insurer under the "Stowers Doctrine," under which an insured can sue the insurer for failing to settle a claim that is within policy limits.

The Texas Supreme Court has ruled the caps unconstitutional except in cases of wrongful death. In *Lucas v. U.S.*, 757 S.W.2d 687 (1988), the high court found that limiting recovery for people injured by medical negligence for the purpose of reducing malpractice premium rates was unconstitutional, holding that the Texas Constitution, Art. 1, sec. 13, the Open Courts Doctrine, guarantees meaningful access to courts. The cap on damages in cases of wrongful death, which the court has not declared unconstitutional, is worth about $1.3 million today because of growth in the CPI.

A vendor's endorsement extends a manufacturer's commercial general liability policy to the vendor, protecting the vendor against claims asserted by third parties for injuries resulting from the manufacturer's product. For example, the vendor could be a physician, and the manufacturer could be a company that makes medical devices or implants.

Sec. 10.01 of Art. 4590i limits to two years the amount of time that may pass between the act of alleged malpractice and the commencement of a claim. Minors under the age of 12, however, have until age 14 to file.

Sec. 13.01 of Art. 4590i requires a claimant in a medical malpractice case within 90 days of filing the claim to file a cost bond of $5,000 per health care

provider or put the same amount in an escrow account. Alternatively, a claimant may file an expert report, a professional medical opinion on the case, in lieu of the financial bond. If neither the financial bond nor the expert report is filed within 90 days, the court must order a cost bond of $7,500 per defendant within 21 days. If the claimant fails to post the cost bond at that time, the claim is dismissed. To reinstate a claim, the claimant must post the $7,500 cost bond and court costs incurred by the defendant. A claimant who cannot afford the cost bond and does not have an attorney may file an affidavit in lieu of securities.

Within 180 days of filing a claim, the claimant must furnish an expert report, either the one used in filing or, if a cost bond was posted, an initial expert report, with the curriculum vitae of each expert to the defendant. The court may extend this deadline by 30 days and may grant a further grace period. If the expert report is not furnished, the claimant must voluntarily withdraw the claim and forfeit the cost bond to pay the defendant's attorney fees and court costs.

The expert report filed by a claimant is not admissible as evidence by the defendant and may not be referred to during the course of the action. The court will grant a motion challenging the adequacy of the report only if the author of the report is not qualified as an expert.

Sec. 16.02 (a) of Art. 4590i, prohibits collection of prejudgment interest if the claim is settled within 180 days after filing the claim.

DIGEST:

Article 10 of CSHB 4 would amend sections of the Medical Liability and Insurance Improvement Act of Texas (Art. 4590i, V.T.C.S.) as it applies to:

- the amount of liability for physicians and other health care providers;
- cases involving emergency or charity care;
- matters of litigation including expert reports, the structure of attorney fees, and filing deadlines;
- recovery matters; and
- the effect of any future legal challenge to the act.

The bill also would broaden the definition of health care provider and state legislative intent regarding the state of medical liability insurance, health care, and medical liability claims in Texas.

Limits on liability. Article 10 of CSHB 4 would amend the limits on liability in medical malpractice cases both in general and in specific instances.

The bill would amend sec. 11.02-04 of art. 4590i, V.T.C.S., the general, $500,000 indexed cap on liability in medical malpractice cases, to include punitive damages in the limit and apply it on a per-claimant basis. The bill would remove the alternative indexed limitation of $150,000 and replace it with a cap on noneconomic damages of $250,000 per claimant, regardless of the number of defendants. This cap would not be indexed. It also would repeal the section stating that the cap does not apply to the liability of an insurer under the "Stowers Doctrine."

Article 10 of CSHB 4 would create an alternative limit that would be effective if the previously described cap were invalidated. The alternative cap would apply to all damages, other than economic damages, and also would be set at $250,000. It would apply only to physicians and hospitals that carry certain levels of liability coverage, levels that would increase in three tiers over time.

Before September 1, 2005, the levels would be:
- $100,000 per claim and $300,000 aggregate for residents,
- $200,000 per claim and $600,000 aggregate for physicians, and
- $500,000 per claim and $1.5 million aggregate for hospitals.

Beginning September 1, 2005, the levels would be:
- $100,000 per claim and $300,000 aggregate for residents,
- $300,000 per claim and $900,000 aggregate for physicians, and
- $750,000 per claim and $2.25 million aggregate for hospitals.

Beginning September 1, 2007, the levels would be:
- $100,000 per claim and $300,000 aggregate for residents,
- $500,000 per claim and $1 million aggregate for physicians, and
- $1 million per claim and $3 million aggregate for hospitals.

Hospitals that provide charity care would have liability limited at $500,000, except in cases of intentional, willful or wanton negligence, conscious indifference, or reckless disregard for the safety of others. The limit on liability would be in exchange for uncompensated health care services.

The bill also would add a statute of repose, limiting the filing of a claim to 10 years after the act.

Article 10 of CSHB 4 would prohibit insurers from excluding or limiting coverage for a vendor's endorsement issued to a manufacturer and establish physicians as vendors in relation to a manufacturer's general liability policy.

Emergency or charity care. Article 10 of CSHB 4 would limit the liability of emergency care. It would require jury instructions to include circumstances surrounding the emergency and related medical care. The required qualifications for a testifying expert witness would apply to matters of causation in addition to standard of proof, and the bill would establish qualification requirements in cases involving a non-physician. In addition, the definition of "person responsible for the patient" would be broadened to include schools, siblings, and others for the purposes of liability limits in cases involving volunteers.

Pre-trial matters. Article 10 of CSHB 4 would prohibit taking a deposition of a health care provider for the purposes of a liability claim prior to filing. It would require filers of claims to submit only an expert report and no longer require a cost-bond. The bill would require a claimant to serve each party an expert report and the expert's curriculum vitae by the 180th day after filing the claim. If that failed to occur, the court would dismiss the claim with prejudice and order the claimant to pay the defendant's attorney fees and court costs.

Until the expert report was filed, all discovery would be stayed except for the patient's medical records. The expert report required for filing the claim could not be introduced into evidence or referred to by either party in the course of the action. Any other expert report could be introduced by either party. The bill would expand the qualification requirements for a testifying expert witness to include causation as well as standard of care. It also would establish qualifications for expert witnesses testifying in a claim against a non-physician.

Article 10 of CSHB 4 would limit the contingency fee that an attorney could contract or collect to 33.3 percent of the amount recovered. If the $250,000 cap on liability were invalidated, a different limit on contingency fees would take effect. This alternate limit would set the following schedule:

- 40 percent of the first $50,000 recovered,
- 33.3 percent of the next $50,000 recovered,
- 25 percent of the next $500,000 recovered, and
- 15 percent of any additional amount.

Recovery matters. Article 10 of CSHB 4 would limit the recovery of medical expenses to those actually paid by or on behalf of the claimant. It would permit claimants to collect prejudgment interest even if the claim were settled within 180 days after filing.

In cases when the claimant seeks recovery for economic losses, the bill would require the claimant to present evidence of economic loss in the form of a net after-tax loss and the jury to hear if any recovery would be subject to taxation.

Article 10 of CSHB 4 would add collateral source provisions to the Medical Liability and Insurance Improvement Act. Collateral source benefits would be defined as Social Security payments; workers' compensation; accident, health, or sickness insurance policies; disability insurance policies; and some other types of insurance, except for life insurance policies. The bill would allow the defendant in a medical liability claim to introduce collateral source benefits as evidence. Once collateral source was introduced, the plaintiff would be permitted to introduce evidence of payment for the insurance policy. The insurer paying the collateral benefits would be barred from recovering any payments from a claimant and would not hold any rights to the claimant's award, unless required by federal law.

During the course of an action, a defendant could pay for the continuation of a claimant's health or disability insurance, if the claimant were unable or unwilling to continue paying for it.

The bill would require the court to order periodic payments, rather than a lump sum payment, at the request of either the defendant or the plaintiff in cases when the award was $100,000 or more. The court would specify the

number, interval, and amount of the payments. The order for payment would constitute a release of the claim. As a condition of authorization for periodic payments, the defendant would be required to show financial responsibility, an insurance policy, bond, or other proof of ability to make full payment. If the recipient of periodic payments died, all payments except loss of earnings would cease and any remaining security would be returned to the defendant. Attorney fees would be paid in a lump sum by estimating the total value of the award and calculating its net present value.

Directions if challenged. The bill would direct any question of the constitutionality or other validity of its provisions to district court in Travis County, which could grant or deny a temporary or permanent injunction. Any appeal would be a direct, accelerated appeal to the Supreme Court. The bill would permit interested associations to sue if they had more than one member who would have standing to sue and seek a ruling on the constitutionality or validity the bill.

Effective date. The amendments that Article 10 of CSHB 4 would make to the Medical Liability and Insurance Improvement Act would apply to actions that occurred on or after January 1, 2004. The limits on attorney contingency fees also would apply only to contracts signed on or after January 1, 2004.

Article 10 of CSHB 4 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003. If it took effect September 1, 2003, then mailing of written notice of a claim by certified mail, return receipt requested on or after June 1, 2003, and before September 1, 2003, would constitute filing of a claim and it would be governed by current law. If the bill took immediate effect, then the same method of filing could be used if sent on or before the 60th day after the effective date.

SUPPORTERS SAY:

Texas has a medical malpractice crisis, and the changes included in Article 10 of CSHB 4 are the best way to help ensure patient access to care. Large jury awards have driven up the cost of medical malpractice insurance over the past few years. Faced with large increases in the cost of their malpractice insurance, physicians in some areas of the state have limited their practices, retired early, or left Texas. High-risk specialties, such as obstetrics and neurology, have been hardest hit, to the extent that many OB/GYNs no longer

deliver babies, while increasing numbers of neurologists no longer perform surgery. Article 10 of CSHB 4 would strike an appropriate balance between common sense reforms to the medical liability system and protecting the right of those who are harmed to recover damages to compensate them for the injury.

CSHB 4 would help ensure access to health care by limiting insurers' exposure to risk. This would lead to a reduction in medical malpractice rates, which would permit more physicians to practice in the state.

Other states have enacted similar reforms to address similar problems. In 1975, California enacted its Medical Injury Compensation Reform Act (MICRA), considered the nation's most comprehensive set of medical malpractice revision initiatives. It has had a significant impact on premium rates in California, where increases have occurred at about one-quarter the pace of the rest of the nation.

The only solution to the medical malpractice crisis is to limit the liability of insurers, who then could pass the savings on to physicians. The growth in malpractice claims has left insurers facing higher payouts from a shrinking pool of funds, which cannot be solved by passing the costs on to policyholders. Managed health care has forced physicians to operate within very thin margins and does not allow them to pass on the cost of higher premiums to their patients. Insurers' holdings primarily are in bonds, and their performance has not been hampered by the stock market. The shrinking pool of funds is due to payouts, not investment losses.

Also, increased regulation of physicians alone would not solve this problem. The regional disparities in malpractice claims have nothing to do with the doctors who practice there. Heavy advertising by lawyers in the Rio Grande Valley has driven the growth in malpractice claims there. Regional disparities in the pattern of malpractice claims are due to the sentiments of certain courts or venues, not the competence of the physicians practicing in those areas. This shows that the root of the problem rests with the tort system, not the Board of Medical Examiners. To strengthen the board, the Legislature also is considering SB 104 by Nelson and similar legislation to give the board greater regulatory authority and more resources.

Limits on liability. Limits on noneconomic damages are a cornerstone of the efforts to reduce medical malpractice rates because high verdicts in malpractice cases make it more expensive for insurers to write policies. A March 2000 report by Jury Verdict Research, a database of verdicts and settlements resulting from personal injury claims, found that jury awards in malpractice cases nationally rose by 43 percent from 1999 to 2000, to a median of $1 million, while the median settlement amount actually fell during the same period. The survey also found that plaintiffs lost more than half the cases that went to trial. Based on California's experience, a $250,000 cap on non-economic damages in Texas would result in a substantial reduction in liability premiums over a period of years.

Efforts to reduce medical malpractice insurance premiums and protect patient access would be useless without a cap on damages. California's long history of caps, as well as a report by the U.S. Office of Technology Assessment, support the conclusion that caps are an integral part of the solution. A higher cap on noneconomic damages would not have as much impact on liability premiums.

Limiting the amount of an award in a medical malpractice case would reduce premium rates. Juries often are sympathetic to plaintiffs and award them much more than a settlement would provide because that is what the jurors would want for themselves. Given that economic damages would not be capped, a limit on noneconomic damages would ensure that plaintiffs received the compensation they deserved, rather than winning a "lottery."

Unlimited noneconomic damages undermine the state's health-care system. Lawyers pursue medical malpractice cases in hopes of reaping large sums of money in emotional cases with unsophisticated jurors who do not understand the impact of multimillion-dollar settlements on the entire health-care system. When premiums rise too high, doctors stop practicing, thereby threatening access to medical care for all Texans. Capping damages would encourage insurers to do business in Texas by ensuring that they would not incur losses because of large damage awards. As more insurers joined the market, competition would reduce premiums.

A cap on noneconomic damages would not limit a patient's right to redress. It would not limit the amount a patient could be compensated for actual losses

and damages, past or future health care expenses, past loss of earnings, or future loss of earning capacity, and other economic damages. Noneconomic damages are intangible and include things like pain and suffering or punitive damages. These elements do not help the patient regain what was lost, instead they weigh down the medical system. Patients should get what they deserve in the form of economic losses because noneconomic damages do not make a patient whole — economic damages do.

Capping noneconomic damages would improve the health and welfare of nursing home residents. According to an industry trade group, about half of all nursing homes do not carry liability insurance because they cannot afford the premiums. Nursing homes will be required to carry insurance after September 1, 2003, but the high cost of the policies will squeeze the amount that is spent on residents' care. This bill would reduce premiums, freeing up money for direct care, and allowing nursing homes to buy adequate levels of liability insurance. In addition, insurers would become advocates for families of nursing home patients because liability policies often require certain levels of care at given policy rates.

Other types of liability that are similar to medical malpractice already have caps on damages. These include claims against charities and volunteers, some health plans, and manufacturers of vaccines. Physicians and hospitals should enjoy similar protection.

The state should include a cap on damages in medical malpractice reform efforts even though a previous $500,000 cap on noneconomic damages was held unconstitutional by the Texas Supreme Court. In *Lucas v. U.S.*, 757 S.W.2d 687, the high court found that limiting recovery for people injured by medical negligence for the purpose of reducing malpractice premium rates was unconstitutional, except in cases of wrongful death. The basis for the court's decision is which Texas Constitution, Art. 1, sec. 13, called the Open Courts Doctrine, guarantees meaningful access to courts. In other cases, the court has held that the Legislature must offer a quid pro quo if it restricts access to the courts.

The cap proposed by Article 10 of CSHB 4 would not violate the Open Courts Doctrine because the limit on damages would be in exchange for access to

health care. In addition, the court has changed since the time of *Lucas* and might be more amenable to limits on damages.

An alternate to the first limit on liability in the bill would ensure that the state's reform efforts stand even if the first limit were held unconstitutional. The quid pro quo offered by the alternate cap would satisfy the constitutionality test as it has in the Charitable Immunity and Liability Act of 1987, upon which it is modeled. In addition, the caps-for-coverage trade would promote higher actual recovery for patients as it would ensure that physicians and hospitals carry sufficient liability insurance to cover an award.

Repealing of current law stating that a damage award cap does not apply to the liability of an insurer under the "Stowers Doctrine" would clarify the intent of the cap. With the current language, some plaintiff's attorneys argue that if a physician or hospital carries insurance that is greater than the cap, the insurer should settle for any amount within policy limits, even if that amount is above the cap.

Statute of repose. Article 10 of CSHB 4 would help reduce medical liability insurance premiums by increasing the predictability of the system. This statute of repose would limit the amount of time — from 14 years to 10 years — that an insurer might be called on to pay a claim involving a minor. According to insurers in Texas, most obstetric claims are filed within three years of the birth. It also would give physicians some relief in the length of a "trailer" policy, insurance to cover liability after retirement, that they must purchase.

Hospitals. Hospitals are charitable organizations because they are required to offer charity care in exchange for their tax-exempt status. In addition, any hospital with an emergency clinic must treat all patients, resulting in bad debt of about 25 percent. As a result, most hospitals are loathe to admit patients for non-emergency services or preventive care because the hospital must pay for liability insurance in addition to absorbing the cost of the care. This bill would afford to hospitals that offer charity care the same immunity that applies to other charitable organizations and would encourage hospitals to offer more free care.

The free services offered by many clinics are performed by volunteer physicians who are not always covered by clinics' liability policies. Just as

other volunteers have limited liability under the Charitable Immunity and Liability Act, so should volunteer physicians.

This bill would have no effect on the number of abortions performed in Texas. Medical malpractice rates for OB/GYNs reflect the risk associated with full-term births, not abortions. The only effect this bill would have on the unborn would be to ensure that there are enough OB/GYNs practicing without restrictions in Texas to have one present at birth.

Vendor's endorsement. In class action lawsuits involving prescription drugs or medical devices, a physician may be named as a defendant to prevent the case from being removed to federal court, even though the physician only prescribed the medication or device. The manufacturer of the drug or medical device is the more appropriate defendant in these cases, and CSHB 4 would indemnify the physician under the manufacturer's product liability insurance.

Emergency or charity care. Physicians are required to treat anyone who walks into an emergency room, yet their actions may be compared to those of a physician in an office environment in cases of alleged medical malpractice. Emergency care often is provided without medical history and under extreme time pressure. Because of these special circumstances, requiring jury instructions to include circumstances surrounding the emergency and related medical care is appropriate.

High school kids often receive free physicals from doctors volunteering their time. Because most of these kids are under 18, there are questions about who can sign the release form. This bill would fix the problem by extending that authority to the school.

Pre-trial matters.
Deposition. Rule 202 of Texas Rules of Civil Procedure permits claimants to petition the court for an order authorizing a deposition to investigate a potential claim or suit. In medical malpractice cases, a plaintiff's lawyer may depose one of the health care providers before filing a lawsuit without the knowledge of the other future defendants, thwarting a defendant's right to be present. This bill would prevent that abuse and ensure that all defendants were aware of the proceedings.

Expert report. The current cost bond system is ineffectual because there are so many loopholes. This bill would create one system that is straightforward and fair to people of all income levels because it would require no financial obligation. Requiring an expert report, or professional medical opinion on the case, when filing a lawsuit also focuses the suit on whether the defendant's actions were consistent with accepted standards of care, not on the finances of the plaintiff.

Claimants without legitimate cases should not be permitted to waste everyone's resources during the 180-day period until the expert report is filed. Even in cases that do not result in a lawsuit, claimants run up expenses on both sides with vast amounts of discovery. Article 10 of CSHB 4 would limit those expenses to legitimate claims, which could involve as much discovery as needed.

The required qualifications for an expert witness should apply to causation to give juries a better idea of what happened. Under current law, a testifying physician must be in active practice, know the accepted standards of medical care, and be qualified on the basis of training or experience to offer an expert opinion. For example, a neurologist only may testify to the standards of care for neurology. However, without including causation, a family physician could testify that an act by a neurologist caused the alleged damage. Juries should hear only the most qualified opinions from like specialists.

Attorney fees. Attorneys often receive more of the settlement than the claimant because of contingency arrangements. Injured parties should not be forced to exchange most of their award for access to the courts. A limit on attorney fees would help solve this problem.

A limit on attorney fees also would make attorneys more selective in accepting cases rather than taking "long-shot" cases in hopes of a big payout. This would help reduce premium rates because insurers would pay awards only on legitimate cases. Limiting the financial incentive to go to court would reduce the number of claims and equalize them across the state, thereby reducing premiums.

Recovery matters.

Medical expenses. Medical expenses should be limited to what was actually paid, not the normal charge for the service. Managed care companies have special contracts with physicians and hospitals, so they pay less. Similarly, Medicare reimburses at a rate below most private insurers. In both cases, successful claimants should be reimbursed the reduced amount originally paid for the services, (i.e., health care providers should not be charged for money they never received). This provision would not limit future medical expenses and would not preclude payment of Medicare costs.

Prejudgment interest. Interest should be paid for the amount of awarded damages outstanding, and not on monies already received. Under current law, a defendant is charged prejudgment interest on the entire amount of the award, which may include portions of the award already received by settlement with another party.

The interest rate should be pegged to 52-week treasury bills rather than the current peg that includes a 10 percent floor and a 20 percent ceiling. With interest rates in the 3 percent range recently, it is unfair to make defendants pay 10 percent. This change also would benefit the plaintiffs if rates should rise above 20 percent in the future.

Evidence of economic loss. Tax returns provide the best way to calculate loss of income and make a claimant whole. Personal injury awards are not taxable, so it is overly generous to compensate victims for money that would have gone to pay taxes when the award would not.

Collateral source. The concealment of collateral source compensation, such as insurance from workers' compensation, prevents a jury from making a true assessment of loss. Juries should know if the claimant would receive compensation from another source, otherwise it could overpay the claimant in an effort to make the claimant whole. Presenting collateral source information to a jury would help reduce medical malpractice insurance rates because the insurer would pay only what is not already covered. The court may order defendants to pay for the insurance policy to keep it in effect, so the claimant would not be forced to pay for anything.

Disclosure of collateral sources would not jeopardize the claimant, as the amounts paid to obtain the coverage could be introduced. Also, collateral sources are a more efficient mechanism by which a claimant can be compensated. A larger portion of a health care or disability insurance premium is expended on actual services than the portion of a liability premium amount spent to compensate claimants.

Subrogation, an insurance company's right to go after what it has paid on behalf of a plaintiff due to injuries or loss caused by the defendant, should be barred to protect claimants from lawsuits by insurers. Article 10 of CSHB 4 would ensure that claimants' awards could not be taken away by insurers.

Periodic payments. Claimants should not receive compensation for costs that never materialize. Periodic payments for awards over $100,000 would make the jury award system more fair. Economic damages are designed to compensate for expenses associated with harm to the patient, including medical bills, many of which cease when the patient dies. Even while the patient is alive periodic payments are fairer because the patient's future income is assured. With a lump-sum payment, a patient could lose the entire settlement through a bad investment decision.

This bill would help ease Texas' current crisis by allowing insurers to plan their payments better. Instead of paying an enormous sum at the end of a trial, an insurer could build future payments into its business plan and adjust rates accordingly. In this way, a few unusually high jury awards would not deplete an insurer.

Directions if challenged. Constitutionality of the noneconomic damages cap and other reforms in Article 10 of CSHB 4 should be established as quickly as possible to reap the benefits of reduced malpractice insurance premiums. Accelerated appeals and associations' standing to sue are important to put the constitutionality question to rest as quickly as possible. In California, the bulk of the premium rate reductions occurred only after the caps in MICRA were found constitutional.

Texas does not need a guaranteed premium rate reduction in statute to ensure that savings from these changes are passed on to physicians. The Texas Medical Liability Trust (TMLT), as the largest single medical malpractice

insurer, writes about 30 percent of all policies in the state. This not-for-profit trust must pass savings to policyholders and is likely to do so quickly, since it is owned and managed by physicians. The TMLT has indicated that it will reduce rates by as much as 12 percent if the constitutionality of caps on damages is upheld. If the TMLT lowered its rate, other insurers would follow suit to remain competitive.

OPPONENTS SAY:

The tort system is not a significant cause of the medical malpractice liability crisis. Texas should focus first on reforms that will directly lower medical malpractice rates, such as better regulation of doctors and insurance rate regulation.

The Texas State Board of Medical Examiners (BME) does not address problems with physicians adequately and cannot assure that all licensed physicians in Texas are fit to practice. According to BME data, the board received more than 6,000 malpractice complaints against physicians between January 2001 and May 2002, yet opened no investigations during that period. The board is underfunded and lacks legislative direction to go aggressively after bad doctors.

Legislators also should tighten regulation of the insurance industry. Insurers' intense competition for market share during the 1990s sank premium rates to artificial depths. Thin margins, coupled with stock market woes and low interest rates, have forced insurers to pass higher costs on to policyholders.

California's insurance premiums fell only after state voters approved Proposition 103, a 1988 insurance reform initiative that mandated lower rates and regulated insurance companies. A study of California's rate history shows that premiums grew along with the rest of the nation through the 1980s, even after the enactment of the damage award caps in MICRA.

Early analysis of 2002 Texas Department of Insurance (TDI) data suggests no correlation between how much insurers pay out and how much they charge in premiums. Instead, it suggests that noneconomic damage awards are not rising at all, but shrinking as a percentage of total damages. The agency currently is working on a full analysis, which is expected to support this hypothesis. At the very least, the Legislature should wait until TDI completes its analysis before making radical changes to medical malpractice tort.

Limits on liability. Limits on noneconomic damages would not reduce medical malpractice premium rates. Jury awards are not the main driver of premium rates. Some states that have capped noneconomic damages still have seen a rise in premiums, including West Virginia, which appears on the American Medical Association's medical liability insurance rate "crisis" list.

Insurers already have caps on damages. They do not have to pay out more than the policy limit. The caps proposed in CSHB 4 only would serve to reduce the amount a patient could recover from a physician who caused injury, not the insurer.

A cap on non-economic damages would limit unfairly a patient's right to redress. Economic damages account only for medical bills and wages, not intangible losses, such as becoming home-bound, being unable to care for one's children, suffering caused by major disfigurement, and other horrible results of medical malpractice. Economic damages alone do not make a patient whole.

Any cap on damages places an arbitrary value on human life, one that would diminish the value of the lives of women, children, the elderly, and the disabled. This bill would equate a person's life to the amount of money earned, which clearly would discriminate against individuals whose value exceeds their income. Even a cap in a case of a wealthy person with a high income places an arbitrary value on that person's life. Only juries are able to make those types of value distinctions — the Legislature should not.

A cap on damages could endanger older Texans in nursing homes. According to an October 2002 report by the U.S. House of Representatives more than 25 percent of nursing homes in Texas violated federal health standards that placed residents at serious risk. The only recourse for families of mistreated nursing-home patients is threat of a lawsuit. A cap on damages would make that threat meaningless and leave such patients and families powerless.

Other types of liability that already have caps should not apply to physicians and hospitals. Charities and volunteers offer services for free while physicians and hospitals get paid for services. The health plans with caps on liability are ERISA plans, which means they are governed by federal law,

while the liability of physicians and hospitals in Texas are governed by state law. The vaccines manufactured by the companies with liability limits directly protect the public's health while physicians and hospitals treat individual health concerns. Each of the groups now with a cap represents an exception to the general practice of medicine in Texas, while physicians and hospitals are the general practice of medicine and should have no special protection under a cap.

A $250,000 limit on noneconomic damages would violate the Open Courts Doctrine and is unconstitutional. The trade of damage caps for enhanced access to health care is insufficient to withstand a constitutional challenge because there is no guarantee that reducing access to courts in this way would increase access to health care. The alleged flight of physicians from certain areas of the state and certain specialties can be interpreted different ways, including population shifts within the state from rural to urban areas and physicians' dissatisfaction with working in a managed care environment.

An alternate limit on liability in the bill, which would require physicians and hospitals to carry certain levels of insurance in exchange for the protection of damage caps, also is insufficient to withstand a constitutional challenge. The caps-for-coverage trade is no trade at all: physicians already are required to carry certain levels of liability insurance to obtain hospital privileges. The public would be giving up access to courts for protection it already has.

A fairer quid pro quo for caps on damages would be increased compensation for more victims of medical malpractice. By some counts, as many as seven out of eight instances of medical malpractice do not result in a lawsuit and go without any compensation. Texas could implement some sort of "no fault" system, like that for auto insurance, under which losses are paid by the insurer without regard to fault. No fault insurance typically restricts a victim's ability to sue for losses that fall below a certain level. This could be combined with a "loser pay" system where plaintiffs pay the legal fees and court costs for non-meritorious cases. This would give more people access to compensation, a better trade for reduced access to courts.

Indigent patients should not be required to waive their right to recovery in exchange for health services. Hospitals do not give services away for free, except in emergencies as required by federal law. This bill would allow

emergency rooms to treat indigent patients at a lower standard of care without fear of liability because they would force patients to sign away their rights at the door.

Hospitals should not be protected under the Charitable Immunity and Liability Act, which immunizes volunteers and charitable organizations from liability to encourage individuals to give their time and talent without fear of being sued. Overall, hospitals receive compensation for their services, and liability is part of the cost of doing business.

If this immunity were extended to hospitals, the state should limit the immunity only to those that provide charitable care. Last session, the 77th Legislature considered HB 1340 by Brimer, which would have distinguished hospitals that administer charity care for the purposes of possibly extending the Charitable Immunity and Liability Act in the future. It would have limited eligible hospitals to those that provide charity care equal to 10 percent or more of net patient revenue and at least 50 percent of the charity care required by the county. That bill passed the House in the waning hours of the session, but died in the Senate.

Caps on noneconomic damages could increase the number of providers willing to perform abortions in Texas. Medical malpractice rates reflect the amount of financial exposure associated with a certain type of practice. Awards in abortion-related malpractice cases are almost always noneconomic damages, which would be capped under Article 10 of CSHB 4.

Emergency or charity care. The standard of proof and jury instructions in cases involving emergency care should not be any different from other cases. Because emergency room physicians may not know their patients' medical histories, they should be encouraged to run the tests needed to make a diagnosis. The problem of no prior relationship already is accounted for by the standard of care, which compares an emergency room physician's actions to those of another emergency room physician.

The bill should define an "emergency situation" if jury instructions are required. Any time a patient's condition deteriorates it could be termed an emergency, even when the change in condition was caused by malpractice.

A school, camp, or sibling of a child should not be permitted to waive liability. Parents may sign a waiver when they enroll their child, but that decision should be their choice. This bill would automatically waive liability without parents' permission.

Pre-trial matters.

Deposition. This bill would encourage frivolous lawsuits by forcing patients to file a lawsuit to find out if a wrong was done. Under current law, physicians are required to release patient records when they receive a "4590i letter," a claim that may lead to a lawsuit. Discrepancies in patient records and witnesses may be resolved with a deposition of the physician, and the letter may never result in a lawsuit. This bill would force claimants to file a lawsuit just to get the physician's side of the story. An increased number of lawsuits against a physicians also is likely to drive up that physician's medical malpractice insurance premium because those rates are set according to the number of claims against a doctor.

There are sufficient rules in place to limit the taking of depositions, so they should not be prohibited. Rule 202 of the Texas Rules of Civil Procedure permits claimants to petition the court for an order authorizing a deposition to investigate a potential claim or suit. This rule prevents claimants' lawyers from hassling people who are not involved and helps resolve misunderstandings before they become lawsuits.

Expert report. This bill would make it difficult for experts to adequately assess if an act of malpractice had been committed because all discovery would be stayed until after the expert report was filed. For example, the clinical record in nursing homes often is falsified, which prevents an expert from accurately assessing the alleged wrong.

The qualifications for an expert testifying to causation should be defined by the "same school" rule, meaning that peer physicians should be those who practice the same procedures, not necessarily the same specialty. This would give jurors a truer picture of how the procedure is actually performed, rather than an analysis by a specialist who may not perform the procedure often.

Attorney fees. The limit on attorney fees would diminish the public's ability to contract freely with a professional. The state does not limit how much a

doctor or an accountant can charge, so the contractual relationship between a client and an attorney should not be any different. Like those professions, attorneys belong to professional groups that establish ethical guidelines for fees.

The percentage fee reflects the risk a lawyer takes when accepting a case. Patients with difficult cases might be unable to secure representation if lawyers could not cover their risks. Limiting attorney fees would be unlikely to reduce the number of claims because disincentives already exist for lawyers to take "long-shot" cases. Under the contingency system, lawyers must invest significant amounts of money and time in trying cases and do not make such investments for illegitimate cases.

Also, limiting attorney fees has not been shown to prevent the rise of medical malpractice premiums. Three of the states now identified as in crisis — Florida, New Jersey, and New York — set caps on attorney fees.

In the interest of fairness, attorney fees should be better regulated. If they are limited on the claimant's side, they also should be limited on the defendant's side. However, the alleged problem of excessive attorney contingency fees could best be resolved through better oversight by the State Bar of Texas. Currently, claimants who feel their attorney's fees were too high can complain to the Bar, but little is actually done. The Bar should be more stringent in its regulatory role.

Statute of repose. The 10-year statute of repose would limit the right to recovery for children with neurological, endocrine, or reproductive conditions caused by malpractice in utero or at birth. These conditions often emerge only after puberty, which falls within the current statute of limitations, but would be missed by a 10-year cutoff.

Recovery matters.

Medical expenses. The intent of this bill's limits on medical expenses is unclear and should be better defined. It could be interpreted to mean that economic damages are capped as they relate to future medical expenses because they have not been incurred or paid by a claimant. It also could mean that elderly patients whose medical bills are reimbursed, not incurred or paid by Medicare on behalf of the elderly recipient, are not recoverable. Federal

law requires that Medicare recoup the amount it pays for health expenses attributable to a medical malpractice case, so this bill could leave elderly recipients owing Medicare without the inclusion of those expenses in an award.

Evidence of economic loss. The calculation of economic loss should be based on a calculation of net income, not tax returns. People with very good accountants would be punished, as would anyone whose earnings are under the table, such as a gardener or a nanny.

Collateral source. Juries often do not compensate plaintiffs fully for future medical bills or other financial burdens that the plaintiff is likely to encounter, so reducing the compensation further would harm plaintiffs. Responsible people who carry insurance should not be punished by having their awards reduced by that amount.

Prohibiting collateral source disclosure protects claimants from medical malpractice insurers who want to pay less because the claimant has coverage. It is unfair for a claimant's health or disability insurance to pay for an injury caused by a bad doctor. Shifting the risk of a physician's actions to another insurer is not an appropriate way to reduce malpractice insurance premiums.

Collateral source is a less efficient mechanism for compensating a claimant. Health care or disability insurance reimbursement requires an ongoing flow of paperwork for the claimant and the insurer, which adds administrative cost and hassle. Awards in a medical malpractice lawsuit are more streamlined.

Periodic payments. Periodic payments already are an option for courts in the form of structured payments. In fact, most settlements involving children use structured payments. The decision to use structured payments should remain with the court, however, and not be required. Making periodic payments mandatory would not reduce premiums because insurers still would be liable for the entire amount, and their rates would reflect that. Also, periodic payments would remove injured patients' certainty that their bills will be covered. If insurers are losing money now, as they claim, patients should not be at the mercy of insurers' future solvency. Money awarded today should be paid today to ensure that victims can receive the medical care and lost wages they will need in the future.

Directions if challenged. Associations should not have standing to sue because it is unfair to citizens. Instead of waiting until a case came along to decide the constitutionality of these changes, an association would be able to ask the court for a binding opinion without the specifics of a case. Other interested parties might not have the same privilege because the bill only affords standing to associations with more than one member who would have standing individually.

Definitions. The definition of health care provider should not include assisted living facilities. Those facilities are not permitted to administer medical care and are more similar to residences than nursing homes, which have 24-hour nursing care. Including assisted living facilities could limit their liability concerning residents' premises, such as walkway safety.

OTHER OPPONENTS SAY:

Any limit on liability should be indexed, as should the minimums for insurance policies under an alternate cap. These limits today will be worth nothing in 25 years and doctors would only be required to carry minimal levels of insurance by 2028 standards. As the caps and insurance minimums would be in statute, they could be increased over time, but it would make more sense and save future legislatures time and effort to index them in this bill.

Texas should require a guarantee from insurers that these reforms will result in lower premiums. In 1995, the 74th Legislature enacted HB 1988 by Duncan, establishing flexible rating for certain lines of insurance. That law contained a provision introduced by then-Rep. Mark Stiles requiring insurers to estimate the amount of money saved through the civil liability revisions also enacted that session and to apply that amount to a temporary rate reduction. CSHB 4 should require that reductions in tort costs be applied directly to reducing premium rates.

NOTES:

(*See end of Part Two for NOTES for both parts of CSHB 4*.)

Part Two — Tort Liability

WITNESSES:

(*On HB 4, original version:*)
For — Lee Blaylock; Bill Borden; George R. Carlton, Jr.; George Scott Christian, Texas Civil Justice League; Richard Evans, Texas Association of Business; Evan J. Griffiths, Westdale Asset Management; Ray Perryman, Richard J. Trabulsi, Jr., and Alan Waldrop, Texans for Lawsuit Reform; Shannon Ratliff; Mike Scott

Against — Steve Bresnen, Wade Caldwell, Kenneth T. Fibich, Charles S. Siegel, and Paula Sweeney, Texas Trial Lawyers Association; Billy Edwards; Jim Haire; Peter M. Kelly; Tony Korioth, Texas Municipal League Intergovernmental Risk Pool; Yvonne Moran

On — Brock Akers

BACKGROUND:

Class actions. The Civil Practice and Remedies Code (CPRC) and the Texas Rules of Civil Procedure (TRCP) generally govern civil litigation. No chapter of the CPRC specifically addresses class actions, but Rule 42 of the TRCP and supporting case law address the litigation aspects of class-action lawsuits.

A class action is a lawsuit in which a large group of plaintiffs allege injury in a similar manner by the same defendant(s). If a court certifies a group of plaintiffs as a class, the suit may proceed as a class action, with one person or several people serving as "class representative(s)" for the plaintiffs.

A party may file an interlocutory appeal on the issue of class certification. An interlocutory appeal is an accelerated appeal taken before the lawsuit is over. An interlocutory appeal taken on the issue of class certification entitles the party to appellate review of that issue before the case goes further.

Before an offer of settlement in a class action suit, including attorney's fees, can become effective, the court must approve the settlement. Attorney's fees are calculated pursuant to the contract between the clients and attorney(s) and often are structured as a contingent fee of between 20 and 40 percent of damages recovered. The court awards the amount of fees that it considers reasonable and necessary under the circumstances of the case. If a case is not

settled and goes to trial, the trier of fact determines the award to the class. The trier of fact may be the judge or the jury, depending on the case. Class attorneys are entitled to the percentage of the recovery for which they contracted with the class members, but the court may change this amount.

Settlement offers. Although no offer-of-settlement rule exists for all civil actions, some portions of Texas law provide for a system by which a party may offer a settlement to another party. For example, the Deceptive Trade Practices Act (DTPA, Business and Commerce Code, chapter 17) requires that consumers give notice of their complaints to potential defendants. After receiving such a notice, a defendant may offer a settlement to the plaintiff. A plaintiff that fails to accept a reasonable offer is limited in the amount of damages that can be recovered at trial.

Under the common-law Stowers Doctrine, an insurance company has a duty to accept reasonable settlement demands within policy limits. If the insurer fails to accept a reasonable demand and later is assessed with damages in excess of policy limits by the trier of fact, the company is liable for the amount in excess of policy limits.

The Federal Rules of Civil Procedure (FRCP) provide a federal equivalent to an offer of settlement, called an offer of judgment, in FRCP 68. A defendant may serve a plaintiff with an offer to allow judgment to be taken against the defendant for the amount of the offer. This offer may be made at any time up until 10 days before trial. The refusal of such an offer is not admissible in evidence before the jury. If the judgment finally obtained by the plaintiff is not more favorable to the plaintiff than the offer, the plaintiff must pay the costs, including attorney's fees, incurred after the offer.

Election of credit for settlements. CPRC, secs. 33.012 and 33.014 govern recovery amounts and the election of credit for settlements. A court must reduce the amount of damages to be recovered by the claimant on the basis of damages the claimant has received in settlement with other parties. The claimant's recovery can be reduced either by the sum of the dollar amounts of all settlements or by a formula reduction. The formula in sec. 33.012 reduces the recovery by 5 percent for the first $200,000 of damages, 10 percent of damages from $200,001 to $400,000, 15 percent of damages from $400,001 to $500,000, and 20 percent of damages greater than $500,000. A defendant

must elect a reduction method before the end of the trial. An election made by one defendant in writing binds all defendants in the case. If no election is made or if conflicting elections are made, all defendants are considered to have chosen the formula reduction.

Products liability. CPRC, chapter 82 and sec. 16.012 govern products liability. Sec. 82.001 defines a products liability action as an action against a seller or manufacturer for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product. Sec. 16.012 defines manufacturing equipment as equipment and machinery used in manufacturing, processing, or fabricating tangible personal property, excluding agricultural equipment or machinery.

Under sec. 16.012(b) and (c), a claimant must begin a products liability action against a seller or manufacturer of manufacturing equipment within 15 years after the date when the defendant sold the equipment. If the manufacturer or seller expressly represents that the equipment has a useful life of more than 15 years, a claimant must begin an action before the end of the number of years represented as the useful life of the equipment. This “statute of repose” does not apply to the lease of manufacturing equipment.

A manufacturer must indemnify a seller against loss from a products liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product. If a seller alters a product in a way that makes it harmful, the seller is liable for damage caused by changing the product.

Chapter 82 protects a claimant from inherently unsafe products and design defects. An inherently unsafe product is one that is known to be unsafe by the ordinary consumer and is intended for personal consumption. A design defect is a defect that causes injury to a person or property and that could have been corrected by an already available safer alternative design.

A subsequent remedial measure is an action taken by a defendant to improve its product after an injury has occurred. In products liability law, evidence of a subsequent remedial measure generally is not admissible for showing proof of a defect in the product, but is admissible for purposes of impeachment and

showing the feasibility of the manufacturer's producing a safer product at the time of manufacture of the product in question.

Exemplary damages. CPRC, chapter 41 governs exemplary damages, often called punitive damages. Exemplary damages over and above compensatory damages are awarded as a penalty or to punish a wrongdoer for excessively bad conduct, whereas compensatory damages are intended only to compensate the injured party for the injury sustained. Economic damages are damages for pecuniary loss, such as medical expenses or lost wages. Noneconomic damages are damages not for pecuniary loss, such as for pain and suffering.

Chapter 41 caps exemplary damages for most causes of action, except for actions based on conduct described as a felony in portions of the Penal Code. The statute caps exemplary damages at the greater of $200,000 or twice the amount of economic damages plus an amount equal to noneconomic damages found by the jury, not to exceed $750,000.

Example: if a jury finds that a plaintiff should be awarded $50,000 in economic damages, $25,000 in noneconomic damages, and $500,000 in exemplary damages, the plaintiff is limited to $200,000 in punitive damages. To determine this amount, the court would double the economic damages ($100,000) and add the noneconomic damages for a sum of 125,000. Because the exemplary damages determined by the formula are less than $200,000 but the exemplary damages awarded by the jury are greater than that amount, exemplary damages are capped at $200,000. The plaintiff recovers $50,000 in economic damages, $25,000 in noneconomic damages, and $200,000 in exemplary damages, for a total of $275,000. If the exemplary damage award in this example were only $175,000, the plaintiff would recover the full $175,000 plus the other damages, because the exemplary damages would be below the lower cap of $200,000. If the plaintiff were awarded $1 million in economic damages, $2 million in noneconomic damages, and $3 million in exemplary damages, his exemplary damages would be capped at $2.75 million — double the economic damages ($2 million) plus $750,000 of noneconomic damages. The plaintiff is allowed only to add noneconomic damages awarded up to $750,000, but that limitation applies only to the determination of exemplary damages to be awarded, not to the amount of noneconomic damages to which the plaintiff is entitled. Because the amount

of exemplary damages under the formula is $2.75 million and the plaintiff was awarded more than that, the exemplary damage award is capped at that amount. The plaintiff can recover $1 million in economic damages, $2 million in noneconomic damages, and $2.75 million in exemplary damages, for a total of $5.75 million.

Juror qualification. Government Code, sec. 62.015 governs qualification of jurors. A juror may not serve on a particular case if he or she is a witness in the case; has an interest in the subject matter of the case; is related within three degrees of consanguinity (sibling, parent, grandparent, aunt, uncle, cousin) or affinity to a party in the case; has a bias or prejudice in favor of or against a party in the case; or has served as a juror in a former trial of the same case or in another case involving the same questions of fact.

Venue; forum non conveniens. CPRC, chapter 15 governs venue. To hear a case, a court must have proper venue over the proceeding. Generally, venue is proper in the county where the injury occurred or where one or more of the parties reside. Although each plaintiff must establish venue independently of any other plaintiff, if venue is proper over one defendant, it is proper over all defendants properly joined in the case. If a court decides that it does not have proper venue over a case or party, the court must transfer the case to a court that has proper venue.

Under the doctrine of forum non conveniens, governed by case law and CPRC, sec. 71.051, a court has the discretion to decline to hear a case when justice and the convenience of the parties would be served better if the action were brought in another forum. Forum non conveniens generally is used when a case comes from out of state or from another country, involving parties that reside and injuries that occurred outside of Texas.

Venue decisions in Texas courts are subject to interlocutory appeal only in certain circumstances. In federal courts, there is no right to immediate appeal from a venue decision.

Proportionate responsibility and designation of responsible parties. CPRC, chapter 33 and supporting case law govern proportionate responsibility and designation of responsible parties.

Under proportionate responsibility, an award to a party is reduced by the amount of responsibility apportioned to that party. Also, if a party is found to be more than 50 percent liable, that party is barred from recovery. Thus, if a plaintiff is found to be 30 percent liable and the defendant(s) 70 percent liable, the plaintiff's recovery is reduced by 30 percent, and the defendant(s) may not collect an award of damages.

Comparative responsibility laws were enacted to remedy a common-law rule under which contributory negligence was a complete bar to actions based on negligence. That is, plaintiffs could recover no damages if found to have any liability for their injuries. The comparative responsibility statute accounts for the liability of plaintiffs and reduces their recovery on the basis of that amount of liability, rather than completely barring them from recovery. However, it does not require a reduction of exemplary or punitive damages.

In 1989, the Legislature amended CPRC, sec. 33.002(b) to exclude the DTPA and worker's compensation benefits from application of this chapter. In 1995, the law was amended to exclude only those acting in a manner that could be a violation under the Penal Code, worker's compensation benefits, and a claim for exemplary damages.

Defendants may be jointly and severally liable for a plaintiff's injuries if they are found to bear more than 50 percent of the liability for a case. If defendants are found to be jointly and severally liable, each defendant is liable for the full amount of the judgment, not simply the proportion of responsibility assessed to that defendant. However, defendants have rights of contribution against each other, meaning that each defendant can recover from the other defendants for the amount in excess of his liability. For example, Defendant A is found jointly and severally liable for damages of $100,000 and is assigned 70 percent of the liability for those damages, and Defendant B is assigned 30 percent liability. Defendant A is liable for all $100,000 of damages but has a right of contribution from Defendant B for that defendant's $30,000 of damages.

A jury may apportion responsibility for an injury only among parties named in the case, although jurors may hear evidence about others who may have some responsibility. For example, a plaintiff may sue three defendants for damages but may settle with two of the defendants during the course of

litigation. At trial, the third defendant may not tell the jury about the plaintiff's settlement with the other two defendants but may argue that those defendants were responsible for the plaintiff's injuries. However, jurors may not apportion responsibility to the two defendants that settled.

Preserving rights of indemnity. Indemnity is an assurance by which a person is secured against anticipated loss by a third person. Suppose that A is involved in a car wreck with B, both are insured drivers, A is injured, and A sues B. In this case, B's insurance company indemnifies her from losses to A, because part of B's contract with the insurer requires the company to pay for any damage that B causes within policy limits.

CPRC, sec. 33.017 governs the preservation of rights of indemnity. Chapter 33 does not apply to rights of indemnity granted to a seller eligible for indemnity by Chapter 82, by the Texas Motor Vehicle Commission Code (Art. 4413(36), V.T.C.S), or by any other statute, nor rights granted by contract at common law.

Labor Code, sec. 417.001 governs third-party liability in labor-related actions. An employee or legal beneficiary may seek damages from a third party that is or may become liable for injury or death under the worker's compensation subtitle and may seek worker's compensation benefits as well. If benefits are claimed, the insurance carrier is subrogated to the injured employee's rights and may enforce the liability of the third party. That is, the insurer essentially assumes the role of the injured employee for purposes of regaining from the third party the costs of benefits paid to that employee.

Interest. Finance Code, chapter 304, subchapter B governs postjudgment interest and prejudgment interest on future damages.

A court may assess postjudgment interest on damages awarded to a plaintiff. An interest rate for this purpose that is not addressed in a contract under dispute is calculated on the basis of the auction rate for 52-week treasury bills issued by the Federal Reserve Board. Interest is 10 percent a year if the auction rate is less than 10 percent, or 20 percent per year if the auction rate is more than 20 percent. Postjudgment interest accrues from the date a judgment is rendered to the date the judgment is paid, and the interest compounds annually.

Prejudgment interest, assessed in wrongful death, personal injury, or property damage cases, is equal to the postjudgment interest rate applicable at the time of judgment. It does not compound but accrues from 180 days after the defendant receives written notice of the claim or the date the suit is filed and ends the day before the judgment is signed. If the defendant makes a written settlement offer to the claimant that is equal to or more than the amount of the judgment, prejudgment interest does not accrue during the period that the offer may be accepted. If the defendant makes a settlement offer that is less than the judgment amount, prejudgment interest does not accrue only on the amount of the settlement offer during the period when the offer may be accepted.

Appeal bonds. CPRC, sec. 35.006 governs the stay of execution of a judgment. If a party owing a judgment shows the court that it has taken an appeal from a foreign judgment and that that appeal is pending, that it will take an appeal from that foreign judgment, or that a stay of execution has been granted and the party has furnished security for satisfaction of that judgment, the court must stay the enforcement of the foreign judgment until the appeal is concluded, until time for appeal expires, or until the stay of execution no longer exists. A foreign judgment also may be stayed if the debtor shows the court a ground on which enforcement of a judgment of a Texas court would be stayed.

CPRC, chapter 52 governs security for judgments pending appeal. For a judgment to be stayed, the debtor must furnish a bond for the amount of the judgment or set aside the amount of the judgment in money. The trial court sets the amount of the bond or deposit, which generally equals the sum of the judgment, costs, and interest. A court may reduce that amount in a case that does not involve bond forfeiture, personal injury, or wrongful death, a claim covered by liability insurance, or a worker's compensation claim. The amount may be lowered only if the court finds that setting the amount equal to the sum of the judgment, interest, and costs would cause irreparable harm to the debtor and that setting the security at a lower amount would not substantially decrease the likelihood that a judgment creditor could recover the full amount assessed after the exhaustion of appellate remedies. An appellate court may review the amount of a bond or deposit for sufficiency or excessiveness.

Evidence relating to seat belts. Transportation Code, sec. 545.413 makes it a misdemeanor offense not to wear a safety belt if a person is at least 15 years old and is riding in the front of a passenger car while it is being driven, in a seat that has a safety belt. The use or nonuse of a seat belt under this section is not admissible in evidence in a civil trial except in certain cases brought under the Family Code.

Claims against employees or volunteers of a local government unit. CPRC, chapter 108 limits the liability of public servants, excluding an independent contractor, the contractor's agent or employee, or another person who performs a contract for a unit of government. Sec. 108.002 limits to $100,000 the personal liability of a public servant, other than a health-care provider, for actions in the course and scope of employment or service. This limitation applies to damages arising from personal injury, death, property damage, and deprivation of a right, privilege, or immunity.

Public school teachers. Education Code, sec. 22.051 governs liability of a school district's professional employees, defined to include a superintendent, principal, teacher, supervisor, social worker, counselor, nurse, teacher's aide, student teacher or intern, certified school bus driver, and any other person whose employment requires certification and the exercise of discretion. Such employees are immune from personal liability for any act that is incident to or within the scope of their duties and that involves the exercise of judgment or discretion, except when they use excessive force in the discipline of students or cause bodily injury to students through negligence. This provision does not apply to the operation, use, or maintenance of any motor vehicle.

DIGEST:

CSHB 4 (excluding Article 10 dealing with medical malpractice liability revisions, which was covered earlier) would make various changes in tort liability law.

Class actions. Article 1 of CSHB 4 would add Chapter 140 to the CPRC, governing the award of attorney's fees in class actions. Attorney's fees would have to be awarded from a common fund recovered for the class. The bill would cap attorney's fees at 25 percent of the amounts collected by the class members out of the common fund or at four times a base fee, whichever was lower. The court would have to determine the base fee by multiplying the number of hours the attorneys had worked by a rate the court deemed

appropriate in that area for that type of case. The court could increase or decrease the base fee on the basis of factors such as the novelty and difficulty of the case, the attorneys' experience, the amount of money in the action and the results obtained, and the level of expertise required to prosecute the action.

The bill would authorize immediate review by the Supreme Court, rather than by a court of appeals, of a decision of whether or not to certify the class.

CSHB 4 also would add Chapter 26 to the CPRC, governing class actions that involve the jurisdiction of a state agency. Parties to an action in which a state agency had exclusive jurisdiction to determine an issue in a dispute or to grant a remedy would have to exhaust all administrative remedies before going to state court. If the parties had not done so, a court would have to abate the action until administrative remedies were exhausted. If the court found that the administrative remedy conferred on the parties was an adequate substitute for the relief sought in court or was a substantial part of the relief sought by the claimant, the court would have to dismiss the action.

Settlement offers. Article 2 of CSHB 4 would add Chapter 42 to the CPRC, governing settlement and recovery of litigation costs. It would apply to all civil actions except class actions; actions brought under the Family Code; actions relating to residential and construction liability under Property Code, chapter 27; actions brought on behalf of a minor or of person of unsound mind; and actions to collect worker's compensation benefits. It would not apply to an action by or against a governmental unit unless the unit elected to seek recovery of litigation costs under this chapter or elected to waive immunity from liability for costs awarded under this chapter.

If a settlement offer was made under Chapter 42 and the plaintiff subsequently recovered at least 10 percent less than the offer at trial, the plaintiff could not recover attorney's fees from the time of the offer and would be liable to the defendants for the defense fees from the time of the offer, up to the amount of the judgment. The court would have to determine the amount of litigation costs. The judgment amount that would be subject to the settlement offer would not include the proceeds of an insurance policy paid to the claimant as the policy beneficiary, unless those proceeds were the subject of the suit.

A claimant would have up to 30 days to accept a settlement offer, or longer if stated in the offer. The settlement offer and acceptance would have to be in writing and served upon the other parties. The defendant could rescind the offer at any time before the claimant had accepted it. A rescinded offer would not count against the claimant at the time of judgment. A settlement offer would remain inadmissible in court.

In a case where the claimant had settled with one or more persons, the defendants could elect either to take a dollar-for-dollar reduction on their amount of liability on the judgment, based on the settling party's amount of responsibility, or to reduce the amount by a percentage equal to the settling party's liability (percentage test). If the defendants chose not to elect or if they differed on their elections, the percentage test would apply.

Products liability. Article 5 of CSHB 4 would revise statutes relating to products liability. For the purposes of CPRC, sec. 16.012, the bill would substitute its definition of "products liability action" for the definition found CPRC, sec. 82.001. The new definition would add that damages sought could be in the form of any legal or equitable relief, including suits for various types of personal injury actions seeking all types of relief. The bill also would replace the term "manufacturing equipment" in sec. 16.012 with the word "product."

For a claimant to have a statute of repose greater than 15 years, the seller or manufacturer would have to have made an express warranty in writing that the product had a useful safe life longer than 15 years. (The standard in current law is an express *representation*, which may occur verbally.)

CSHB 4 would make a nonmanufacturing seller immune from liability for harm caused to a claimant by a product unless the claimant proved that:

- the seller altered or modified the product and those changes caused the claimant's harm;
- the seller had control over the warnings or instruction for the product and an inadequate warning or instruction caused the claimant's harm;
- the seller made an incorrect express factual representation about the product that the claimant relied upon and thereby was harmed; or
- the seller knew of a defect to the product at the time of supply and the defect caused the claimant harm.

In an action alleging an injury caused by an inadequate warning or instruction with regard to a pharmaceutical product, the defendant would not be liable if the warnings or instructions that accompanied the medicine were those required by the U.S. Food and Drug Administration.

The bill would specify that evidence of subsequent improvements and remedial measures is not admissible in a products liability action, except for purposes of impeaching other evidence.

A defendant would not be liable for damages to a claimant caused by some aspect of labeling, formulation, or design of a product if the defendant proved by a preponderance of evidence that the product's labeling, formulation, or design complied with federal mandatory safety standards or regulations. However, if a plaintiff proved by clear and convincing evidence that the applicable federal standards were grossly inadequate to protect the public, the defendant would remain liable. A defendant would not be liable for damages if the defendant proved by a preponderance of the evidence that the product was subject to premarket licensing or approval by a government agency, that the manufacturer complied with all of the agency's standards, and that the agency later approved or licensed the product for sale. However, a defendant could be held liable if the claimant proved by clear and convincing evidence that the agency standards or procedures used for premarket licensing were grossly inadequate to protect the public or that the manufacturer had withheld from or misrepresented to the agency material and relevant evidence that was related to the performance of the product and the claimant's injury. These limitations would not apply to manufacturing flaws or defects.

Exemplary damages. CSHB 4 would change the determination of the cap on exemplary damages. A court would have to determine the cap on basis of the amount of damages awarded in the judgment, rather than the amount found by the jury; that is, the judge could adjust the jury award before determining the amount of exemplary damages. Also, the award of exemplary damages based on felony conduct would require an actual conviction of a felony, rather than proof that the conduct would constitute a felony.

Juror qualification. CSHB 4 would limit a party's ability to disqualify a petit juror for cause by specifying that a person's answer in voir dire that the person could not award a certain amount of damages based on a hypothetical

set of circumstances would not, in and of itself, establish bias or prejudice in favor or against a party in the action.

Venue; forum non conveniens. Article 3 of CSHB 4 would add Subchapter F to CPRC, chapter 15, establishing a method for transferring all multidistrict civil litigation filed in a district court to a different venue. It would add Subchapter H to Government Code, chapter 74, creating a judicial panel on multidistrict litigation.

The judicial panel could transfer related cases, those involving common issues of material fact, to any district court for consolidated or coordinated pretrial proceedings. Transfer could be initiated by the judicial panel or by a party in a case. The panel would have to order the transfer of related cases if the panel determined that the transfer was for the convenience of the parties and witnesses and was in the interest of justice and efficiency. An order granting transfer would be appealable by interlocutory appeal to the court of appeals, but an order denying transfer could not be appealed.

The judicial panel on multidistrict litigation would comprise seven justices, each from a different court of appeals, appointed by the chief justice of the Supreme Court. The panel would have to determine which multidistrict cases should be transferred and would have to preside over consolidation or coordination of those cases. The panel could assign a district judge to preside over the pretrial proceedings of the coordinated or consolidated cases. A case would have to be remanded to the district court from which it was transferred before the conclusion of pretrial proceedings, unless the case already had been terminated.

CSHB 4 would change the requirement that each plaintiff establish venue independently of any other plaintiff to require that each plaintiff establish venue independently of *every* other plaintiff. If a plaintiff could not establish venue, that plaintiff's part of the case would have to be dismissed or transferred to a county of proper venue. The bill would allow an interlocutory appeal of a trial court's determination that a plaintiff did or did not establish proper venue. It also would allow that appeal to be taken by any party affected by the venue determination.

CSHB 4 would not change the application of the common-law doctrine of forum non conveniens to cases that do not involve personal injury or wrongful death. It would broaden a court's ability to transfer a case out of Texas when the court found that Texas is not the proper venue and make such a transfer mandatory rather than discretionary. It also would reduce the parties' ability to have a case removed from the court to which it was transferred and sent back to a Texas court.

Proportionate responsibility. CSHB 4 would add actions brought under the DTPA, in which a defendant, settling person, or responsible third party is found partly responsible, to the application of CPRC, chapter 33. It also would allow the designation of responsible third parties. Such designation would allow juries to assess responsibility to all designated parties, not only those that are parties to a case.

A defendant who had engaged in a conspiracy to commit various felonies under the Penal Code would be jointly and severally liable for damages caused by that conduct only if the claimant proved that the defendant had acted with specific intent to do harm. Even if defendants were jointly and severally liable for damages to a claimant, they would be liable only for the percentage of damages found by the trier of fact equal to their percentage of responsibility.

CSHB 4 would limit the amount of an insurance carrier's subrogation interest to the amount of total benefits paid or assumed by the carrier to an employee or legal beneficiary, minus the amount by which the court reduces the judgment based on the percentage of liability assessed to the employer.

Interest. CSHB 4 would change the method of calculating postjudgment interest, basing it on the weekly average one-year treasury yield as published by the Federal Reserve System. It would lower the minimum amount of interest from 10 percent to 5 percent and would lower the maximum amount from 20 percent to 15 percent. The bill would prohibit assessment or recovery of prejudgment interest on an award of future damages.

Appeal bonds. CSHB 4 would add several circumstances in which a court could grant a stay of execution of judgment. It would allow a stay in cases where the time for taking an appeal had not expired or where a stay of execution had been requested or was expected to be requested. It would authorize a judgment creditor to furnish the security for a foreign judgment in the future.

The bill would reduce the amount of security required to obtain an appeal bond. It would cap the amount of security at 50 percent of the judgment debtor's net worth or $25 million, whichever was lower. If the debtor showed that it was likely to suffer substantial economic harm if required to post security in the required amount, the trial court would have to lower the bond amount to an amount that would not cause the debtor substantial economic harm. An appellate court could review the bond amount but could not increase the amount above the cap.

Evidence relating to seat belts. CSHB 4 would repeal Transportation Code, sec. 545.413(g), making the use or nonuse of seatbelts admissible in evidence in civil trials.

Claims against employees or volunteers of a local government unit. The bill would remove the exclusion of health-care providers from the limitations on personal liability. It would broaden the definition of a hospital district management contractor to statewide application by removing the qualification of having to provide services as part of a rural health-care network and in a district with a population below 50,000.

Public school teachers. CSHB 4 would remove "teacher" from the definition of "professional employee" under Education Code, sec. 22.051, and would specify that a teacher is not personally liable for acts that are incident to or within the scope of duties of the teacher's employment. This provision would not apply to a criminal offense, including sexual misconduct.

Assignment of judges. CSHB 4 would create a procedure for assigning judges to health-care liability cases. On motion of a party to such a case, the Supreme Court would have to assign a judge. All parties in the case would have an opportunity to file a written objection to the assignment.

Effective date. All portions of CSHB 4 except for Article 10 (medical malpractice liability) would take effect September 1, 2003.

SUPPORTERS SAY:

CSHB 4 would make comprehensive reforms in Texas' system of tort liability law to address the many problems the system now causes. In doing so, CSHB 4 would create a system that offers balance and fairness for all parties.

Texas is one of the most litigious states in the most litigious country in the world. The current lawsuit environment breeds litigiousness, which diminishes the peace of a civil society. Publicity about "jackpot" jury verdicts often does not relate those verdicts to job losses, reduced stock values, and the stifling effect on product improvements. Juries often appear to render such verdicts without first considering how much they will increase the costs of products and services to the average consumer.

Class actions. Class actions rarely go to trial, as defendants often are forced to settle the cases because the costs of pursuing the action and the risks involved are too great. Because it is less expensive to settle these cases, settlement often occurs shortly after a class is certified. Unfortunately, such settlements rarely benefit the class members more than they benefit the attorneys.

Interlocutory appeal. By authorizing interlocutory appeals for class certification, CSHB 4 would end abuses of class actions, rather than class actions themselves. Although imperfect, class actions are a good way to address small problems. Corporations often find it preferable to settle existing liabilities through a single suit rather than through many.

CSHB 4 would enable defendants to question the certification of a class and would remove the implied requirement that a defendant settle once a class is certified. Under current law, no appeal to the certification issue is possible until after trial, and because many cases do not go to trial, defendants unfairly are forced to settle once the class is certified, whether or not the certification is appropriate.

Although expedited appeals to the Supreme Court would be heard only slightly more quickly than regular appeals, using the normal appeals process would take much longer. Removing the court of appeals from the appellate

process would speed up litigation. Although it would take some time to establish this body of law, in the long run, it would make the process fairer, more efficient, and less expensive because the law would be uniform and certain across Texas. Defendants would be precluded from unnecessary appeals of class certification because they would know when their cases were proper under the law. This would save an immense amount of money for the judicial system as well as for parties and litigants.

Attorney's fees. Class attorneys often receive more recovery than the class members themselves receive because the interests of the class attorneys and the defense align when it comes to settlement. The defense wants to limit the amount that it has to pay out, while class attorneys want to maximize their fees. Unfortunately, this process often squeezes the interests of the class out of the fee formula. Although a class settlement must be approved by the court, securing a settlement favorable both sets of attorneys is not difficult.

CSHB 4 would ensure that class members recovered fully for their injuries. It would end the proliferation of "coupon settlements" that entitle class members to a discount off their next purchase while the class attorneys reap millions of dollars. The bill would create a mandatory procedure for calculating fees to be awarded to class counsel and would cap those fees at 25 percent of the class recovery. This cap would ensure that the class members could recover actual value for their injuries by forcing the class attorney to maximize the class recovery.

Administrative remedies. Asbestos litigation is clogging the courts. CSHB 4 would help valid claimants receive their recovery more quickly by requiring that claims within the jurisdiction of state agencies go to the appropriate agency for adjudication before going to court as class actions. Often agencies can offer the relief that the claimants have requested and can do so more quickly than the courts can. Requiring claimants to exhaust their administrative remedies before they go to court would ensure that claimants are compensated timely and fully for their injuries.

Settlement offers. The CSHB 4 provisions on offers of settlement are crafted after Rule 68 of the Federal Rules of Civil Procedure. However, unlike this bill, Rule 68 does not include the loss or gain of attorney's fees. Currently, every settlement has four corners: the plaintiff, plaintiff's attorney, defendant,

and defense attorney. Often, only one of these corners refuses to settle. CSHB 4 would create a system that provides an incentive for all corners to agree to a fair settlement at the earliest possible time.

Rule 68 often is not invoked because the amount that a party can gain — that is, only the litigation costs — is not worth the effort. CSHB 4 would give parties adequate incentive both to seek recovery of costs and fees and to settle early in the case to avoid the risk of losing costs and fees. These incentives would benefit both parties and would ensure relief for injured parties in a timely manner. Plaintiffs would risk losing their attorney's fees and costs from the time of the offer to the end of trial if they did not accept a reasonable offer. Plaintiffs would be liable for defense attorney's fees and costs for that same time period if they refused the offer. Defendants would be encouraged to make reasonable settlement offers early, because they would be entitled to receive reimbursement for their fees and costs from the plaintiffs if the offer was more favorable than the judgment for the plaintiffs. Plaintiffs would be encouraged to accept reasonable settlement offers early because if they did not, they would risk losing their fees and costs from the time the settlement offer was made to the end of trial. These incentives also would help to unclog the courts by reducing the number of cases that make it to trial.

The current system presumes that every defendant has the capacity to pay claims and that most plaintiffs do not have the resources to pay for their own legal representation. Some other states use what is called a two-sided system, in which plaintiffs can make counteroffers with the same protection as defendants have for making settlement offers. In practice, defendants under such systems often are forced to pay costs and fees, while plaintiffs are not required to do this because they do not have the resources. Although the systems are called two-sided, they are unilateral in practice.

CSHB 4 would provide a safeguard to prevent plaintiffs from being responsible for fees that they cannot pay. Plaintiffs would be responsible only for defense fees and costs up to the amount that the plaintiffs received in the judgment.

CSHB 4 is designed to deal with the average case, which generally has a nine-month discovery period. The vast majority of plaintiffs can determine

the value of their cases within 90 days. If a plaintiff with a complex case needed more time to determine its worth, the plaintiff could ask the court to extend the settlement time limit. This limit would encourage plaintiffs to gather information in a timely manner and would prevent cases from lingering in the system.

Election of credit for settlements. CSHB 4 would clarify defendants' choice of settlement credits by allowing them to choose between dollar-for-dollar and percentage credits.

Products liability. These provisions of the bill would diminish the practice of forum selection. Often a plaintiff sues an innocent retailer along with a liable manufacturer to give the plaintiff jurisdiction in Texas courts and to prevent the case from being removed to federal court, which generally is regarded as more defense-friendly. Some plaintiffs sue innocent retailers because the defendant may be willing to offer some money in settlement to avoid the nuisance of dealing with a lawsuit. This bill would protect people who are not at fault from being dragged into suits for the wrong reasons.

CSHB 4 would protect retailers from liability for products manufactured by someone else. The bill would give immunity to a seller that had no part in making a product dangerous. Retailers often are small businesses that are in no better position to pay for the harm than is the plaintiff. The argument that this bill would cause retailers to ignore the safety of the products they sell is devoid of merit. A retailer known to sell shoddy products will lose its customer base.

Statute of repose. Establishing a 15-year statute of repose for product liability claims would allow manufacturers to determine how long they were susceptible to suits. Manufacturers could plan for expansion or improvement of their business without worrying about stale claims.

Government standards defense. CSHB 4 would relieve manufacturers of liability for claims arising from formulation, labeling, or design of products if they complied with mandatory governmental regulations associated with the sale or manufacture of a product. For this immunity to apply, the regulations would have to govern the product risk that allegedly caused harm. Thus, the defendant could use only a mandatory government standard that required

certain safety measures to be taken to prevent the problem that occurred if the defendant followed that standard.

Subsequent remedial measures. Limiting the use of evidence of subsequent remedial measures would encourage manufacturers to improve their products to make them better and safer.

Exemplary damages. By limiting the amount of exemplary damages that a claimant could receive, CSHB 4 would allow a claimant to send a message that the defendant did something wrong without putting the defendant out of business. Exemplary damages should be designed to prevent a defendant from repeating a harmful action, not to prevent a business from operating at all. Allowing the trial court to cap exemplary damages would ensure that the system has the proper checks and balances by allowing the judge to adjust the jury's verdict to conform with the law. Because juries often do not understand the complexities of corporate finance, they find it difficult to ascertain the proper amount of damages to assess against a corporate wrongdoer. The Legislature should assist judges by giving them a simple formula with which to determine damages.

The damage limit proposed in CSHB 4 would not apply to a case in which the defendant had been convicted of a felony. Current law removes the application of the cap if the defendant simply has been accused of conduct that is described as a felony. In some situations, plaintiff's attorneys are "pleading around the caps" by alleging conduct that would constitute a felony. The mere threat of such charges emerging at trial often makes the defendant settle the case, even if the plaintiff might not be able to prove the conduct. This bill would prevent juries from punishing defendants for crimes for which they have not been convicted.

Juror qualification. CSHB 4 would give judges explicit guidelines as to when they may or may not strike jurors for cause. Plaintiff's attorneys often prequalify jurors for large verdicts by striking jurors for cause even for a small amount of bias. The proposed limits on the use of strikes for cause would enable justice to be served better by allowing qualified jurors to serve.

Allowing jurors to be struck for their answers to a hypothetical question about the case would not be equivalent to refusing to allow a prosecutor to

ask if anyone on the panel could not send someone to jail. CSHB 4 would prevent a plaintiff from asking the panel a hypothetical question about one issue in the case, exemplary damages. It is not fair to allow one party to couch a specific question about the facts of its case in a hypothetical framework and then use the answer to strike a potential juror.

Venue; forum non conveniens. Texas courts are clogged with cases that should not belong there. In some cases, no parties are from Texas, the occurrences being litigated did not occur in Texas, and Texas has no meaningful relation to the cases or parties other than that the plaintiffs believe they can recover more money in a Texas court than elsewhere. CSHB 4 would make the Texas rule on forum non conveniens more consistent with the federal rule, giving Texas courts a more substantial basis to send cases back where they belong.

Allowing interlocutory appeals of all venue decisions would prevent cases from being heard in improper venues and being overturned later for that reason. This would speed up the administration of justice by allowing a party to receive appellate review on the issue immediately after it was decided, rather than going through the expense and delay of trial.

Multidistrict litigation. Currently, a large corporation can be sued by many plaintiffs in cases spread over hundreds of counties across the state. In such situations, the company cannot give each case the individual attention that it deserves. CSHB 4, modeled on the federal system, would allow consolidation of cases that share fact issues for the purposes of pretrial matters and would allow multi-plaintiff cases to be heard in a more efficient manner that would ensure justice for all parties. Allowing the same judge to hear cases that involve similar questions of fact would ensure that each case received the same ruling. This consolidation would reduce costs for the judicial system and for parties. The cases would have a consolidated discovery process, a consolidated effort on pretrial motions, and reduced attorney participation because the cases would be run by an attorney steering committee. In this system, each of the plaintiffs would be better able to get the amount that they deserve.

Proportionate responsibility and designation of responsible parties. CSHB 6 would allow all potentially responsible parties to be submitted to the

fact finder. The current system confuses jurors because they are told about all of the possibly responsible people but may assess liability only to those that are parties in the case. This encourages plaintiffs to seek to maximize their recovery by suing defendants with the "deepest pockets" rather than those that are most liable.

It makes no sense to allow jurors to hear about all of the responsible parties but not to let them decide the amount of responsibility that should be assessed to nonparties. Some innocent business owners are being held responsible for crimes committed by others. For example, an apartment owner was held liable for the murder of a resident. The jury was told about the murderer and about his conviction for murder, but he was not made a party to the case. The jury found the apartment owner liable for failure to protect the plaintiff from harm, even though the owner had nothing to do with the crime. Under CSHB 4, the jury could assess liability against the criminal and not hold the apartment owner responsible for a crime he did not commit.

Interest. Eliminating prejudgment interest on future damages would be fair because these damages are not incurred until after trial is over. The reasoning behind assessing prejudgment interest is that plaintiffs already have paid money for actual damages that could have been in their possession and control during the time they were waiting for defendants to pay. It does not make sense to charge a defendant interest on a debt that has yet to be incurred.

CSHB 4 would establish a judgment interest rate that more closely reflects market conditions. In recent months, interest rates have fallen sharply. Current law requires a minimum interest rate of 10 percent and a maximum of 20 percent. These rates are exorbitant in view of the interest that many investments are earning now. Reducing the rates would be fair to both parties.

Appeal bonds. Many defendants find it difficult to pursue appeals because they cannot afford the high costs of an appeal bond. In many cases, the cost of the bond makes the end of the suit at the time of judgment and not after a rightfully brought appeal. CSHB 4 would limit the bonding requirement to compensatory damages awarded and would cap the total amount of the bond. The proposed amount, the greater of 50 percent of the defendant's net worth or $25 million, has been found sufficient in other states and has not been

considered so high as to encourage defendants to default on their bonds or to deny plaintiffs the relief to which they are entitled.

There is no easy way to define "net worth," and it is important to give judges discretion to determine this on a case-by-case basis. If a plaintiff feels that a defendant is manipulating its assets to reduce the bond amount, the plaintiff can ask the judge to address this.

Evidence relating to seatbelts. CSHB 4 would ensure fairness at trial by allowing the use or nonuse of seatbelts to be admissible in evidence. Jurors must be able to hear appropriate evidence to assign fault appropriately. Excluding this evidence can result in assessing more responsibility and damages to defendants than they deserve. It is nonsensical to require people to wear seatbelts when in a moving vehicle and then to reward them at trial even if they have broken the law. CSHB 4 would give people an additional reason to wear their seatbelts, because if they were injured, they would bear some responsibility for failing to obey the law.

Claims against employees or volunteers of a local government unit. The lack of protection for workers in county hospitals makes these hospitals vulnerable to costly medical malpractice claims. CSHB 4 would make all public servants subject to a $100,000 limit on personal liability. This limitation would allow rightful claimants the relief they deserved while preventing hospitals from closing because of rising litigation costs.

Public school teachers. Teachers perform valuable services and deserve more protection from liability. CSHB 4 would eliminate current confusion over whether a teacher's act is discretionary or ministerial for purposes of determining liability and would enable teachers to do their jobs without worrying about being sued.

OPPONENTS SAY:

CSHB 4 would destroy the benefits that the legal system has developed for ordinary people over hundreds of years of common law. It would endanger the legal rights of millions of Texas citizens. Calling this a "reform" bill is misleading, as the system it would create would be more unfair than the current system. CSHB 4 effectively would slam the courthouse doors in the faces of plaintiffs with valid claims and would encourage defendants to continue wrongful business practices by removing the threat of suit.

So-called "jackpot" verdicts are a combination of compensation for injuries and a message to companies to stop hurting people. Companies sometimes refuse to listen to consumers' complaints unless they face severe consequences. If jurors are not allowed to send a message through damage awards, companies will have no incentive to keep deadly products off the market.

Class actions. Class actions provide a valuable avenue for relief, especially for small claims that are not sufficient to justify an individual expenditure of resources. By making it more difficult to maintain class actions, changing the appeals process, and requiring the exhaustion of administrative remedies before going to court, CSHB 4 would prevent thousands of people from being able to obtain the justice they deserve.

Interlocutory appeal. Providing an interlocutory appeal for class certification decisions would make defendants less likely to settle valid claims because they could delay the cases by seeking appeal at a stage where appeal is not necessary. Valid claims would take much longer to be resolved, and the people who need relief the most might die before they could receive it.

The current court system has checks and balances in place to prevent abuses. Trial judges are qualified to make class certification rulings and must follow set guidelines to certify a class. An existing body of case law clearly describes the elements of a valid class action. By certifying a class, the trial judge is stating that the claims alleged have merit. No other area of the law allows a party to appeal a trial court's determination that the claims alleged are not frivolous. An interlocutory appeal is intended to be reserved for extraordinary circumstances, not for class certification.

An expedited appeals process can be beneficial if applied fairly. However, interlocutory appeals on the class certification issue can become a tool for crafty litigants to abuse the process by delaying otherwise valid claims or having them dismissed because of minor procedural matters rather than on the facts.

Attorney's fees. Although problems may exist with attorney's fees in certain class settlements, CSHB 4 would not address the problems' source and solution. The problem arises when class attorneys have a conflict of interest

at the time of settlement. Often the interests of the class attorneys and defendant will align at the time of the settlement because the defendant wants to minimize its payout and the attorneys wants to maximize their fees. Often the defendants will agree to high attorney's fees in exchange for a settlement that reduces the overall payout. This agreement shortchanges class members and reduces the deterrent value of the suit.

The so-called lodestar method of fee determination proposed by CSHB 4 would do more to reduce the defendant's payout than to increase the class recovery. The solution to the current problem would be to mandate close oversight of settlements by judges and to implement standards and a process for determining attorney's fees that are fair to all parties.

Administrative remedies. In theory, state agencies could and should provide a fair and efficient avenue for pursuing redress of claims. However, many agencies are influenced unduly by the entities they regulate. Few agencies have the infrastructure and funding to adjudicate disputes in a timely manner, and the budget cuts now proposed are likely to make matters worse. For example, the Board of Medical Examiners traditionally has maintained a backlog of cases and cannot proceed on more than a few cases a year. Also, under this bill, it is possible that a party would have to go through every agency that has control over the issues in the case to exhaust the administrative remedies. Even then, the parties may not receive just compensation for their injuries because agencies rarely have the authority or inclination to award full damages and often cannot award attorney's fees.

Settlement offers. It is almost impossible to say what a case is worth 90 days after the case is filed. At that stage, litigants barely have had time to begin discovery and likely have not had a chance to depose any witnesses or parties. By requiring a plaintiff to accept a defendant's offer of settlement this early in the case, CSHB 4 would force plaintiffs to decide the value of their case before they have had a chance to gather enough facts. Defendants could undervalue their cases and make too low an offer, then have to incur the same litigation expenses they were trying to avoid.

CSHB 4 would cause a greater "litigation lottery" than now exists. It would force parties to guess the value of their cases early in the process at the risk of losing litigation costs. The process of determining the value of a person's

injuries would become a guessing game. The sharp penalties that would be assessed against the plaintiffs if they did not reach a certain mark would preclude many injured claimants from receiving the amount of recovery they deserved.

Election of credit for settlements. The easiest and fairest way to deal with settlement credits would be to allow only percentage credits. These enable plaintiffs to deal with defendants in settlements from a position of strength because the amount of the judgment would be reduced only by the amount of the settling defendant's assessed responsibility. With a dollar-for-dollar credit, plaintiffs would lose all of the recovery awarded at trial if the amount they settled for with a defendant was the same as or exceeded the amount of the judgment.

Products liability. Rather than protecting innocent sellers, CSHB 4 is aimed primarily at reducing justifiable forum selection. Plaintiffs typically sue all parties that they believe are liable for their injuries. Sanctions exist in current law for frivolous lawsuits. This bill only would preclude injured parties from recovering from tortfeasors and would not immunize sellers for their bad acts.

The vast majority of toys sold in this country are made abroad. The Consumer Product Safety Division neither has the time nor resources to ensure that these products meet federal safety standards that govern size of toy parts and the toxicity of paints and glues. They rely on the retailers to do this. This bill would remove the retailer's obligation to exercise judgment to ensure that the products they sell are safe.

Government standards defense. CSHB 4 would immunize manufacturers that make unsafe products. Protecting manufacturers that comply with governmental regulations would allow manufacturers to deny responsibility for injuries they cause. Governmental regulations are set as minimum standards, not according to what is or is not safe for the average consumer, and are not designed for setting liability limits. If companies are allowed to use this defense, it would completely remove any incentive they have to fix a problem that has injured people.

Subsequent remedial measures. Limiting the admissibility of subsequent remedial measures to impeachment purposes would prevent juries from

hearing all the evidence they need to determine liability and damages. It is important for jurors to know if a company has changed its product because the company knew that it was dangerous. Limiting this evidence would withhold material facts and would prevent juries from properly deciding cases. It would encourage companies to continue making products they know are unsafe without the deterrent of knowing that a jury might hear about it later.

Additionally, this protection would put an artificially short life span on products that frequently and reliably have lasted longer than the representations made by the manufacturer. There is nothing in this bill to prevent a manufacturer from purposely representing a shorter life than expected on a product and consumers would be harmed because they would be required to rely on these representations.

Exemplary damages. Exemplary damages are intended to punish wrongdoers for egregious harm so that they will not repeat the harmful acts. Limiting the amount of exemplary damages that a court could assess against a defendant would undermine a jury's ability to send the proper message to the wrongdoer. Jurors decide murder cases and other cases, and they can be trusted to determine how much to assess against a wrongdoer in exemplary damages. In the unlikely event that a jury grants a verdict that is too high, a judge can lower the damage award. Current law provides this protection, and there is no need for the changes proposed in CSHB 4.

A deterrent already exists to prevent plaintiffs from "pleading around the caps." Plaintiffs must both plead and prove acts that would constitute a felony before they can recover damages in excess of the caps. Regardless of what plaintiffs plead, they must have the proof to back up the pleadings to receive damages. This poses no threat to defendants because if plaintiffs fail to prove the actions, defendants are not liable for amounts in excess of the caps. CSHB 4 would reward criminals for "playing the system" by giving them protection from liability for which they are rightfully liable.

Juror qualification. By removing a party's ability to strike a juror for cause based on a statement of bias against damages, CSHB 4 would interfere with the jury process unnecessarily. In a system that is supposed to promote unbiased selection, it would be unfair to make a party use a preemptory strike

on a juror that should be struck for cause. Additionally, the law requires that jurors be struck for cause when they say that they are unwilling to follow the law, yet this bill would allow jurors that refuse to follow the law to be placed on a jury. This would be similar to requiring a prosecutor to use a preemptory strike against a juror who said that he did not want to send anyone to jail. Judges typically require a much higher standard of proof of bias to strike a juror for cause and generally do not base a causal strike on a juror's tendency to lean toward one party. It is important for both sides to be able to find out as much as possible about potential jurors before selecting them for the panel, to ensure trial by a jury of peers. Limiting one side's ability to do this would be unfair and against the interest of justice.

Venue; forum non conveniens. Pushing cases out of Texas that belong in the state's courts would deny claimants relief to which they are entitled. Plaintiffs already must plead and prove sufficient facts to show that venue is proper. The current venue rules give judges enough authority to remove cases that do not belong here. As the party who has been injured and needs compensation, the plaintiff is allowed to choose a forum that is both convenient and necessary to the parties. Denying plaintiffs this right would sway the balance in the favor of the defense and would trample the rights of injured plaintiffs.

Allowing an interlocutory appeal of venue decisions would cause unnecessary delay. Currently, a right to appeal a venue decision exists upon the completion of a case. To allow a party to appeal a decision in the middle of the process would invite gamesmanship and delaying tactics. For example, it could take four months for a party to receive a decision on the issue from the court of appeals and an additional four months if the Supreme Court decided to hear the case. During this eight-month delay, the parties would incur costs and tie up court time in a case that probably would have been concluded in that amount of time. This would be costly to both the parties and the judicial system and would reduce the system's efficiency.

Multidistrict litigation. Combining multi-plaintiff cases, as proposed by this bill, would not be in the interest of justice. Making the parties join together for purposes of pretrial procedure would ignore the uniqueness of each plaintiff's injuries. A single judge reviewing a block of hundreds of cases cannot give each case the individual attention it needs and deserves. Courts

are dealing with heavy dockets and are attempting to resolve pretrial matters more efficiently. Adding hundreds of cases to one judge's docket would tax the court and would be impractical in view of the overload that most courts already face. Combining cases also would require the parties to travel more, putting a greater burden on an already injured claimant.

CSHB 4 would allow defendants to "forum shop," which the bill's supporters say plaintiffs should not be allowed to do. Defendants could combine cases into the court of their choosing rather than into the court that was most proper.

CSHB 4 would deny plaintiffs the right to use their chosen attorneys for pretrial matters and would force them to use a panel of attorneys. No single plaintiff would be guaranteed that his attorney would be on the panel, and the panel might not include the most experienced or qualified attorneys. Also, the bill would provide no guidance as to how to choose the panel of attorneys. This could prove a Herculean task for a judge in a consolidated case, since there might be thousands of attorneys to choose from. Adding this task to a judge's already heavy docket would increase the frustration, inefficiency, and cost already burdening the parties and the system.

Proportionate responsibility and designation of responsible parties. Plaintiffs have the right to sue any and all parties that they believe are liable for their injuries, and they risk being forever barred from claims against necessary parties that they fail to sue. Requiring the designation of all potential defendants would be unfair to plaintiffs because it would override their right to sue whom they choose. Defendants could bring a string of possible defendants into the case in name only and encourage juries to assess damages to the imaginary defendants. Also, if a designated party is found to be jointly and severally liable for the plaintiff's injuries and the true defendants liable as well, but not jointly and severally, the true defendants could skip out on the amount of damages assessed against them because the designated parties would be liable for the whole amount. This would be unfair to the plaintiffs and would deny them their right to recourse for their injuries. CSHB 4 would increase juries' confusion because jurors would have to assess liability to a string of designated parties, none of whom they had seen or heard anything about, other than what the parties had said.

CSHB 4 would specify no means for a designated party to respond to an accusation. These parties would have no incentive to respond, because the statements made and verdict rendered at trial would have no bearing on further cases involving the designated parties. The jury would have to rely on a one-sided finger-pointing description of what occurred and would be denied the ability to hear the other side.

Interest. Prejudgment interest is assessed both to compensate a plaintiff for paying costs incurred before trial and as an incentive for a defendant to settle a valid suit before trial. By removing the claimant's ability to recover prejudgment interest, CSHB 4 would offer a defendant an incentive to wait as long as possible to go to trial and would remove the incentive for a timely settlement, because the defendant's damages would be the same no matter when he agreed to pay them.

Current law provides for fluctuation of interest rates by requiring that market rates apply. It also protects the parties from receiving too high or too low a rate by providing a floor and ceiling. A higher market rate encourages the defendant to settle a case in a more timely manner because it is more than the defendant's return on the money.

Appeal bonds. The purpose of an appeal bond is to ensure a plaintiff's recovery in the event that the defendant tries to skip out on the judgment. Capping the amount of the bond, as proposed in CSHB 4, would limit a party's ability to recover the full amount of damages if the defendant defaulted on the bond, because the cap often would be lower than the judgment amount.

Determining the cap would be difficult, expensive, and time-consuming for a court. It would have to assume the position of a corporate financial analyst and spend much time going through voluminous and complicated documents. Also, appeal could not be taken until the bond amount was assessed, creating further delay and costs to the parties.

Evidence relating to seatbelts. CSHB 4 would allow the use or nonuse of seatbelts to be admissible in evidence. This could allow defendants to reduce their liability on the basis of something wholly unrelated to the cause of an accident.

Claims against employees or volunteers of a local government unit. The bill would further strain already injured plaintiffs by limiting their ability to recover from certain health-care providers. Tortfeasors should be liable for all damages they cause. Reducing the liability of these providers would deprive claimants of their right to recover for their injuries.

Public school teachers. CSHB 4 would make school teachers immune from liability for acts that do not involve discretion and for acts involving the use or operation of a motor vehicle. For example, a teacher would not be liable if he or she were driving a bus full of children and had an accident that killed a child. Current law holds that a teacher's duty to report the sexual abuse of a student is not a discretionary act, and thus the teacher is not immune from liability under this section. CSHB 4 would immunize a teacher who failed to report such abuse. Expanding teachers' liability from immunity might make it easier for them to do their jobs, but it would do so at the expense of the health and safety of school children.

Assignment of judges. By allowing a party to move for the appointment of a judge on a health-care liability claim from a list promulgated by the Supreme Court, CSHB 4 would provide another avenue for forum shopping. Besides offering defendants the ability to delay the case, it would allow them to choose their judge.

OTHER OPPONENTS SAY:

HB 3 and HB 4 do not belong in the same bill. The fact that both bills relate to changes in tort liability statutes is not a sufficient reason to combine them. The public is better informed about medical malpractice than about tort law. The bills were combined so that tort-reform proposals could "piggyback" on medical malpractice. Both issues are important, and they carry distinct consequences for Texas. However, considering them together muddies the waters and makes it more difficult to debate these issues properly. Separating the bills would allow suitable review of all of the issues.

NOTES:

The committee substitute combines elements from two bills, HB 4 and HB 3, both by Nixon. CSHB 4 would remove the requirement that a court determine the reasonable attorney fees for a class action before determining a base fee; restore design defects immunity for toxic or environmental torts and for drugs or devices; and remove successor liability pertaining to civil suits of a foreign corporation. The substitute also would extend immunity to sellers of

pharmaceutical products when the buyer is given the FDA product insert; create an option to change judges to one from a list created by the Supreme Court for health care claims; and expand public school teachers' limitations from liability to all acts within the scope of their job, including the use of a motor vehicle.

The committee substitute includes the majority of HB 3 by Nixon in Article 10. The committee substitute would create a 10 percent buffer for the rejection of settlement offers. The committee substitute does not include changes to the statute of limitations that would remove any disability of minority and permit minors to file a claim, but includes a statute of repose. The committee substitute would award attorney fees in a lump sum even when the judgment was in periodic payments, while the bill as filed would have awarded some of the attorney fees under a periodic payment schedule. The committee substitute would identify physicians as vendors for the purpose of a vendor's endorsement. The bill as filed would have required the commissioner of insurance to conduct a study of the medical malpractice insurance market in Texas following enactment of the bill.

After two days of floor consideration on second reading, CSHB 4 was recommitted to the Civil Practices Committee on March 20 due to a point of order. As reported by the Civil Practices Committee on March 20, the committee substitute for the recommitted HB 4 is identical to the committee substitute initially reported from the committee.

A related measure, CSHJR 3 by Nixon, allowing the Legislature to limit damages other than economic damages, originally was set on the calendar for Thursday, March 20. Yesterday, HJR 3 was recommitted to the Civil Practices Committee, was reported with a revised substitute, and was set on the calendar for Wednesday, March 26.

On March 13, the U.S. House passed H.R. 5, concerning medical liability, which would limit non-economic damages to $250,000, punitive damages to the greater of twice economic damages or $250,000, and attorneys' fees. It would prohibit a jury from awarding punitive damages when no monetary or economic award was granted. The bill would preempt state law where there

are fewer liability protections for providers or health plans, but would not preempt state law in regard to caps as long as some type of cap exists.