SUBJECT: Allowing the Legislature to limit damages other than economic damages

COMMITTEE: Civil Practices — committee substitute recommended

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

1 nay — Y. Davis

WITNESSES: 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, Texas Citizens 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; George Roberts, Texas Hospital Association; Chris Spence, Texas Association of Homes and Services for the Aging; Joe Ewing, M.D., Primary Care Coalition; Robert Kottman, M.D., Bexar County Medical Society; Mary Dale Peterson; Vincente Juan, M.D.; and 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; and 14 individuals

On — Donald Patrick, Texas State Board of Medical Examiners; C.H. Mah, Brian Ryder, Texas Department of Insurance; Tony Korioth, Texas Municipal League Intergovernmental Risk Pool; and G.K. Sprinkle, Texas Ambulance Association

BACKGROUND: VTCS, Art. 4590i, the Medical Liability and Insurance Improvement Act, originally enacted by the 65th Legislature in 1977, caps noneconomic damages in medical liability cases. Noneconomic damages generally cover pain-and-suffering and similar losses as opposed to economic damages such as compensation for lost wages or medical bills. The cap is indexed to the Consumer Price Index and has grown from $500,000 at the time of enactment to about $1.3 million today.

Although the cap on noneconomic damages in medical malpractice claims was intended to apply to all malpractice cases, the Texas Supreme Court has ruled the cap 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 as violating Texas Constitution, Art. 1, sec. 13, the Open Courts Doctrine, which guarantees meaningful access to courts.

DIGEST:

CSHJR 3 would add sec. 66 to Art. 3 of the Texas Constitution, authorizing the Legislature to set limits on damages, except economic damages. It would apply to limitations on damages in medical liability cases enacted during the current regular session or subsequent sessions. It also would apply to limitations on damages in all other types of cases after January 1, 2005, subject to approval by a three-fifths vote of the members present in each house.

It would define "economic damages" as compensatory damages for any pecuniary loss or damage. Economic damages would not include any loss or damage, however characterized, for past, present, and future physical pain and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment.

The Legislature's authorization to limit damages other than economic damages would apply to all damages and losses, however characterized, and would apply regardless of whether the claim or cause of action arose or was derived from common law, a statute, or other law, including tort, contract, or any other liability theory or combination or theories.

The authorization to limit damages would apply to a law enacted by the 78th Legislature during its regular session or any subsequent sessions to limit the liability of a provider of medical or health care regarding treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that caused or contributed to, whether actual or claimed, disease, injury, or death of a person. The claim or cause of action would include a medical or health care liability claim as defined by the Legislature.

For all other types of claims or causes of action, the Legislature's authorization to limit damages other than economic damages would apply after January 1, 2005. Any such exercise of legislative authority would require a three-fifths vote of the members present and would have to cite this constitutional authorization.

The proposed amendment would be submitted to the voters at an election on September 13, 2003. The ballot proposal would read: "The constitutional amendment concerning civil lawsuits against doctors and health care providers, and other actions, authorizing the legislature to determine limitations on non-economic damages."

If the voters rejected the proposed amendment, a court could not consider any aspect of the vote for any purpose, in any manner, or to any extent.

SUPPORTERS SAY:

Texans should decide whether limiting noneconomic damages is an appropriate action for the Legislature to take. The state currently is facing a crisis in medical malpractice insurance caused by increases in damages and size of awards. 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, jeopardizing Texans' access to healthcare. A key solution to this crisis would be enactment of a $250,000 cap on noneconomic damages, as proposed in CSHB 4 by Nixon. The state faced a similar medical malpractice crisis when it enacted the initial cap on damages, but this measure was thwarted by the Supreme Court's decision that caps were unconstitutional in most cases. The voters of Texas, not the courts, should decide if their elected lawmakers can enact reasonable and necessary solutions to persistent problems with the liability system.

Texas voters should be able to decide this issue quickly so that limiting noneconomic damages, one of the keystones to solving the medical malpractice crisis, can take effect without delay. The drop in the stock market is not to blame for higher medical malpractice premiums because insurers have most of their holdings in bonds. Nor did excessive competition earlier drive down premiums, as evidenced by the dwindling number of insurers in Texas. Only comprehensive medical liability reform with reasonable caps on noneconomic damages will end this crisis, which is forcing too many doctors to drop their practices. If approved by Texas voters, this constitutional

amendment would ensure that the Legislature's attempts to resolve the medical malpractice crisis would not be overturned by future courts. Even if a damage cap were found constitutional by the current Supreme Court, it could be overturned by a future court.

In California, medical malpractice rates fell the most after the caps in the state's Medical Injury Compensation Reform Act (MICRA) were declared constitutionally sound. Proposition 103, which enacted insurance reform, was limited in scope. It was MICRA, the comprehensive reform package, that led to long-term lower rates in California. This proposed constitutional amendment would ensure that the Legislature could enact a similar remedy.

The election for voters to decide on CSHJR 3 should be held on September 13, 2003, because it would be the first uniform election date after the Legislature adjourns. Other proposed constitutional amendments have been submitted to the voters on even earlier dates when the need for expedited action was clear. Texas needs relief quickly, and the cost of the election in counties that otherwise would not hold one would be negligible compared to the premium rate reductions that the liability caps allowed by the amendment would bring.

Allowing future limits on noneconomic damages for actions other than those involving medical or health care liability claims would mean future legislatures also could enact solutions to other problems with the liability system. Limits on damages should be enacted in response to special situations — those that threaten Texans health, well-being, or other security— such as the medical malpractice crisis facing the state today. Requiring a three-fifths vote to enact such limits on damages would ensure that a clear consensus existed that special circumstances warranted such limits.

The intent of HJR 3 is clear: the Legislature would have the authority to limit noneconomic damages. The proposed amendment only addresses compensatory damages, not punitive damages, and it would define the two forms of compensatory damages. Economic damages would be any pecuniary damage or loss, such as lost wages or medical bills, while noneconomic damages would be all other compensatory damages. This definition is in line with legal precedent. In *Horizon v. Auld*, 43 S.Ct.J. 1151, a recent case concerning medical malpractice and limits on damages, the Texas Supreme

Court held that the cap on noneconomic damages in sec. 4590i of the Insurance Code does not include punitive damages.

No court should be allowed to misinterpret the outcome of the vote on this constitutional amendment should it fail. It could fail for a number of reasons, such as national or international events, bad weather, other issues or candidates on the ballot, or confusing ballot language. If damage caps face a legal challenge before the courts, the outcome of this vote should not be a factor in deciding their constitutionality.

OPPONENTS SAY:

Texans should not be asked to give the Legislature free rein to restrict their constitutionally protected access to relief in court when they suffer losses and seek to establish liability for damages. No one can predict what other types of caps the Legislature would enact in the future if given the broad, open-ended authority in this amendment. Some caps might be acceptable, while others might not; the courts are the appropriate forum to decide these issues.

The damage caps authorized by this constitutional amendment would neither lower medical malpractice premiums nor improve patient access to care. The increase in premiums is not due to higher jury awards, which have not increased as quickly as premiums. Increases in medical malpractice insurance rates can be attributed to other factors, including premiums driven artificially low in the 1990s by competition, recent stock market performances, very low interest rates, and an increasingly litigious society that drives up claims and defense costs. None of these factors would improve through a cap on damages, nor would a cap affect whether doctors stay in practice, yet those harmed would lose an important legal right to redress.

Texans should feel no pressure to vote on this now. In California, it was not the constitutional approval of caps but Proposition 103 that lowered rates, through insurance reform and a rate rebate. The Legislature should focus on other tools it has to lower medical malpractice insurance rates, such as improvements in the regulation of physicians and insurance reform, rather than grant the Legislature broad authority to limit damage awards in all cases, no matter how justifiable and legitimate those awards may be.

Even if damage caps were justified in medical malpractice cases, there is no similar justification for a broad authorization for limits on damage awards in

all other types of cases. This is another attempt to piggy-back onto medical malpractice limitations broader, less justifiable liability restrictions in other types of cases.

Requiring a vote by three-fifths of each house to enact future caps for non-medical liability cases would not protect Texas' interests any better than the current system. Even though the Legislature already has the authority to enact caps with a majority vote, the courts oversee the use of that authority, and the Constitution protects the right of access to the courts. Our system of checks and balances works well, but this amendment would be an end-run around the judiciary.

The language in this constitutional amendment could be interpreted to authorize the Legislature to cap all damages that are not economic, including punitive damages. While sec. 41.007 of the Texas Civil Practice and Remedies Code already caps punitive damages to four times the total damages awarded, a more restrictive cap could be subject to a constitutional challenge. Granting future legislatures blanket authority to cap all damages except strictly economic damages would remove those decisions from judicial oversight. The Supreme Court already has held that lowering insurers' exposure to risk is not a sufficient trade-off for limiting access to the courts.

This matter is best left to the courts — current and future. The composition of courts may change, reflecting the changing values of Texans. Decisions about limiting rights should be open for review by future courts, and possibly overturned if those decisions no longer reflect the state's values.

The courts should not be prohibited arbitrarily from considering the way Texans voted on this amendment in determining the constitutionality of a cap on damages. The Open Courts Doctrine guarantees meaningful access to courts, but this access already may be limited in cases where there is a meaningful trade-off. The decision by Texas voters on whether or not the Legislature should be able to set caps on damages would be an indication of the value they place on the appropriateness of a cap versus enhanced access to healthcare. The courts can weigh the fairness of such a trade, and voter input on this issue is one factor to be considered.

OTHER OPPONENTS SAY:

The date of election should not be moved to September because it would require some counties to pay for elections they might not otherwise have held. Constitutional amendments traditionally are considered by the voters during the general election in November. A difference of two months is not sufficient justification to force this cost upon those counties.

NOTES:

CSHJR 3 originally was set on the Constitutional Amendments Calendar for March 20, but was not considered. On March 24, the House adopted the author's motion to recommit the joint resolution to the Civil Practices Committee, which reported it favorably, with a revised substitute. Compared the original substitute, the revised substitute would require a three-fifths vote of the members present in each house for the Legislature to limit other than economic damages for all cases and claims except those involving medical or health care liability.

Unlike the original substitute, the revised substitute would not specifically allow the Legislature to apply damage limits to lawsuits still pending final judgment when the statute became effective. The revised substitute also deleted specific authorization for the Legislature to apply a statutory limitation of liability to single claims, claimants, or combinations thereof; any damage or loss, other than economic; and any element or combination of elements of the damages. Also deleted was specific authority for the Legislature by statute to increase or decrease the limit over time or condition it on a specified event. The revised substitute also changed the ballot language to refer to civil lawsuits against doctors and health care providers and other actions.

The original committee substitute changed the date of the election in the filed version from November 2, 2003, to September 13, 2003.

CSHB 4 by Nixon would establish a $250,000 cap on noneconomic damages in medical malpractice cases. It also would establish an alternative cap that would require health care providers to carry certain levels of malpractice insurance in exchange for cap protection.