AN IN-DEPTH LOOK AT TEXAS' NEW TORT REFORM LAW

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Article 1. Class Actions

Adds Chapter 26 to Texas Civil Practice and Remedies Code providing:

- Attorney’s fees awarded to class counsel must employ the lodestar method of calculation (reasonable hours worked X reasonable hourly rates), and cannot increase or decrease fees by more than four times the lodestar.

- If a class is awarded coupon/noncash benefits, attorney’s fees must be awarded in noncash in the same proportion as the recovery for the class; class counsel and defendant cannot negotiate a deal that pays cash to a lawyer and noncash to the class.

- The trial court must hear all pleas to the jurisdiction (asserting that a state agency has exclusive/primary jurisdiction) prior to ruling on class certification.

- There may be an interlocutory appeal to the Texas Supreme Court upon class certification, including pleas to the jurisdiction, staying all proceedings in the case. This applies to all cases in which a petition for review or notice of appeal is filed on or after the effective date.

- The Texas Supreme Court must adopt rules complying with this provision for resolving class actions by December 31, 2003.

Article 2. Settlement

Adds Chapter 42 to Texas Civil Practice and Remedies Code providing:

- The Supreme Court must adopt rules governing offers of settlement effective by January 1, 2004. Such rules will set deadlines for when a defendant must make a declaration to trigger this settlement offer provision and by when such a settlement offer must be made. The rules must also set up the procedures for making such a settlement offer and must address cases with multiple parties.

- Provides incentives for parties to make and accept reasonable settlement offers early into the lawsuit by shifting the costs of litigation when a party refuses a pre-trial settlement offer that turns out to be as good as or better than what the party ultimately wins.

- Litigation costs, incurred after the date of rejection, will be awarded to the offering party as follows:
• As on offset for the defendant: If the plaintiff’s recovery is less than 80% of the rejected offer. Even if costs are shifted against the plaintiff, the plaintiff still recovers at least 50% of his or her economic damages plus the amount of any statutory liens against the plaintiff’s recovery.

• For the plaintiff: If the plaintiff’s recovery is more than 120% of the rejected demand.

• Litigation costs means money actually spent, and obligations actually incurred, including court costs, reasonable fees for not more than two testifying experts and reasonable attorneys' fees.

• This chapter must be invoked by the defendant, but upon the defendant’s declaration that settlement offers can be used in the case, either the defendant or the plaintiff can make the settlement offer.

• If there are multiple defendants, each must opt for the provision otherwise it only applies to the defendant who made the offer.

• Exceptions: class actions, shareholder’s derivative actions, actions by or against a governmental unit, actions under the Family Code, Worker’s Comp actions, actions in Justice of the Peace courts, and any other action the Supreme Court chooses to exempt.

• This article applies to actions filed on or after January 1, 2004.

**Article 3. Venue; Forum Non Conveniens**

Government Code Section 74.024(c), Civil Practice and Remedies Code, Sections 15.003 and 71.051(b), and Sections 5A-B and 607 of the Probate Code are amended:

• **Multi-district litigation:** Establishes a judicial panel on multi-district litigation, appointed by the Chief Justice of the Texas Supreme Court, which may transfer factually-related actions pending in multiple counties to a single court for consolidated or coordinated pretrial proceedings, including summary judgment proceedings. Such panel must operate according to Supreme Court rules, allowing transfer only upon the panel’s written finding that transfer is for convenience of the parties and witnesses and will promote efficient resolution.

• This procedure provides for more consistent outcomes and reduces the overall cost of large-scale litigation by creating a procedure for consolidating cases with common fact questions.
• **Venue:** Provides that in multi-plaintiff actions, every plaintiff must independently establish venue, and allows immediate interlocutory appeal of a trial court’s venue determination.

  - Venue for personal injury, wrongful death or property damage actions brought by or against a personal representative of an estate under the probate code are to be determined by the general venue provisions.

  - Health care liability claims against a hospital district must be brought in the county in which the district is established.

• **Forum Non Conveniens:** Creates a single standard based on federal law (whether dismissal is in the interest of justice and for convenience of the parties) for determining whether a case should be dismissed so that it may be pursued in a more appropriate state or country.

**Article 4. Proportionate Responsibility; Designation of Responsible Third Parties (“RTP”)**

Chapter 33 of the Texas Civil Practice and Remedies Code is amended as follows:

• Applicable to tort actions and DTPA claims in which the defendant, settling third person or third party is found responsible for a percentage of harm, ensuring that named defendants will be responsible only for the portion of fault attributable to them by allowing the jury or fact-finder to consider the conduct of all potentially responsible persons when allocating fault to the plaintiff’s injury.

• Does not affect immunity of worker’s compensation employers if submitted as responsible third parties.

• Creates a motion to “designate a responsible third party” (which can include a liable employer).

  - The motion must be filed no later than 60 days before trial, but the Court can grant leave to designate unless the objecting party establishes that the defendant failed to plead sufficient facts to satisfy the pleading requirements.

  - A RTP cannot be submitted to the jury without sufficient supporting evidence.

  - Any RTP’s must be disclosed pursuant to the discovery rules.
• Opposing party may make a motion to strike a RTP after adequate time for discovery on no evidence grounds. Court must grant the motion unless the defendant raises a fact issue regarding the RTP’s responsibility.

• A defendant may designate an unknown person as a RTP as long as the unknown RTP is alleged to have committed a criminal act.

• Credit for pre-trial settlement by another defendant in cases other than healthcare liability claims is based on the percentage of responsibility allocated to the settling defendant rather than the settlement amount. Credit for pre-trial settlement by another defendant with respect to healthcare liability claims is based on the total dollar amount of the settlements unless all non-settling defendants agree to a credit based on the percentage of responsibility allocated to the settling defendant.

• Joint and several liability provisions apply if the defendant is greater than 50% liable or if the claimant can show specific intent for criminal conduct.

• This new law applies to an action filed on or after July 1, 2003.

**Article 5. Products Liability**

Section 16.012 and Chapter 82 of the Civil Practice and Remedies Code are amended as follows:

• Establishes a 15-year statute of repose for product liability claims, except in “latent disease” cases when the disease does not manifest for many years after use of the product.

• Creates an “innocent retailer” defense in which a retailer cannot be held liable for a product defect unless the retailer has some actual responsibility for the defect. There are several exceptions to this defense, including an exception preventing use of the defense if the manufacturer is outside the court’s jurisdiction or insolvent. This may prohibit suits against the seller for breach of warranty.

• Chapter 82: Establishes a rebuttable presumption that defendants are immune from liability in failure to warn cases involving pharmaceuticals if the defendant includes warnings approved by FDA.

• The statutes also set out the factors to rebut the presumption for each defendant. Several exceptions exist, including one making the defense inapplicable if the manufacturer misrepresented or withheld required information from the government.
Provides additional protection from liability, through a rebuttable presumption, for manufacturers who comply with federal standards or regulatory requirements applicable to a product. Such protection is only available if the standard was mandatory, applicable to the harmful product, and adequate to protect the public from risk.

The Texas Rule of Evidence regarding admissibility of “subsequent remedial measures” in a products liability action based on strict liability shall be revised by the Texas Supreme Court to conform to the federal rules so that there will be no such exception for products liability actions.

This new law applies to an action filed on or after July 1, 2003. An action filed on or after July 1, 2003 is governed by the prior law.

**Article 6. Interest**

The Finance Code, Sections 304.003(c) and Section 304.1045 are amended and added so that:

- The post-judgment interest rate is based on the prime rate to more closely reflect market conditions; putting a floor of 5% and a ceiling of 15% on the interest rate.

- Prejudgment interest may not be assessed or recovered on an award of future damages.

**Article 7. Appeal Bonds**

Section 7.01: Sections 35.006 and 52.006 of the Civil Practices and Remedies Code are amended:

- Modifying the rules relating to appeal bonds so that the cost of the bond alone will not make the appeal of a trial court judgment prohibitive. The amount of the security must equal the sum of compensatory damages + interest for the estimated duration of the appeal + costs, but may not exceed 50% of the judgment debtor’s net worth or $25 million, whichever is less.

- Gives the court discretion to prevent dissipation of judgment debtor’s assets during the stay if it does not interfere with the debtor’s normal course of business.

**Article 8. Evidence Relating to Seat Belts**

Sections 545.412(d) and 545.413(g) of the Transportation Code are repealed.
* Allows admission into evidence of the use or non-use of a seat belt or a child safety seat.

* This new law applies to an action filed on or after July 1, 2003.

**Article 9. Reserved**

**Article 10. Health Care**

Chapter 74 of the Civil Practice and Remedies Code is amended as follows:

* **Notice requirements:**
  * Claimant must give 60 days notice to the physician/health care provider prior to instituting a lawsuit.
  * A statement that this provision has been followed is required of any subsequent filings.
  * Notice will toll the applicable statute of limitations for 75 days following the notice.
  * All parties are entitled to obtain complete medical records from any party within 45 days from the date of receipt of a written request.
    * A detailed form is provided that is to be used to obtain protected health information.

* **Informed consent:**
  * The only theory of recovery authorized is negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.
  * Texas Medical Disclosure Panel:
    * Created to determine which risks and hazards must be disclosed to patients.
  * Consent will be effective if given in writing, signed by the patient or the patient’s authorized representative, signed by a competent witness, and includes statement of risks and hazards involved in the procedure.
• A guardian’s signature is no longer required, only an authorized representative; this is a lower standard.

• Evidence of disclosure, or failure to disclose as required shall be admissible.

• Failure to disclose shall create a rebuttable presumption of a negligent failure to conform to this section, but failure to disclose may be found reasonable if an emergency or other reason made it medically unfeasible to make the disclosure.

• Emergency Care:
  • A person who gives emergency medical care in good faith, including use of an automated external defibrillator, is not liable in civil damages unless the act is willfully or wantonly negligent.
  • This good faith provision does not apply to someone who gives emergency medical care for remuneration.

• Unlicensed Medical Personnel:
  • Persons not licensed or certified who administer emergency medical care are not civilly liable unless willfully or wantonly negligent.

• Standard of Proof Involving Emergency Medical Care:
  • Claimant must show that the physician/health care provider deviated from accepted standards of medical care by a preponderance of the evidence.

• A jury may consider:
  • Whether person providing care did or did not have patient’s complete medical history;
  • Presence or lack of a preexisting physician-patient relationship;
  • Circumstances of the emergency; and
  • Circumstances surrounding delivery of emergency care.
Statute of Limitations:

- Lawsuit must be filed within 2 years of the tort or breach that is the subject of the claim, provided that minors under age 12 shall have until their 14th birthday.
- Statute of Repose: a claimant must bring claim not later than 10 years after the date of the act or omission.

Liability Limits:

- Civil liability for non-economic damages shall be limited to an award of $250,000 per claimant, recoverable from a physician or health care provider, other than a health care institution, regardless of the number of defendants or claims brought.
- The limit of non-economic damages for each single health care institution is $250,000, and the limit for all healthcare institutions shall be limited to $500,000.
- In a wrongful death or survival action against a physician or a health care provider, the limit of civil liability for all damages, including exemplary damages, shall not exceed $500,000 for each claimant.
- The liability limits are to be increased or decreased according to the Consumer Price Index.

Procedural Provisions:

- Claimant shall serve an expert report on each party within 120 days after the claim was filed.
- If not met, the court may dismiss the claim with prejudice, and award attorney’s fees and court costs to the affected physician or health care provider.

Discovery Procedures:

- Every plaintiff shall serve on the defendant complete answers to the standard interrogatories and produce documents as required by the Health Care Liability Discovery Panel within 45 days after filing.
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- The time limits above may be extended by the courts, or as agreed by the parties in writing, but cannot extend beyond an additional 30 days.

- **Expert Witnesses:**
  - A person may qualify as an expert on whether the physician departed from the accepted standards of medical care only if the person is a physician who:
    - Is practicing at the time of the testimony, or was practicing at the time the claim arose;
    - Has knowledge of accepted standards of medical care involved in the claim; and
    - Is qualified on the basis of training/experience to offer an expert opinion regarding those accepted standards of medical care.

- **Arbitration Agreements:**
  - No physician shall require a patient to accept an arbitration agreement clause unless written in 10-point boldface type and includes the exact language provided in the bill.

- **Payment for Future Losses:**
  - Applies only to actions against physician or health care provider in which the present value of the award of future damages as determined by the court equals or exceeds $100,000.
    - Periodic payments must be allowed on request.
    - An uninsured defendant must provide evidence of financial responsibility adequate to assure full payment of damages awarded.
    - Money damages shall continue to be paid to the estate of a deceased recipient of periodic payments.

- **Awards of Attorney’s Fees:**
For purposes of computing fees based on a recovery to be paid in periodic installments, the court must place a total value on the payments based on the claimant’s projected life expectancy, and reduce the amount to present value.

**Article 11. Claims Against Employees or Volunteers of a Governmental Unit**

Sections 101.106, 108.002(a) and (b) of the Civil Practice and Remedies Code are amended:

- A public servant is not personally liable for damages in excess of $100,000 arising from personal injury, death, or deprivation if the damages are the result of an act or omission in the course and scope of the public servant’s office, employment, or contractual service.

- Filing suit under section 101.106 against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter, and vice versa.

- Any judgment or settlement against an individual employee bars the claimant from any suit against or recovery from the governmental unit regarding the same subject matter.

- If suit against an individual employee based on conduct within the scope of employment could have been brought against the governmental unit, the suit is considered to be against the employee in the employee’s capacity only; on the employee’s motion, the suit shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the motion is filed.

Chapter 26 of the Health and Safety Code is amended by adding Sub-chapter C as follows:

- A Municipal Hospital Management Contractor (“MHMC”) is a nonprofit corporation, partnership, or sole proprietorship that manages or operates a hospital under a contract with a municipality.

- A MHMC is considered a governmental unit for purposes of Chapters 101, 102, and 108 of the Civil Practice and Remedies Code.

**Article 12. Reserved**
Article 13. Damages

Section 41.001 et seq of the Civil Practice and Remedies Code is amended:

- All mention of the word “exemplary” is removed from damages title, creating a new exclusive chapter for all damages in all civil cases.

- Adopts the former gross negligence standard for awarding punitive damages and requires jury awards of punitive damages to be based on a unanimous jury verdict.

- Amends exceptions from exemplary damages cap to exclude penal code injury to a child or elderly or disabled individual if the injury occurred while providing health care.

- Limits recovery of health care expenses to expenses actually paid, or incurred by, or on behalf of, the plaintiff.

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

- This article takes effect September 1, 2003.

Article 14. Reserved

Article 15. School Employees

Chapter 22 of the Education Code is amended as follows:

- Provides new definitions for professional employees of a school district

- Gives process for notice of claim, exhaustion of remedies, alternate dispute resolution, and recovery of attorney’s fees.

- Provides additional protection for teachers against frivolous litigation related to actions taken by the teacher at school.

- Applies only to conduct occurring on or after 9/1/03.

Article 16. Admissibility of Evidence (Nursing Homes)

Human Resources Code is amended by adding Section 32.060:
Limits the admissibility of evidence in a civil action relating to nursing institutions regarding violations of the medical assistance program under this chapter, or assessment of a monetary penalty against or by an institution.

Sunsets the requirement of mandatory liability insurance coverage for nursing homes.

**Article 17. Limitations in Civil Actions of Liabilities Relating to Certain Mergers or Consolidations**

Civil Practice and Remedies Code is amended by adding Chapter 149 as follows:

- Includes language on liability limits for asbestos claims by a purchasing company, limiting liability to the amount of the assets of the acquired company if the acquisition that generated the asbestos related liability took place before May 13, 1968.

- Applies to actions commencing on or after the effective date of the act or actions pending on the effective date.

- This article is effective immediately.

**Article 18. Charitable Organization Immunity and Liability**

Civil Practice and Remedies Code Section 84.004(c) is amended:

- Expands immunity for volunteer health care providers, deleting the good faith and course and scope requirements.

- Expands immunity to all volunteers, not just volunteers serving as an officer, director or trustee.

**Article 19. Liability of Volunteer Fire Departments and Volunteer Fire Fighters**

Civil Practice and Remedies Code Chapter 78 is amended by adding Sub-chapter C:

- Limits the liability of volunteer fire departments and fire fighters to that of counties and county employees covered by the tort claims act.

**Article 20. Design Professionals**

Civil Practice and Remedies Code is amended by adding Chapter 150 as follows:
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- In any action for damages alleging professional negligence by a design professional, the plaintiff must file with the complaint an affidavit of an expert (another design professional) which sets forth at least one negligent act, error, or omission, otherwise the action is dismissed with prejudice.

**Article 21. Limitations of Liability**

Civil Practice and Remedies Code Section 75.002 is amended by adding Sub-section (h):

- An owner, lessee, or occupant of real property is liable for trespass resulting from migration or transport of any air contaminant, other than odor, only upon a showing of actual and substantial damages by a plaintiff in a civil action.

**Article 22. Community Benefits and Charity Care**

Health and Safety Code Chapter 311 is amended by adding Section 311.0456 as follows:

- Nonprofit hospitals must provide charity care equal to at least 8 percent of the net patient revenue of the hospital during the preceding fiscal year; and at least 40 percent of the charity care provided in county in which the hospital is located to qualify for governmental immunity limits on non-economic damages.

- A hospital must submit a report based on its most recent audited fiscal year not later than April 30 of each year.

**Article 23. Accelerated Appeal; Effective Date; Severability**

Accelerated Appeal:

- A declaratory judgment action may be filed in Travis County to determine the constitutionality of any provision of Article 10 (Health Care Section).

- Any trial court order temporarily or permanently enjoining any part of Article 10 on any ground is appealed directly to the Texas Supreme Court on an accelerated basis.

Effective Date:

- All articles, other than Article 17, take effect September 1, 2003.

- Article 17 takes effect immediately.

- Articles 4, 5, and 8 apply to an action filed on or after July 1, 2003. An action filed before July 1, 2003 is governed by the prior laws in effect.
• Article 2 on Settlement Offers applies to actions filed on or after January 1, 2004.

Severability:

• Provisions of the bill are severable; a finding of invalidity as to one section does not affect any other section.
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