

ADVOCATE

TEXAS CIVIL JUSTICE LEAGUE

JULY 2003

Texans for Twelve

Proposition 12 Lets Lawmakers Cap Damages

On September 13, Texas voters will consider twenty-two amendments to the state's constitution. Proposition 12 (HJR3) authorizes the Texas Legislature to limit non-economic damages in medical liability cases. It also gives the Legislature the authority to enact limits on other types of damages in lawsuits generally, although House Bill 4, which was recently signed into law by Governor Rick Perry, contains no such limitations.

For more information on proposed constitutional amendments, visit the Texas Secretary of State at www.sos.state.tx.us

THIS ISSUE:

- 2 Tort Reform Legislation Good for Texas
- 3 Texas Omnibus Civil Justice Reform Bill House Bill 4 Highlights
- 5 Asbestos Coalition Vows to Fight

Voter approval of Proposition 12 is vital to the success of medical liability reform in reducing the frequency and severity of litigation against physicians, hospitals, and other health care providers. Without Proposition 12, plaintiff's lawyers are likely to challenge the constitutionality of the caps on damages in the courts. While the Texas Supreme Court is generally thought to be deferential to the Legislature in these matters, such a lawsuit could delay the effect of the caps for years, thus deepening the current medical liability crisis and driving more physicians out of practice. If voters approve Proposition 12 on September 13, the caps will take effect immediately, restore predictability and stability to the liability system, and begin paying dividends in terms of improved access to health care for all Texans.

Voters Consider Landmark Reform on September 13, 2003

Moreover, Proposition 12 could be vital in the future as the Legislature grapples with the economic threat of mass litigation against large and small businesses, as we are currently witnessing with respect to asbestos exposure. Many basic Texas industries are being driven to the brink of bankruptcy by mass asbestos litigation, in which tens of thousands of claimants, most of whom are not impaired, seek compensation for harm they may never actually incur. If the crisis is allowed to linger much longer, stronger measures might be required to stop the egregious abuses in the current system and prevent the spread of this type of litigation to other areas.

Last day to register to vote August 14

First day of early voting August 27

1 West 15th Street
Suite 975
Austin, TX 78701
Phone (512) 320-0474
Fax (512) 474-4334
www.tcjl.com

Tort Reform Legislation Good for Texas

by Ralph Wayne
President, Texas Civil Justice League

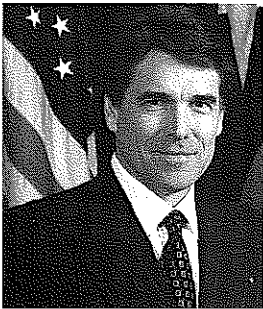
Last November, Texas voters sent a message to the Legislature that they wanted significant and lasting civil justice reforms. This spring the Legislature responded by enacting the most substantive and far-reaching tort reform legislation since then-Governor George W. Bush's first administration in 1995.

House Bill (HB) 4, the Texas Omnibus Civil Justice Reform Act of 2003, accomplishes many of the objectives for which the Texas Civil Justice League was created in 1986. Under the dedicated leadership of Governor Rick Perry, House Speaker Tom Craddick, and Lieutenant Governor David Dewhurst, the Texas House and Senate agreed on wide-ranging reform legislation that addresses lawsuit abuse in medical and health care

liability, products liability, and class actions. The bill also closes a number of loopholes in the current laws that have allowed claimants in personal injury lawsuits to recover multiple damages for the same loss.

At the same time, the Legislature adopted House Joint Resolution (HJR) 3, a constitutional amendment that authorizes the Legislature to establish limitations on damages in medical liability and other tort cases. The voters of Texas will have the opportunity to vote on Proposition 12 (HJR 3) in a special election on September 13 of this year. This constitutional amendment is critically important in preserving access to health care for all Texans, and we urge all citizens to go to the polls in September and make their voices heard in support of the Legislature's reform package.

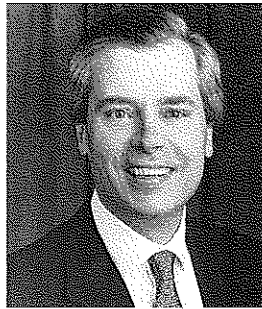
State Representative Joe Nixon (R-Houston), Senator Bill Ratliff (R-Mount Pleasant), and Senator Jane Nelson (R-Lewisville) were the primary authors of HB 4 and HJR 3. With the help of their colleagues, both Republicans and Democrats, these lawmakers fought a session-long battle against efforts by the wealthy and influential personal injury plaintiff's trial lawyers to weaken the bill. All Texans who are interested in a fair and balanced civil justice system, as well as in preserving and enhancing access to health care in this state, owe them a debt of gratitude.



Governor Rick Perry



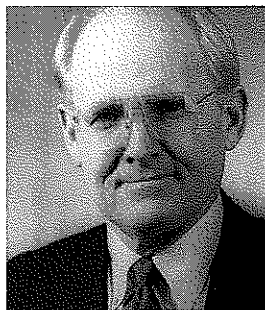
House Speaker Tom Craddick (R-Midland)



Lieutenant Governor David Dewhurst



Representative Joe Nixon (R-Houston)



Senator Bill Ratliff (R-Mt. Pleasant)



Senator Jane Nelson (R-Lewisville)

Some of the major components of HB 4 include:

- class action reforms that give the Texas Supreme Court clear jurisdiction to establish uniform standards for class action, limit excessive attorney fee awards, and assure that courts allow state agencies to grant relief when appropriate in lieu of expensive and inefficient class action litigation
- further reforms of venue rules to reduce forum shopping and strengthen law allowing trial judges to dismiss lawsuits from other states with little connection to Texas;

continued on page 5

Texas Omnibus Civil Justice Reform Bill

House Bill 4 Highlights

CLASS ACTIONS

- Interlocutory appeal to Supreme Court of certification decisions without necessity of conflicts among the appellate courts
- Requires trial court to rule on whether claim should be before an agency rather than the court prior to ruling on class certification
- Limits attorney fee awards
- Stays all proceedings in the trial court pending appeal of order granting or denying class certification

OFFERS OF SETTLEMENT

- Provisions may be initiated only by a defendant, but once a defendant does so, plaintiff may invoke them as well
- If defendant makes an offer that is rejected, and plaintiff does not obtain judgment for at least 80 percent of the amount, attorney fees and costs incurred after rejection must be paid by plaintiff.
- If plaintiff makes an offer that is rejected, and the judgment exceeds 120 percent of the amount, attorney fees and costs incurred by plaintiff after rejection must be paid by defendant.
- The amount of fees and costs shifted cannot exceed the sum of non-economic damages + punitive damages + 50 percent of economic damages

MULTI-DISTRICT LITIGATION

- Chief Justice appoints 5 appeals court judges as a multi-district litigation (MDL) panel
- MDL panel can consolidate any cases with common issues of fact in a single district court for pre-trial proceedings, including disposition short of trial

VENUE FOR AGGREGATED PLAINTIFFS

- Every plaintiff must establish venue in the suit independently of any other plaintiff
- Mandatory dismissal or transfer of any plaintiff who cannot establish venue except upon exceptional showing
- Interlocutory de novo appellate review of order granting or denying transfer or dismissal

FORUM NON CONVENIENS

- Court must decline jurisdiction if, considering the interest of justice and convenience of the parties, there is a better forum for the suit
- Court must stay or dismiss such cases

PROBATE COURT VENUE

- The venue provisions of the Civil Practices & Remedies Code trump the venue provisions of the Probate Code
- Plaintiffs will not be able to forum shop by creating or adding a trust or estate as a party for the purpose of invoking the venue provisions of the Probate Code

JOINT & SEVERAL LIABILITY

- The threshold for joint liability in toxic tort cases is raised from 15 percent to 50 percent
- Defendants can designate (as opposed to join) other responsible third parties whose fault contributed to causing plaintiff's harm
- Defendants can include employers with comp immunity and bankrupts as responsible third parties
- Jury assesses the percentage of fault of each claimant, defendant, settling party, or designated responsible third party. A defendant pays only the assessed percentage of the judgment unless the defendant is 50 percent responsible or more, or committed an enumerated felony in concert with another person

SETTLEMENT CREDITS

- The sliding scale for credit against a judgment for settlements paid by other parties is repealed. The old sliding scale election routinely was manipulated to the prejudice of defendants
- Defendants will receive a credit based on the percentage of fault assessed by the jury against settling parties. There are special provisions dealing with a different mechanism for health care providers.

STATUTE OF REPOSE

- Fifteen-year statute of repose for product liability claims against product manufacturers and sellers
- For latent disease exposure claims, the claimant must have been exposed within fifteen years of the product's sale by the manufacturer, and the disease must initially manifest more than fifteen years after the sale.

INNOCENT SELLER DEFENSE

- Seller is not liable for defective product unless involved in design, modification, installation, or warnings, knew of the defect, or made incorrect statements relied on by the purchaser, and which caused the harm.
- Seller still is liable if manufacturer is bankrupt.

GOVERNMENT STANDARDS DEFENSE

- Rebuttable presumption product is not defective if it meets mandatory government standards or was approved or licensed by the FDA.
- Plaintiff can rebut by showing material omission or misrepresentation to agency, or that standards were insufficient to provide reasonable safety

PREJUDGMENT INTEREST

- Instead of old 10 percent floor, prejudgment interest tied to NY Fed prime, with a floor of 5 percent and ceiling of 15 percent
- Prejudgment interest no longer awardable on future damages

APPEAL BONDS

- Foreign judgments cannot be executed in Texas if appeal pending or planned in foreign jurisdiction and security has been or will be posted in the foreign jurisdiction
- Appeal bonds for Texas judgments are for the amount of compensatory damages, costs, and interest for the duration of the appeal—no longer does a defendant have to post a bond for a punitive damage award.
- Appeal bonds are capped at the lesser of 50 percent of the defendant's net worth or \$25 million, and the court must reduce it further if such a bond would cause the defendant economic hardship

SEAT BELTS

- The statute forbidding any evidence of lack of seat belt use in auto accident cases is repealed. Such evidence is now admissible.

MEDICAL MALPRACTICE

- Substantial procedural and evidentiary requirements are imposed in medical malpractice actions
- Liability for non-economic damages (pain and suffering) is capped at \$250,000 against all physicians cumulatively and at \$500,000 for all health care institutions cumulatively, with no individual institution being liable for more than \$250,000 for such damages.

GOVERNMENTAL EMPLOYEE IMMUNITY

- Governmental employees acting in the course and scope of employment cannot be subject to more than \$100,000 in damages if they are indemnified or insured by the governmental entity for the first \$100,000.

PUNITIVE DAMAGES

- Jury can award punitive damages only if the verdict is unanimous as to liability for punitives and the amount, and jury must be so instructed.

DAMAGE EVIDENCE NET OF TAXES

- Evidence of loss of earning, earning capacity, or inheritance must be presented to jury as a net claim after tax, and the court must instruct the jury as to the portion of damages requested that are subject to tax.

SCHOOL EMPLOYEE IMMUNITY

- Broadens definition of school employees entitled to immunity for actions involving the exercise of discretion in the course and scope of employment
- Requires exhaustion of school district administrative remedies prior to suit
- Mandatory payment of attorney fees and costs by plaintiff suing person subject to immunity
- Immunity does not extend to use of excessive force in discipline or negligence that results in personal injury to a student

SUCCESSOR ASBESTOS LIABILITY

- If company with liability for mining or sale of asbestos-containing products was merged or acquired by a successor prior to May 13, 1968, the limit of the successor company's liability for asbestos claims as a result of the acquisition is limited to the FMV of the acquired company at the time of acquisition.
- The limitation applies to "successors of successors," based on the FMV of the initially acquired company at the time of the initial acquisition.

CHARITABLE VOLUNTEER IMMUNITY

- Volunteer workers in the course and scope of their duties for charitable organizations are immune from suit except for intentional torts and gross negligence.

VOLUNTEER FIRE DEPARTMENTS

- Volunteer fire and EMT personnel are liable only to the extent a county or county employees are liable.

ARCHITECTS AND LICENSED PROFESSIONAL ENGINEERS

- Filing of suit against an architect or licensed professional engineer for professional negligence must be accompanied by affidavit of expert witness who holds Texas license in the field and actively practices in the same subject area as the defendant

TRESPASS FROM PREMISES AIR POLLUTION

- Owner, lessee, or occupant of real property not liable for trespass as a result of migration of air contaminants (other than odor) absent a showing of actual and substantial damage to plaintiff.

Asbestos Coalition Vows to Fight

by Ron C. Dipprey

Texas Asbestos Consumers Coalition

After several weeks of negotiation with representatives of the trial bar, multiple meetings with several Texas Senators, and an eleventh-hour effort on behalf of Lieutenant Gov. Dewhurst and Governor Perry, Senate Bill 496, the asbestos litigation reform legislation, failed to reach the twenty-one votes necessary for rule suspension on May 20, 2003.

The bill was characterized by business interests as fair and balanced. It allowed truly impaired persons (mesothelioma and cancer) to proceed to court, utilized a medical criteria system to evaluate impairment of those exposed to asbestos, and provided a tolling of the statute and an inactive docket for those not yet impaired.

The Texas Asbestos Consumers Coalition will continue our efforts to broaden support for this legislation in anticipation of passage in the 2005 session or in a special session if one is called.

We have already opened communication with the Governor about the possibility of being included in the call for a special session, hopefully later this year. We will keep you advised. Meanwhile, we will continue to communicate with our twenty committed Senate votes and work on the others.

Thank you for your interest and participation.

SINCE 1986, THE TEXAS CIVIL JUSTICE LEAGUE has led the fight to create a strong business climate by changing the state's tort laws and restoring fairness and stability to the civil justice system. ¶ TCJL is the largest state civil justice association in the nation. Its diverse membership include individuals, railroads, law firms, professional and trade associations, health care providers, cities, counties, school districts, chambers of commerce and businesses of all sizes. ¶ TCJL was the first recipient of the organization award presented by the national Tort Reform Summit in 2000.

Tort Reform Legislation Good for Texas

continued from page 2

- changes in the laws governing proportionate responsibility to assure that Texas juries may assess fault to all parties who may have contributed to the claimant's harm;
- products liability reforms providing that truly innocent sellers of products are immune from liability and that manufacturers that make products or give product warnings in compliance with specific government regulations are not unduly penalized for compliance;
- a \$250,000 cap on non-economic damages in law suits against physicians, and a \$500,000 cumulative cap on non-economic damages in lawsuits against health care institutions, such as hospitals; and protection for public school employees, charitable volunteers, and volunteer firefighters from frivolous lawsuits.

Clearly, this skeletal outline cannot do full justice to the scope and significance of HB 4 in eliminating lawsuit abuse, improving health care, and encouraging economic growth in Texas. The Texas Civil Justice League, together with numerous other groups including Texans for Lawsuit Reform, the Texas Medical Association, the Texas Hospital Association, Texans Allied for Patient Access, the National Federation of Independent Business, and the Texas Association of Business, is proud to have been involved in successfully advocating this historic legislation.

Much has been accomplished this session. Nevertheless, the Texas Civil Justice League recognizes that Texas is home to some of the most powerful and entrepreneurial plaintiff's lawyers in the country. With almost unlimited resources to spend, they will undoubtedly attempt to defeat the constitutional amendment at the polls and undo HB 4 at the courthouse. They will continue their assault on Texas jobs and businesses with mass tort actions involving tens of thousands of claimants, many of whom are not even injured. The Texas Civil Justice League pledges to continue the fight to preserve the reforms we have achieved and shut off lawsuit abuses, such as asbestos litigation, that HB 4 did not directly address.