

ADVOCATE

TEXANS FOR LAWSUIT REFORM: MAKING TEXAS A BEACON FOR CIVIL JUSTICE IN AMERICA

★ JUNE, 2003 ★

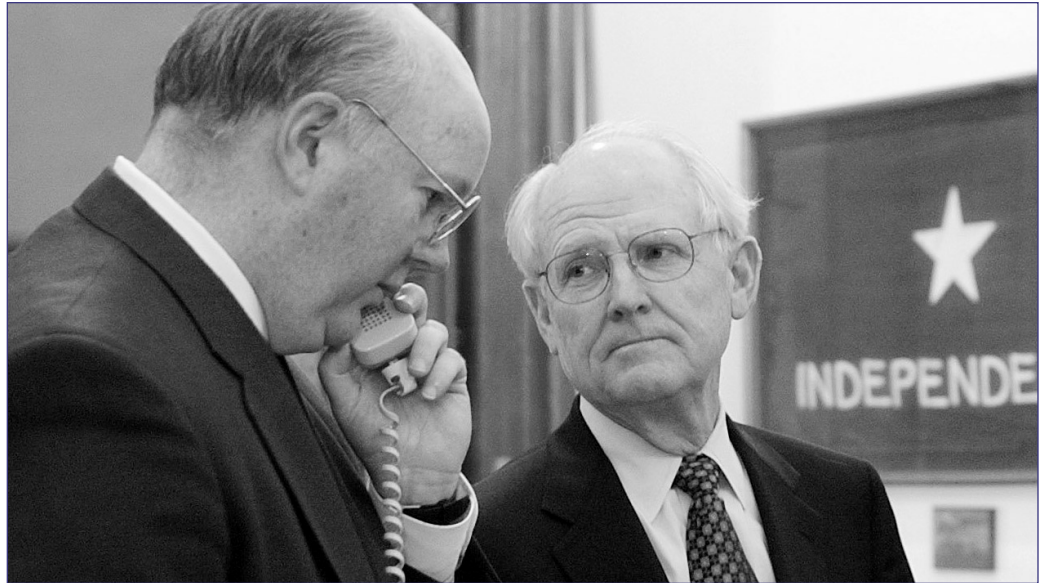
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OUR MISSION

Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action; legal, academic, and market research; and grassroots initiatives. The common goal of our more than 11,561 supporters is to make Texas the Beacon State for Civil Justice in America.

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Rep. Joe Nixon (left) and Sen. Bill Ratliff (right) work together to pass historic tort reform

Historic Tort Reform Bill Passes

When we founded TLR in 1994, we believed that in this democracy, citizens who see a wrong, an abuse, or a problem have both the right and the duty to organize themselves to petition their government to right the wrong, end the abuse, or cure the problem. TLR has grown to over 11,561 citizens in every nook and cranny of Texas—men and women who are engaged in the whole range of trades, occupations and professions in our society. We have petitioned our government to cure many of the wrongs, abuses and problems in our civil justice system. Our government responded by enacting House Bill 4 in the 2003 session of the Texas Legislature. (See page 8 for complete summary.)

House Bill 4 is the most comprehensive tort reform legislation that any state has ever passed. It will serve as a model to other states that wish to address the over-litigiousness of American society. HB 4 will help restore balance, fairness, common sense, and a degree of predictability to the Texas civil justice system. It will go a long

way toward restoring litigation to its traditional and appropriate role in our society, as the method of last resort to resolve a legitimate dispute between parties. HB 4 will benefit generations of Texans in innumerable and immeasurable ways, including: restoring respect for the law, improving the efficiency of our courts, producing cost savings to consumers for the goods and services they purchase, alleviating our current health care crisis, and encouraging economic development and job growth.

TLR did not produce HB 4. The dedicated men and women in the Legislature, working with Governor Rick Perry, Lt. Governor David Dewhurst, and Speaker Tom Craddick, produced HB 4. To them, we are deeply appreciative and grateful. But all of us in TLR—all 11,561 of us—can be justifiably proud that we fully participated in our magnificent democracy and played an important role in the development and passage of comprehensive tort reform in Texas.

Richard W. Weekley *Leo Linbeck* *Richard J. Trabulsi, Jr.*
Richard W. Weekley Leo Linbeck, Jr. Richard J. Trabulsi, Jr.
Chairman & CEO Senior Chairman President

What's Left To Be Done

Legislative Matters

There was a very ambitious tort reform agenda presented by civil justice groups to the 2003 Legislature. HB 4, the omnibus tort reform bill, encompassed most of the items of the tort reform agenda and consumed virtually all of TLR's human and financial resources during the session. Other agenda items, filed as separate bills, did not pass and need to be addressed in the future. Several of these matters are described below:

ASBESTOS LITIGATION Over sixty American companies have been bankrupted by asbestos litigation, and hundreds of thousands of jobs have been lost as a result. *The Wall Street Journal* estimates that over 85% of America's public companies face future exposure to crippling asbestos litigation. The problem is that court judgments and settlements in asbestos litigation include both injured parties and unimpaired parties. So much money is flowing to persons who have not been impaired by asbestos that often there are not sufficient funds to fully compensate persons who are actually ill from asbestos.

STATUTORY EMPLOYER One of the most abused areas of personal injury litigation relates to construction work sites on which an employee is injured, collects workers compensation benefits from his employer, and then sues the owner of the work site or other contractors working on the site. It makes sense that if every employer working on a particular site agrees to carry workers compensation insurance, the workers compensation protection should apply to the site owner, the general contractor and the subcontractors working for the general contractor. This reform would encourage greater participation in the workers compensation system and should reduce the overall cost of construction.

GOVERNMENT HIRING OF CONTINGENCY FEE LAWYERS At TLR's urging, the 1999 Legislature enacted a law to assure that no Texas governmental officer could, acting alone, hire contingency fee lawyers. Also, the statute requires that contingency fee lawyers working for the State can charge only a reasonable fee for the work performed and the result gained. The purpose of the statute is to avoid the kind of conduct that has led to the indictment of former Attorney General Dan Morales in his attempt to pay a huge contingency fee to a friend, Mark Murr, in the tobacco litigation. This sensible checks-and-balances approach to the government hiring of outside lawyers should apply to all governmental units in Texas.

LEGAL AND JUDICIAL ETHICS Texas is the only state in the Union that does not regulate referral fees paid by one lawyer to another. We believe that judges should disclose material financial relationships with lawyers and litigants in a case. It might be that the Texas Supreme Court will address these issues in its Rules prior to the next legislative session.

Non-Legislative Matters

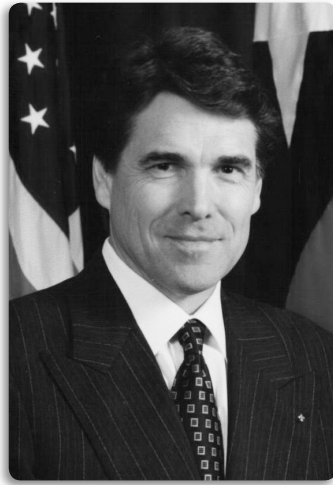
TLR engages in a wide range of activities concerning the civil justice system in addition to its legislative advocacy, including:

POLITICAL ACTIVITY TLR has an active Political Action Committee, which has engaged in every election cycle since 1994. It is that activity that has helped to create the pro-reform legislative environment that produced this year's historic civil justice reform. The plaintiffs' lawyers will redouble their own electoral activities to try to reverse this year's reforms, and TLR PAC will stay fully engaged in electing and protecting public officials who believe in a fair and balanced civil justice system.

PUBLIC RELATIONS The plaintiffs' bar, working mostly through "consumer groups" that it funds, has a highly sophisticated and persistent public relations campaign to influence elections, legislation, editorial policy, and the broad jury pool. In Texas, the plaintiffs' bar has a special emphasis on undermining our conservative Supreme Court. TLR has public relations consultants who keep the public truthfully informed about civil justice matters.

JUDICIAL SELECTION Bad statutes in the hands of bad judges produce bad results. Unfortunately, even good statutes in the hands of bad judges produce bad results. Therefore, TLR is active in the selection of judges who are honest, hard working, smart, and conservative.

AMICUS BRIEFS Appellate opinions are as important to the development of our common law as are statutes. When supporters of TLR bring our attention to matters being heard by the Texas Supreme Court on an important matter of law with broad application, we sometimes file a "friend of the court" brief to advocate our position on that legal issue.



Governor Rick Perry

Rick Perry has been a strong advocate of civil justice reform throughout his career in public service. He has made tort reform a central theme of his political campaigns. In his campaign for governor in 2002, he pledged comprehensive reforms to cure the many lawsuit abuses that have prevailed in recent Texas history. Governor Perry recognized the health care crisis that has been produced by runaway lawsuits against doctors, hospitals and other health care providers, and he advocated a series of reforms in medical lawsuits that are an integral part of HB 4. His vigorous leadership on tort reform—both as Governor and previously as Lt. Governor—was an essential part of enacting the comprehensive reforms of HB 4.



Lt. Governor David Dewhurst

David Dewhurst was a successful businessman before pursuing his career in public service. As a businessman, he saw firsthand the pervasive effects of lawsuit abuse on the state's economy. The Lt. Governor referred tort reform to the State Affairs Committee, chaired by Bill Ratliff, who has long been one of the most respected members of the Texas Legislature. The State Affairs Committee had a diverse membership of dedicated and highly effective Senators, who worked hard to understand both the important policy considerations and the complex legal doctrines of HB 4. Lt. Governor Dewhurst personally studied the bill thoroughly, delved into the intricacies of the various legal issues in HB 4, monitored developments carefully as the bill worked its way through the process, and weighed in at crucial times to make sure that the bill stayed on track to final passage.



Speaker Tom Craddick

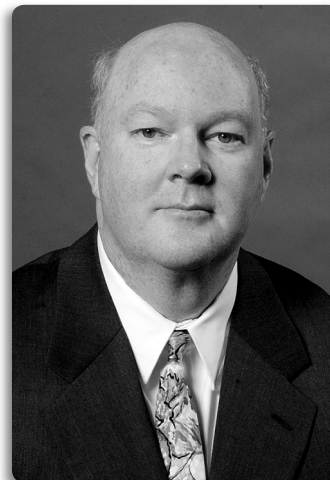
For three sessions running, tort reform was buried in an unfriendly committee in the House of Representatives, frustrating the will of the people and denying the members of the Legislature the right to vote on important lawsuit abuse issues. That changed with the election of Tom Craddick as Speaker of the House in the 2003 session. The Speaker appointed a diverse and exceptionally talented Civil Practices Committee, which gave serious consideration to HB 4, improved it significantly with committee amendments, and voted it out of committee early enough in the session to assure that the legislation could be fully considered by both chambers of the Legislature. Speaker Craddick calmly, deliberately, and fairly led the House through a tumultuous debate that lasted several days, spread over two weeks, and included repeated and acrimonious parliamentary inquiries and points of order. There has been no stronger proponent of tort reform than Tom Craddick, and HB 4 could not have happened without his leadership.

Senator Bill Ratliff

Bill Ratliff, longtime Texas Senator and former Lt. Governor, chaired the Senate State Affairs Committee, which heard an unprecedented sixty-one hours of public testimony on HB 4 over a period of six weeks from scores of witnesses. Chairman Ratliff personally listened to practically every minute of that testimony. He confirmed his reputation for intelligence, studiousness, deliberation and fairness in shepherding HB 4 through the Senate. He was always exceptionally courteous to and cooperative with TLR. He was equally courteous and open to the opponents of HB 4. Chairman Ratliff has been a supporter of civil justice reform throughout his career. We believe that his personal attention to HB 4 and his intellectual contributions to it greatly enhanced the effectiveness of the legislation and reinforced his reputation as a statesman. It is a tribute to his statesmanship that he led the Senate to a 28-3 vote on so significant a bill as HB 4.

**Representative Joe Nixon**

Joe Nixon of Houston chaired the House Civil Practices Committee. Chairman Nixon, a practicing litigation attorney, sat on Civil Practices as a committee member in the three previous legislative sessions in which tort reform had been bottled up in that committee. Often, the tort reformers who testified before that committee saw him as our one true friend. It was entirely fitting, then, that this courageous lawyer would sponsor the bill that would finally address the pent up demand for civil justice reform in Texas. Joe often met with proponents and opponents of the bill and also listened to three full days of committee testimony. Every person who sought to be heard, was heard. Chairman Nixon then stood on the floor of the House to advocate the bill for days of fierce and exhausting debate. He withstood mean-spirited personal attacks from several plaintiff lawyers who are Members of the Texas House. He kept his composure, and he respectfully but persistently pressed the case for passage of the bill. The result was a sweeping and strong bill that won an overwhelming majority of 99 votes and was the basis for the bill that was enacted into law.



Our Team

Citizens propose, the Legislature disposes. HB 4 was produced by the men and women of the Texas Legislature. To them, we give our appreciation and gratitude. But legislation as complex, comprehensive and important as HB 4 does not happen without an enormous citizens' effort encompassing legal work, lobbying, grassroots advocacy, and public relations.

THE BEST LEGAL MINDS

Alan Waldrop has been TLR's lead counsel for a number of years. **Jim Davis** and **Lee Parsley** ably assisted him in legal work on HB 4. They did a truly magnificent job of research, drafting, and advocacy. One of the most respected and experienced members of the Texas Senate said of Alan Waldrop: "He is the most thorough, responsive, productive and articulate lawyer I have seen in the legislative process." During these months of grueling testimony in both chambers, there often would be a dozen or more plaintiffs' lawyers arguing against a particular aspect of HB 4. Often, Alan was the sole witness to counter their testimony. He was all we needed.

THE MOST RESPECTED LOBBYISTS

The word "lobbyist" is often a pejorative term. Persons who use "lobbyist" that way have not associated with the TLR lobbyists who worked on HB 4 this session; they are extraordinarily honorable, hard working, and competent professionals. The TLR lobby team was headed up by one of the most experienced and respected lobbyists in our state Capitol, **Bill Messer**. Bill had a complex, consuming, and exhausting task in heading our lobby team, and he did a magnificent job. He was joined by former state senator **David Sibley**, who sponsored much of the meaningful tort reform legislation of 1995. Bill and David are well liked and trusted by the members of the Legislature. They were ably assisted by **Ellen Williams**, **Laura Keel**, **Ed Lopez**, **Gilbert Turrieta**, **Robert Saunders** and **Jill Warren**. **Toni Barcellona** was part of the lobby team and also handled our coordination with the various trade and professional organizations that supported tort reform. They composed a team of unexcelled competence in this session of the Legislature.

TLR'S STAFF—THE BEST IN THE BUSINESS

Work during the session contributes to the success of a legislative initiative, but an ambitious initiative such as HB 4 would have had no chance of success had the proper preparation not occurred prior to the session. Our staff and consultants work hard and effectively day in day out, year in year out, to carry out the variety of TLR tasks, including legislative advocacy. Our Executive Director, **Andi Behlen**, is a skilled administrator and is widely experienced in politics. She is assisted by **Kristi Vasquez**, **Glenda Hovey**, and during the session, **Mary Tipps**. **Matt Welch** has been our extremely effective PAC director and was our Legislative Director during the session. Matt's many friends in political office gave him an effective voice in advocating HB 4.

TLR'S UNEQUALLED CONSULTANTS

Denis Calabrese is our political strategist, and is considered to be one of the best in his profession in the entire country. **Ken Hoagland**, **Chuck McDonald**, **Rickey Dailey**, and **Hal Harris** handle our public relations, and they do outstanding work in press relations, letters to the editor, Opinion Editorials and other aspects of public communication. **Beverly Kishpaugh**, a beloved force in Texas politics for decades, coordinates our grassroots activities. **John Doner** handles our direct mail and other special activities. **Kate Doner**, **Elizabeth Blakemore**, and **Alison McIntosh** compose our fundraising team. These are the dedicated people who are at the core of any TLR endeavor and the key to any TLR success.

HB 4 will benefit generations of Texans in innumerable and immeasurable ways, including: restoring respect for the law, improving the efficiency of our courts, producing cost savings to consumers for the goods and services they purchase, alleviating our current health care crisis, and encouraging economic development and job growth.

Summary of House Bill 4

Class Actions

Gives jurisdiction to the Texas Supreme Court to hear an appeal from a trial court order certifying or refusing to certify a class

Stays all proceedings in the trial court pending that appeal

Requires the Texas Supreme Court to promulgate rules to be used by trial courts in calculating the fees to be awarded to class counsel, including rules requiring that:

- the fee be calculated using the lodestar method, which requires a reasonable fee based on the hours actually worked by class counsel
- if part of the recovery by the class is non-cash, the fee paid to class counsel must be in cash and non-cash in the same percentage as the recovery by the class

Requires that before a class is certified, the trial court must rule on any plea to the jurisdiction in which it is asserted that the plaintiff's claims are within the jurisdiction of a state agency

Offer of Settlement

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

- This cost-shifting mechanism is available in most civil cases, and comes into play upon the defendant filing an election to have the mechanism in play in that case
- The defendant's litigation costs are shifted to the plaintiff if the plaintiff's judgment is less than 80% of the defendant's settlement offer
- The plaintiff's litigation costs are shifted to the defendant if the plaintiff's judgment is more than 120% of the plaintiff's settlement 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

Multidistrict Litigation

Creates the five-member Judicial Panel on Multidistrict Litigation, appointed by the Chief Justice of the Texas Supreme Court, that is empowered to transfer factually related cases pending in multiple counties to a single court for consolidated or coordinated pretrial proceedings

The cases must be returned to the county in which the case was filed for trial

This procedure, which is modeled on federal law, 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

Fixes an anomaly in the current law by allowing an immediate appeal of a trial court's decision that a plaintiff in a multi-plaintiff case has independently established venue in the county of suit

Forum Non Conveniens

Creates a single standard based on federal law for determining whether a case should be dismissed so that it may be pursued in a more appropriate state or country

The court will be able to dismiss a case that has no connection to Texas and should have

been brought in another state or country if dismissal is in the interest of justice and for the convenience of the parties

Proportionate Responsibility

Ensures 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 for a plaintiff's injury

- The jury may allocate fault to any responsible person, including a bankrupt, criminal, person beyond the court's jurisdiction, or employer with workman's compensation immunity
- Does not impose additional liability or cost on businesses that carry workers' compensation insurance or others who are not parties to the case or are immune from liability

Provides that the credit for the 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 being based on the amount of the settlement

Provides that the credit for the pre-trial settlement by another defendant with respect to healthcare liability claims is based on the total dollar amount of the settlements unless all nonsettling defendants agree to a credit based on the percentage of responsibility allocated to the settling defendant

Corrects a problem with the definition of "claimant" that was identified by the Texas Supreme Court

Products Liability Reform

Establishes a 15-year statute of repose for product liability claims, except in "latent disease" cases, in which the disease does not manifest for many years after use of the product

Creates an "innocent retailer defense" under which a retailer cannot be held liable for a product defect unless the retailer has some actual responsibility for the defect

- Numerous exceptions to the defense are provided, including an exception that prevents use of the defense if the responsible manufacturer is outside the court's jurisdiction or insolvent

Provides protection from liability, through the use of a rebuttable presumption, to manufacturers, distributors, or prescribers of pharmaceutical products in cases in which it is alleged that the defendant failed to provide an adequate warning about the product's risk

- Defense is available if the defendant provided government approved warnings with the product
- Several exceptions are provided, including one making the defense inapplicable if the manufacturer misrepresented or withheld required information from the government

Provides additional protection from liability, through the use of a rebuttable presumption, for manufacturers who comply with federal standards or regulatory requirements applicable to a product

- Protection is available only if the standard was (1) mandatory, (2) applicable to the aspect of the product that allegedly caused harm, and (3) adequate to protect the public from the risk

Requires the Texas Supreme Court to revise the Texas Rules of Evidence to conform them to the Federal Rules of Evidence in regard to the admissibility of "subsequent remedial measures" in a products liability action

Continued...

Judgment Interest

Prohibits the assessment of pre-judgment interest on an award of future damages

Establishes a post-judgment interest rate that is based on the prime rate and, therefore, more closely reflects market conditions

Adjusts the current floor and ceiling for the post-judgment interest rate from 10%-20% to 5%-15%

Appeal Bonds

Modifies 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

Limits the bond requirement to compensatory damages awarded to the plaintiff and places reasonable limits on the total amount of a bond

Evidence Regarding the Use of Seat Belts

Allows the jury or fact-finder to know whether a plaintiff was wearing a seat belt at the time of an accident for the purpose of allocating fault and determining the cause of damages

Health Care Liability Reform

The limit on non-economic damages varies based on whether the defendant is a physician or health care provider other than a health care institution. A \$250,000 cap applies to health care providers other than health care institutions on a per claimant basis, and a \$250,000 cap applies to health care institutions on a per defendant basis; total damages against health care institutions, collectively, cannot exceed \$500,000 in any single case.

- Cap on non-economic damages not indexed for inflation
- Health care provider not required to maintain proof of financial responsibility in order for cap on non-economic damages to apply

An alternative limit on non-economic damages is established and varies based on whether the defendant is a health care provider other than a health care institution. A \$250,000 cap applies to health care providers other than health care institutions on a per claimant basis, and a \$250,000 cap applies to health care institutions on a per defendant basis not to exceed \$500,000 in any single case.

- Cap on non-economic damages not indexed for inflation
- Cap on non-economic damages applies to physician or registered nurse who provides proof of financial responsibility:
 - effective 9/1/03 - \$200,000/\$600,000
 - effective 9/1/05 - \$300,000/\$900,000
 - effective 9/1/07 - \$500,000/\$1million
- Cap on non-economic damages applies to physicians in residency training programs who provide proof of financial responsibility of \$100,000/\$300,000
- Proof of financial responsibility established by:
 - purchase of liability insurance or plan of insurance; or
 - purchase of coverage through risk retention group
 - maintenance of reserves in financial institution or letter of credit

Limitation on damages in wrongful death and survival cases

- Cap on compensatory and punitive damages of \$500,000 indexed for inflation since 1977
- No cap on recovery of past or future health care expenses
- Liability of insurer under Stowers' Doctrine limited to liability amount of insured

Requires future medical expenses to be paid as they accrue

Allows future damages other than medical expenses to be paid through periodic payments

- Future damages in excess of \$100,000 may be made by periodic payments rather than by lump-sum, but court not required to order periodic payments plan
- Judgment shall specify how and when the periodic payments are made
- Periodic payments of future health care will terminate upon death of recipient
- Periodic payments of future earnings will not terminate upon death of recipient
- Court shall require defendant(s) to provide proof of adequate insurance or post security adequate to assure full payment of the periodic payment
- Attorney fees are paid at time of judgment based on present value of future damages

Establishes a 10 year statute of repose for health care liability cases

Requires jury instructions on circumstances associated with delivery of emergency care

Provides that standard of proof in cases involving emergency care is preponderance of evidence

Modifies pre-trial procedures to address frequency of claims

- Eliminates cost bond requirement
- Allows parties to extend date for serving expert report by agreement
- Defendants must object to sufficiency of report within 21 days
- Allows time extensions to cure deficiencies in expert report
- If expert report not timely filed, the court shall dismiss the action and award attorney fees and costs to defendant(s)
- Allows interlocutory appeal if trial judge fails to dismiss claim due to failure to meet expert report requirement

Establishes process for disclosure of patient's medical records in compliance with HIPAA confidentiality requirements

Clarifies qualifications for expert rendering opinion on causal relationship between injury and alleged departure from applicable standard of care

Establishes qualifications for expert in suit against provider, other than a physician

Clarifies how the Good Samaritan Law applies to health care providers who respond to emergency situations

Limits liability of hospitals that provide charity care services

Clarifies the limitation on punitive damages in health care liability cases

Claims Against Employees of a Local Governmental Unit

Extends current limit on personal liability of governmental employees to health care workers employed by a local governmental unit

Limits liability of nonprofit organizations that manage a city or hospital district hospital

Continued...

Damages

Requires jury awards of punitive damage to be based on a unanimous jury verdict

Limits recovery of health care expenses to expenses actually incurred by the plaintiff

Allows the jury to consider a plaintiff's income taxes when awarding lost future income

Public School Teachers

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

Successor Liability for Asbestos-Related Litigation

Limits a successor corporation's liability in asbestos-related litigation 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

Volunteer Immunity

Provides protection from lawsuits for volunteers of charitable organizations and volunteer firefighters

Design Professionals

In a suit against a registered architect or licensed professional engineer, requires the plaintiff, at the time suit is filed, to provide an affidavit by a third-party registered architect or licensed professional engineer setting forth the specific acts of negligence allegedly committed by the defendant

Migration of Particles in the Air

Allows trespass action for migration or transport of an air contaminant only on a showing of actual and substantial damage to the plaintiff

Limitation of Liability for Nonprofit Hospitals

Limits the liability of a nonprofit hospital or hospital system that provides charity care and community benefits in an amount equal to at least 8% of the net patient revenue of the hospital or system, and provides at least 40% of the charity care provided in the county in which the hospital or system is located

HJR 3 & THE CONSTITUTIONAL AMENDMENT

Governor Rick Perry, Lt. Governor David Dewhurst, and Speaker Tom Craddick vigorously supported a Joint Resolution of the Texas House and Senate to allow the people of Texas to vote on an amendment to the Texas constitution that does two things. First, it allows the Legislature to place limits on non-economic damages in lawsuits against health care providers. This assures that the caps on non-economic damages that are part of HB 4 will not be tied up in courts for years by challenges to the constitutionality of those caps. Second, it allows future Legislatures to impose limits on non-economic damages in any other kind of lawsuit; the amendment requires that the enactment of any such future limits would need a three-fifths majority in each chamber of the Legislature.



Jane Nelson, Senate Sponsor of HJR3.

It is important to note that the limits that are the subject of this constitutional amendment relate only to non-economic damages, such as pain and suffering and mental anguish. The caps do not apply to economic damages such as medical care and lost wages.

Representative Joe Nixon sponsored HJR 3 in the House. He and Speaker Craddick and the House leadership garnered more than the two-thirds majority necessary to pass the Joint Resolution. Senator Jane Nelson sponsored HJR 3 in the Senate. She eloquently and strongly advocated the HJR in a vigorous Senate debate, and she and Lt. Governor Dewhurst won the two-thirds majority vote needed in the Senate.

The people of Texas will vote on this constitutional amendment on September 13, 2003. All TLR supporters are encouraged to work hard to make sure that this important constitutional amendment is approved by the people of Texas.