



2003 Texas Legislative Update

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Article 1 – Class Actions¹

This article of H.B. 4, as its title indicates, focuses primarily on class actions. However, it also contains some more obscure changes to interlocutory appeal practice as well as Texas Supreme Court jurisdiction.

Rules Regarding Class Actions

H.B. 4, first and foremost, orders the Texas Supreme Court to adopt rules for the “fair and efficient resolution of class actions.” It also addresses the calculation of attorneys’ fees for class counsel. Specifically, the statute orders trial courts to use the Lodestar² method to calculate attorneys’ fees awarded to class counsel. The statute further provides that rules promulgated by the Texas Supreme Court may give a trial court discretion to increase or decrease any fee award, as calculated by the Lodestar method, by “no more than four times based on specified factors.” [Copies of the Texas Supreme Court’s latest draft of rules relating to class actions, as well as those related to the calculation of class counsel’s fees are attached.](#) The rules are to be adopted on or before December 31, 2003.

H.B. 4 also addresses class actions against state agencies. The new statute provides that, in such cases, and before certifying the class, the trial court must rule on all pending pleas to the jurisdiction.

Interlocutory Appeals

H.B. 4 also allows for the interlocutory appeal of additional orders. First, in a class action case against a state agency in which the agency’s plea to the jurisdiction is denied and the class certified, the new statute allows for the denial of the plea to be appealed as part of any appeal of the interlocutory order certifying the class.

The new statute also allows for the appeal of certain orders in medical malpractice cases. An interlocutory appeal may now be taken from an order: (1) denying a defendant’s objection to the sufficiency of a plaintiff’s expert report; and (2) granting a defendant’s motion challenging the failure of a plaintiff to make a good faith effort to comply with the requirements for expert reports in such cases.

Finally, the new statute allows for an interlocutory appeal to the Texas Supreme Court of class certification orders.

¹ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP’s Appellate and Litigation Support section.

² The lodestar method requires that class counsel’s fee be based on the actual number of hours worked by class counsel multiplied by a reasonable hourly rate. *See Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir. 1998).

Stay of Trial Court Proceedings

Previously, an interlocutory appeal stayed only the trial of the underlying case. Now, however, the interlocutory appeal of an order (1) certifying or refusing to certify a class; (2) denying a motion for summary judgment based on an assertion of immunity by an employee of the state or a political subdivision of the state; or (3) granting or denying a plea to the jurisdiction by a governmental unit, stays all proceedings pending resolution of the appeal.

Conflicts Jurisdiction

Finally, this section of H.B. 4 defines the conflict jurisdiction of the Texas Supreme Court. Conflict jurisdiction gives the Texas Supreme Court jurisdiction to hear cases in which there is a conflict among Texas courts of appeals. Under prior interpretations of conflict jurisdiction, the Texas Supreme Court took a rather narrow view, holding:

... two decisions "hold differently" or conflict when "the rulings in the two cases are 'so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.' " [citations omitted] "The conflict must be on the very question of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court." [citation omitted] Factual differences in cases do not preclude their being in conflict if the differences do not distinguish "the legal principle being announced." [citation omitted]

Henry Schein, Inc. v. Stromboe, 103 S.W.3d 675, 687-88 (Tex. 2002). The new statute provides a much more lenient standard, now defining conflict jurisdiction as follows:

... one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in law and unfairness to litigants.

Effective Date – September 1, 2003

The changes to interlocutory appeal practice apply to any case in which an interlocutory appeal is taken and the notice of appeal is filed on or after September 1, 2003. The changes to the Texas Supreme Court's conflict jurisdiction apply to any case in which a petition for review is filed on or after September 1, 2003.

Article 2 – Settlement³

Offer of Settlement Provision

H.B. 4, Article 2, is similar to the offer of settlement provisions found in many other jurisdictions as well as Texas’ Insurance Code and Deceptive Trade Practices Act. It seeks to encourage parties to settle lawsuits and give the parties an incentive to be reasonable in their settlement evaluations/discussions or face sharing the other party’s costs. Given the potential impact, it is likely to have a serious effect on parties’ litigation strategy with regard to offers of settlement.

- a. **Provides penalty if judgment is “significantly less favorable” than settlement offer.**

Article 2 has been codified at Chapter 42 of the Texas Civil Practices and Remedies Code and must be read in conjunction with Texas Rule of Civil Procedure 167, a draft of which has been recently promulgated by the Texas Supreme Court and is attached hereto for your convenience. The basic premise of Chapter 42 is that if a party makes a proper settlement offer and the other party rejects the offer but at trial receives an amount “significantly less favorable” compared to the settlement offer, the rejecting party must pay their adversary’s costs.

- b. **Provision is invoked by the defendant.**

This offer of settlement provision is available to both plaintiffs and defendants. However, to invoke the remedial measures of Chapter 42 and Rule 167, the *defendant* must file with the court a declaration that the settlement procedure allowed by Chapter 42 and Rule 167 is available in the action and being invoked; the plaintiff cannot invoke Chapter 42 and Rule 167. The invocation of the offer of settlement provisions only applies to the particular defendant who invoked the procedure, and the declaration must be filed no later than 45 days before the case is set for trial on the merits. The procedures apply to all litigation except:

1. class actions;
2. shareholder derivative actions;
3. actions by or against governmental units;
4. actions under the Family Code;
5. worker’s compensation claims; and
6. cases in justice courts.

³ Article summarized by [Chris Hansen](#), partner in Hermes Sargent Bates, LLP’s professional liability, insurance, and commercial litigation section.

c. What is a valid settlement offer?

Once the defendant formally invokes Chapter 42 and Rule 167, then the offering party (either plaintiff or defendant) may make a valid settlement offer by:

1. setting forth the offer in writing;
2. state that the offer is being made under Rule 167 and Chapter 42 of the Texas Civil Practices and Remedies Code;
3. identify the party or parties making the offer and the party or parties to whom the offer is made;
4. state all terms of the offer;
5. set forth a deadline by which the offer must be accepted (no sooner than 14 days after the offer is served); and
6. serve the offer on all parties whom the settlement offer is being made.

d. Timing.

The offer of settlement may not be made within 60 days after the appearance of the offeror or offeree, whichever is later, or within 14 days before the date the case is set for trial.⁴ An offer can be withdrawn before it is accepted. An offer that is not withdrawn can be accepted only by written notice served on the offeror by the deadline. An offer can be rejected by the expiration of time or by written rejection. The time limits for making the declaration and making the offer of settlement can be modified by the court on motion filed before the commencement of trial and a showing of good cause.

e. Penalty.

If, after the trial of the matter, the judgment to be entered is “significantly less favorable”⁵ to the rejecting party when compared to the offer of settlement, then the amount of the judgment is either increased or decreased by the amount of court costs, reasonable fees for not more than two testifying experts and reasonable attorney’s fees incurred by the offering party after the date the rejecting party rejected the settlement offer. Further, the costs awarded to either the plaintiff or defendant may not exceed 50% of the economic damages awarded, 100% of the non-economic damages awarded, and 100% of the exemplary damages awarded.

⁴ A party may make an offer inside 14 days before trial if it is in response to another offer so long as it is made within 7 days of the date of the prior offer.

⁵ A judgment is considered “significantly less favorable” to the rejecting party compared to the settlement offer if: (1) the rejecting party is the plaintiff and the award will be less than 80% of the rejected offer; or (2) the rejecting party is the defendant and the award will be more than 120% of the rejected offer.

Evidence related to an offer is not admissible except for the purpose of enforcing the offer. Further, the provisions of the offer of settlement rule may not be made known to the jury.

Effective Date: January 1, 2004.

These changes apply only to cases filed on or after January 1, 2004.

Article 3 – Venue; Forum Non Conveniens⁶

H.B. 4 includes some provisions to address the issue of where lawsuits are filed. In particular it modifies venue provisions for probate cases, multi-plaintiff cases, multi-district cases and medical malpractice cases involving hospital districts. H.B. 4 also revised Texas' Forum Non Conveniens statute to make it uniformly applicable to all cases.

Amended Venue Provisions.

a. Probate Cases

This modification to venue under section 15.007 of the Texas Civil Practices and Remedies Code attempts to curtail and prevent the manufacturing of venue through the creation of trusts or using probate courts to work around the venue provisions of the CPRC. The Texas Probate Code sections 5A, 5B and 607 have been amended to state that venue **must be** determined under section 15.007 of the CPRC in actions by or against a personal representative for personal injury, death, or property damage. This change effectively resolves the current split among courts of appeals as to whether section 15.007 trumps the Probate Code in personal injury cases brought by or against a guardian or estate representative. *See Reliant Energy, Inc. v. Gonzalez*, 102 S.W.3d 868 (Tex. App. – Houston [1st Dist.] 2003, pet. granted); *In re J7S*, 979 S.W.2d 374 (Tex. App. – Houston [14th Dist.] 1998, orig. proceeding).

b. Multi-Plaintiff Cases

Prior to H.B. 4, each plaintiff in a multi-plaintiff case was required to independently establish venue in the county of suit and for those plaintiffs that could not do so, the trial court decided whether the plaintiff was properly joined in the lawsuit. In 2000, the Texas Supreme Court concluded that the remedy of an interlocutory appeal was not available to defendants where the trial court allowed the plaintiff to join the action even if he could not independently establish venue.

H.B. 4 maintains the requirement that each plaintiff in a multi-plaintiff case must independently establish venue in the county of suit. If the plaintiff cannot do so, then the court must transfer the case to another venue or dismiss the plaintiff unless the plaintiff can establish that his presence is otherwise procedurally correct, there is no unfair prejudice to any other party, there is an essential need to have that plaintiff's claim tried in that venue, and the venue is a fair and convenient venue for that plaintiff and all defendants. In contrast to the Texas Supreme Court's holding in 2000, H.B. 4 now provides the remedy of an interlocutory appeal of the trial court's ruling. An interlocutory appeal automatically stays the trial of the case pending the appeal.

⁶ Article summarized by [Chris Hansen](#), partner in Hermes Sargent Bates, LLP's Professional Liability, Insurance, and Commercial Litigation section.

c. Multi-District Cases

In cases pending in the same or different constitutional courts, county courts at law, probate courts, or district courts that involve one or more common questions of fact, the cases can be transferred to a district court for consolidated or coordinated pretrial proceedings. These include summary judgment or other dispositive motions but do not include the trial of the particular case. The decision to transfer is made by a judicial panel on multi-district litigation. The panel consists of five court of appeals judges that are active or administrative judges appointed by the chief justice of the Texas Supreme Court. There must be a concurrence of three of the five judges when deciding whether to transfer venue for consolidation or coordination. The applicable standard for transfer is “convenience of the parties and witnesses” and to “promote justice and efficient conduct of the action.”

d. Medical Malpractice Cases

Although not part of Article 3 of H.B. 4, the sweeping tort reform of 2003 included a change to venue in medical malpractice actions against hospital districts. *See* Tex. H.B. 4, §23.02(a), (d). Specifically, the Texas Health and Safety Code section 281.056(a) was amended to provide that venue in actions against hospital districts created under Texas Health and Safety Code Chapter 281 is mandatory in the county in which the hospital district is established.

Changes to Forum Non Conveniens Practice

Forum non conveniens (“FNC”) or the idea that certain claims would be more properly heard in a forum outside Texas was codified in sections 71.051 and 71.052 of the Texas Civil Practices and Remedies Code. Prior to H.B. 4, the FNC statute was divided into non-asbestos cases [TEX. CIV. PRAC. & REM. CODE § 71.051] and asbestos and alien cases (TEX. CIV. PRAC. & REM. CODE § 71.052). Asbestos and alien cases were subject to a different set of criteria than all other cases seeking a stay or dismissal on FNC grounds often making it more difficult to obtain a dismissal.

The revisions of the FNC statute via H.B. 4 benefit the asbestos defendants most by creating a uniform FNC statute for all cases. H.B. 4 repealed TEX. CIV. PRAC. & REM. CODE section 71.052 and revised section 71.051. Courts now have more flexibility to dismiss lawsuits that should have been filed and litigated in other states or countries. The new single standard, which is similar to the federal standard, maintains the six criteria⁷ originally set forth in section 71.051 but also allows the court to stay or dismiss if it is in the interest of justice and for the convenience of the parties.

⁷ (1) an alternative forum exists in which the claim or action may be tried; (2) the alternative forum provides an adequate remedy; (3) maintenance of the action in the courts of Texas would work a substantial injustice to the moving party; (4) the alternative forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all properly joined defendants; (5) the balance of the private interests of the parties and the public interest of the state predominate in favor or the claim or action being brought in an alternative forum; and (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

Effective Date: September 1, 2003.

These changes apply to all cases filed on or after September 1, 2003.

Article 4 – Proportionate Responsibility and Designation of Responsible Parties⁸

H.B. 4 made some significant modifications to Responsible Third Party practice, eliminated the dollar-for-dollar or sliding scale settlement credits, and modified various definitions which, in and of themselves, impact a party's potential contribution rights. Those changes are highlighted in more detail below.

“Designation” of Responsible Third Parties [TEX. CIV. PRAC. & REM. CODE §33.004].

a. Timing.

The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

b. Defendant's Motion.

A defendant may now “designate,” rather than “join,” a responsible third party. A defendant does so by filing a “motion for leave to designate that person as a responsible third party.” The trial court shall grant leave to do so unless another party files an objection.

c. Objection.

Any objection to the designation must be filed on or before the 15th day after the date the motion for leave is served. To prevent designation of the responsible third party, the objection must establish:

- The defendant did not plead sufficient facts concerning the third party's alleged liability to satisfy the Texas Rules of Civil Procedure's pleading requirements; and
- after being granted leave to replead, defendant still fails to plead sufficient facts.

d. Effect of Being Designated A Responsible Third Party.

None. The designation expressly does not impose liability on the responsible third party and may not be used in any other proceeding “on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.”

⁸ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP's Appellate and Litigation Support section.

e. Jane or John Doe Third Parties.

1. Timing.

Any request to “designate” an unknown party must be done within 60 days after the filing of the defendant’s original answer.

2. Procedure.

The defendant alleges in an answer “that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit.”

3. Burden.

The court shall grant a motion for leave to designate an unknown person as a responsible third party if:

- The Defendant pleads sufficient facts for trial court to determine that there is a reasonable probability that the act of the unknown person was criminal;
- The Defendant states in its answer all identifying characteristics of the unknown person, known at the time of the answer; and
- The allegations satisfy the pleadings requirements of the Texas Rules of Civil Procedure.

f. Motion to Strike.

After an adequate time for discovery, a party may move to strike the designation on the ground that there is no evidence that the designated person is responsible for any portion of the claimant’s alleged injury or damage.

The court shall grant the motion unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person’s responsibility.

This “motion to strike” procedure sounds an awful lot like a “no evidence” motion for summary judgment and will likely be treated, by trial courts and on appeal, the same way.

g. Savings Provision.

If a person is designated as a “responsible third party,” the claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.

BEWARE: Because of the broader time frame applicable to designated responsible third parties in the first place, this savings provision appears to drastically increase a Plaintiff's ability to join parties against whom plaintiff's claims would otherwise be barred, essentially creating an indefinite extension to limitations provided that plaintiff's suit against the first-party defendant is timely.

In fact, since a defendant has until 60 days before trial to designate a responsible third party, it stands to reason that a plaintiff could conceivably sue that party directly on the day of trial. Obviously, pleading and other docket control deadlines may come into play, but the statute specifically allows a plaintiff to do so. Under these circumstances, it would seem that the only realistic option under those circumstances is for a trial court to continue the case.

h. Requests for Disclosure.

The new Act requires that the Texas Supreme Court amend Texas Rule of Civil Procedure 194.2 "as soon as practicable" to include disclosures of the name, address, and telephone number of any person who may be designated as a responsible third party.

Amended Definitions [TEX. CIV. PRAC. & REM. CODE § 33.011].

a. Amended Definition of "Claimant" [TEX. CIV. PRAC. & REM. CODE § 33.011(1)].

"Claimant" is now defined as (1) a person seeking recovery of damages; and (2) in an action in which a party seeks recovery of damages for injury to another person, damage to property of another person, death of another person, or other harm to another person, "claimant" includes:

- (A) the person who was injured, was harmed, or died or whose property was damaged; and
- (B) any person who is seeking, has sought, or could seek recovery of damages for injury, harm or death of that person or damage to property of that person.

By changing this definition, the Legislature appears to have drastically enlarged the scope of this definition from that originally interpreted by *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112, 122 (Tex. 1998). In *Drilex*, the court held that all family members seeking to recover for an injury to a child qualified as one "claimant" under section 33.011(1) and, thus, any amount paid to any family member was to be treated as an amount paid to a "claimant" for settlement purposes.

Now, however, "claimant" is not limited simply to those seeking recovery, but also those who "could have" sought recovery for the injury to another. Presumably, no longer will you have the problem created in *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002).

Finally, a much broader class of “claimant” available for purposes of establishing the 51% bar to recovery. *See* TEX. CIV. PRAC. & REM. CODE § 33.001 (“a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.”).

b. Amended definition of “Settling person” [TEX. CIV. PRAC. & REM. CODE § 33.011(5)].

The statute now defines a “settling person” as “a person who has at any time paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability...” This definition removes language that seemed to require that person have done so “at time of submission,” presumably expanding this definition to include defendants who settle after the case is submitted to the jury. *See, e.g., Palais Royal, Inc. v. Gunnels*, 976 S.W.2d 837, 854 (Tex. App. – Houston [1st Dist.] 1998, pet. dismiss’d) (defining “at time of submission” to mean a time before the charge conference, the reading of the charge to the jury, and closing arguments, and refusing to allow credit for a the settlement of a co-defendant who settled with the plaintiff after the case was submitted to the jury).

c. Amended definition of “Responsible Third Party” [TEX. CIV. PRAC. & REM. CODE § 33.011(6)].

Who is a “responsible third party”?

“Responsible third party” is now defined broadly as “any person alleged to have caused or contributed to cause, in any way, the harm...” More importantly, however, the definition removes the prior requirements that:

- (i) the court be able to exercise jurisdiction over the person;
- (ii) the person could have been, but was not, sued by the claimant; and
- (iii) the person is or may be liable to plaintiff for all or part of the damages claimed against the named defendant(s).

With these requirements gone, a defendant can now designate as “responsible third parties” entities or persons over whom court would not otherwise have jurisdiction. This amendment should also allow for the designation of co-defendants against whom plaintiff’s claims may be compelled to arbitration and possibly negligent (and otherwise immune) parents in a suit by a child.

Who is not a “responsible third party”?

According to the amended definition, ONLY sellers eligible for indemnity under TCPRC Chapter 82 are not “responsible third parties.” Again, however, this amendment is more important for what is not included. The following are no longer excepted from designation as a responsible third party:

- (i) an employer covered by workers' compensation insurance coverage; and
- (ii) a person or entity that is a debtor in a bankruptcy proceeding, or a person or entity against whom claimant's claim has been discharged in bankruptcy.

By allowing such employers and bankrupt entities to be considered by the jury, these amendments clearly shift the burden of immunity or insolvency squarely on the Plaintiff.

Settlement Credits [TEX. CIV. PRAC. & REM. CODE § 33.012].

For all cases other than health care claims:

No longer is a defendant entitled to a dollar-for-dollar or sliding scale settlement credit. Instead, a jointly and severally liable defendant is now entitled simply to a credit for the settling person's percentage of responsibility.

For health care claims:

For health care claims, the defendant has the option of either: (1) a dollar-for-dollar credit; or (2) a credit for settling person's percentage of responsibility. As with prior practice, the defendant is required to make the election prior to submission to the jury. However, the default credit, in the event no election is made, is the dollar-for-dollar credit.

Changes to Joint & Several Liability Statute [TEX. CIV. PRAC. & REM. CODE § 33.013].

H.B. 4 deletes the joint and several liability provisions previously applicable to hazardous substance and toxic tort cases.

Modification of Workers' Compensation Insurance Carrier's Subrogation Interest [TEX. LAB. CODE §417.001(b)].

H.B. 4 limits an insurance carrier's subrogation interest to: (1) the total amount of benefits paid or assumed by carrier to employee or legal beneficiary MINUS (2) the amount by which a court reduces a judgment based on the percentage of responsibility attributed to the employer.

Effective Date – July 1, 2003

These change apply to any action filed on or after July 1, 2003.

Article 5 – Products Liability⁹

The Fifteen Year Statute of Repose Now Applies To All Products

Section 16.012 of the Texas Civil Practice and Remedies Code was promulgated in 1993 and provided a fifteen-year statute of repose for manufacturing equipment. A claimant had to bring a lawsuit against a manufacturer or seller of “manufacturing equipment” within fifteen years of the date of sale. “Manufacturing equipment” was defined as equipment and machinery used in the manufacturing, processing, or fabrication of tangible personal property but did not include agricultural equipment or machinery. Even though this statute was promulgated in 1993, there was little case law in Texas or the Fifth Circuit interpreting its application, and, due to the limited equipment to which it applied, was seldom employed as a defense.

As a result of House Bill 4, the fifteen-year statute of repose has been expanded and now applies to all products. A claimant must now commence a products liability cause of action against a manufacturer or seller of a product before the end of fifteen years after the date of sale of the product by the defendant.

There are, however, four exceptions:

1. If the manufacturer or seller expressly warrants in writing that a product has a useful life of more than fifteen years, a claimant must commence a products liability action against the manufacturer or seller before the end of the number of years warranted.
2. There is a “latent disease” exception. The statute does not apply to actions for personal injury or wrongful death where the claimant alleges that he was exposed a product before the end of fifteen years after the date of sale; that the exposure to the product caused the claimant’s disease; and that the symptoms of the disease did not manifest themselves before the end of the fifteen year period to a degree and for a duration that would put a reasonable person on notice that he suffered some injury.
3. The statute of repose does not apply to the lease of a product.
4. The statute does not apply to claims to which the General Aviation Revitalization Act of 1994 applies.

No More Strict Liability For Innocent Product Sellers

Pursuant to House Bill 4, the Texas Civil Practices and Remedies Code now contains a new provision governing the liability of non-manufacturing sellers. TEX. CIV. PRAC. & REM. CODE §82.003. It provides that a seller who does not manufacture a product is not liable for harm resulting from the product unless a claimant proves one of the following:

⁹ Article summarized by [Gina Acosta](#), associate in Hermes Sargent Bates, LLP’s Products Liability section.

1. the seller participated in the design of the product;
2. the seller altered or modified the product resulting in the claimant's harm;
3. the seller installed the product or had the product installed on another product and the claimant's harm resulted from the installation;
4. the seller exercised substantial control over the content of an inadequate warning or instruction that accompanied the product;
5. the seller made an express factual representations about some aspect of the product that was incorrect; the claimant relied on the representation in obtaining or using the product; and the claimant would not have been harmed or would have not have suffered the same degree of harm had the product been as represented;
6. the seller actually knew of a harmful defect in the product when it was sold; or
7. the manufacturer of the product is insolvent or not subject to the court's jurisdiction.

House Bill 4 specifically provides that this defense will not apply to a manufacturer or seller whose liability in a products liability action is governed by Chapter 2301 of the Texas Occupations Code (which governs the sale or lease of motor vehicles).

This new statute should now result in a reduction in the amount of indemnity claims filed by sellers under Chapter 82 of the Texas Civil Practice and Remedies Code. Also, this statute may result in more products suits ending up in federal court. Typically, a products suit included a diverse manufacturer and an innocent seller who was non-diverse, thereby destroying diversity jurisdiction. Now, for suits filed after July 1, 2003, any non-diverse seller can arguably be disregarded as fraudulently joined for jurisdictional purposes.

Rebuttable Presumption Based On Compliance With Government Standards

House Bill 4 adds a new provision to the Texas Civil Practices and Remedies Code that creates a government standards defense, by way of a rebuttable presumption, which can be asserted under two scenarios. TEX. CIV. PRAC. & REM. CODE §82.008. First, a product manufacturer or seller in a products liability action will be entitled to a rebuttable presumption that he is not liable for injury to a claimant caused by some aspect of the formulation, design, or labeling of the product if the manufacturer or seller proves that the formula, design, or labeling complied with mandatory safety standards or regulations adopted and promulgated by the federal government (or any agency of the federal government) that were applicable to the product at the time of manufacture and that governed the risk that allegedly caused the harm. This presumption can be rebutted if a claimant proves:

1. that the mandatory federal safety standard or regulation was inadequate to protect the public from an unreasonable risk of injury; or
2. that the manufacturer, before or after marketing the product, withheld or misrepresented information relevant to the federal government's determination of adequacy of the safety standards at issue.

Second, there will be a rebuttable presumption that a product manufacturer or seller is not liable for injury to a claimant caused by some aspect of the formulation, design, or labeling of the product if the manufacturer or seller proves that the product was subject to pre-market licensing or approval by the federal government (or any agency of the federal government); that the manufacturer complied with all of the government's procedures and requirements with respect to pre-market licensing or approval; and that after full consideration of the product's risks and benefits, the product was approved or licensed for sale by the government. Again, a claimant will be able to rebut this presumption if he can prove:

1. that the standards or procedures used in pre-market approval or licensing were inadequate to protect the public an unreasonable risks of injury; or
2. that the manufacturer, before or after approval or licensing, withheld or misrepresented information from the government that was material and relevant to the performance of the product and was causally connected to the injury at issue.

The government standards defense does not apply to manufacturing flaws or defects even if the manufacturer complied with federal mandatory quality control or manufacturing processes. Furthermore, this defense will not apply to pharmaceutical products.

Whether this statute has a significant impact on products cases will depend on how it is interpreted. Typically, federal standards – like, for instance, Federal Motor Vehicle Safety Standards (“FMVSS”) - have been interpreted as minimum performance standards, not design standards. If this remains the case, it would stand to reason that the “rebuttable presumption” provided by this statute could be overcome rather easily.

Evidence of Subsequent Remedial Measures Not Admissible In Products Cases

Previously, Texas Rule of Evidence 407 generally prohibited the introduction of “subsequent remedial measures” (evidence of measures taken after an event which, if taken previously, would have made the event less likely to occur) if the evidence was admitted to prove negligence or other culpable conduct in connection with the event. However, this general prohibition did not apply in products liability actions based on strict liability.

As a result of House Bill 4, Texas Rule of Evidence 407 was rewritten to conform to Federal Rule of Evidence 407 and now provides that subsequent remedial measures are not admissible in products liability actions and reads as follows: “[w]hen, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the

injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. ..." Subsequent remedial measures will still be admissible for other purposes such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. *See* Supreme Court of Texas, Misc. Docket No. 03-9145, *Amendments to the Texas Rules of Civil Procedure, the Texas Rules of Appellate Procedure, the Texas Rules of Evidence, and the Texas Rules of Judicial Administration*, 66 TEX. BAR JOURNAL 774, 775 (2003).

Effective Date – July 1, 2003

These changes apply to any action filed on or after July 1, 2003.

Article 6 – Interest¹⁰

The pre- and post-judgment interest rate were apparently of utmost concern to the 2003 Legislature, having been amended in two different House Bills, H.B. 4 and H.B. 2415. Both bills include identical language changing the post-judgment interest rate.

Interest Rates.

Prior to H.B. 4, the post-judgment interest rate was tied to the “auction rate quoted on a discount basis for 52 week treasury bills issued by the United States government as most recently published by the Federal Reserve Board,” and provided an interest rate floor of 10% and a ceiling of 20%. Given low interest rates, the post-judgment interest rate¹¹ had been at 10% for some time.

H.B. 4 changed that rate. Now, the post-judgment interest rate is based on the prime rate as established by the Federal Reserve Bank of New York, with a floor of 5% and cap of 15%. Currently, rates are below 5%. Thus, the current pre- and post-judgment interest rate on a judgment should be 5%.

No Prejudgment Interest on Future Damages.

Previously, a trial court was required to award pre-judgment interest on future damages. *See C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 324-27 (Tex. 1994). Now, however, H.B. 4 adds section 304.1045 to the Texas Finance Code which provides that “[p]rejudgment interest may not be assessed or recovered on an award of future damages.”

Trial Court No Longer Allowed To Toll Pre-judgment Interest Based On Periods of Delay.

A trial court used to be expressly permitted to toll the accrual of prejudgment interest during periods of delay in the case. For example, if the plaintiff’s counsel had asked for numerous continuances or had, in some other fashion, acted unilaterally to delay the trial and ultimate judgment, the trial court could refuse to award pre-judgment interest for that period. That authority is gone under H.B. 4. Section 304.108, which provided a trial court this authority, has been repealed.

Effective Date – June 20, 2003?

The changes to the pre- and post-judgment interest statutes have a slightly different effective date, and one that will likely need some clarification from the court. While the interest rate changes contained in H.B. 4 went into effect September 1, 2003, the identical changes

¹⁰ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP’s Appellate and Litigation Support section.

¹¹ By changing the post-judgment interest rate, H.B. 4 necessarily changes the prejudgment interest rate as well, at least in wrongful death, personal injury, and property damage cases. *See* TEX. FIN. CODE §304.103 (“The prejudgment interest rate is equal to the post-judgment interest rate at the time of judgment.”).

contained in H.B. 2415 went into effect upon enactment of the bill, which was signed by Governor Perry on June 20, 2003.

Whether one looks to H.B. 4 (September 1, 2003) or H.B. 2415¹² (June 20, 2003), their effective dates apply as follows:

The changes in law made by this Act apply in a case in which a final judgment is **signed or subject to appeal** on or after the effective date of this Act.

Tex. H.B. 4, §6.04, 78th Leg., R.S. (2003); Tex. H.B. 2415, §2(a), 78th Leg., R.S. (2003).

Clearly, the language is ambiguous. Does the effective date language mean the changes apply:

- (1) in a case in which a final judgment is signed on or after the effective date of this Act; or
- (2) in a case subject to appeal on or after the effective date of this Act?

Or, does it mean the changes apply:

- (1) in a case in which a final judgment is signed on or after the effective date of this Act; or
- (2) in a case in which a final judgment is subject to appeal on or after the effective date of his Act?

Under Scenario 1, the “subject to appeal” appears to refer to cases, other than those in which final judgments have been entered, but that are otherwise subject to appeal on or after the Act’s effective date – i.e., interlocutory orders. However, Scenario 1’s reference to interlocutory orders would be unnecessary since there would not be any money award included in such a judgment to which post-judgment interest would necessarily apply. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2003).

Scenario 2 is equally puzzling, since if it truly refers to cases “subject to appeal” on or after the effective date, it would seem to apply to any judgment in any case currently in any appellate pipeline. This Scenario would seem unprecedented and unworkable, given the requirement that every judgment currently on appeal be modified to include the new interest rate. This scenario would also seem to run into some constitutional issues given that, by all appearances, it would have to apply retroactively to a judgment.

Whatever the case, to the extent a judgment has been entered, even before June 20, 2003 or September 1, 2003, and the trial court still has plenary power over that judgment, it would be a good idea to at least raise this issue so it could be pursued on appeal.

¹² H.B. 2415 **only** changes the interest rate; it does not address pre-judgment interest on future damages. Thus, that change in the law could only have gone into effect on September 1, 2003, as provided by H.B. 4.

Article 7 – Appeal Bonds¹³

A supersedeas bond is the instrument by which a judgment debtor stays the execution of a judgment pending an appeal. Texas law always required that bond to be in the amount of the judgment, plus interest for the expected duration of the appeal (most courts usually required anywhere from 18 months to two years worth of interest) and costs. The bond could only be lowered upon a showing of “irreparable harm.”

Amount of Security Potentially Lowered and Capped.

H.B. 4 significantly lessens the burden of posting an appeal bond. Now, to supersede a money judgment, security must be posted in an amount equal to:

1. the amount of **compensatory damages** awarded;
2. interest for the estimated duration of the appeal; and
3. costs awarded in the judgment.

TEX. CIV. PRAC. & REM. CODE § 52.006(a). No longer are punitive damages considered in calculating the amount of the bond.

Further, regardless of the amount of the judgment, the amount of the bond needed to supersede the judgment is capped at the lesser of:

1. 50% of the judgment debtor’s net worth¹⁴; or
2. \$25 million.

TEX. CIV. PRAC. & REM. CODE § 52.006(b).

Easier Burden to Have Amount of Security Lowered

In addition to this cap, the statute was further amended to seemingly make it easier for a debtor to have the amount of security required to supersede a judgment lowered. Now, a trial court is required to lower the amount of security if the judgment debtor shows it is likely to suffer “substantial economic harm,” a seemingly far cry from the prior “irreparable harm” showing required.

¹³ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP’s Appellate and Litigation Support section.

¹⁴ One significant issue that will need to be resolved is whether a debtor’s net worth includes **insurance coverage** for the claimed conduct. Generally, insurance coverage is not considered an asset for accounting purposes unless it has a cash surrender value.

Ability to Use Assets In Normal Course of Business

And, finally, the new statute, while still giving the trial court discretion to enjoin a judgment debtor from disposing of assets to avoid satisfaction of a judgment, it prohibits a trial court from making any order that interferes with the debtor's ability to use those assets in the normal course of business. TEX. CIV. PRAC. & REM. CODE § 52.006(e).

New Rules of Appellate Procedure

The Texas Supreme Court has also amended Texas Rules of Appellate Procedure 24.2 and 24.4 to reflect these changes. Most changes simply mirror the requirements already set out in the statute. However, one change of particular importance is new Rule 24.2(c), which provides a procedure for determining a debtor's net worth. The new rule provides as follows:

- (1) **Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence.** A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.
- (2) **Contest; Discovery.** A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.
- (3) **Hearing; Burden of Proof; Findings.** The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

TEX. R. APP. P. 24.2(c).

Effective Date – September 1, 2003.

These changes apply to any case in which a final judgment is signed on or after September 1, 2003.

Article 8 – Evidence Relating To Seat Belts¹⁵

Use or Non-Use of Seatbelts Now Admissible At Trial

Texas law provides requirements for the use of seat belts in motor vehicles for both adults and children. Previously, the use or non-use of a safety belt was generally not admissible as evidence in a civil trial. TEX. TRANSP. CODE ANN. §§545.412(d) and 545.413(g). This often prevented Defendants from demonstrating the comparative negligence of a claimant who failed to wear her seat belt in an automobile accident. However, House Bill 4 repealed sections 545.412(d) and 545.413(g) of the Texas Transportation Code now allowing for such evidence to be submitted to a jury.

Effective Date – July 1, 2003

This change applies to any action filed on or after July 1, 2003.

¹⁵ Article summarized by [Gina Acosta](#), associate in Hermes Sargent Bates, LLP's Products Liability section.

Article 10 – Health Care¹⁶

The practical effect of H.B. 4 is that it repeals the Texas Medical Liability and Insurance Improvement Act, which was the law relating to medical malpractice cases in Texas, and replaced it with extensive amendments that are codified in Chapter 74 of the Civil Practices and Remedies code. Specifically, H.B. 4 codifies provisions relating to notice letters, informed consent, the disclosure panel, *res ipsa loquitur*, the set of uniform discovery questions, the arbitration agreement language, and the DTPA exemption for physicians and health care providers into Chapter 74. These major changes in the law affecting medical malpractice litigation are explained below.

Limitations on Damages

a. Non-economic damages.

The limit on non-economic damages varies based on whether the defendant is a physician, a health care provider, or a health care institution. The term “health care provider” now includes chiropractors, optometrists, and health care institutions. The term “health care institution” includes ambulatory surgical center, assisted living facility, and hospice.

A claimant’s¹⁷ recovery for non-economic damages is limited to:

- \$250,000 from physicians or health care providers, regardless of the number of defendant physicians or health care providers in the suit.
- In cases involving healthcare institutions, the claimant cannot recover more than \$250,000 for non-economic damages from any one health care institution and is limited to total recovery of \$500,000 for non-economic damages if there are multiple health care institutions.
- There is an aggregate cap of \$750,000 regardless of the number of defendants in the case.

In wrongful death cases based on health care liability claims, the claimant is limited to recovery of \$500,000, which includes punitive damages but excludes expenses related to necessary medical, hospital, or custodial care. The limitations on damages recoverable in wrongful death cases may be increased or decreased in accordance with the changes to the consumer price index.

¹⁶ Article summarized by [Tanja Martini](#), associate in Hermes Sargent Bates, LLP’s Medical Malpractice section.

¹⁷ A “claimant” is also defined now to include all claimants from a single injury, including an estate – *i.e.*, derivative claimants, such as wrongful death beneficiaries or other claimant’s seeking to recover based on an injury to another.

b. Lost income.

Chapter 74 also allows the jury to consider a plaintiff's income taxes when awarding lost future income.

c. Periodic payment of future medical, healthcare, or custodial expenses.

The new rules also provide that the court must order that medical, health care, and custodial services awarded be paid in periodic payments rather than lump-sum payment if the present value of future damages equals or exceeds \$100,000. The court shall require the defendant(s) to provide proof of adequate insurance or post security adequate to assure full payment of the periodic payment. Additionally, the judgment shall specify how and when the periodic payments are made. Further, at the request of the defendant, the court may also order that other future damages be paid in periodic payments. If the recipient of the periodic payment dies before all the payments are made, payments for loss of future earnings will continue to be paid to the recipient's estate, but other periodic payments will stop. There is also a limitation on the interest allowed. Prejudgment interest must be included on past damages. However, no prejudgment interest is available on future damages. Attorney fees are paid at time of judgment based on present value of future damages.

d. Stowers.

An insurer's liability under the Stowers Doctrine may not exceed the liability of the insured.

Notice Requirements

Chapter 74 provides that a notice of suit must be accompanied by an authorization form for release of protected health information. The party must use a form that is designed to comply with HIPPA. If the party fails to provide the proper release form or no release at all, the suit will be abated until 60 days after the defendant receives such authorization. The time by which a health care provider must furnish a copy of the claimant's medical records has been increased from 10 days to 45 days.

Ten-Year Statute of Repose

A 10-year statute of repose, barring all health care liability claims if not brought within 10 years of the date of the act or omission giving rise to the claim is now in effect. H.B. 4, however, has not affected the 2-year statute of limitations.

Experts and Expert Reports

Claimants no longer have the option of filing cost bonds. Instead, a claimant must furnish an expert report including the expert's curriculum vitae within 120 days of filing suit, rather than 180-days as previously allowed. If the plaintiff fails to serve the report before the deadline, the court may dismiss the case with prejudice and award attorney's fees and costs to

the defendant. The court may also grant one 30-day extension for serving the expert report. Additionally, the parties may agree to extend the date for serving the expert report. If the defendant intends to challenge the sufficiency of the expert report, he must do so within 21 days of being served or any objections will be waived. Chapter 74 allows for an interlocutory appeal if the trial judge fails to dismiss the claim due to failure to meet expert report requirement or if the defendant's objections are overruled.

Chapter 74 also contains more specific qualifications for expert witnesses. Defendant doctors may testify as an expert on their own behalf. In suits against a health care provider, an expert is qualified to testify on the behalf of a plaintiff only if the expert is (1) practicing in the same field as the defendant when the testimony is given or when the claim arose; (2) has knowledge of standards of care; and (3) is qualified on the basis of training and/or experience - *i.e.*, the expert is board certified, licensed, or has other substantial training and is actively practicing health care in the area of practice relevant to the claim. The court may depart from such criteria in determining the qualifications of the expert to testify if the court finds good reason to admit the testimony.

Discovery

Discovery in a health care liability claim is stayed until the claimant has served the expert report and curriculum vitae except that the claimant may acquire information through written discovery, deposition on written questions, or discovery from nonparties. Additionally, before the expert report is filed, the plaintiff may take two depositions.

Good Samaritan Law.

The Good Samaritan law in Texas [TEX. CIV. PRAC. & REM. CODE §74.001(a)] used to provide that “[a] person who in good faith administers emergency care ... at the scene of an emergency but not in a hospital or other health care facility or means of medical transport is not liable in civil damages for an act performed during the emergency unless the act is willfully or wantonly negligent.” The protection provided by this law did not apply, however, if the care was administered “for or in expectation of remuneration.” Even where the person administering the care waived or elected not to receive remuneration on the occasion in question, that person was still considered to be acting “for or in expectation of remuneration” and thus was not protected by this law. Further, emergency room physicians or admitting or attending physicians of the patient were not entitled to protection.

H.B. 4 seeks to eliminate those exclusions by significantly expanding the Good Samaritan law. First, H.B. 4 deletes the provision that made the Good Samaritan Law inapplicable if the emergency care was administered in a hospital, health care facility, or means of medical transport. The Act further provides that simply being legally entitled to receive remuneration for emergency care does not necessarily establish that the care was administered for or in anticipation of remuneration. And, finally, the new amendments delete the provision that expressly excluded emergency room physicians, treating physicians, and attending physicians from benefiting from the statute.

Effective Date – September 1, 2003.

These changes apply to any action filed on or after September 1, 2003.

Article 11 – Claims Against Employees or Volunteers of a Governmental Unit¹⁸

Expands Liability Protection to “Public Servants.”

Currently, a public servant, other than a provider of health care, is not personally liable for damages in excess of \$100,000 arising from personal injury, death, deprivation of right, privilege, or immunity, or property damage if the damages resulted from an act or omission by the public servant in the course and scope of the public servant’s official duties. [TEX. CIV. PRAC. & REM. CODE §108.002(a), (b).] H.B.4 expands the protection provided by this statute by:

- (1) eliminating the exception for health care providers;
- (2) specifically defining “public servant” to include “a licensed physician who provides emergency or postemergency stabilization services to patients in a hospital owned or operated by a unit of local government; and
- (3) defining nonprofit corporations, partnerships, or sole proprietorships that manage or operate a governmental hospital for a municipality or local government into the definition of “governmental unit” under Chapters 101 and 102, thus, making their employees “public servants” under section 108.002.

Election of Remedies

The Act also adds an “Election of Remedies” section to the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE §101.106. This section appears to force a plaintiff to choose whether to sue a governmental employee or a governmental unit, but not both. Suit against one “constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff” against the other. *Id.* at §101.106(a), (b).

This new statute exhibits a clear favor for suing the governmental unit rather than the governmental employee. “If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.” *Id.* at §101.106(e). And, if suit is filed against a governmental employee based on conduct with the scope of his or her employment and could have been brought against the governmental unit, the suit is considered to be against the employee in his or her official capacity only. *Id.* at §101.106(f). In fact, suit against the employee, upon motion of the employee, “shall be dismissed” unless the plaintiff amends its pleadings dismissing the employee and naming the governmental unit as defendant within 30 days of the day the employee’s motion is filed. *Id.*

¹⁸ Article summarized by [Alan Gooding](#), associate in Hermes Sargent Bates, LLP’s Construction Law, General Civil Litigation, and Estate Planning sections.

Effective Date – September 1, 2003

These changes in law apply to any action filed on or after September 1, 2003.

Article 13 - Damages¹⁹

Article 13 of H.B. 4 addresses both the standards applicable to the award of exemplary damages and the proof necessary to establish various elements of economic damages.

Exemplary Damages Standard.

Exemplary damages are now available upon a showing of malice or gross negligence. The answer to the predicate question for exemplary damages and the amount of exemplary damages **must be unanimous** and the jury must be instructed as such.

Malice has been re-defined as “specific intent” to “cause substantial injury or harm to the claimant.” “Gross negligence,” in turn, is defined as it was previously: an act or omission (a) which, when viewed objectively from the standpoint of the actor at the time of the occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (b) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

As you may recall, under the old exemplary damages statute, “malice” was the standard for all cases and “gross negligence” was the standard for wrongful death suits. However, an alternative definition of “malice” was nearly the same as the definition of “gross negligence.” Thus, this change appears to have been made so that the standards make more logical sense. “Malice” is redefined so as to not overlap with the definition of “gross negligence” and all cases are now subject to exemplary damages where there is either “malice” or “gross negligence.”

Exemplary Damages – Injury to Child, Elderly or Disabled Person.

Currently, Texas Civil Practice and Remedies Code section 41.008 provides an exception to the caps on exemplary damages if a defendant violates certain provisions of the Texas Penal Code, one of them being Section 22.04 which makes it a felony to injure a child, an elderly person, or a disabled person. Inevitably, this would result in this Penal Code section being plead in any medical malpractice case or nursing home case involving a child, elderly, or disabled person. H.B. 4 amended that exception by providing that a violation of this Penal Code section does not avoid the exemplary damage caps provided by Section 41.008 so long as the conduct occurred “while providing health care as defined by Section 74.001.”

Proof of Economic Damages I – Recovery of Medical or Health Care Expenses “Actually Paid or Incurred.”

Recovery of medical or health care expenses is now limited “to the amount actually paid or incurred buy or on behalf of the claimant.” Presumably, a claimant can no longer recover amounts of economic damages for medical care unless someone actually paid for the care. Thus, donated care and costs negotiated down by an insurer will affect the amount of medical expenses a plaintiff can recover.

¹⁹ Article summarized by [Amy Davis](#), associate in Hermes Sargent Bates, LLP’s Products Liability section.

Proof of Economic Damages II – Lost Earnings, Earning Capacity, Inheritance & Contribution of Pecuniary Value Must Take Into Account Tax Liability.

A claimant must prove recovery of lost earnings, earning capacity, inheritance and contributions of pecuniary value with an offset for tax liability. This provision places the burden on a claimant seeking to recover lost income, lost inheritance or loss of household services to prove the effect federal taxes would have on the amounts sought. The jury is to be instructed as to whether such damages are subject to federal or state income taxes.

Effective Date – September 1, 2003

These changes apply to any action filed on or after September 1, 2003.

Article 15 – School Employees²⁰

There were a vast number of changes with regard to Article 15, Subchapter B, Chapter 22 of the Education Code, which addresses school employees. Below is a section-by-section description of the amended section as well as the newly added sections.

Section 22.051 – Expanded Definition of “Professional Employee of a School District.”

This section was amended, and the definition of a “professional employee of a school district” was changed to include substitute teachers, teachers employed by a company that contracted with the school district, and members of the board of trustees. The remainder of the definition did not change and still covers the same individuals that were covered before. The only other changes to this section involved deleting the reference to motor vehicle use and immunity from liability. However, these subsections were simply moved to § 22.0511. The following sections are the new sections that were added to Chapter 22.

Section 22.0511 – Additional Basis for Immunity from Liability.

This section basically transplants what was located in § 22.051(a) and (b) and adds a new subsection. Under subsection (c), in addition to the immunity provided in (a) and (b), immunity is also provided under the Paul D. Coverdell Teacher Protection Act of 2001 (20 U.S.C. 6731, *et seq.*). For purposes of subsection (c), the term “individual” includes a person who provides services to private schools, to the extent provided by federal law.

Section 22.0513—Notice of Claim.

Under subsection (a), when suing a professional employee of a school district, the person being sued must be given written notice reasonably describing the incident no less than 90 days before filing suit. Subsection (b) states that if no written notice is provided, the person being sued may file a plea in abatement not later than the 30th day after the date the person files their answer. According to (c), a court shall abate the suit if, after a hearing, the court finds that notice was not provided under subsection (a). Finally, subsection (d) states that the case is to be abated until the 90th day after the date written notice is given.

Section 22.0514—Exhaustion of Remedies.

A person may not sue a professional employee of a school district unless that person has exhausted all remedies provided by the school district.

Section 22.0516—Alternative Dispute Resolution (“ADR”).

A court may refer a case to ADR as provided in Texas Civil Practice and Remedies Code Chapter 154.

²⁰ Article summarized by Lisa Pittard, former associate in Hermes Sargent Bates, LLP’s Appellate and Litigation Support section.

Section 22.0517—Recovery of Attorney’s Fees in Action Against Professional Employee.

An employee of a school district can recover attorney’s fees if the employee is found immune from liability under this subchapter.

Effective Date – September 1, 2003

These changes apply to actions filed on or after September 1, 2003

Article 16 – Admissibility of Certain Evidence In Civil Actions²¹

Certain Evidence Prohibited Against Nursing Homes

This article of H.B. 4 deals primarily with the admissibility of certain evidence against nursing homes. Specifically, H.B. 4 adds Texas Human Resources Code § 32.060 which generally prohibits the admission of evidence of: (1) a finding by the Texas Department of Human Services that a nursing institution has violated a standard for participation in the medical assistance program; or (2) any assessment or payment of a monetary penalty against or by a nursing institution as required by the medical assistance program. Such evidence is admissible only if:

- (1) the evidence relates to a material violation of this chapter or a rule adopted under this chapter or assessment of a monetary penalty with respect to:
 - (A) the particular incident and the particular individual whose personal injury is the basis of the claim being brought in the civil action; or
 - (B) a finding by the department that directly involves substantially similar conduct that occurred at the institution within a period of one year before the particular incident that is the basis of the claim being brought in the civil action; and
- (2) the evidence of a material violation has been affirmed by the entry of a final adjudicated and unappealable order of the department after formal appeal; and
- (3) the record is otherwise admissible under the Texas Rules of Evidence.

The new Act also adds Texas Health and Safety Code § 242.017, which provides for the same general prohibition on the admission of evidence against nursing institutions mentioned previously, along with the same exceptions.

Finally, towards that end, H.B. 4 repeals Texas Health and Safety Code §§ 32.021(i) and (k) and § 242.050 which provided that: (1) a record of the Texas Department of Human Services, including a record of a Department survey, complaint investigation, incident investigation, or survey report, that relates to a nursing institution may be introduced into evidence in a civil action, enforcement action, or related proceeding if the record is admissible under the Texas Rules of Evidence; and (2) a Department surveyor or investigator can testify in a civil action as to observations, factual findings, conclusions, or violations of requirements for licensure or for certification for participation in the state Medicaid program, if the testimony is admissible under the Texas Rules of Evidence.

²¹ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP's Appellate and Litigation Support section.

Effective Date – September 1, 2003

These changes apply to actions filed on or after September 1, 2003.

Article 17 – Limitations in Civil Actions of Liabilities Relating To Certain Mergers or Consolidations²²

Successor Corporation’s Liability Limited for Asbestos-related Claims

H.B. 4 creates Chapter 149 of the Texas Civil Practice and Remedies Code which, generally, limits a successor corporation’s liability for asbestos-related claims to the fair market value of the “total gross assets” of the acquired company when that acquired company has asbestos-related liability. Assets are to be valued as of the date of the merger or consolidation.

Effective Date - Immediately

This statute, unlike most others, took effect immediately upon enactment of H.B. 4,²³ and applies to actions commenced on or after that date and to those actions pending on that date in which the trial, a new trial, or retrial begins on or after that date.

²² Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP’s Appellate and Litigation Support section.

²³ H.B. 4 was signed by Governor Perry on June 11, 2003.

Article 18 – Charitable Immunity and Liability²⁴

Immunity Now Applies To All Volunteers

Section 84.004 of the Texas Civil Practice and Remedies Code previously provided that, with a few exceptions, a volunteer who was serving as an officer, director, or trustee of a charitable organization was immune from civil liability for any act or omission resulting in injury, damage, or death if the volunteer was acting within the course and scope of his duties as an officer, director, or trustee within the organization. TEX. CIV. PRAC. & REM. CODE ANN. §84.004(a). House Bill 4 amended section 84.004(a) to delete the reference to officers, directors, and trustees thereby providing immunity for all volunteers for the charity.

Burden of Proof

Section 84.004 of the Texas Civil Practices and Remedies Code also provided immunity, with some exceptions, for volunteer health care providers who served as direct service volunteers if the volunteer was acting in good faith and in the course and scope of the volunteer's duties within the organization; if the volunteer committed the act or omission in the course of providing health care services; if the service provided was within the scope of the license of the volunteer; and if volunteer obtained necessary consent prior to providing health care services. TEX. CIV. PRAC. & REM. CODE ANN. §84.004(c). Pursuant to House Bill 4, a volunteer health care provider no longer has to prove that she was acting in good faith and in the course and scope of her duties as a volunteer to be entitled to immunity.

Exceptions to Immunity

One of the exceptions to volunteer immunity was that immunity was not available to volunteers whose actions or omissions were intentional, willfully or wantonly negligent, or done with conscious indifference or reckless disregard for the safety of others. TEX. CIV. PRAC. & REM. CODE ANN. §84.007(a). House Bill 4 deleted the reference to “wantonly negligent” within this exception and now provides that immunity will not be available to volunteers whose actions or omissions were intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others.

Effective Date – September 1, 2003

These changes apply to any action filed on or after September 1, 2003.

²⁴ Article summarized by [Gina Acosta](#), associate in Hermes Sargent Bates, LLP's Products Liability section.

Article 19 – Liability of Volunteer Fire Departments and Volunteer Fire Fighters²⁵

Volunteer Fire Fighters and Fire Departments Given Immunity and Limits of Liability

H.B. 4 now provides liability limits for personal injury, death, or property damage claims resulting from a volunteer fire department or fire fighter providing emergency response. Essentially, the new statutes, sections 78.101-78.104 of the Texas Civil Practice and Remedies Code, provide all the same limitations provided to a county or employees of a county under Chapter 101 of the Texas Civil Practice and Remedies Code.

Effective Date – September 1, 2003

These changes apply to all actions filed on or after September 1, 2003.

²⁵ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP's Appellate and Litigation Support section.

Article 20 – Design Professionals²⁶

Article 20 of H.B 4 adds Chapter 150 to the Civil Practice and Remedies Code titled “Design Professionals”. Chapter 150 is applicable to registered architects and licensed engineers and sets up a procedure similar to that in medical malpractice cases where the plaintiff that files suit against a design professional is required to demonstrate with the statement of an expert filed with the complaint some evidence of the negligence of the design professional.

Certificate of Merit

Specifically, Section 150.002 requires that in any action for damages alleging professional negligence against a design professional, the Plaintiff must file with the complaint a “certificate of merit”. The certificate of merit is an affidavit that must set forth specifically at least one negligent act, error or omission of the design professional claimed to exist and the factual basis of each such claim and is of an engineer or architect who is:

1. A third party to the case;
2. Either a professional engineer or registered architect;
3. Practicing in the same area of practice of the defendant;
4. Licensed in Texas; and
5. Actively engaged in the practice of architecture or engineering.

In doing so, Chapter 150 of the Civil Practice and Remedies Code seeks to reform litigation against architects and engineers by requiring some proof of negligence at the time suit is filed in the form of an affidavit from another architect or engineer who is not a professional expert, but an expert actually engaged in architecture or engineering.

Timing

The certificate of merit is to be filed with the complaint. It does not have to be filed with the complaint if within 10 days of the date of filing, limitations will expire on the claim and the plaintiff alleges in the complaint that the certificate of merit could not be prepared due to time constraints. The plaintiff then has 30 days after filing the complaint to file the certificate of merit, which may be extended by the court after a motion and hearing showing good cause for the extension.

²⁶ Article summarized by [Charles T. Weigel, Jr.](#), senior associate in Hermes Sargent Bates, LLP’s Commerical Litigation, General Tort Liability, Products Liability, Property Damage, and Personal Injury Defense sections.

Effect On Defendant's Answer Deadline

The defendant is not required to answer a complaint until 30 days after the filing of the certificate of merit and the failure of the plaintiff to file a certificate of merit is grounds for dismissal of the complaint with prejudice.

Effective Date – September 1, 2003

These changes apply to any action filed on or after September 1, 2003.

Article 21 – Limitations of Liability²⁷

Trespass – Migrating Particles

H.B. 4 adds section 75.002(h) to the Texas Civil Practice and Remedies Code, which provides that an owner, lessee, or occupant of real property is liable for trespass based on the migration or transport of any air contaminant (other than odor) only upon a showing of actual or substantial damages to the plaintiff.

Effective Date – September 1, 2003

This new statute applies to cases filed on or after September 1, 2003.

²⁷ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP's Appellate and Litigation Support section.

Article 22 – Community Benefits and Charity Care²⁸

Nonprofit Hospitals Entitled To Non-Economic Damage Limits

H.B. 4 creates a new statute, Texas Health and Safety Code §311.0456, which provides that a nonprofit hospital or hospital system, certified as such by the Texas Department of Health, is entitled to the non-economic damage limits provided by Texas Civil Practice and Remedies Code §101.023(b)²⁹ with regard to any cause of action that accrues while the hospital or hospital system is certified nonprofit. A hospital or hospital system is entitled to be certified as nonprofit if it provides:

1. charity care in an amount equal to at least 8% of the net patient revenue of the hospital or hospital system during the preceding fiscal year of the hospital or system; and
2. at least 40% of the charity care provided is in the county in which the hospital is located.

Effective Date – September 1, 2003

This new statute applies to cases filed on or after September 1, 2003.

²⁸ Article summarized by [Thad D. Spalding](#), partner in Hermes Sargent Bates, LLP’s Appellate and Litigation Support section.

²⁹ Section 101.023(b) limits “money damages in a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.”

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 03-9160

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

ORDERED that:

1. In accordance with the Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws ___:
 - a. Rule 42 of the Texas Rules of Civil Procedure is amended as follows, effective January 1, 2004, except that Rule 42(i) applies only in cases filed on or after September 1, 2003; and
 - b. Rule 167 of the Texas Rules of Civil Procedure is added as follows, effective January 1, 2004, only in cases filed on or after that date.
2. Rule 8a of the Texas Rules of Civil Procedure is added as follows, effective January 1, 2004, only in cases filed on or after that date.
3. The Clerk is directed to:
 - a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register*.

4. These amendments may be changed in response to comments received before December 31, 2003. Any interested party may submit comments in writing as follows:

by mail addressed to: Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 7871

by fax to the attention of: Rules Attorney
512-463-1365

by email to: chris.griesel@courts.state.tx.us.

SIGNED AND ENTERED this 9th day of October, 2003.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Priscilla R. Owen, Justice

Harriet O'Neill, Justice*

Wallace B. Jefferson, Justice

Michael H. Schneider, Justice*

Steven Wayne Smith, Justice

J. Dale Wainwright, Justice

*Justices O'NEILL and SCHNEIDER concur in the Order to the extent it relates to Rule 42 and 167 only, and dissent to Order as it relates to Rule 8a.

JUSTICE O'NEILL, joined by JUSTICE SCHNEIDER, dissenting to Order Adopting Rule 8a of the Texas Rules of Civil Procedure.

Recognizing that the rule remains subject to change based upon comments received, I dissent to the Court's adoption of Rule 8a governing referral fees. Rule 8a bears no logical relationship to the rules governing offers of settlement and class actions, which the Court adopts today pursuant to legislative mandate. Moreover, the core function of the referral rules the Court adopts is to govern attorney conduct. Accordingly, if such a rule is to be promulgated, it should be as a Rule of Professional Conduct, in accordance with section 81.024 of the Government Code, not as a Rule of Civil Procedure. As far as I can tell, other jurisdictions that have adopted a similar rule have done so by professional conduct rules or by statute, and not as a matter of civil procedure. I encourage members of the Bar and the public to offer comments on the procedure by which the Court has adopted this rule, as well as on the rule's substance.

8a. REFERRAL FEES

8a.1 Referral Fee Defined. A referral fee is a payment of money or anything of value:

- (a) made by any person in consideration of:
 - (1) the referral of a client or case, or
 - (2) the solicitation of a client or a case by any means that does not include the name of lead counsel or lead counsel's law firm; and
- (b) made to an attorney who does not, and is not reasonably expected to, provide professional services in the case:
 - (1) that are substantial; and
 - (2) for which the payment would be a reasonable fee apart from the referral.

8a.2 Disclosure. The attorney in charge for a party must file with the court a notice disclosing every referral fee paid or agreed to be paid with respect to the party. The notice must:

- (a) state the amount and date of each payment made or agreed to be made;
- (b) state the name, address, telephone number, and state bar identification number of each attorney to whom a payment has been made or is to be made; and
- (c) state that the client has approved each such payment or agreement.

8a.3 Time for Disclosure. An attorney in charge must make the disclosure required by Rule 8a.2 within 30 days of the attorney's first appearance as attorney in charge. Thereafter, an attorney in charge must disclose any previously undisclosed payment of a referral fee or agreement to pay a referral within 30 days of the date the payment or agreement is made.

8a.4 Sanctions.

- (a) *Grounds for sanctions.* The court must impose just sanctions on an attorney if the court finds that:
 - (1) the attorney intentionally failed to make the disclosure required by Rule 8a.2; or
 - (2) the attorney divided or agreed to divide a fee in violation of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.
- (b) *Unconscionable referral fee.* A referral fee is unconscionable within the meaning of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct if it exceeds \$50,000 or 15% of the attorney fees for the party in the case, whichever is less. A lesser referral fee may also be determined to be unconscionable in the circumstances in which it is paid.
- (c) *Sanctions imposed.* If the court finds that grounds for imposing sanctions on an attorney exist, the court:
 - (1) must disqualify the attorney from representing the party in the case unless disqualification would unfairly prejudice the party;
 - (2) may permit the party to void the party's agreement to retain the attorney;
 - (3) may order the forfeiture of all fees for the attorney in the case; and
 - (4) may impose other appropriate sanctions in addition.

8a.5 Hearing. The court must, on a party's motion, and may, on its own initiative, conduct an evidentiary hearing to determine whether there has been a violation of this rule.

RULE 42. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law; or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

~~———*Derivative Suit.* In a derivative suit brought pursuant to Article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.~~

Comment to 2003 amendment: The second paragraph of subdivision (a) regarding derivative suits has been deleted because it is redundant of Article 5.14 of the Business Corporation Act, which sets forth detailed procedures for derivative suits.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) ~~where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or~~

~~(4) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include these issues include:~~

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

Comment to 2003 amendment: Subparagraph (b)(3) is omitted as unnecessary.

(c) Determining by Order Whether to Certify a Class Action to Be Maintained; Notice and Membership in Class; Judgment; Actions Conducted Partially as Class Actions.

(1) (A) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be maintained. When a person sues or is sued as a representative of a class, the court must~~

— at an early practicable time — determine by order whether to certify the action as a class action.

Comment to 2003 amendment: The requirement that certification be decided “at an early practicable time” is a change from the previous Texas rule 42 (c)(1) and federal rule 23 (c)(1), which required the trial court to decide the certification issue “as soon as practicable after the commencement of [the suit].” The amended language is not intended to permit undue delay or permit excessive discovery unrelated to certification, but is designed to encourage good practices in making certification decisions only after receiving the information necessary to decide whether certification should be granted or denied and how to define the class if certification is granted.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 42 (g).

~~(C) This determination~~ An order under Rule 42 (c)(1) may be altered, or amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(D) An order granting or denying certification under Rule 42(b)(3) must state:

- (i) the elements of each claim or defense asserted in the pleadings;
- (ii) any issues of law or fact common to the class members;
- (iii) any issues of law or fact affecting only individual class members;
- (iv) the issues that will be the object of most of the efforts of the litigants and the court;
- (v) other available methods of adjudication that exist for the controversy;
- (vi) why the issues common to the members of the class do or do not predominate over individual issues;

(vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy; and

(viii) if a class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.

(2) (A) For any class certified under Rule 42(b)(1) or (2), the court may direct appropriate notice to the class.

(B) ~~After the court has determined that a class action may be maintained it shall order the party claiming the class action to~~ For any class certified under Rule 42(b)(3), the court must direct to the class members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. ~~In all class actions maintained under subdivisions (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class~~ The notice must concisely and clearly state in plain, easily understood language:

~~(A)~~(i) the nature of the ~~suit~~ action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through counsel if the member so desires;

~~(v)~~ ~~(B)~~ that the court will exclude ~~him~~ any member who if he so requests by a specified date exclusion, stating when and how members may elect to be excluded; and

~~(vi)(C)~~ that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and ~~the binding effect of a class judgment on class members under Rule 42 (c)(3).~~ ~~(D)~~ that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1); ~~or (b)(2), and (b)(3),~~ whether or not favorable to the class, shall include; ~~and~~ describe; ~~and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2).~~ The judgment in an action maintained as a class action under subdivision (b)(~~4~~3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions ; Multiple Classes and Subclasses. When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(e) Settlement, Dismissal, or Compromise. ~~A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(1) (A) The court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) Notice of the material terms of the proposed settlement, dismissal or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs.

(C) The court may approve a settlement, dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, dismissal, or compromise under Rule 42(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 42(b)(3), the court may not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, dismissal, or compromise that requires court approval under Rule 42(e)(1)(A).

(B) An objection made under Rule 42(e)(4)(A) may be withdrawn only with the court's approval.

(f) **Discovery.** Unnamed members of a class action are not to be considered as parties for purposes of discovery.

(g) **Class Counsel.**

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

! the work counsel has done in identifying or investigating potential claims in the action;

! counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;

! counsel's knowledge of the applicable law; and

! the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 42(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant or applicants best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 42(h) and (i).

(h) Procedure for determining Attorney Fees Award. In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.

(i) Attorney's fees award.

(1) In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), TEX. DISCIPLINARY R. PROF. CONDUCT.

(2) If any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

(g) **Effective date.** ~~This rule shall be effective only with respect to actions commenced on or after September 1, 1977.~~ Rule 42(i) applies only in actions filed after September 1, 2003.

167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

167.1 Generally. Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages — including a counterclaim, crossclaim, or third-party claim — except in:

- (a) a class action;
- (b) a shareholder's derivative action;
- (c) an action by or against the State, a unit of state government, or a political subdivision of the State;
- (d) an action brought under the Family Code;
- (e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or
- (f) an action filed in a justice of the peace court or small claims court.

167.2 Settlement Offer.

- (a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant — a party against whom a claim for monetary damages is made — files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.
- (b) *Requirements of an offer.* A settlement offer must:
 - (1) be in writing;
 - (2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;

- (3) identify the party or parties making the offer and the party or parties to whom the offer is made;
 - (4) state the terms by which all monetary claims — including any attorney fees, interest, and costs that would be recoverable up to the time of the offer — between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
 - (5) state a deadline — no sooner than 14 days after the offer is served — by which the offer must be accepted;
 - (6) be served on all parties to whom the offer is made.
- (c) *Conditions of offer.* An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.
- (d) *Non-monetary and excepted claims not included.* An offer must not include non-monetary claims and other claims to which this rule does not apply.
- (e) *Time limitations.* An offer may not be made:
- (1) before a defendant's declaration is filed;
 - (2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
 - (3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.

- (f) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.

167.3 Withdrawal, Acceptance, and Rejection of Offer.

- (a) *Withdrawal of offer.* An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.
- (b) *Acceptance of offer.* An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.
- (c) *Rejection of offer.* An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the deadline stated in the offer.
- (d) *Objection to offer made before an offeror's joinder or designation of responsible third party.* An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

167.4 Awarding Litigation Costs.

- (a) *Generally.* If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.
- (b) *"Significantly less favorable" defined.* A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:

- (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or
 - (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.
- (c) *Litigation costs.* Litigation costs are the expenditures actually made and the obligations actually incurred — directly in relation to the claims covered by a settlement offer under this rule — for the following:
- (1) court costs;
 - (2) reasonable fees for not more than two testifying expert witnesses; and
 - (3) reasonable attorney fees.
- (d) *Limits on litigation costs.* The litigation costs that may be awarded under this rule must not exceed the following amount:
- (1) the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus
 - (2) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.
- (e) *No double recovery permitted.* A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.
- (f) *Limitation on attorney fees and costs recovered by a party against whom litigation costs are awarded.* A party against whom litigation costs are awarded may not recover attorney fees and costs under another law incurred after the date the party rejected the settlement offer made the basis of the award.

- (g) *Litigation costs to be awarded to defendant as a setoff.* Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

167.5 Procedures.

- (a) *Modification of time limits.* On motion, and for good cause shown, the court may — by written order made before commencement of trial on the merits — modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.
- (b) *Discovery permitted.* On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.
- (c) *Hearing required.* The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

167.6 Evidence Not Admissible. Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

167.7 Other Settlement Offers Not Affected. This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 03– 9145

**AMENDMENTS TO
THE TEXAS RULES OF CIVIL PROCEDURE,
THE TEXAS RULES OF APPELLATE PROCEDURE,
THE TEXAS RULES OF EVIDENCE, AND
THE TEXAS RULES OF JUDICIAL ADMINISTRATION**

ORDERED that:

1. As required by the Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws ___ (“HB 4), and in accordance with its mandatory deadlines:
 - a. Rule 166 of the Texas Rules of Civil Procedure is amended as follows, effective September 1, 2003;
 - b. Rules 24.2(a)(1), 24.2(b), and 24.4(a) of the Texas Rules of Appellate Procedure are amended, and Rules 24.2(c)-(d) are added, as follows, effective in all cases in which a final judgment is signed on or after September 1, 2003 (see HB 4 §§ 7.02, 7.03, 7.04(b));
 - c. Rule 407(a) of the Texas Rules of Evidence is amended as follows, effective in all cases filed on or after July 1, 2003 (see HB § 5.03, 23.02(c));
 - d. Rule 11.1 of the Texas Rules of Judicial Administration is amended, and Rule 11.7 is added, as follows, effective in all cases pending on August 31, 2003; and
 - e. Rule 13 of the Texas Rules of Judicial Administration is added as follows, effective in all cases filed on or after September 1, 2003 (see HB 4 §§ 3.03, 23.02(a)).

2. The Clerk is directed to:

- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each elected member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.

3. These amendments may be changed in response to comments received before December 1, 2003. Any interested party may submit comments in writing as follows:

by mail addressed to Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 7871

by fax to the attention of the Rules Attorney at 512-463-1365

by email to chris.griesel@courts.state.tx.us.

SIGNED AND ENTERED this 29th day of August, 2003.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

Harriet O'Neill, Justice

Wallace B. Jefferson, Justice

Michael H. Schneider, Justice

Steven Wayne Smith, Justice

J. Dale Wainwright, Justice

1. Rule 166, Texas Rules of Civil Procedure, is amended by adding the following paragraph to the end of the rule:

Pretrial proceedings in multidistrict litigation may also be governed by Rules 11 and 13 of the Rules of Judicial Administration.

2. Rule 24.2(a)(1) of the Texas Rules of Appellate Procedure is amended as follows:

24.2. Amount of Bond, Deposit or Security

(a) *Type of Judgment.*

- (1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must ~~be at least equal the amount sum of~~ compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:

(A) 50 percent of the judgment debtor's current net worth; or

(B) 25 million dollars.

3. Rule 24.2(b) of the Texas Rules of Appellate Procedure is amended as follows:

24.2. Amount of Bond, Deposit or Security

* * *

(b) *Lesser Amount.* The trial court ~~may order a lesser amount than~~ must lower the amount of security required by (a) to an amount that will not cause the judgment debtor substantial economic harm if, after notice to all parties and a hearing, the court finds:

- (1) that posting a bond, deposit, or security in the amount required by (a) ~~will irreparably harm~~ is likely to cause the judgment debtor substantial economic harm; and

~~(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.~~

4. Rules 24.2(c)-(d) of the Texas Rules of Appellate Procedure are added as follows:

24.2. Amount of Bond, Deposit or Security

* * *

(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

(d) *Injunction.* The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

5. Rules 24.4(a) of the Texas Rules of Appellate Procedure is amended as follows:

24.4. Appellate Review

(a) *Motions; Review.* On a party's motion to the appellate court, that court may review:

- (1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);
- (2) the sureties on any bond;
- (3) the type of security;
- (4) the determination whether to permit suspension of enforcement; and
- (5) the trial court's exercise of discretion under 24.3(a).

6. Rules 407(a) of the Texas Rules of Evidence is amended as follows:

RULE 407. Subsequent Remedial Measures; Notification of Defect

(a) **Subsequent Remedial Measures.** When, after an injury or harm allegedly caused by an event, measures are taken ~~which that~~, if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. ~~Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.~~

7. Rule 11.1 of the Texas Rules of Judicial Administration is amended as follows:

11.1 Applicability. This rule applies to any case filed before September 1, 2003, that involves material questions of fact and law in common with another case pending in another court in another county on or after October 1, 1997.

8. Rule 11.7 of the Texas Rules of Judicial Administration is added as follows:

11.7 Relationship to Rule 13.

- (a) *Generally.* This rule is to be construed and applied so as to facilitate the implementation of Rule 13 to the greatest extent possible.
- (b) *Application of Rule 13 by Agreement of the Parties.* Parties may agree to the application of Rule 13. Such an agreement must be in writing and must be joined by all parties to the case. An agreement is effective and irrevocable when it is filed with the trial court if:
 - (1) no pretrial judge has been appointed in the case, or
 - (2) a pretrial judge has been appointed in the case, and the parties in all related cases to which the same pretrial judge has been assigned have likewise agreed to the application of Rule 13.
- (c) *Assignments of Pretrial Judges After September 1, 2003.* An assignment of a pretrial judge to any case after September 1, 2003, must be made in consultation with the Chair of the Multidistrict Litigation Panel.
- (d) *Consultation of Pretrial Judges.* In conducting pretrial proceedings and deciding pretrial matters, a pretrial judge assigned under this rule must consult with the judge of a pretrial court to which related cases have been transferred under Rule 13.

9. Rule 13 of the Texas Rules of Judicial Administration is added as follows:

Rule 13. Multidistrict Litigation

13.1 Authority and Applicability.

- (a) *Authority.* This rule is promulgated under sections 74.161-.164 of the Texas Government Code.

- (b) *Applicability.* This rule applies to civil actions that involve one or more common questions of fact and that were filed in a constitutional county court, county court at law, probate court, or district court on or after September 1, 2003. Cases filed before that date are governed by Rule 11 of these rules.

13.2 Definitions. As used in this rule:

- (a) *MDL Panel* means the judicial panel on multidistrict litigation designated pursuant to section 74.161 of the Texas Government Code, including any temporary members designated by the Chief Justice of the Supreme Court of Texas in his or her discretion when regular members are unable to sit for any reason.
- (b) *Chair* means the chair of the MDL Panel, who is designated by the Chief Justice of the Supreme Court of Texas.
- (c) *MDL Panel Clerk* means the Clerk of the Supreme Court of Texas.
- (d) *Trial court* means the court in which a case is filed.
- (e) *Pretrial court* means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under this rule.
- (f) *Related* means that cases involve one or more common questions of fact.
- (g) *Tag-along case* means a case related to cases in an MDL transfer order but not itself the subject of an initial MDL motion or order.

13.3 Procedure for Requesting Transfer.

- (a) *Motion for Transfer; Who May File; Contents.* A party in a case may move for transfer of the case and related cases to a pretrial court. The motion must be in writing and must:
 - (1) state the common question or questions of fact involved in the cases;
 - (2) contain a clear and concise explanation of the reasons that transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases;

- (3) state whether all parties in those cases for which transfer is sought agree to the motion; and
- (4) contain an appendix that lists:
 - (A) the cause number, style, and trial court of the related cases for which transfer is sought; and
 - (B) all parties in those cases and the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel.
- (b) *Request for Transfer by Judges.* A trial court or a presiding judge of an administrative judicial region may request a transfer of related cases to a pretrial court. The request must be in writing and must list the cases to be transferred.
- (c) *Transfer on the MDL Panel's Own Initiative.* The MDL Panel may, on its own initiative, issue an order to show cause why related cases should not be transferred to a pretrial court.
- (d) *Response; Reply; Who May File; When to File.* Any party in a related case may file:
 - (1) a response to a motion or request for transfer within twenty days after service of such motion or request;
 - (2) a response to an order to show cause issued under subparagraph (c) within the time provided in the order; and
 - (3) a reply to a response within ten days after service of such response.
- (e) *Form of Motion, Response, Reply, and Other Documents.* A motion for transfer, response, reply, or other document addressed to the MDL Panel must conform to the requirements of Rule 9.4 of the Texas Rules of Appellate Procedure. Without leave of the MDL Panel, the following must not exceed 20 pages: the portions of a motion to transfer required by subparagraphs (a)(1)-(2); a response; and a reply. The MDL Panel may request additional briefing from any party.
- (f) *Filing.* A motion, request, response, reply, or other document addressed to the MDL Panel must be filed with the MDL Panel Clerk. The MDL Panel Clerk may require

that all documents also be transmitted to the clerk electronically. In addition, a party must send a copy of the motion, response, reply, or other document to each member of the MDL Panel.

- (g) *Filing Fees.* The MDL Panel Clerk may set reasonable fees approved by the Supreme Court of Texas for filing and other services provided by the clerk.
- (h) *Service.* A party must serve a motion, response, reply, or other document on all parties in related cases in which transfer is sought. The MDL Panel Clerk may designate a party or parties to serve a request for transfer on all other parties. Service is governed by Rule 9.5 of the Texas Rules of Appellate Procedure.
- (i) *Notice to Trial Court.* A party must file in the trial court a notice — in the form prescribed by the MDL Panel — that a motion for transfer has been filed. The MDL Panel Clerk must cause such notice to be filed when a request for transfer by a judge has been filed.
- (j) *Evidence.* The MDL Panel will accept as true facts stated in a motion, response, or reply unless another party contradicts them. A party may file evidence with the MDL Panel Clerk only with leave of the MDL Panel. The MDL Panel may order parties to submit evidence by affidavit or deposition and to file documents, discovery, or stipulations from related cases.
- (k) *Hearing.* The MDL Panel may decide any matter on written submission or after an oral hearing before one or more of its members at a time and place of its choosing. Notice of the date of submission or the time and place of oral hearing must be given to all parties in all related cases.
- (l) *Decision.* The MDL Panel may order transfer if three members concur in a written order finding that related cases involve one or more common questions of fact, and that transfer to a specified district court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the related cases.
- (m) *Orders Signed by Chair or Clerk; Members Identified.* Every order of the MDL Panel must be signed by either the chair or by the MDL Panel Clerk, and must identify the members of the MDL Panel who concurred in the ruling.

- (n) *Notice of Actions by MDL Panel.* The MDL Panel Clerk must give notice to all parties in all related cases of all actions of the MDL Panel, including orders to show cause, settings of submissions and oral arguments, and decisions. The MDL Panel Clerk may direct a party or parties to give such notice. The clerk may determine the manner in which notice is to be given, including that notice should be given only by email or fax.
- (o) *Retransfer.* On its own initiative, on a party's motion, or at the request of the pretrial court, the MDL Panel may order cases transferred from one pretrial court to another pretrial court when the pretrial judge has died, resigned, been replaced at an election, requested retransfer, recused, or been disqualified, or in other circumstances when retransfer will promote the just and efficient conduct of the cases.

13.4 Effect on the Trial Court of the Filing of a Motion for Transfer.

- (a) *No Automatic Stay.* The filing of a motion under this rule does not limit the jurisdiction of the trial court or suspend proceedings or orders in that court.
- (b) *Stay of Proceedings.* The trial court or the MDL Panel may stay all or part of any trial court proceedings until a ruling by the MDL Panel.

13.5 Transfer to a Pretrial Court.

- (a) *Transfer Effective upon Notice.* A case is deemed transferred from the trial court to the pretrial court when a notice of transfer is filed with the trial court and the pretrial court. The notice must:
 - (1) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address, and phone number;
 - (2) list those parties who have not yet appeared in the case; and
 - (3) attach a copy of the MDL transfer order.
- (b) *No Further Action in Trial Court.* After notice of transfer is filed in the trial court, the trial court must take no further action in the case except for good cause stated in the order in which such action is taken and after conferring with the pretrial court.

But service of any process already issued by the trial court may be completed and the return filed in the pretrial court.

- (c) *Transfer of Files; Master File and New Files in the Pretrial Court.* If the trial court and pretrial court are in the same county, the trial court must transfer the case file to the pretrial court in accordance with local rules governing the courts of that county. If the trial court and pretrial court are not in the same county, the trial court clerk must transmit the case file to the pretrial court clerk. The pretrial court clerk, after consultation with the judge of the pretrial court, must establish a master file and open new files for each case transferred using the information provided in the notice of transfer. The pretrial court may direct the manner in which pretrial documents are filed, including electronic filing.
- (d) *Filing Fees and Costs.* Unless the MDL Panel assesses costs otherwise, the party moving for transfer must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs.
- (e) *Transfer of Tag-along Cases.* A tag-along case is deemed transferred to the pretrial court when a notice of transfer — in the form described in Rule 13.5(a) — is filed in both the trial court and the pretrial court. Within 30 days after service of the notice, a party to the case or to any of the related cases already transferred to the pretrial court may move the pretrial court to remand the case to the trial court on the ground that it is not a tag-along case. If the motion to remand is granted, the case must be returned to the trial court, and costs including attorney fees may be assessed by the pretrial court in its remand order. The order of the pretrial court may be appealed to the MDL Panel by a motion for rehearing filed with the MDL Panel Clerk.

13.6 Proceedings in Pretrial Court.

- (a) *Judges Who May Preside.* The MDL Panel may assign as judge of the pretrial court any active district judge, or any former or retired district or appellate judge who is approved by the Chief Justice of the Supreme Court of Texas. An assignment under this rule is not subject to objection under chapter 74 of the Government Code. The judge assigned as judge of the pretrial court has exclusive jurisdiction over each related case transferred pursuant to this rule unless a case is retransferred by the MDL Panel or is finally resolved or remanded to the trial court for trial.

- (b) *Authority of Pretrial Court.* The pretrial court has the authority to decide, in place of the trial court, all pretrial matters in all related cases transferred to the court. Those matters include, for example, jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement). The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer over which the trial court's plenary power would not have expired had the case not been transferred.
- (c) *Case Management.* The pretrial court should apply sound judicial management methods early, continuously, and actively, based on its knowledge of each individual case and the entire litigation, in order to set fair and firm time limits tailored to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole. After a case is transferred, the pretrial court should, at the earliest practical date, conduct a hearing and enter a case management order. The pretrial court should consider at the hearing, and its order should address, all matters pertinent to the conduct of the litigation, including:
- (1) settling the pleadings;
 - (2) determining whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable;
 - (3) scheduling preliminary motions;
 - (4) scheduling discovery proceedings and setting appropriate limitations on discovery, including the establishment and timing of discovery procedures;
 - (5) issuing protective orders;
 - (6) scheduling alternative dispute resolution conferences;
 - (7) appointing organizing or liaison counsel;
 - (8) scheduling dispositive motions;

- (9) providing for an exchange of documents, including adopting a uniform numbering system for documents, establishing a document depository, and determining whether electronic service of discovery materials and pleadings is warranted;
 - (10) determining if the use of technology, videoconferencing, or teleconferencing is appropriate;
 - (11) considering such other matters the court or the parties deem appropriate for the just and efficient resolution of the cases; and
 - (12) scheduling further conferences as necessary.
- (d) *Trial Settings.* The pretrial court, in conjunction with the trial court, may set a transferred case for trial at such a time and on such a date as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings. The pretrial court must confer, or order the parties to confer, with the trial court regarding potential trial settings or other matters regarding remand. The trial court must cooperate reasonably with the pretrial court, and the pretrial court must defer appropriately to the trial court's docket. The trial court must not continue or postpone a trial setting without the concurrence of the pretrial court.

13.7 Remand to Trial Court.

- (a) *No Remand If Final Disposition by Pretrial Court.* A case in which the pretrial court has rendered a final and appealable judgment will not be remanded to the trial court.
- (b) *Remand.* The pretrial court may order remand of one or more cases, or separable triable portions of cases, when pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled or no longer apply.
- (c) *Transfer of Files.* When a case is remanded to the trial court, the clerk of the pretrial court will send the case file to the trial court without retaining a copy unless otherwise ordered. The parties may file in the remanded case copies of any pleadings or orders from the pretrial court's master file. The clerk of the trial court will reopen the trial court file under the cause number of the trial court, without a new filing fee.

13.8 Pretrial court orders binding in the trial court after remand.

- (a) *Generally.* The trial court should recognize that to alter a pretrial court order without a compelling justification would frustrate the purpose of consolidated and coordinated pretrial proceedings. The pretrial court should recognize that its rulings should not unwisely restrict a trial court from responding to circumstances that arise following remand.
- (b) *Concurrence of the Pretrial Court Required to Change Its Orders.* Without the written concurrence of the pretrial court, the trial court cannot, over objection, vacate, set aside, or modify pretrial court orders, including orders related to summary judgment, jurisdiction, venue, joinder, special exceptions, discovery, sanctions related to pretrial proceedings, privileges, the admissibility of expert testimony, and scheduling.
- (c) *Exceptions.* The trial court need not obtain the written concurrence of the pretrial court to vacate, set aside, or modify pretrial court orders regarding the admissibility of evidence at trial (other than expert evidence) when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice. But the trial court must support its action with specific findings and conclusions in a written order or stated on the record.
- (d) *Unavailability of Pretrial Court.* If the pretrial court is unavailable to rule, for whatever reason, the concurrence of the MDL Panel Chair must be obtained.

13.9 Review.

- (a) *MDL Panel Decision.* Orders of the MDL Panel, including those granting or denying motions for transfer, may be reviewed only by the Supreme Court in original proceedings.
- (b) *Orders by the Trial Court and Pretrial Court.* Orders and judgments of the trial court and pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending at the time review is sought, irrespective of whether that court issued the order or judgment to be reviewed.

13.10 MDL Panel Rules. The MDL Panel will operate at the direction of its Chair in accordance with rules prescribed by the panel and approved by the Supreme Court of Texas.