

**THE MAJOR IMPACTS OF HB4 ON THE PERSONAL INJURY
PRACTICE**

GREG CURRY
LAWRENCE ANDREW MELSHEIMER
Thompson & Knight, L.L.P.
1700 Pacific Ave., Suite 3300
Dallas, Texas 75201

ROB ROBY
Gwinn & Roby
1201 Elm Street, Suite 4100
Dallas, Texas 75270

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I. INTRODUCTION

In 2003, the Texas Legislature passed House Bill 4 ("HB4") and changed many laws that affect personal injury practice.¹ These changes affect the laws relating to topics from proportionate responsibility, responsible third parties, and damages to venue and medical malpractice. While some of the changes merely codified the law, others will have a significant impact on the personal injury practitioner. This paper will not address all of the provisions of HB4 but will focus on those changes that will impact the personal injury practitioner the most.

II. SIGNIFICANT CHANGES BY HB4

A. Proportionate Responsibility, Responsible Third Parties and Damages

1. Proportionate Responsibility.

The changes to proportionate responsibility laws apply only to tort and DTPA cases and to suits filed on or after July 1, 2003. A defendant is still generally liable for the percentage of damages attributable to his percentage of liability.² But the definition of a "claimant" under the proportionate responsibility rules has changed to include "any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person."³ Before, "claimant" included only those parties who were seeking recovery of damages.⁴ The new law resolves the *Utts* dilemma of whether to include parties who could have sought damages but were nonsuited or had withdrawn from the case.⁵

HB4 also changed the rules relating to settlement credits. Before, a reduction for settlement occurred in two ways. A plaintiff's recovery could be reduced by the sum of the dollar amounts of all the settlements or by a dollar amount equal to the sum of a potential four-tiered equation based upon the amount of damages found by the jury after any reduction.⁶

HB4 eliminated a defendant's election of dollar-for-dollar or sliding scale settlement credit. Now the only credit available to a defendant is a reduction by a settling person's percentage of responsibility.⁷ A defendant will have to prove responsibility on a settling co-defendant to receive a credit. If co-defendant settles after everyone rests, it is too late to prove the co-defendant's percentage. This change presents interesting ethical issues for defense counsel who represent multiple clients.

One exception to the settlement rule remains for health care liability claims.⁸ There, the defendant may elect to reduce the claimant's recovery by either a percentage equal to each settling person's percentage of responsibility or the sum of the dollar amounts of all settlements. If no election is made and the defendants are not unanimous in choosing the percentage reduction, recovery will be reduced by the sum of all dollar amounts of all settlements.⁹

HB4 also amended the law relating to joint and several liability. A defendant will still be found jointly and severally liable if his percentage of responsibility is greater than 50% or if he conspired with another to commit a felony and intended to do substantial harm to others. But HB4 repealed the hazardous substance/toxic tort exception.¹⁰

2. Responsible Third Parties

A significant change brought by HB4 was to responsible third parties for actions filed on or after July 1, 2003. First, the definition of a responsible third party changed. Under prior law, a responsible third party was a person over whom the court could exercise jurisdiction; who could have been sued but was not; and who was or may have been liable to the plaintiff for all or part of the damages claimed against the named defendant(s).¹¹ A responsible third party did not include the claimant's employer if the employer

¹ Act of June 2, 2003, 78th Leg., R.S., H.B. 4, §1 et seq.

² A plaintiff can still recover only if his percentage of fault is 50% or under.

³ TEX. CIV. PRAC. & REM. CODE §33.011(1)(2003).

⁴ TEX. CIV. PRAC. & REM. CODE §33.011(1)(2002).

⁵ See *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002)(finding claimant under former proportionate responsibility law includes only those who sought to recover damages).

⁶ See TEX. CIV. PRAC. & REM. CODE §33.012(b)(2)(2002).

⁷ TEX. CIV. PRAC. & REM. CODE §33.012(a).

⁸ TEX. CIV. PRAC. & REM. CODE §33.012(c).

⁹ *Id.*

¹⁰ Under prior law, the hazardous substance exception imposed joint and several liability upon a defendant if the defendant's percentage of responsibility was 15% or greater and the claimant's damages were caused by the depositing, discharging or release in to the environment of any hazardous or harmful substance or the result of a toxic tort. TEX. CIV. PRAC. & REM. CODE §33.013(c)(2002).

¹¹ TEX. CIV. PRAC. & REM. CODE §33.011(2002).

maintained workers' compensation insurance or a person in bankruptcy or an adjudicated bankrupt.¹²

Now a responsible third party is any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought.¹³ Notably, there are no more requirements of personal jurisdiction or that the claimant could recover from the responsible third party. A defendant can also designate bankrupt parties and an employer and obtain reduction for their percentages of responsibility. In addition, the new law allows the designation of unknown or "Doe" responsible third parties within 60 days of filing original answer.¹⁴

Procedurally under the new rules, a party may now request disclosure of the name, address, and telephone number of any person who may be designated as a responsible third party.¹⁵ In addition, responsible third party will be designated, rather than joined as required under the old rules, by motion at least 60 days before trial.¹⁶ The court will grant leave unless an objection is filed within 15 days.¹⁷ Designating a responsible third party also extends the statute of limitations for a plaintiff against that third party. A plaintiff can avoid limitations problems if he seeks to join the responsible third party no later than 60 days after his designation.¹⁸

But designation does not assure submission to the jury. A party will have to present sufficient evidence to support the submission.¹⁹ In addition, designating a person as a responsible third party or a finding of fault against that person does not impose liability on the person.²⁰ Nor can it 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.²¹

The new responsible third party rules present an important issue that courts will confront. A plaintiff is now allowed to revive otherwise state claims against the third party if his defendant designates the third party. For example, consider the scenario where plaintiff sues defendant on fraud after three years. By that point, his claim against third party for negligence has run. If defendant designates third party, plaintiff can now sue third party.

Or plaintiff sues defendant, who has little to do with the tort action after the limitations for third party have run. Defendant then designates the responsible third party. Plaintiff arguably will not be barred by limitations from suing third party.

Under each of these scenarios, what rights does a third party have when limitations have already run? Arguably, the case for the third party strengthens if there is evidence of intentional collusive behavior on the part of the plaintiff and/or the defendant. But in the absence of such evidence, what rights remain for third parties against claims that are otherwise barred by limitations? Undoubtedly, courts will soon grapple with these difficult issues.

3. Damages

HB4 changed the law relating to damages awards. These changes apply to cases filed on or after September 1, 2003.

Though the standards are the same as prior versions of the statute, HB4 changed the definition of "exemplary damages." In addition to fraud and malice, HB4 reintroduces gross negligence as basis for exemplary damages.²² Gross negligence is defined as an act or omission: (a) which 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.²³

In addition, exemplary damages now can be awarded only if the jury is unanimous both as to liability and amount.²⁴ There are mandatory jury instructions on unanimity of finding exemplary damages.²⁵ Exemplary damages are not available if only nominal damages are awarded.²⁶

New limitations were placed on awards of exemplary damages. Exemplary damages are now limited to the greater of: (1) two times economic damages plus up to \$750,000 in non-economic damages or (2) \$200,000.²⁷ The limitation on exemplary damages does not apply to recovery for conduct described as a felony if the conduct was

¹² *Id.*
¹³ TEX. CIV. PRAC. & REM. CODE §33.011(6).
¹⁴ TEX. CIV. PRAC. & REM. CODE §33.004(j).
¹⁵ TEX. R. CIV. P. 194.2.
¹⁶ TEX. CIV. PRAC. & REM. CODE §33.004(a).
¹⁷ TEX. CIV. PRAC. & REM. CODE §33.004(f).
¹⁸ TEX. CIV. PRAC. & REM. CODE §33.004(e).
¹⁹ TEX. CIV. PRAC. & REM. CODE §33.003(b).
²⁰ TEX. CIV. PRAC. & REM. CODE §33.004(i).
²¹ *Id.*

²² TEX. CIV. PRAC. & REM. CODE §41.003(a).
²³ TEX. CIV. PRAC. & REM. CODE §41.001(11)
²⁴ TEX. CIV. PRAC. & REM. CODE §41.003(d).
²⁵ TEX. CIV. PRAC. & REM. CODE §41.003(e).
 Interestingly, there is no mandatory jury instruction on unanimous finding of liability.
²⁶ TEX. CIV. PRAC. & REM. CODE §41.004(a).
²⁷ TEX. CIV. PRAC. & REM. CODE §41.008(b).

committed knowingly or intentionally.²⁸ But HB4 added a cap for liability for felony conduct causing injury to a child, elderly individual, or disabled individual “if the conduct occurred while providing health care as defined under CPRC § 74.001.”²⁹ Those scenarios are now subject to the same caps as most other actions. Before, there was no protection from penal cap-busting for health care providers against claims by children, elderly or disabled individuals.

B. Venue and Forum Non Conveniens

1. Venue for Multiple Plaintiffs

There are also new rules for venue in cases that involve multiple plaintiffs. These rules apply to cases filed on or after September 1, 2003.

In cases that involve more than one plaintiff, each plaintiff still must establish venue independently of any other plaintiff.³⁰ But the new rules provide for mandatory dismissal or transfer of any plaintiff who cannot establish venue except under exceptional circumstances.³¹ If a plaintiff cannot establish venue, he must satisfy the four elements: (a) joinder is proper under Texas Rules of Civil Procedure; (b) maintaining venue in the county of suit does not unfairly prejudice another party to the suit; (c) there is an essential need to have the person’s claim tried in the county where suit is pending;³² and (d) the county where suit is pending is a fair and convenient venue for the person seeking to join in or maintain venue for the suit and the persons against whom the suit is brought.³³

The new rules seem to expand the right to an interlocutory appeal of venue decisions. Before, a determination of a plaintiff’s ability to join a lawsuit under the “essential need” exception was subject to

²⁸ These exceptions include murder, capital murder, aggravated kidnapping, aggravated assault, sexual assault, aggravated sexual assault, injury to a child, an elderly individual or a disabled individual if not during health care, forgery, commercial bribery, misapplication of fiduciary property or property of a financial institution, fraudulent destruction, removal or concealment of a writing, and theft of the third degree or higher. In addition, it includes intoxication assault and manslaughter. TEX. CIV. PRAC. & REM. CODE §41.008(c).

²⁹ TEX. CIV. PRAC. & REM. CODE §41.008(c)(7). “Health care” is defined in TEX. CIV. PRAC. & REM. CODE §74.001 as “any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement.”

³⁰ TEX. CIV. PRAC. & REM. CODE §15.003(a).

³¹ *Id.*

³² Presumably, this maintains the definition of “essential” as “indispensably necessary” from *Surgitek v. Abel*, 997 S.W.2d 598, 604 (Tex. 1999).

³³ TEX. CIV. PRAC. & REM. CODE §15.003(a).

interlocutory appeal, but a determination that the plaintiff could independently establish venue was not immediately appealable. Now appeals are allowed under the exception, but the rules also allow an appeal of the trial court’s determination that a plaintiff did or did not independently establish proper venue.³⁴ Thus, the new statute allows for immediate appeal of the trial court’s decision in any case granting or denying transfer or dismissal.

Another important change in the law is that the trial is stayed until resolution of appeal.³⁵ The aggrieved party still must appeal the order within 20 days of when the order is signed.³⁶ The appeal must be made to the appellate court district in which the trial court is located.³⁷ The appeal is reviewed by a de novo review of the record and not abuse of discretion or substantial evidence standard.³⁸ In addition, it must be reviewed within 120 days.³⁹

2. Forum Non Conveniens

In addition to the venue rules, the rules on forum non conveniens were changed and apply to cases filed on or after September 1, 2003. A party seeking to dismiss a claim under forum non conveniens in a personal injury or wrongful death action is no longer required to prove six factors by a preponderance of the evidence. Instead, the new rules create a single standard based on federal law for determining whether a case should be dismissed so that it may be pursued in a more appropriate state or country.⁴⁰ The six factors now are only considerations in the court’s determination of whether venue is more appropriate in another forum. A court still may not stay or dismiss a claim in two circumstances: (1) if the party opposing the motion makes a prima facie showing that the act or omission that was a proximate or producing cause of the injury or death that occurred in Texas or (2) if the plaintiff is a legal resident of Texas.⁴¹ Common-law forum non conveniens analysis applies for all other general civil cases.⁴²

In addition, HB4 eliminated the distinction between U.S. residents and non-U.S. residents in the forum non conveniens analysis. Before, non-U.S. residents faced possibly tougher forum non conveniens challenges because their cases were subject to application of the common-law forum non

³⁴ TEX. CIV. PRAC. & REM. CODE §15.003(b).

³⁵ TEX. CIV. PRAC. & REM. CODE §15.003(d).

³⁶ TEX. R. APP. P. 26.1(b) and 28.1.

³⁷ TEX. CIV. PRAC. & REM. CODE §15.003(c).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ TEX. CIV. PRAC. & REM. CODE §71.051(b).

⁴¹ TEX. CIV. PRAC. & REM. CODE §71.051(e) & (f).

⁴² TEX. CIV. PRAC. & REM. CODE §71.051(i).

conveniens.⁴³ This standard still applies to cases filed before September 1, 2003, and in those cases provides U.S. residents with two protections not available to non-U.S. residents: (1) the Texas residency exception and the causation-exception.

Finally, HB4 eliminated Civ. Prac. & Rem. Code §71.052, which provided forum non conveniens challenges involving asbestos-related claims and protected plaintiffs by stipulating that the filing of alternate-forum case would relate back to original filing. Asbestos-related cases now should apply §71.051.

C. Texas Judicial Panel on Multidistrict Litigation

For cases filed before September 1, 2003, multidistrict litigation is governed by Tex. R. Jud. Admin. 11.⁴⁴ Under Rule 11, any party, or a trial judge *sua sponte*, can request pretrial consolidation by filing a motion with the presiding judge of the administrative judicial region in which the case is pending. A motion must be filed in each case to be consolidated and served on all parties to the cases, and on the presiding judges of the administrative judicial regions in which the cases are pending. The presiding judge must grant the motion if the case involves material questions of fact and law common to a case in another court and county and if the assignment of a pretrial judge would promote the just and efficient conduct of the cases.

Article 3 of HB4 allowed the Texas Supreme Court to establish a Multidistrict Litigation Panel and Multidistrict Litigation ("MDL") similar to the federal system. These rules apply to cases filed on or after September 1, 2003, or to those filed before September 1, 2003 upon joint written agreement by the parties.

The Chief Justice of the Texas Supreme Court now appoints a five-member Judicial Panel.⁴⁵ The panel is authorized to consolidate cases involving common questions of law and fact for pretrial purposes.⁴⁶ The panel may only transfer actions involving one or more common questions of fact pending in different courts to a single court.⁴⁷ Cases may be transferred upon a showing that the transfer is for the convenience of parties and witnesses and the promotion of just and efficient conduct of actions.⁴⁸

A party can move to transfer a case, or the trial court, the presiding judge of an administrative region,

or the MDL Panel's on its own initiative can request a transfer.⁴⁹ There is no automatic stay upon the filing of a motion with the MDL Panel, but the trial court or the MDL Panel may issue stay pending the outcome of the panel's finding.⁵⁰ The MDL Panel may decide the matter on written submission or after an oral hearing.⁵¹ In determining whether a transfer is appropriate, the MDL Panel will accept facts in the pleadings as true unless contradicted. Parties may file evidence but only with leave of the MDL Panel.⁵² Three members of the MDL Panel must concur in writing for the panel to order a transfer.⁵³ The orders of the MDL Panel, including those granting or denying motions to transfer, are reviewable only in the Texas Supreme Court by an original proceeding.⁵⁴

If the MDL Panel decides to transfer the case, the transfer is effective when a notice of transfer filed with the trial court and the pretrial court.⁵⁵ The notice must list all the parties who have appeared in the cases and those parties who have not yet appeared, and it must attach a copy of the MDL transfer order. Once the notice of transfer is filed, the trial court can take no further action except for good cause. The trial court then transfers all its files to the pretrial court.

The actions may be assigned to active, retired, or former judges.⁵⁶ Once transferred, the pretrial court may decide all pretrial matters in all related cases, including discovery, jurisdiction, joinder, venue, and case management.⁵⁷ The transferee judge is also allowed to rule on summary judgment, but he may not conduct trial on the merits.⁵⁸ Most of the orders of the pretrial judge cannot be changed by the trial judge unless the pretrial court concurs in writing.⁵⁹ Even without permission, a trial court can change a pretrial court's order on admissibility of evidence when necessary due to changed circumstances, to correct an error of law, or to prevent manifest injustice.⁶⁰ The orders of the trial court and the pretrial court are reviewable only by the appellate court with jurisdiction over the court in which case is pending at the time review is sought.⁶¹

⁴³ TEX. CIV. PRAC. & REM. CODE §71.051(a)(2002).
⁴⁴ TEX. R. JUD. ADMIN. 11.7, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtitle. F app. (Vernon 1988).
⁴⁵ TEX. GOV'T CODE §74.161(a).
⁴⁶ TEX. GOV'T CODE §74.162.
⁴⁷ Importantly, this provision does not apply to questions of law.
⁴⁸ *Id.*

⁴⁹ TEX. R. JUD. ADMIN. 13.3.
⁵⁰ TEX. R. JUD. ADMIN. 13.4.
⁵¹ *Id.*
⁵² *Id.*
⁵³ TEX. GOV'T CODE §74.161(b).
⁵⁴ TEX. R. JUD. ADMIN. 13.9.
⁵⁵ TEX. R. JUD. ADMIN. 13.5.
⁵⁶ TEX. R. JUD. ADMIN. 13.6.
⁵⁷ *Id.*
⁵⁸ *Id.*
⁵⁹ TEX. R. JUD. ADMIN. 13.8.
⁶⁰ TEX. R. JUD. ADMIN. 13.9.
⁶¹ *Id.*

D. Products Liability

HB4 made several changes that impact products liability cases filed on or after July 1, 2003. Previously, the definition of a product liability action was limited to claims for damages arising out of personal injury, death, or property damage. Now the definition of a product liability action has been expanded to include any manufacturer or seller for injury or damage of real or personal property regardless of the relief sought, including personal injury, wrongful death, economic loss, declaratory, injunctive, and equitable relief.⁶² But these actions only apply to sales and not to leases or to any claim under the General Aviation Revitalization Act of 1994.⁶³

HB4 also changed an important evidentiary rule applicable to products liability cases. HB4 amended Texas Rule of Evidence 407 to conform to the Federal Rules. Evidence of subsequent remedial measures in product liability cases based on strict liability is no longer admissible.⁶⁴

In addition, HB4 introduces a 15-year statute of repose for all products liability claims.⁶⁵ This limitation does not apply in express warranty cases⁶⁶ and "latent disease" cases, in which disease does not manifest for many years after use of product.⁶⁷

Several products liability defenses also have been codified. The government standards defense applies to formulation, labeling or design of products. This defense creates a rebuttable presumption only if the

government standard was (i) mandatory, (ii) applicable to the aspect of the product that allegedly caused harm, and (iii) the standard was adequate to protect the public from risk.⁶⁸ But the presumption does not apply to manufacturing flaws or defects even if the manufacturer complied with federal standards.⁶⁹ A plaintiff can rebut the presumption by showing a material omission or misrepresentation to an agency, or that standards were inadequate to provide reasonable safety.⁷⁰

The innocent retailer defense was also codified. Under prior law, if a non-manufacturer "innocent retailer" sold the product that was the basis of the products liability claim, then that seller was independently and directly liable to the plaintiff without limitation, even if the retailer took no wrongful action in selling the product.⁷¹ If the seller was an "innocent retailer" and was not independently culpable for any of plaintiff's loss or injuries, that seller could then seek indemnification from the manufacturer of the product.⁷²

Now, a retailer cannot be held liable for product defects unless the retailer has some actual responsibility for defect.⁷³ There are numerous exceptions to defense, including exception that prevents use of the defense if a responsible manufacturer is outside court's jurisdiction or insolvent.⁷⁴

Finally, there is now a rebuttable presumption in products liability cases involving pharmaceutical products. Health care providers, manufacturers, distributors, and prescribers are not liable for failure to warn on products if the FDA approved the warnings and the product was used according to FDA approval.⁷⁵ To rebut the presumption, a plaintiff can show that the defendant withheld or misrepresented information to the FDA,⁷⁶ withdrawal or recall of the product from market, promotion of an unapproved use, prescription

⁶² TEX. CIV. PRAC. & REM. CODE §16.012(a)(2).

⁶³ TEX. CIV. PRAC. & REM. CODE §16.012(f) & (g).

Aviation claims are governed by the General Aviation Revitalization Act of 1994, which provides an 18-year statute of repose for actions for damages arising out of an accident involving a general aviation aircraft. A general aviation aircraft is one that seats a maximum of fewer than 20 passengers and has not engaged in scheduled passenger-carrying operations

⁶⁴ TEX. R. EVID. 407.

⁶⁵ TEX. CIV. PRAC. & REM. CODE §16.012(b).

⁶⁶ If the manufacturer or seller expressly warrants in writing that a product has a useful life of longer than 15 years, then a claimant must commence a products liability action against that party before the end of the number of years warranted after the date of the sale. TEX. CIV. PRAC. & REM. CODE §16.012(c).

⁶⁷ TEX. CIV. PRAC. & REM. CODE §16.012(d) & (d-1). The "latent disease" exception is a codified discovery rule. The exception applies only if: (1) the claimant was exposed to the product before the end of 15 years after it was first sold; (2) the exposure caused the disease that is the basis of the action; and (3) the symptoms did not manifest themselves to a degree or for a duration sufficient to put a reasonable persons on notice as to the existence of an injury before the end of the 15-year limitations period.

⁶⁸ TEX. CIV. PRAC. & REM. CODE §82.008.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984).

⁷² TEX. CIV. PRAC. & REM. CODE §82.002 (1997).

⁷³ TEX. CIV. PRAC. & REM. CODE §82.003.

⁷⁴ To find liability of a non-manufacturing retailer, a plaintiff must show the seller participated in the design of the product, caused the harm by altering or installing the product, made a false representation about the product, knew of the defect, or that the manufacturer of the product is insolvent or not subject to the jurisdiction of the court. *Id.*

⁷⁵ TEX. CIV. PRAC. & REM. CODE §82.007.

⁷⁶ *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)(finding this claim is preempted by federal law);

for unapproved use, or bribery of public official or witness.⁷⁷

E. Medical Legislation

The most publicized change heralded by HB4 was to the area of legislation relating to medicine, including medical malpractice and the Good Samaritan statute. The changes apply to cases filed on or after September 1, 2003.

1. Medical Malpractice

HB4 made several changes to medical malpractice law. First, it expanded the definitions of health care liability claim and health care provider. A "health care liability claim" is a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.⁷⁸ A "health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including: a registered nurse, a dentist, a podiatrist, a pharmacist, a chiropractor, an optometrist, or a health care institution.⁷⁹ The term also includes: an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; or an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.⁸⁰ A "health care institution" was added to the definition of a health care provider and includes an ambulatory surgical center, an assisted living facility, an emergency medical services provider, a health services district created under Chapter 287 of the Health and Safety Code, a home and community support services agency, a hospice, a hospital, a hospital system, an intermediate care facility for the mentally retarded, a nursing home, and an end stage renal disease facility.⁸¹ Before, ambulance services and were owners and affiliates of health care providers were not considered health care providers.

HB4 also expanded who qualifies as a claimant under a health care liability claim. Now, a "claimant" is "a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained

damages as the result of the bodily injury or death of a single person are considered a single claimant."⁸² Thus, family members are now aggregated as a single claimant for purposes of limiting damages awards.

HB4 also changed the notice mechanisms for a malpractice claimant. Now a claimant must provide an authorization for release of protected health information with his notice of claim.⁸³ There is abatement without an authorization.⁸⁴ Health care providers then have 45 days to provide a complete set of the patient's medical records.⁸⁵ The claimant may revoke the authorization for release of protected information; but if the authorization is revoked, the health care provider may elect to abate the suit.⁸⁶

There are new limits on when a plaintiff may bring a health care liability claim and new limits on the amount damages a plaintiff may recover. Now there is a ten-year statute of repose on all health care liability claims, even those of minors.⁸⁷ Courts will undoubtedly examine whether the ten-year statute of repose even bars claims by minors if they are not brought within ten years after the act giving rise to the claim.⁸⁸ As the statute stands, there is no exception should the minor not reach majority within the ten-year period.

Most notably, HB4 introduced liability limits for each claimant in a medical malpractice action. The caps on damages are simple. First, there is now a \$250,000 on noneconomic damages, excluding exemplary damages, for each claimant.⁸⁹ This limit is not adjusted for inflation, and it applies regardless of the number physicians or health care providers. But the limit applies only for a single health care institution. If there are multiple health care institutions, the \$250,000 limit aggregates to a total of

⁸² TEX. CIV. PRAC. & REM. CODE §74.001(a)(2).

⁸³ TEX. CIV. PRAC. & REM. CODE §74.052(a).

⁸⁴ *Id.*

⁸⁵ TEX. CIV. PRAC. & REM. CODE §74.051(d).

⁸⁶ TEX. CIV. PRAC. & REM. CODE §74.052(a) & (b).

⁸⁷ TEX. CIV. PRAC. & REM. CODE §74.251(b).

⁸⁸ *See Weiner v. Wasson*, 900 S.W.2d 316, 318 (Tex. 1995)(holding a minor is not legally capable of bringing suit until he reaches age 18).

⁸⁹ TEX. CIV. PRAC. & REM. CODE §74.301(a). Noneconomic damages are damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages. TEX. CIV. PRAC. & REM. CODE §41.001(12).

⁷⁷ TEX. CIV. PRAC. & REM. CODE §82.007.

⁷⁸ TEX. CIV. PRAC. & REM. CODE §74.001(a)(13).

⁷⁹ TEX. CIV. PRAC. & REM. CODE §74.001(a)(12).

⁸⁰ *Id.*

⁸¹ TEX. CIV. PRAC. & REM. CODE §74.001(a)(11).

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\$500,000 for all institutions.⁹⁰ The limit also includes vicarious liability.⁹¹

Second, there is a \$500,000 limit in wrongful death or survival actions, including exemplary damages, for each claimant.⁹² This limitation is adjusted for inflation.⁹³ This limit does not apply to amount of damages for medical expenses received before judgment or for future treatment.⁹⁴ In addition, if the present value of future damages equals or exceeds \$100,000, the court must order periodic payments if requested by the plaintiff, a physician or a health care provider.⁹⁵ Finally, the liability of an insurer under the *Stowers* doctrine in a wrongful death or survival action cannot exceed the liability of the insured.⁹⁶

For non-profit hospitals that are certified by the Texas Department of Health, the non-economic damages cap is lowered to \$100,000 per person or \$300,000 per occurrence.⁹⁷ To qualify as a non-profit hospital, it must render charity care equivalent to 8% of net revenues and that render at least 40% of all charity care in their home county.⁹⁸

HB4 also introduced a \$500,000 cap on all damages for plaintiffs that received charity care from a hospital or hospital system and their employees and agents.⁹⁹ "Charitable organizations" that fall under this protection now include accredited private primary or secondary schools but excludes fraternal organizations and secret societies.¹⁰⁰ Notably, "hospital systems" were added under the scope of the cap and are defined as a system of hospitals and other health care providers located in Texas that are under the common governance or control of a corporate parent.¹⁰¹

For the \$500,000 charitable limits to apply, a hospital must have patient or person responsible for the patient¹⁰² sign a written statement acknowledging: (1)

the hospital is providing care that is not administered for or in expectation of compensation; and (2) the limitations on the recovery of damages from the hospital in exchange for receiving the health care services.¹⁰³ The limits apply even if: (1) the patient is incapacitated due to illness or injury and cannot sign the required acknowledgment statement; or (2) the patient is a minor or is otherwise legally incompetent and the person responsible for the patient is not reasonably available to sign the required acknowledgment statement.¹⁰⁴

HB4 clarified damages relating to medical expenses and lost earnings. Recovery of medical expenses is limited to costs actually paid or incurred by the plaintiff.¹⁰⁵ Medical expenses paid by a collateral source are not recoverable. In addition, what is initially billed or reasonable charges are no longer recoverable. Any recovery of lost earnings now must be net of income taxes.¹⁰⁶

HB4 also changed the rules regarding expert witnesses in medical malpractice cases. First, the time required to serve an expert report has been shortened from 180 days of filing suit. Now a claimant must serve an expert report on each party within 120 days of filing suit.¹⁰⁷ An expert report is defined as "a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed."¹⁰⁸ In addition, only physicians now qualify as an expert witness on causation issues.¹⁰⁹ The court

and possession of the patient and has written authorization to consent for the patient from the parent, the managing conservator, or guardian of the patient, and an educational institution in which the patient is enrolled that has written authorization to consent for the patient from the parent, managing conservator, or guardian of the patient, or any other person with legal responsibility for the care of the patient. TEX. CIV. PRAC. & REM. CODE §84.003(7).

¹⁰³ TEX. CIV. PRAC. & REM. CODE §84.0065(a).

¹⁰⁴ TEX. CIV. PRAC. & REM. CODE §84.0065(b).

¹⁰⁵ TEX. CIV. PRAC. & REM. CODE §41.0105.

¹⁰⁶ This provision could have a more dramatic impact than intended. Generally, judgments not related to personal injury are taxable. Under this provision, a plaintiff would recover a post-tax judgment and then pay a tax on that judgment, or in effect, be subject to double taxation. In an attempt to negate this effect, the court is required to instruct the jury on the tax consequences of any recovery of compensatory damages. TEX. CIV. PRAC. & REM. CODE §18.091.

¹⁰⁷ TEX. CIV. PRAC. & REM. CODE §74.351(a).

¹⁰⁸ TEX. CIV. PRAC. & REM. CODE §74.351(r)(6).

¹⁰⁹ TEX. CIV. PRAC. & REM. CODE §74.401 & 74.402.

⁹⁰ TEX. CIV. PRAC. & REM. CODE §74.301(c).

⁹¹ TEX. CIV. PRAC. & REM. CODE §74.301(b).

⁹² TEX. CIV. PRAC. & REM. CODE §74.303(a).

⁹³ TEX. CIV. PRAC. & REM. CODE §74.303(b).

⁹⁴ TEX. CIV. PRAC. & REM. CODE §74.303(c).

⁹⁵ TEX. CIV. PRAC. & REM. CODE §74.503. Future damages are those damages incurred after the date of judgment, excluding exemplary damages. Future damages are awarded as a penalty or punishment.

⁹⁶ TEX. CIV. PRAC. & REM. CODE §74.303(d).

⁹⁷ TEX. CIV. PRAC. & REM. CODE §101.023(b); TEX. HEALTH & SAFETY CODE §311.0456(f).

⁹⁸ TEX. HEALTH & SAFETY CODE §311.0456(c).

⁹⁹ TEX. CIV. PRAC. & REM. CODE §84.0065.

¹⁰⁰ TEX. CIV. PRAC. & REM. CODE §84.003(1).

¹⁰¹ TEX. CIV. PRAC. & REM. CODE §84.003(6).

¹⁰² "Person responsible for patient" was added and includes: the patient's parent, managing conservator, or guardian, the patient's grandparent, the patient's older brother or sister, another adult who has actual care, control,

may dismiss a claim with prejudice and award fees and costs if an expert report is not filed within the 120-day period.¹¹⁰

Discovery rules in medical malpractice claims also changed. Now discovery is limited until the claimant serves an adequate expert report.¹¹¹ A claimant is only allowed to acquire information related to the patient's healthcare and only through written discovery, depositions on written questions, and discovery from nonparties.¹¹² All claimants are also limited to two depositions before serving an expert report.¹¹³ Notably absent are the Rule 202 depositions that were frequently conducted prior to commencement of a health care liability suit.¹¹⁴

A defendant must challenge the report's adequacy within 21 days of its service.¹¹⁵ After a hearing, the court must grant a motion challenging the adequacy of an expert report if the court finds that the report does not represent a good faith effort to comply with the definition of an expert report.¹¹⁶ A court may grant the claimant one 30-day extension to allow a claimant to cure deficiencies in an expert report.¹¹⁷

The report is only required to address issues relating to liability or causation.¹¹⁸ If an expert report is properly served and meets the statutory requirements, it is not admissible by any party, cannot be used in a deposition or trial and cannot be referred to by any party during the course of the action for any purpose.¹¹⁹ But these restrictions are waived if the claimant uses report for purpose other than to meet the service requirement.¹²⁰

2. Good Samaritan Statute

HB4 expanded the applicability of the Good Samaritan Statute. Prior to the revision, the law distinguished emergency care given at the scene of the emergency from that given in a hospital or other care facility. Subject to some exceptions, most persons rendering emergency care in good faith were immune from liability absent a showing of willful and wanton negligence. And if the person rendered emergency care within a hospital, he was also generally immune

from liability without a showing of willful and wanton negligence. But if the care was provided by a person who regularly rendered administered care in a hospital emergency room, i.e. an emergency room doctor or nurse, he was subject to liability unless he was at the scene of the emergency for reasons wholly unrelated to his work rendering health care. In all circumstances, the prior statute alluded that a provider of emergency care was excluded from protection if he was legally entitled to receive remuneration for his services.¹²¹ Finally, the law provided no definition of "emergency care."

Now, a claimant still must show by a preponderance of the evidence that the person who rendered the emergency care was with willful and wanton negligence and deviated from the degree of care and skill that is reasonably expected of an ordinary prudent person under like circumstances.¹²² But now, the location at which care is administered is no longer relevant. The legislature deleted the language that excluded care provided in a hospital or care facility by persons who regularly administer care from the protections of the Good Samaritan statute. In those situations, a new definition – "emergency medical care" – will determine the applicability of the Good Samaritan Statute in hospital settings.¹²³ HB4 further establishes the burden of proof a patient must meet in his health care liability claim against a physician or health care provider for injury or death arising out of emergency medical care in an emergency room or obstetrical unit or in a surgical suite immediately following emergency room consultation.¹²⁴ It also introduces mandatory jury

¹²¹ After its amendment, the court found that whether the provider was legally entitled to remuneration was not relevant under prior law. *McIntyre v. Ramirez*, 109 S.W.3d 741 (Tex. 2003).

¹²² TEX. CIV. PRAC. & REM. CODE §74.151.

¹²³ HB4 defines "emergency medical care" as "[B]ona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency." TEX. CIV. PRAC. & REM. CODE §74.001.

¹²⁴ When emergency medical care is rendered in these three areas, a claimant must prove by a preponderance of the evidence that the physician or health care provider, with willful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or

¹¹⁰ TEX. CIV. PRAC. & REM. CODE §74.351(b).

¹¹¹ TEX. CIV. PRAC. & REM. CODE §74.351(s).

¹¹² *Id.*

¹¹³ TEX. CIV. PRAC. & REM. CODE §74.351(u).

¹¹⁴ See *In re Miller*, -- S.W.3d --, 2004 WL 742741 (Tex. App.—Beaumont 2004, orig. proceeding).

¹¹⁵ TEX. CIV. PRAC. & REM. CODE §74.351(a).

¹¹⁶ TEX. CIV. PRAC. & REM. CODE §74.351(l).

¹¹⁷ TEX. CIV. PRAC. & REM. CODE §74.351(c).

¹¹⁸ TEX. CIV. PRAC. & REM. CODE §74.351(j).

¹¹⁹ TEX. CIV. PRAC. & REM. CODE §74.351(k).

¹²⁰ TEX. CIV. PRAC. & REM. CODE §74.351(t).

instructions for negligence actions involving emergency medical care that was rendered in these three settings.¹²⁵ Finally, HB4 provides guidance on how to determine what care was administered “for or in anticipation of remuneration.”¹²⁶

F. Offer of Settlement

HB4 also established a procedure, called an offer of settlement, to encourage settlement of lawsuits by allowing the prevailing party to recover certain litigation costs if a settlement offer made under the rules is rejected and a less favorable outcome is received. These new rules apply to cases filed on or after January 1, 2004.

Offer of settlement rules apply only in certain circumstances, and categories of cases are excluded from its purview. First, offer of settlement rules apply only to claims for monetary relief.¹²⁷ But even if monetary relief is sought, the rules do not apply to class actions, derivative suits, actions against

similar circumstances. TEX. CIV. PRAC. & REM. CODE §74.153.

¹²⁵ HB4 provides special jury instructions in emergency medical care cases that involve care in a hospital emergency department, an obstetrical unit, or a surgical suite immediately following the evaluation of treatment of a patient in a hospital emergency department. In these actions, the court must instruct the jury to consider several factors, including:

1. Whether the person providing care did or did not have the patient’s medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;
2. The presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;
3. The circumstances constituting the emergency; and
4. The circumstances surrounding the delivery of the emergency medical care.

However, these mandatory instructions do not apply in certain circumstances. They do not apply when the care or treatment occurred after the patient was stabilized and was capable of receiving medical treatment as a nonemergency patient, the care or treatment was unrelated to the original medical emergency, or the care or treatment was related to an emergency caused in whole or in part by the defendant. TEX. CIV. PRAC. & REM. CODE §74.154.

¹²⁶ The new legislation adopts a subjective analysis to determine the meaning of “for or in expectation of remuneration” and expressly provides that “being legally entitled to receive remuneration for the emergency care shall not determine whether or not the care was administered for or in anticipation of remuneration.” See TEX. CIV. PRAC. & REM. CODE §74.151(b)(1). In *McIntyre v. Ramirez*, the Texas Supreme Court reached the same conclusion under the former version of the Good Samaritan statute.

¹²⁷ TEX. R. CIV. P. 167.1.

governmental entities, actions under the Family Code, actions to collect worker’s compensation, and actions brought in the courts of the justice of the peace.¹²⁸

To commence the offer of settlement process, a defendant must file a declaration of the offer, and the procedural rules then apply to any party that makes or receives offers as to that defendant.¹²⁹ Only a “defendant” can invoke the settlement procedure, but a “defendant” includes a counterdefendant, cross-defendant, or third party defendant.¹³⁰ Thus, a plaintiff, as a counterdefendant, can file the declaration and invoke potential fee shifting. And a defendant cannot file a declaration within 45 days before the date the case is set for a conventional trial on the merits.¹³¹ The court can modify this restriction and the time limitation on making an offer upon motion and a showing of good cause.¹³²

Once a defendant invokes the procedure, offers can be made under the rules only to those claims by and against that defendant.¹³³ The plaintiff can also make an offer of settlement.¹³⁴ If the offer is rejected and the judgment is “significantly less favorable” to the rejecting party than the settlement offer, all post-rejection costs up to the time of judgment are awarded to the offeror.¹³⁵ Litigation costs include court costs, reasonable fees of two or fewer testifying experts, and reasonable attorneys’ fees.¹³⁶ A judgment is “significantly less favorable” when either (1) the plaintiff rejected the defendant’s offer and the award is less than 80% of the offer or (2) the defendant rejected the plaintiff’s offer and award is more than 120% of the offer.¹³⁷ But the recovery of costs is capped at the sum of the sum of 50% of economic damages plus 100% of non-economic damages plus 100% of exemplary damages less the amount of any lien.¹³⁸ If a party is allowed to recover costs and fees under another statute, he will not be allowed to stack and recover under the offer of settlement rules.¹³⁹ And litigation costs awarded to a defendant must be made as a setoff to the plaintiff’s judgment against the defendant.¹⁴⁰

The party against whom costs are to be awarded, upon motion and good cause shown, can conduct

¹²⁸ *Id.*
¹²⁹ TEX. R. CIV. P. 167.2.
¹³⁰ TEX. R. CIV. P. 167.1.
¹³¹ TEX. R. CIV. P. 167.2.
¹³² TEX. R. CIV. P. 167.5(a).
¹³³ TEX. R. CIV. P. 167.2(a).
¹³⁴ *Id.*
¹³⁵ TEX. R. CIV. P. 167.4(a).
¹³⁶ TEX. R. CIV. P. 167.4(c).
¹³⁷ TEX. R. CIV. P. 167.4(b).
¹³⁸ TEX. R. CIV. P. 167.4(d).
¹³⁹ TEX. R. CIV. P. 167.4(e).
¹⁴⁰ TEX. R. CIV. P. 167.4(g).

discovery to ascertain the reasonableness of the costs requested.¹⁴¹ Upon request, the court must conduct a hearing on the request for costs in which the affected parties may present evidence.¹⁴² If the court finds the costs reasonable, the court must order the party requesting discovery to pay all attorney fees and expenses incurred by the other party in responding to the discovery request.¹⁴³

There are many procedural requirements of the offer. An offer cannot be made before a defendant's declaration is filed or within 60 days after the later of the appearance in the case of the offeror or the offeree.¹⁴⁴ Nor can an offer be made within 14 days of a conventional trial except if it is in response to and within 7 days of a prior offer.¹⁴⁵

An offer also must meet statutory, technical requirements. It must be in writing and state that the offer is made pursuant to the Texas Rules of Civil Procedure and the Civil Practices & Remedies Code.¹⁴⁶ It must identify the relevant parties, and it must attempt to settle all monetary claims, including interest and costs.¹⁴⁷ The offer also must give at least 14 days after the offer is served for acceptance and be served on all parties to whom the offer is made.¹⁴⁸

Successive offers are allowed.¹⁴⁹ In those situations, rejection of a successive offer is subject to the cost shifting only if the offer is more favorable to offeree than any prior offer.¹⁵⁰ The offer also can be subject to reasonable conditions, and the offeree can object to a condition by written notice before the stated deadline.¹⁵¹ If the offeree does not object, there is a presumption that the offer was reasonable.¹⁵² A rejection of an offer subject to a condition that a court finds unreasonable cannot shift costs.¹⁵³

An offeror can withdraw his offer before acceptance by written notice served on the offeree.¹⁵⁴ And an offeree can accept only by written notice by the deadline provided in the offer.¹⁵⁵ Once accepted, either

party can file the offer and acceptance and move for their enforcement.¹⁵⁶

An offer that is not withdrawn or accepted is rejected.¹⁵⁷ An offeree can also reject by written notice.¹⁵⁸ In addition, if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void if the offeree files an objection to the offer within 15 days after service of the offeror's pleading or designation.¹⁵⁹

G. Class Actions, Interest on Judgments and Appeal Bonds

1. Class Actions

HB4 also tightened the rules pertaining to class actions. These new rules apply to cases filed on or after September 1, 2003.

The legislature has imposed a new exhaustion requirement on class certifications. Trial courts are now required to rule on whether a claim should be before an agency rather than the court prior to ruling on class certification.¹⁶⁰ If a plea to the jurisdiction is denied and the class is subsequently certified, a person, as part of an appeal of the verification order, may obtain appellate review of the order denying the plea to the jurisdiction.

In addition, the trial court's ruling on a motion to certify must be written, define the class, the class claims, issues, and defenses, and appoint class counsel.¹⁶¹ These orders certifying or refusing to certify a class is now a type of interlocutory order from which a petition for review is allowed¹⁶² because the Texas Supreme Court now has jurisdiction over interlocutory appeals relating to class certification.¹⁶³ Before, the Supreme Court did not have authority to review an interlocutory order on certification of a class and only commencement of trial was stayed pending resolution of the appeal. In addition, all proceedings are now stayed pending the appeal.¹⁶⁴

The legislature also amended the calculation of attorney's fees in class action cases. Before, trial court had discretion whether to award a contingency

141 TEX. R. CIV. P. 167.5(b).
 142 TEX. R. CIV. P. 167.5(c).
 143 TEX. R. CIV. P. 167.5(b).
 144 TEX. R. CIV. P. 167.2(e).
 145 *Id.*
 146 TEX. R. CIV. P. 167.2(b).
 147 *Id.*
 148 *Id.*
 149 TEX. R. CIV. P. 167.2(f).
 150 *Id.*
 151 TEX. R. CIV. P. 167.2(c).
 152 *Id.*
 153 *Id.*
 154 TEX. R. CIV. P. 167.3(a).
 155 TEX. R. CIV. P. 167.3(b).

156 *Id.*
 157 TEX. R. CIV. P. 167.3(c).
 158 *Id.*
 159 TEX. R. CIV. P. 167.3 (d).
 160 TEX. CIV. PRAC. & REM. CODE §26.051.
 161 TEX. R. CIV. P. 42.
 162 TEX. CIV. PRAC. & REM. CODE §51.014(a)(3).
 163 TEX. GOV'T CODE §22.225(d).
 164 TEX. CIV. PRAC. & REM. CODE §51.014(b).

percentage or use the lodestar method.¹⁶⁵ Now, a court must use the Lodestar method to calculate the amount of fees.¹⁶⁶ The fees award must be in the range of 25% to 400% of the lodestar figure.¹⁶⁷ The court is also required to consider the factors specified in Rule 1.04(b) of the Tex. Disciplinary R. Prof'l Conduct.¹⁶⁸ In addition, if a portion of the recovery is paid in coupons or other noncash benefits, attorney's fees must be paid in cash and noncash amounts proportionally to the recovery for the class.¹⁶⁹

2. Interest on Judgments

New rules on calculating interest apply to final judgments signed or judgments subject to appeal on or after September 1, 2003.¹⁷⁰ Under prior law, pre-judgment interest was recoverable on future damages in wrongful death, personal injury, and property damage cases. In these cases, the trial court had discretion to exclude periods of trial delay in calculating pre-judgment interest when the delay was caused by one of the parties. In addition, the post-judgment interest rate was pegged to the auction rate of 52-week U.S. treasury bills, with a floor of 10% and a ceiling of 20%. Pre-judgment rates were similarly calculated.

Under the new rules, a court can no longer assess pre-judgment interest on awards of future damages, effectively overruling *C & H Nationwide, Inc. v. Thompson*.¹⁷¹ HB4 also establishes a post-judgment interest rate that is based on a prime rate and adjusts current floor and ceiling for the post-judgment interest to 5 and 15%, respectively.¹⁷² Pre-judgment rates are

¹⁶⁵ The Lodestar method is a method developed mostly in federal courts and is reasonable hours worked multiplied by reasonable hourly rates, with certain adjustments based on multiple other factors listed in canons of professional responsibility.

¹⁶⁶ TEX. R. CIV. P. 42(i)(1).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ TEX. R. CIV. P. 42(i)(2).

¹⁷⁰ See *Columbia Medical Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 865 (Tex. App.—Fort Worth 2003, pet. denied)(finding amendments apply to cases where a judgment is signed on after the effective date of the act and to cases where a judgment becomes subject to appeal, i.e., capable of being appealed, on or after the effective date of the act).

¹⁷¹ TEX. FIN. CODE §304.1045; *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315 (Tex. 1994).

¹⁷² TEX. FIN. CODE §304.003(c). House Bill 2415 duplicated HB4 and enacted the same limits with the rate based on prime rate of Federal Reserve Bank of New York. This provision sets a minimum of 5% if the prime rate published by the New York Federal Reserve is less than 5% and a maximum of 15% a year if the prime rate is more than 15%.

similarly calculated.¹⁷³ In addition, the trial court no longer has discretion to find that prejudgment interest does not accrue during periods of delay.

3. Supersedeas Bonds

HB4 also modified the rules relating to appeal bonds so that cost of the bonds alone will not prohibit appeals of judgments. These changes apply to final judgments signed on or after September 1, 2003. Previously, the amount of the bond had to be at least the amount of the judgment, with interest for the period of the appeal and costs. It also included any punitive damages or additional damages authorized by law. Now a defendant is required to have only a bond to cover the compensatory damages awarded to plaintiff, interest for the estimated duration of the appeal, and costs awarded in the judgment.¹⁷⁴ In addition, the amount of security must not exceed the lesser of 50% of defendant's net worth or \$25 million.¹⁷⁵

If the bond is based on net worth, the judgment debtor must file an affidavit with detailed information concerning assets and liabilities from which his net worth can be ascertained.¹⁷⁶ The affidavit is prima facie evidence, but the judgment creditor may contest it and conduct discovery.¹⁷⁷ A trial court must hear a judgment creditor's contest, during which the judgment debtor has the burden of proving net worth.¹⁷⁸

The new rules also allow judgment debtors to further reduce the bond requirements. The court is required to reduce the amount of security upon a judgment debtor's showing that he is "likely to suffer substantial economic harm if required to post security in the amount required."¹⁷⁹ The determination of "substantial economic harm" will be left to the courts' discretion as there is no statutory definition.

Notably, the Texas Rules of Appellate Procedure already had allowed trial courts to lessen the amount of the bond upon a finding that the bond would "irreparably harm" the judgment debtor and would not "substantially impair the judgment creditor's ability to recover." The new standard weakens the requirement from a demonstration that "irreparable harm" will occur to a likelihood of "substantial economic harm" and now ignores any impact the reduction would have on the judgment creditor.¹⁸⁰

¹⁷³ TEX. FIN. CODE §304.103; TEX. R. APP. P. 24.2.

¹⁷⁴ TEX. CIV. PRAC. & REM. CODE §52.006(a).

¹⁷⁵ TEX. CIV. PRAC. & REM. CODE §52.006(b).

¹⁷⁶ TEX. R. APP. P. 24.2(a).

¹⁷⁷ TEX. R. APP. P. 24.2(a) & (b).

¹⁷⁸ TEX. R. APP. P. 24.2(c).

¹⁷⁹ TEX. CIV. PRAC. & REM. CODE §52.006(c).

¹⁸⁰ TEX. R. APP. P. 24.2(b).

H. Other Legislation

Finally, HB4 repealed evidentiary rules pertaining to seat belt use. These changes apply to suits filed on or after July 1, 2003. Under prior law, evidence of use or non-use of safety belts or safety seat systems in automotive negligence and products liability cases was inadmissible.¹⁸¹ HB4 repealed these rules, and now this evidence is admissible.

¹⁸¹ TEX. TRANS. CODE §545.412(d) & 545.413(g)(1997 & Supp. 2003).