HOUSE COMMITTEE ON CIVIL PRACTICES
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2004

A REPORT TO THE
HOUSE OF REPRESENTATIVES
79TH TEXAS LEGISLATURE

JOE NIXON
CHAIRMAN

COMMITTEE CLERK
TERI AVERY

Committee On
Civil Practices

January 6, 2005

Joe Nixon
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Tom Craddick
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Civil Practices of the Seventy-Eighth Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Seventy-ninth Legislature.

Respectfully submitted,

Joe Nixon

Dan Gattis

Jaime Capelo

Yvonne Davis

Will Hartnett

Phil King

Mike Krusee

Patrick Rose

Beverly Woolley

Dan Gattis
Vice-Chairman

Members: Jaime Capelo, Yvonne Davis, Will Hartnett, Phil King, Mike Krusee, Patrick Rose, Beverly Woolley

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CHARGE ONE

Study the need for an inactive docket for claims alleging personal injury or death caused by exposure to asbestos fibers or other mineral dusts.

INTRODUCTION

During the interim, the House Committee on Civil Practices was charged with studying the need for an inactive docket for claims alleging personal injury or death caused by exposure to asbestos fibers or other mineral dusts. Legislators have taken particular interest in the effect that non-symptomatic asbestos related claims have had on the court system, the economy and persons who are symptomatic. These asymptomatic litigants claim to have been exposed to asbestos, silica or other mineral dusts, but manifest no signs of physical illness related to that exposure. They do not claim any objective medical criteria demonstrate that they have negative physical manifestations caused by the claimed exposure. In contrast, the symptomatic claimant has been exposed to asbestos and demonstrates negative physical manifestations. By using objective medical criteria, the symptomatic claimant demonstrates his illness is caused by exposure to asbestos, silica or other mineral dusts. The large awards for asymptomatic litigants, those persons who are not and may never become sick, are threatening the ability of those who are symptomatic from receiving compensation.

Asbestos litigation is wreaking havoc on businesses in Texas. The extraordinary number of unimpaired claimants is strangling the judicial system and depriving legitimate claimants from receiving full compensation. Until 1988, nine percent of all asbestos cases were filed in five states – Mississippi, New York, West Virginia, Ohio and Texas. Two thirds of all new asbestos claims filed between 1998 and 2000 were filed in the same five states. By 2003, it was estimated that half of the over 200,000 asbestos claims pending in the United States were filed in Texas courts. Seventy-five percent of the asbestos claims in Texas are from out-of-state. Of all new asbestos filings in the nation, 42% were in Harris, Galveston and Jefferson counties by the mid-1990's. The number of asbestos cases continues to explode. More than 100,000 new cases were filed in the last year.

The American Bar Association created a commission in November 2002 by the Board of Governors, at the request of President-Elect Dennis Archer, to bring a recommendation to the House of Delegates at its February 2003 meeting concerning widely reported and longstanding problems in asbestos litigation. The recommendation was to address dual concerns: 1) protecting the right of claimants with impairing asbestos-related injuries to obtain fair compensation efficiently in the tort system, and 2) preventing scarce judicial and party resources from being misdirected by a flood of premature claims by individuals who have been exposed to asbestos but do not have, and may never get, any functional impairment from asbestos-related disease.

The number of bankruptcies resulting from asbestos claims continues to rise. According to the RAND report, 16 bankruptcies were filed in the 1980's, 18 in the 1990's and 22 in the two year period from January 2000 and spring 2002.

On the federal level, Congress has considered a number of bills that propose to give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by asbestos; fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become sick in the future; enhance the ability of the Federal and State judicial systems to supervise and control asbestos litigation and asbestos-

related bankruptcy proceedings; and conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically harmed by exposure to asbestos while securing the right to similar compensation for those who may suffer physical harm in the future. A federal law as yet to be enacted.

During the 78th regular legislative session, the House Committee on Civil Practices heard House Bill 1240, by Nixon, et al., relating to civil claims involving exposure to asbestos. HB 1240 sought to create a new chapter in the Civil Practice and Remedies Code for civil claims relating to asbestos litigation and a new chapter relating to limiting post-merger asbestos-related liabilities of an innocent successor corporation. The bill sought to establish an inactive docket for unimpaired claims, establish objective medical criteria for determining actual impairment, and give trial preference to asbestos claims involving malignant conditions caused by asbestos exposure. A committee substitute for HB 1240 passed favorably out of House Committee on Civil Practices but was not finally passed by the House.

During and after the 78th legislative session, a series of articles and editorials appeared in newspapers and periodicals across the state and the nation on the subject of asbestos. Major daily newspapers endorsed a reasoned approached to solve the asbestos litigation crisis. Business and insurance journals wrote of the economic need for the legislation.

The Committee's goal is to safeguard fundamental rights for both the symptomatic and asymptomatic parties, while relieving the clogged court system. The committee seeks to insure that those individuals who are truly injured receive just compensation in a timely manner; preserve the rights of those claimants who may become symptomatic, and encourage an efficient resolution of claims to relieve the overstressed court system.

HISTORY

The longest running mass tort in US History is asbestos litigation. The RAND Institute for Civil Justice has been studying asbestos litigation since the 1980's. Though the use of asbestos has dramatically declined since 1980 and workplace exposures have been regulated since 1971 by the Occupational Safety and Health Administration (OSHA), the number of new claims filed continues to rise sharply. The cost to defendants continues to increase just as sharply. Exposure to asbestos has created a flood of litigation targeting approximately 8,400 defendant companies in Federal and State courts. The United States Supreme Court has characterized it as `an elephantine mass' of cases that `defies customary judicial administration and calls for national legislation,' Ortiz v. Fibreboard Corporation, 119 S. Ct. 2295, 2302 (1999). Asbestos personal injury litigation can be unfair and inefficient, imposing a severe burden on litigants and taxpayers alike, in most cases involving defendant companies that were never involved in the production of asbestos. The extraordinary volume of asymptomatic asbestos cases continues to strain Federal and State courts, with 300,000 cases pending and 100,000 new cases filed last year. Asbestos personal injury litigation has already contributed to the bankruptcy of more than 60 companies and the rate of asbestos -driven bankruptcies is accelerating. Transaction costs are enormous in asbestos cases. 67% of every dollar recovered in asbestos cases goes to pay for attorneys and legal expenses.

The vast majority of asbestos claims are filed by individuals who have been exposed to asbestos but show no present asbestos related impairment. The cost of compensating these persons who are not sick effects the ability of defendants to compensate people with cancer and other serious asbestos related diseases and strains the ability of courts to manage the torrent of cases involving unimpaired plaintiffs. An estimated 50,000 to 60,000 workers have lost their jobs as a direct result of asbestos litigation and related bankruptcies of defendant companies and each displaced worker will, on average, lose between $25,000 and $50,000 in lost wages.

Concerns about statutes of limitations can force claimants who have been exposed to asbestos but who have no injury or symptoms to bring premature lawsuits in order to protect against losing their rights to future compensation should they become impaired. Consolidations, joinder, and similar procedures to which some courts have resorted in order to deal with the mass of asbestos cases, can undermine the appropriate functioning of the judicial process and encourage the filing of thousands of cases by exposed persons who are not yet sick and who may never become sick.

Current Texas law encourages the filing of thousands of cases on behalf of exposed persons who are not yet sick and may never become sick. Asbestos litigation, if left unchecked by reasonable legislative action, will continue to inhibit the economy and run counter to plans to stimulate economic growth and the creation of new jobs. The reasonable legislative solution requires deferring the claims of exposed persons who are not sick in order to preserve defendants' ability to compensate people who develop cancer and other serious asbestos related injuries. In this way, the jobs, benefits, and savings of American workers and the well-being of the national economy will be safeguarded.

Congress is considering a number of bills that would give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by asbestos; while preserving the rights of claimants who were exposed to asbestos to pursue compensation should they become sick in the future; strengthen the authority of the Federal and State judicial systems to supervise and control asbestos litigation and asbestos related bankruptcy proceedings to allow compensation of symptomatic claimants with cancer and others who are physically harmed by exposure to asbestos, while preserving the right to similar compensation for those who may become ill and suffer physical harm in the future.

The American Bar Association supports enactment of Federal legislation that would allow persons alleging non-malignant asbestos-related disease claims to file a cause of action in Federal or State court only if those persons meet the medical criteria in the ‘ABA Standard for Non-Malignant Asbestos -Related Disease Claims' dated February 2003 or an appropriate similar medical standard; and toll all applicable statutes of limitations until such time as the medical criteria in such standard are met.

COMMITTEE REVIEW

The need for an inactive docket for claims alleging personal injury or death caused by exposure to asbestos fibers or other mineral dusts was studied extensively during the 78th Regular Session of the Legislature and during the First Called Session of the 78th Legislature. HB 1240 was considered in public hearings on April 2, 2003 and April 9, 2003. It was considered in a formal meeting on April 14, 2003. A similar bill, HB 47, was considered in a public hearing on July 8, 2003, during the First Called Session of the 78th Legislature. Representatives from the Texas Civil Justice League, Citizens Against Lawsuit Abuse and from individual businesses testified on or for the need for an inactive docket for claims alleging personal injury or death caused by exposure to asbestos fibers or other mineral dusts. Personal injury trial lawyers representing themselves and their clients, along with a labor representative and a physician testified against the bill. As a result of the testimony from those hearings, the original bill was substituted to streamline the petition and filing process and change the medical criteria to reflect American Bar Association guidelines, with alternative criteria for those who do not have pulmonary function tests within the medical criteria. Additionally, independent expert requirements were applied on a prospective basis only. The substitute added occupational medicine to the physicians qualified to evaluate and diagnose nonmalignant asbestos and allows for paying for "B" readers.

Further, in the Spring of 2004, the Ohio state Legislature passed groundbreaking legislation regarding the use of medical criteria in asbestos cases. HB 292 and HB 342 were signed by Governor Taft of Ohio in the first week of June 2004. The bills are landmark legislation in that they rely on objective medical criteria and include silica and other mineral dusts. Many in the legal community believe that omitting silica and other mineral dusts from asbestos legislation will cause a spike in the number of silica or mineral dusts filings in lieu of weak or meritless asbestos cases.

In the Summer of 2004, Chairman Nixon sent an email to the interested parties whose associations had previously testified on the issue. This information was disseminated to the committee members for their review.

RECOMMENDATION

The Committee's goal is to safeguard fundamental rights for both the symptomatic and asymptomatic parties, while relieving the clogged court system. The committee seeks to insure that those individuals who are truly injured receive just compensation in a timely manner; preserve the rights of those claimants who may become symptomatic, and encourage an efficient resolution of claims to relieve the overstressed judicial system.

During its review, the committee found that asbestos litigation is impairing the ability of symptomatic persons from receiving just compensation, clogging the court system in Texas and wreaking financial havoc for businesses and individuals with little or no nexus to asbestos.

The committee recommends legislative remedies that focus on seeking prompt, efficient legal redress for symptomatic claimants. Those claimants who have become sick as a result of their exposure to asbestos, silica or other mineral dusts should have their claims heard first in the courts. Of primary concern is the use of objective medical criteria to allow these parties compensation. The use of independent standards as set out by the American Bar Association or the American Medical Association are required to ensure that those truly harmed by asbestos or mineral dust exposure can be adequately and efficiently compensated. Further, preserving the rights of unimpaired claimants to seek legal redress in the event they develop an asbestos-related disease in the future is critical. The establishment of an inactive docket for claims alleging personal injury caused by exposure to asbestos fibers or mineral dusts is one option. The Ohio model is another alternative. The committee would like to work with the Texas Trial Lawyers Association, the Texas Association of Defense Counsel, the Asbestos Coalition and other stakeholders to draft and pass into law an adequate remedy which addresses each of these concerns.

CHARGE TWO

Monitor the legislation passed by the 78th Legislature, with a particular emphasis on the implementation of and rulemaking for HB 4.

INTRODUCTION

During the 78th Regular legislative session, the Committee on Civil Practices reported favorably and the Legislature passed House Bill 4 (HB 4), a comprehensive tort reform bill addressing many issues affecting the civil court system. The intent of HB 4 is to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society. HB 4 contains elements addressing: class action lawsuits, offers of settlement, venue and forum non conveniens, proportionate responsibility, products liability, prejudgement and postjudgement interest, appeal bonds, seat belts and child safety seats, medical malpractice, charitable volunteer immunity and liability, admissibility of evidence regarding nursing homes, and liability relating to asbestos claims.

House Bill 4 established a clear-cut legislative course for the civil court system while allowing details to be provided through the rulemaking authority granted to the Texas Supreme Court. In this way, the rules are developed by the practitioners who must live with them, after thorough debate and with opportunities for public comment. It also provided for monitoring of the legislation by the Texas Department of Insurance and the Texas Department of Health.

Rulemaking authority was expressly granted to the Texas Supreme Court in several sections of the bill. By granting this authority to the Court, the Legislature maintains its broad policy-setting role while allowing for a comprehensive study of specific procedures. While the legislature regularly meets for 140 days every other year, the use of rulemaking authority provides agencies and units of government with the necessary tools to make administrative changes, resolve conflicting issue and adapt to changes more efficiently and effectively, without waiting for another legislative session. This process ensures efficient implementation of legislative policy direction.

Article 10 of HB 4 reformed the health care liability system in Texas by striking an appropriate balance between common sense reforms to the medical liability system and protecting the right of those who have been harmed to recover damages to compensate them. It's goal was to achieve lower medical malpractice insurance rates for health care providers in order to increase access to health care. By establishing limits on non-economic damages in health care suits, HB 4 helps ensure access to health care by limiting insurers' exposure to risk, which leads to a reduction in medical malpractice rates, which permits more physicians to practice in the state, particularly high-risk specialties such as obstetrics and neurology.

Article 22 of HB 4 is intended to clarify and set forth the duties, responsibilities and benefits that apply to hospitals for providing community benefits that include charity care. A nonprofit hospital will qualify for a $100,000 limitation on non-economic damages in claims brought against the hospital if the hospital provides charity care in an amount equal to at least eight percent of the hospital's net patient revenue, and provides 40 percent of the charity care in the county in which the hospital is located. The Texas Department of Health is directed to verify the certification of these hospitals.

COMMITTEE REVIEW

The Civil Practices Committee met in a public hearing in Austin on April 22, 2004, to monitor the rulemaking and implementation of HB 4.

The following witnesses testified at the April 22, 2004 hearing:

The Honorable Nathan Hecht, Justice, Texas Supreme Court
Jose Montemayor, Commissioner, Texas Department of Insurance
David Peeples, Chair, Multidistrict Litigation Panel
Bruce Gunn, Texas Department of Health
Rob Roby, Texas Association of Defense Counsel, Inc.
Guy Choate, Texas Trial Lawyers Association
George Linial, Texas Association of Homes & Services For The Aging
Jon Opelt, Texas Alliance For Patient Access

The main objectives of the April 22, 2004, public hearing was to be updated on the rulemaking process and the positive effect the legislation was having on medical malpractice insurance rates and access to health care.

The Texas Supreme Court Rulemaking Requirements in House Bill 4

The Court provided testimony on its rulemaking authority, procedure and results to the committee. Rulemaking authority is established for the Court in Article 5, Section 31, Texas Constitution. The burden of responsible for the efficient administration of the judicial branch is given to the Supreme Court in the Constitution. In the same section, the Legislature is given the authority to delegate to the Courts rulemaking authority.

To assist in its rulemaking, the Court in 1940 appointed a rules advisory committee. Currently, the committee has 52 members from around the State and from diverse areas of practice, serving three year terms. Charles L. "Chip" Babcock of Dallas chairs the committee. They meet several times during the year in Austin. The meetings are open. Notice of them is public and a stenographic recording is maintained. Transcripts of their proceedings and proposals are available on the internet at <www.jw.com/scac>.

After the passage of House Bill 4, the Court reviewed the legislation to determine what rule changes would be required and to established a timeline for making those changes. Rulemaking authority is expressly granted to the Supreme Court in the following sections of House Bill 4.

- Section 1.01 (Chapter 26: CLASS ACTIONS, Civil Practice and Remedies Code) directs the Supreme Court to "adopt rules to provide for the fair and efficient resolution of class actions." It requires specific changes in Rule 42 of the Texas Rules of Civil Procedure regarding attorney fees in class actions and class actions involving state agency jurisdiction.

- Section 2.01 (Chapter 42: SETTLEMENT, Civil Practice and Remedies Code) requires the Supreme Court to promulgate rules implementing Chapter 42 settlement offers.

- Section 3.02 (Section 74.163, Government Code) grants rulemaking authority to the Judicial Panel on Multidistrict Litigation. Section 3.02 requires rules for the operation of the newly created panel on multidistrict litigation(MDL) in cases filed on or after September 1, 2003.

- Section 4.12 of the bill requires that Rule 194.2 of the Texas Rules of Civil Procedure be amended to provide for disclosure of information identifying responsible third parties.

- Section 5.03 directs that Rule 407(a) of the Texas Rules of Evidence be amended as soon as practicable to conform to Rule 407 of the Federal Rules of Evidence.

- Section 7.02 of the bill limits the bond required to supersede a judgment on appeal, and in some instances the limitation is tied to the judgment debtor's net worth.

The Court notified the Advisory Committee of requirement of House Bill 4. The Committee began to work on the rules in June 2003, scheduled an additional meeting in July, added a day to a previously scheduled meeting, and continued working at its October meeting. During this same period, the Court devoted enormous time to studying Committee recommendations, revising proposed rules, and preparing rules for adoption and publication. By this accelerated process, all statutory deadlines were met.

Adoption of Rules by the Court Under House Bill 4

Class Actions. Section 1.01 of House Bill 4 requires specific changes in Rule 42 of the Texas Rules of Civil Procedure regarding attorney fees in class actions and class actions involving state agency jurisdiction. The statute also directs the Supreme Court generally to "adopt rules to provide for the fair and efficient resolution of class actions." The Advisory Committee recommended changes to effectuate the specific statutory requirements, and further recommended other changes to conform Rule 42 to Rule 23 of the Federal Rules of Civil Procedure, as amended, effective December 1, 2003. The Supreme Court adopted all of these recommendations on October 9, 2003. The specifically required changes were made effective in cases filed on or after September 1, as required by House Bill 4, § 23.02(d). The other changes were made effective January 1, 2004. The Court invited comments for a period of 83 days. No comments were received.

Offer of Settlement. Section 2.01 of House Bill 4 permits cost-shifting when certain settlement offers are rejected and requires rules implementing the statutory provisions. For about two years preceding enactment of House Bill 4, the Advisory Committee had devoted enormous time and energy to researching and debating whether such cost-shifting procedures should be adopted, and if so, how they should operate. Also, the Task Force of Civil Litigation Improvements specially appointed by the Supreme Court and chaired by Joe Jamail of Houston, had recommended cost-shifting procedures. By the time the 78th Legislature convened, the Court had before it several drafts of an offer-of-settlement rule and the extensive research on which they were based. Participants in the legislative process were aware of these efforts in setting the parameters for an offer-of-settlement procedure. Section 2.02 of House Bill 4 required that rules be in effect by January 1, 2004. Because

the Advisory Committee was already thoroughly familiar with the extremely complex issues involved in adopting such procedures, it was able to adapt its work to the requirements of section 2.01. The Court, too, had already devoted much attention to the issues and was prepared to consider and revise the Committee's recommendations. Thus it was possible for the Court to adopt Rule 167 of the Texas Rules of Civil Procedure by October 9, 2003, and to meet the statutory deadline. The Court invited comments for a period of 83 days. A few comments were received. Experience with Rule 167 is as yet insufficient to evaluate its operation.

Multidistrict Litigation. Section 3.02 of House Bill 4 requires rules for the operation of the newly created panel on multidistrict litigation(MDL) in cases filed on or after September 1, 2003. A subcommittee of the Advisory Committee was appointed to draft these rules. At the Advisory Committee's July 2003 meeting, the subcommittee proposed Rule 13 of the Rules of Judicial Administration to govern proceedings before the MDL Panel, the transfer and re-filing of cases, proceedings before the transferee court, and retransfer for trial. The procedures involved are very complex, and the goal was to provide maximum guidance for judges, lawyers, and court clerks. Further, it was necessary for the new procedures to minimize expense by relying on existing structures because the Legislature provided no funding for the MDL Panel. Thus, for example, the Clerk of the Supreme Court was designated to serve as the Clerk for the MDL Panel because no statute provides for clerical or office support for the Panel. Rule 13, as recommended by the Advisory Committee and revised by the Supreme Court, was adopted on August 29, 2003, to meet the September 1 deadline prescribed by House Bill 4, § 23.02(a). The Court also revised Rule 11 of the Rules of Judicial Administration, which provides for assignment of a pretrial judge in related cases, to allow it to function in tandem with Rule 13. The statutory deadline did not allow time for public comment before adoption of Rule 13, but the Court invited comment for a period of 90 days following adoption. The Court is not aware of any problems with the operation of Rule 13 to date.

Disclosure of Responsible Third Parties. Section 4.12 of House Bill 4 requires that Rule 194.2 of the Texas Rules of Civil Procedure be amended to provide for disclosure of information identifying responsible third parties. The Supreme Court made this change on March 3, 2004, effective in cases filed on or after July 1, 2003, as required by House Bill 4, § 23.02(c), in which a request for disclosure under Rule 194.1 is made on or after May 1, 2004. No changes are anticipated to this rule.

Subsequent Remedial Measures. Section 5.03 of House Bill 4 directs that Rule 407(a) of the Texas Rules of Evidence be amended as soon as practicable to conform to Rule 407 of the Federal Rules of Evidence. This required the elimination of the last sentence of the rule and other less important changes. The Supreme Court made these changes on August 29, 2003, effective in cases filed on or after July 1, 2003, as required by House Bill 4, § 23.02(c). The statutory deadline did not allow time for public comment before the changes were adopted, but the Court invited comments for a period of 90 days afterward. No comments were received.

Supersedeas Bonds. Section 7.02 of House Bill 4 limits the bond required to supersede a judgment on appeal, and in some instances the limitation is tied to the judgment debtor's net worth. The new statutory limits conflicted with existing Rule 24 of the Texas Rules of Appellate Procedure. The Advisory Committee recommended conforming changes in Rule 24 and the addition of Rule 24.2(c) to prescribe procedures for determining net worth. The Supreme Court revised the recommended provisions and adopted changes on August 29, 2003, before the September 1 effective date of the statutory changes set by House Bill 4, § 7.04.

This expedited schedule did not allow for public comment before the changes were adopted, but the Court invited comment for a period of 90 days following adoption. With the exception of a typographical error, the Court is not aware of any problems with these changes to date.

Unanimous Verdict on Exemplary Damages. Section 13.04 of House Bill 4 requires changes to Texas Rules of Civil Procedure 226a and 292. Exemplary damages may be awarded only if the jury is unanimous in finding liability for and the amount of exemplary damages. This conflicts with the admonitory instructions required by Rule 226a of the Texas Rules of Civil Procedure. The Pattern Jury Charge Committee and the Advisory Committee have been studying what changes should be made in Rule 226a. The Court issued an order on October 7 amending Texas Rules of Civil Procedures 226a and 292 in response to HB4.

Adoption of Rules and Implementation of Article 22: Community Benefits and Charity Care by Texas Department of Health (TDH)

The Texas Department of Health provided testimony on Article 22 of House Bill 4. Under Article 22 of HB 4, a nonprofit hospital will qualify for a $100,000 limitation on non-economic damages in claims brought against the hospital if the hospital provides charity care in an amount equal to at least eight percent of the hospital's net patient revenue, and provides 40 percent of the charity care in the county in which the hospital is located. To be certified, nonprofit hospitals must send a request to be certified and a copy of their most recent completed and audited prior fiscal year charity care data to TDH not later than April 30th of each year. Not later than May 31st of each year, TDH must verify the charity care data in requesting hospitals' reports, analyze the data and determine which hospitals meet the requirements for certification, issue certifications that are effective on May 31st and expire on the anniversary of that date, post the names of certified hospitals on the TDH Center for Health Statistics website and publish the names of certified hospitals in the Texas Register.

TDH held a stakeholders meeting on March 25, 2004 to identify and resolve requirements of HB 4. Stakeholders at the meeting included representatives of Senator Staples' office, Scott & White Hospital, Texas Hospital Association, Texas Trial Lawyers Association, Texas Watch, and Consumers Union.

A number of issues were identified and resolved during the meeting. TDH cannot fully comply with the requirement to certify hospitals by May 31, 2004 using the most recent (FY2003) hospital data. The department will not receive all hospital reports until May 15. It is not possible to complete its auditing of the received hospital data until November 2004. To overcome this issue, stakeholders agreed on a process to be utilized over the next two certification cycles.

2004 - The Department will certify using FY 2002 hospital data rather than FY 2003 data; charity care data from hospitals that do not file charity care reports with TDH will be derived from:

- DHS Medicare Cost Reports for hospitals that do not request to be certified, or,
- Annual Statement of Community Benefits Standard form if the hospital requests certification

2005 - The Department will add a new data field in the FY 2004 Annual Survey of Hospitals that will ask for specific Charity Care Cost data. However, since the auditing of the FY 2004 hospital data will not be finalized until November 2005, the May 2005 certification will be determined with FY 2003 audited hospital data**.**

Final rules for implementing HB4, Article 22, were approved by the Board of Health on March 11, 2004 and published in the Texas Register on March 26, 2004 (29 TxReg 3176-3177).

Implementation of House Bill 4

Multidistrict Litigation Panels

The committee heard testimony from Judge David Peeples regarding multidistrict litigation. To date, two Multidistrict Litigation panels have been established. On December 12, 2003, the Multidistrict Litigation Panel held a hearing on the Motion for Transfer filed by Union Carbide. On December 30, 2003, the order was pronounced. After considering the arguments, a majority of the panel found that a number cases involved one or more common questions of fact, and transferred these cases and tag-along cases to one district judge for the convenience of the parties and witnesses and to promote the just and efficient conduct of the cases. On March 19, 2004, Bridgestone/Firestone and Ford filed a motion for MDL transfer concerning a number of tread-separation cases. The motion was served to all plaintiffs' counsel with a response due within 20 days. No response was filed. After reviewing the unopposed motion, the panel granted the motion to transfer in an order pronounced on May 4, 2004.

Judge Peeples informed the committee that the MDL panels receive no funding from the Legislature. Costs are being absorbed by the courts current budget. For example, the Clerk of the Supreme Court was designated to serve as the Clerk for the MDL Panel.

Article 10 - Medical Liability

The primary goal of Article 10 in House Bill 4 is to maintain access to health care for the people of Texas by ensuring a healthy competitive environment for medical malpractice insurers in Texas and by increasing the number of insurers so that competition can bring about reasonable medical malpractice insurance rates. The passage of House Bill 4 was definitely a move in the right direction and has done much to avert a growing health care crisis. While not all doctors, hospitals and nursing homes had seen a premium decrease at the time of the committee meeting, all have received a reprieve from a pre-tort reform planned rate increases and it is anticipated that over time doctors, hospitals and nursing homes will experience a rate decrease. The Texas Department of Insurance provided the committee with information regarding the number of new medical malpractice insurers in the state and the effect of HB 4 for medical malpractice rates.

Ten new medical malpractice carriers had either entered the market or were seeking to enter the market in Texas at the time of the April meeting. Two companies had announced they will expand their physician writings in Texas. The largest medical malpractice writer, Texas Medical Liability Trust, reduced their rates by 12% on January 01, 2004. A small writer, Continental Casualty Company, reduced their rates by 11.5% on February 01, 2004. However, most medical malpractice insurers report no change in rates. For instance, the Doctors Company had indicated an increased rate change, prior to the consideration of HB 4, of about 20% but filed in October 2003 for no change. In March 2004 they filed for an increase of 0.7%. The Texas Department of Insurance (TDI) disapproved rate increases for those insurers that asked for increases. The Texas Medical Liability Insurance Underwriting Association (JUA) filed for a 35.8% increase which was disapproved November 2003. The Medical Protective Company (Med Pro) filed for a 19% increase which was disapproved April 20, 2004. Med Pro will move its physicians to its purchasing group July 01, 2004. TDI has requested Med Pro file its purchasing group rates and actuarially justify them.

On November 5, 2004, the Texas Department of Insurance published its fourth and final quarterly report relating to insurers writing medical professional liability insurance in Texas. The updated report summarizes new entrants into the medical malpractice field in Texas. Over the period of September 01, 2003 to October 01, 2004, 11 new carriers have applied to be "registered" to write medical malpractice in Texas. All of these organizations have been registered. In addition, one carrier has been licensed ("admitted") and another has filed for name reservation. When applications are approved, carriers are considered "admitted" in the case of admitted carriers, "eligible" in the case of surplus lines writers, and "registered" in the case of risk retention groups and purchasing groups. Over the same period of time, two companies have withdrawn from the medical liability insurance market in Texas. No carriers have withdrawn since December 2003.

Since Sept 01, 2003, one large carrier and one small carrier have reduced their rates. Another small carrier raised their rates by 34.4%. The Commissioner disapproved the requested 19% rate increase of a large fourth carrier. This fourth carrier moved its insureds into a previously-dormant purchasing group and implemented a 10% increase effective July 01, 2004. TDI staff brought an enforcement action against this carrier. From July 12 through July 14, 2004 a hearing was held before the State Office of Administrative Hearings (SOAH) on both the 10% increase and the disapproved 19% increase. A decision on this matter is currently pending before the administrative law judge.

On September 20, 2004, Texas Medical Liability Trust announced further reductions in its premiums. Effective Jan. 1, 2005, premiums will be reduced by an average of 5%. This reduction is on top of the 12 percent the carrier announced upon passage of Proposition 12. TMLT's action is a direct response to HB 4. The largest hospital writer in Texas reduced their rates by 15%.

ARTICLE 10 - Interlocutory Appeals

The committee received additional testimony regarding interlocutory appeals. House Bill 4 allows an interlocutory appeal to be filed if a trial court denies a motion under §74.351(b), Civil Practice & Remedies Code, for dismissal of a health care liability claim when an expert report has not been timely filed, or if a trial court grants a motion under §74.351(l) to challenge the adequacy of an expert report. The intent of these provisions were to prevent a claim from proceeding through trial and increasing the costs of defending the claim when it should have been dismissed because the expert report was not timely filed or the report was substantively defective. Despite the clear intent of these provisions, there is some question whether a defendant physician or health care provider may seek an interlocutory appeal under §51.014(10) if a trial court denies a motion to challenge the adequacy of an expert report.

ARTICLE 10 - Expert Witnesses

House Bill 4 made a number of important changes in state law relating to qualifications of expert witnesses and the issuance of an expert report in health care liability cases. A process was established for court review of the qualifications of an expert witness if objections are made with the court. Reportedly, misleading and dishonest expert testimony continues to be a problem.

Overview from Practitioners

Representatives of the Texas Association of Defense Counsel, Inc. (TADC) and the Texas Trial Lawyer Association (TTLA) were invited to address the committee on the experiences they have had in working with the new statute. Both reported a large spike in the number of suits filed immediately prior to the effective date of the legislation. This was followed by a downward spike, which is now leveling out.

As practitioners, the groups brought to the attention of the committee a problem with the new settlement credit section of the statute in multi-defendant lawsuits. The elimination of the dollar-for-dollar credit has been problematic. It is retained in medical liability cases, but not for other torts. This change in the law has put non-settling defendants at a serious disadvantage. In many cases, it will allow claimants to recover more than 100 percent of their damages. It creates substantial conflicts between defendants, encourages collusive settlements, and makes it much more difficult to coordinate the defense of mass actions, especially in the toxic tort arena.

According to the Texas Trial Lawyers Association, if the dollar-for-dollar credit would return, a plaintiff would have to have perfect knowledge to recover fully. Plaintiffs may not be able to partially settle. The Chair requested that the two associations work on a fair methodology to be offered to remedy the situation. Other concerns include the changes in the statute of repose in relation to asbestos litigation and the lack of funding for the judiciary to realize fully the benefits of the MDL process.

RECOMMENDATIONS

House Bill 4 has now been in effect for a year. In that time we have had a chance to study the implementation of the new laws. The following recommended amendments or additions to House Bill 4 are provided for your consideration.

Texas Supreme Court Funding

The complexity of many of the rules required to implement House Bill 4, and the short timetable allowed for their adoption, proved the need for additional resources. The Court would like additional funding for a second rules attorney, publication of rules materials and proceedings on their website, operation of the Supreme Court Advisory Committee and the multidistrict litigation panel. The Committee on Civil Practices will work with the House Committee on Appropriations to increase funding for the Court.

Legal education offerings in Texas help keep the bar abreast of proposed and adopted changes in court rules. Chip Babcock, chair of the Advisory Committee, has provided a website for Committee materials which would otherwise be difficult to obtain. The Court lacks funding to provide these materials on its own website. The Supreme Court should have the resources to publish continuing education information, proposed and adopted rules on the internet, as well as historical rulemaking records. The Committee will work with the Court and the House Committee on Appropriations to increase funding to establish and maintain greater internet access to Court orders and records.

Multidistrict Litigation Panel Funding

The committee believes that funding is appropriate for the MDL Panel. While Rule 13 allows for operation of the Panel, funding for its operation comes from the travel budgets of the Panel members' courts and the budget of the Clerk of the Supreme Court. The Committee will work with the Court and the House Committee on Appropriations to provide necessary funding for the Panel.

Texas Department of Health

The Texas Department of Health recommends that, during the 79th Regular Session, the statute be modified to allow for future certifications to take place in December of each year rather than in May as the law currently requires. The Committee will work with representatives of the TDH to draft and pass legislation which will make the necessary changes in the statute to streamline the certification process in Article 22 of HB 4.

Settlement Credit

The settlement credit change in H.B. 4 has created a major problem in multi-defendant lawsuits that do not involve medical liability. H.B. 4 rightly abolished the old sliding scale settlement credit, but it also eliminated the dollar-for-dollar credit that has been an integral part of Texas law for many, many years. H.B. 4 retained the dollar-for-dollar credit in medical liability cases, but not for other tort actions. This change in the law has put non-settling defendants at a serious disadvantage and in many cases will allow claimants to recover more than 100 percent of their damages. It also creates substantial conflicts between defendants, encourages collusive settlements, and makes it much more difficult to coordinate the defense of mass actions, especially in the toxic tort arena.

The Committee recommends restoring the optional dollar-for-dollar credit and allowing the non-settling defendant to elect the appropriate credit after verdict. This solution would both preserve the claimant's recovery and allow defendants the full benefit of a settlement before trial.

APPENDIX A

AMERICAN BAR ASSOCIATION
COMMISSION ON ASBESTOS LITIGATION
REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

RESOLVED, That the American Bar Association adopts the "ABA Standard For Non- Malignant Asbestos-Related Disease Claims" dated February 2003.

FURTHER RESOLVED, That the American Bar Association supports enactment of federal legislation consistent with the ABA Standard that would: 1) allow those alleging non-malignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the ABA Standard; 2) toll all applicable statutes of limitations until such time as the medical criteria in the ABA Standard are met.

FURTHER RESOLVED, That the American Bar Association recommendation does not in any way address issues associated with claims for asbestos-related malignancies.

FURTHER RESOLVED, This recommendation is not intended to preempt legal definitions for claiming or impairment as they may be found in regulations relating to the Occupational Safety and Health Administration (OSHA), the Americans with Disability Act, the federal Rehabilitation Act, their state and local counterparts, Workers Compensation statutes in the 50 states and the District of Columbia, and their regulations, and federal and state laws regulating employee benefit plans and employer health care coverage plans.

APPENDIX B

ABA Standard For Non-Malignant Asbestos-Related Disease Claims
February 2003

I. The filing of any civil action alleging personal injury for asbestos related non-malignant disease must be accompanied by a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

    a. A detailed occupational and exposure history from the person ("claimant") whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all of the principal employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and

    b. A detailed medical and smoking history that includes a thorough review of claimant's past and present medical problems, and their most probable cause.

2. Sets out the details of the occupational, medical and smoking history, and verifies that at least 15 years have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.

3. Verifies that the claimant has:

    a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

    b. Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases,* Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).

4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and technique that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5th Ed.) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A)§3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am. Rev. Resp. Dis. 1991:144:1202-1218 that shows:

   a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or

   b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.

   c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board certified pulmonologist, internist or occupational physician that states:

      1. That the doctor has a doctor/patient relationship with the claimant; and

      2. That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and

      3. That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and

      4. That the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality and reporting standards set forth herein.

5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.

II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be attached to any complaint alleging non- malignant, asbestos-related disease. Failure to attach the required reports or demonstration by any party that the reports do not satisfy the standards set forth herein shall result in the dismissal of the action, without prejudice, upon motion of any party.

III. No state or federal statute of limitations governing personal injury tort actions arising from exposure to asbestos shall commence as a result of a purported diagnosis or finding of a non- malignant disease related to asbestos that does not meet the criteria set forth herein.

APPENDIX C

REPORT

The Commission was created in November 2002 by the Board of Governors, at the request of President-Elect Dennis Archer, to bring a recommendation to the House of Delegates at its February 2003 meeting concerning widely reported and longstanding problems in asbestos litigation. The recommendation was to address dual concerns: 1) protecting the right of claimants with impairing asbestos-related injuries to obtain fair compensation efficiently in the tort system, and 2) preventing scarce judicial and party resources from being misdirected by a flood of premature claims by individuals who have been exposed to asbestos but do not have, and may never get, any functional impairment from asbestos-related disease.

By way of background, the ABA, beginning in 1981 and in numerous subsequent policies adopted over the years, has been on record generally opposing federal product liability legislation. In February 1983, it reaffirmed its opposition to broad federal product liability legislation. In the same resolution, however (hereinafter identified as the February 1983 policy), the ABA adopted a policy in support of narrowly drawn federal legislation in two discrete areas of product liability law. One of those areas was victim compensation for certain occupational diseases such as asbestosis.

In the early 1980's, courts, policymakers and lawyers were concerned that the volume of asbestos claims was threatening to overwhelm the court system. The February 1983 policy supported federal legislation that addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: a) there is a long latency period between exposure to the product and manifestation of the disease; b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

In its report, the Committee sponsoring the February 1983 policy stated that it "believes that the current social problem presented by occupational latent diseases, such as asbestosis, is unique and has been a catastrophic phenome non on a national scale to asbestos workers and to the asbestos industry. While this Committee is reluctant to recommend federal intervention in the tort liability and common law systems of the several states, the Committee believes that the unique national scope and magnitude of the problems for adequate compensation to injured parties and liability for occupational latent diseases as they affect the financial stability of the specific industry, such as asbestos, warrants attention at the federal level. The Committee also believes that federal attention to such a unique and urgent national problem is neither premature nor precipitous, and would not result in harmful violation of the inherent values of this country's common law tort liability systems of the several states." (Emphasis added)

The February 1983 policy is silent as to what type of federal legislation might be appropriate in the area of asbestos. To date, no subsequent ABA policy has been adopted to address asbestos litigation or legislation.

For the reasons discussed in this Report, the Commission believes that Congressional action on asbestos litigation is urgently needed. The Commission proposes that Congress enact a Standard that would (a) identify non-malignant claims that are entitled to compensation and defer those that do not currently belong in the courts, and (b) ensure that state and federal statutes of limitations do not run against individuals who do not yet (and may never) meet the medical criteria in the Standard. **The Commission's Standard deals only with non-malignant claims and does not in any way deal with claims for asbestos -related cancers or malignancies.** The Commission's recommendation is designed to establish a minimum impairment threshold in order to file a non-malignant asbestos claim, and is not intended to change the law of causation that exists from state to state. The Commission's recommendation is also not intended to in any way affect the ABA's long-standing policy against the broad federalization of tort law.

I. Background

Asbestos litigation is not a new phenomenon. It is the tragic legacy of extensive industrial use of asbestos in the workplace, predominantly from the 1930s to the early 1970s. Significant numbers of industrial workers began developing disabling, and sometimes fatal, asbestos-related diseases decades later (a delay attributable to the long latency between exposure and manifestation of disease). They brought suit against a relatively small number of former manufacturers of asbestos-containing industrial insulation products.

By the 1980s, what had once been a series of isolated cases turned into a steady flow. Claimants began regularly obtaining significant awards. In 1982, Johns-Manville Corporation -- the single largest supplier of asbestos-containing insulation products in the U.S. and the primary target of the early claims -- declared bankruptcy due to the burden of the asbestos litigation. At that point, it had approximately 16,000 pending claims. By comparison, today it is common for some defendants to have more than 100,000 cases pending.

The asbestos litigation paused only briefly, if at all, as a result of the Manville bankruptcy. Heavily exposed industrial workers continued to get sick from asbestos-related diseases and to bring claims in the tort system throughout the 1980s and into the 1990s. Asbestos dockets in certain jurisdictions swelled. Several other former manufacturers of asbestos-containing insulation declared bankruptcy (e.g., Unarco, Eagle-Picher, Raybestos Manhattan, Celotex).

As the litigation expanded, calls for a national solution intensified. In 1991 the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found that "the situation has reached critical dimensions and is getting worse." The Ad Hoc Committee "recognize[d] that virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for the Congress" and stated that it "firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem…". U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, p.2 (March 1991) (emphasis added).

In the continued absence of legislative action, some courts and parties attempted to craft creative solutions to the growing body of asbestos claims, including litigation class actions, settlement class actions, mass trial consolidations, joint defense claims handling organizations, and "global" settlement negotiations. None succeeded. Class actions failed because the factual disparity among the various claims and the disparate interests of present and future claimants precluded proper treatment under Federal Rules of Civil Procedure 23. The Supreme Court in 1997 and 1999 reviewed and struck down two proposed class action settlements known as the *Amchem* settlement and the *Ortiz* settlement. In both cases, however, the Supreme Court called upon Congress to correct the problem. Justice Ginsberg delivered the opinion for the Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed. 2d 689 (1997), in which she noted that the Judicial Conference had urged Congress to act on the situation and "no Congressional response has emerged." In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L.Ed. 2d 715 (1999), Justice Souter delivered the opinion for the Court and said "this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation" 527 U.S. at 821 (emphasis added). Chief Justice Rehnquist's concurring opinion stated that asbestos litigation "cries out for a legislative solution" 527 U.S. at 865.

Mass consolidations, at least in the eyes of some courts, suffered similar shortcomings. *See, e.g.*, *Cimino v. Raymark Industries, Inc.,* 151 F.3d 297, 320-21 (5th Cir. 1998); *Malcolm v. National Gypsum Co.,* 995 F.2d 346, 350-353 (2d Cir.1993); *Cain v. Armstrong World Industries*, 785 F.Supp. 1448, 1454-56 (S.D.Ala. 1992). Joint defense claims handling organizations dissolved over various strategic and liability share issues, as did "global" settlement negotiations.

Despite the failure of efforts to find a new solution to the asbestos litigation, the tort system appeared to be relatively stable in the early 1990s. The flow of new claims was substantial (RAND estimates it was 15,000 to 20,000 per year), but fairly predictable. (*Asbestos Litigation Costs and Compensation, An Interim Report*, RAND Institute for Civil Justice, 2002, hereinafter the "RAND report"). More importantly, it appeared that by the mid-1990s there was a downward trend in new filings, reflecting the fact that the period of most intensive industrial use of asbestos had drifted further into the past and the occurrence of disabling non-malignant diseases was falling in corresponding fashion.

In retrospect, however, it is clear that a countervailing trend was emerging and accelerating in the 1990s: for-profit litigation screenings began systematically generating tens of thousands of new non-malignant claims each year by individuals who had some degree of occupational asbestos exposure, but did not have, and probably would never get an impairing asbestos-related disease. These individuals may or may not have markings on lung x-rays "consistent with" exposure to asbestos (and dozens of other possible causes) but do not, and may never, experience any symptoms of asbestos disease or develop any asbestos-related conditions that would impair or affect their life or daily functions. (In this Report, such individuals are referred to as being asymptomatic or without functional impairment.)

Asbestos exposure can affect the body in a number of ways. It can cause mesothelioma, a cancer of the exterior lining of the lung and peritoneum. It can also cause cancer inside the lung. Although there is an ongoing debate about the issue, some believe that it can cause cancer at other sites in the body.

Asbestos exposure can also cause non-malignant pulmonary disease. Asbestosis is a fibrosis (scarring) of tissue inside the lung, particularly in the walls surrounding the alveolar spaces at the end of the airways. Significant fibrosis in this area reduces the elasticity of the lung and interferes with the lung's ability to

oxygenate the blood. Asbestotic lungs are characterized by reduced capacity, i.e., they can process only a reduced volume of air compared to normal lungs. Workers who suffer from significant asbestosis generally have shortness of breath on exertion.

Asbestosis can be a progressive disease. In its milder forms, it may not cause any symptoms. It may or may not progress to the point of causing functional impairment detectable on objective pulmonary function tests.

Asbestos exposure may also cause non- malignant changes in the pleura, the tissue that lines the outside of the lung and the inside of the rib cage. The purpose of the pleura is to facilitate the smooth, constant movement of the lungs as they expand and contract. Asbestos exposure can cause circumscribed thickening of pleural tissue (called "pleural plaques") as well as diffuse pleural thickening. Ordinarily, these conditions -- which occur outside the lung -- do not result in any functional impairment. Significant diffuse pleural thickening, however, can restrict the ability of the lung to expand and may result in objective impairment that can be identified by pulmonary function testing.

While pleural plaques and diffuse pleural thickening involve the same tissue that is involved in the malignant disease mesothelioma, they are different physiological processes. Pleural plaques and pleural thickening do not become or lead to mesothelioma. Mesothelioma incidence is a function of exposure and individual susceptibility, not the presence or absence of non- malignant pleural changes.

By virtually all accounts, contemporary asbestos litigation is no longer driven solely, or even primarily, by the occurrence of disabling asbestos-related diseases. Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings. According to the recent RAND report, somewhere between two-thirds and 90% of new claims are now brought by individuals who have radiographically detectable changes in their lungs that are "consistent with" asbestos-related disease (and with dozens of other causes), but have no demonstrated functional impairment from those changes: "In sum, it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily life." RAND report at pg. vi; and, pg. 20. The Commission conducted numerous interviews with some of the nation's leading medical authorities in asbestos-related pulmonary function analysis. Virtually all of them stated that their clinical experience confirmed the RAND data.

The asymptomatic claimants find their way into the tort system due to a confluence of factors. Key among them are the activities of for-profit litigation screening companies and the manner in which statutes of limitations operate under some states' laws.

A. Litigation Screenings

For-profit litigation "screening" companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have "free" testing done -- usually only chest x-rays. Promotional ads declare that "You May Have Million $ Lungs" and urge the workers to be screened even if they have no breathing problems because "you may be sick with no feeling of illness." The x-rays are usually taken in "x-ray mobiles" that are driven to union halls or hotel parking lots. There is evidence that many litigation screening companies commonly administer the x-rays in violation of state and federal safety regulations. In order to get an x-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are "positive."

The x-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the x-rays are taken or have malpractice insurance for these activities. According to these doctors, no doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for x-ray evidence that is "consistent with" asbestos-related disease. Some x-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars -- in some cases, millions -- in the aggregate by the litigation screening companies due to the volume of films read.

Despite the fact that there are approximately 500 qualified B readers (experts in reading x-rays for the presence of occupational disease pursuant to the International Labor Office standard, discussed more fully below) in the United States, the litigation screening companies often use only a handful of them to read their x-rays. According to the Manville Trust, 49.6% of the tens of thousands of non- malignancy claims it receives that identify a doctor are based on the B reads of just ten doctors. A single doctor accounted for over 30,000 non-malignancy claims submitted to the Trust over a six- year period.

The rate of "positive" findings by these doctors can be startlingly high, often upwards of 50% and in some studies as high as 90%. In one case, a "positive" rate of 94% was reported. *Raymark Indus. v. Stemple*, 1990 WL 72588, *10 (D. Kan.). While those readings do not purport to be medical diagnoses and the B readers make no assertion that their findings establish actual breathing abnormality, the findings serve as the basis for new lawsuits.

Independent audits of the results of litigation screenings have produced disturbing results. A National Institute for Occupational Safety and Health (NIOSH) audit evaluating the "positive" x-rays of 795 tire workers, for example, showed "only two had any signs of parenchymal change and only 19 showed pleural bnormalities." *Raymark Indus. v. Stemple* at *15. The Manville Trust audit of non- malignancy claims showed that certain B readers, responsible for thousands of claims, failed independent review more than 50% of the time.

Some litigation screening companies purport to go beyond x-rays, offering pulmonary function testing and the opportunity to see a physician. Even there, however, the participating doctors assert they are not practicing medicine. They often examine the workers in hotel rooms and meeting halls, not hospitals or doctors' offices. Medical and occupational histories are taken by non- medical personnel who work for the litigation screening companies, not the doctors. The examinations are completed in minutes; "reports" are written by assistants who are not on site. One such litigation screening doctor has testified that he has been paid over $1 million to examine approximately 14,000 workers in this fashion. He found that all 14,000 have asbestosis.

Another litigation screening company acknowledges that it was paid more for "positive" findings than for "negative" findings.

B. Statute of Limitations Concerns

A worker put on notice that he or she has x-ray changes "consistent with" asbestos-related disease may face a legal dilemma. It could be and frequently is argued that this finding triggers the running of the statute of limitations, despite the fact that the worker does not have any breathing problems and does not consider himself to be "sick." State law generally requires a claimant to sue within a certain period after he knew or had reason to know of an "injury" and its possible wrongful cause.

A number of states have expressly adopted a "two disease" rule for asbestos-related claims. Under this rule, a claimant who suffers from disabling asbestosis must timely file a claim for that disease, but is not automatically barred from bringing a separate claim many years later should he or she develop an asbestos-related cancer. The statute of limitations runs separately for the "second" disease.

The two disease rule is not uniformly embraced by state law. More importantly, some states have not expressly decided whether a litigation screening x-ray finding of non-disabling changes "consistent with" asbestos-related disease triggers the statute of limitations for a nonmalignancy claim. If it does, a worker who has asymptomatic pleural plaques could be timebarred from bringing a claim if many years later he or she develops impairing asbestosis. As a result, even states that have adopted the two disease rule have found that it has not stopped the high levels of filings by asymptomatic plaintiffs.

C. The Impact of Screenings and Statute of Limitations Concerns

The result of the legal dilemma created by screenings and statues of limitations is the wholesale filing of premature non- impairment claims. The statistics are startling. In 2001, the Manville Trust received over 90,000 new claims -- more than in any prior year and nearly six times the total number of claims pending against Manville when it declared bankruptcy twenty years before. Between 2000 and 2002, the Trust received more than 200,000 claims. The Trust has reported that more than 90% of the claims allege only non-malignant changes.

The experience of the Manville Trust is not unique. According to the RAND report, there has been a substantial increase in annual new filings for all defendants since the mid-1990s, and the increase is almost entirely attributable to non- malignancy filings. The vast majority of those non-malignancy claims, RAND reports, do not involve functional, objectively measurable impairment from asbestos-related disease.

The financial impact of this flood of non-impairment claims has been profound. According to the RAND report, more than sixty otherwise financially viable companies have gone bankrupt due to asbestos-related liabilities, over twenty in the last two years. None has claimed an inability to pay fair compensation to truly sick claimants. Virtually all point to the same problem: tens of thousands of non- impairment claims filed each year, with no end in sight.

Nobel Laureate Professor Joseph Stiglitz of Columbia University recently issued a report, commissioned by the American Insurance Association, that calculates the economic impact of these bankruptcies on the employees of the bankrupt companies. He estimates that 60,000 workers have lost their jobs as a result of asbestos-related bankruptcies. (The RAND report estimates job losses at approximately 128,000.) Stiglitz concludes that "[e]ach displaced worker at the bankrupt firms will lose, on average, an estimated $25,000 to $50,000 in wages over his or her career" and will suffer "roughly $8,300 in pension losses, which represent[s], on average, a roughly twenty-five percent reduction in the value of the 401(k) account." Joseph E. Stiglitz, Jonathan M. Orszag, & Peter R. Orszag, "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms" (December 2002) at 3.

The direct costs of asbestos-related bankruptcies can be very substantial. Owens Corning, for example, recently disclosed that, in approximately two years, it has incurred $200 million in legal and consulting fees. These costs directly reduce the funds available to pay claimants.

Bankruptcy has not helped seriously ill asbestos claimants, either. Claims payments stop immediately when bankruptcy is declared and do not resume for several years, and then at significantly reduced values. The Manville Trust is currently paying only five cents on the dollar to claimants. Due to the flood of non-impairment claims, the Trust reports that, over the last five years, it has paid more money to claimants who describe themselves as unimpaired than it has to mesothelioma claimants.

Once a lawsuit is filed, unimpaired claimants may choose to resolve their claims for minimal values, executing a complete release. For the vast majority who never develop a disabling asbestos-related disease, the money is arguably a windfall. For those who later develop mesothelioma, the filing and resolution of a premature claim and execution of a full release can become a haunting mistake.

It is for these reasons, as well as concerns over the availability of fair compensation for seriously ill asbestos disease victims, that many disparate voices have joined in the call for change. The flood of non-impairment claims generated by litigation screenings crowd active litigation dockets, lengthening delays in the disposition of mesothelioma and other serious injury claims. The President-Elect of the ABA, Dennis W. Archer, and the members of the Commission believe that the flood of asbestos cases fully justifies limited Federal intervention with respect to statutes of limitation and impairment criteria. However, this Commission has not addressed broader legislative solutions that have been discussed by others. The ABA's present policy believes that any asbestos legislation should infringe on state law only to the extent necessary to achieve the goal of ensuring that the justice system operates to equitably compensate those who are injured by asbestos. We believe the Commission's recommendations are consistent with this policy.

II. The Commission's Process

Guided by the foregoing principles, the Commission began its arduous task and after careful study and deliberation, with the help of the medical profession, developed its recommendation and report. The ommission

held 4 one-day meetings in the Chicago headquarters office and numerous lengthy conference calls. The Commission reviewed voluminous materials including, but by no means limited to, court orders from state and federal courts, medical and legal articles, including studies from organizations such as RAND, settlement agreements covering non-malignant claims, and statements of medical organizations such as the American Medical Association and the American Thoracic Society.

With the assistance of the American Medical Association, in addition to the individual experience of Commission members, a group of ten of the nation's most prominent physicians in the area of pulmonary function were identified and interviewed at length at the Chicago offices and in numerous subsequent telephone conferences. These physicians volunteered their time and energy to explain not only their clinical experience in the care and treatment of individuals with asbestos related disease, but to discuss their personal involvement in the medical/legal issues surrounding asbestos injury claims. The doctors interviewed by the Commission represented a cross-section of experts in this area – some had testified for plaintiffs in asbestos litigation, some had testified for defendants, some for both and some for neither. The physicians are: Dr. Robert Crapo, Pulmonologist at the University of Utah School of Medicine; Dr. David W. Cugell, Professor of Medicine of the Feinberg School of Medicine, Northwestern University; Dr. Paul Epstein, Clinical Professor of Medicine, Pulmonary Medicine at Penn Medicine at Radnor; Dr. Gary Friedman of the Texas Occupational Medicine Institute in Houston, Texas; Dr. Edwin Holstein, Environmental Health Associates, Boston; Dr. Paul Kvale, Chairman of the Pulmonary Medicine Department of the Henry Ford Hospital, in Detroit; Dr. Stephen Levin from the Occupational Medicine Department at Mount Sinai Hospital in New York; Dr. Neil MacIntyre, Professor of Medicine at Duke University; Dr. Albert Miller, who had been with the Mount Sinai Hospital and is now with St. Vincent Catholic Medical Center of Brooklyn and Queens; and Dr. Christine Oliver, Occupational Health Initiative, Boston. Additionally, the Commission members separately interviewed other physicians with whom their personal and professional experience provided a consulting relationship, including experts in internal medicine and epidemiology.

The Commission is aware of, and considered, the situation of the residents of Libby, MT. Their plight is exacerbated by the fact that their recourse is limited to claims against W.R. Grace, which has filed for bankruptcy reorganization due to asbestos claims. The Commission reviewed reports suggesting that the Libby exposure causes an unusually aggressive and progressive form of asbestos pleural disease that rapidly produces increasing pulmonary function impairment. The Commission believes that its recommendations, by curtailing the flow of money to claimants who have no present functional impairment, will help preserve the assets of W.R. Grace for persons such as Libby residents both now and in the future.

III. The Standard Recommended By the Commission

The bulk of the Commission's work focused on developing objective medical criteria that identify individuals with non-malignant asbestos-related disease causing functional impairment and separate out cases where either the individual has no functional impairment or is impaired solely by some other cause, such as asthma, emphysema or smoking. The physicians interviewed by the Commission almost uniformly agreed that this can be done and substantially contributed to the development of the Commission's proposed Standard.

Similar criteria have been in use in many areas of the asbestos litigation for years. Several courts (including courts in Massachusetts, Chicago, Baltimore and, most recently, New York City) have used medical criteria to place unimpaired claimants on "pleural registries" or inactive dockets that keep such cases dormant until the claimant becomes impaired. Many private settlement agreements between defendants and plaintiffs'

firms use such criteria, and courts have found such criteria to be fair. However, rather than adopt existing criteria from some other source, the Commission based its criteria on the input from the pulmonologists it interviewed, which included doctors who had testified for both plaintiffs and defendants in asbestos litigation. As a result, while the Commission's recommended criteria are similar to many of those already in use, it is not identical to any of them.

Each of the doctors interviewed by the Commission independently stated that the diagnosis of asbestos-related pleural disease, and particularly asbestosis, requires assessment of a number of factors including the review of chest x-rays, pulmonary function tests, latency, and the taking of a complete occupational, exposure, medical and smoking history. Because many symptoms and findings are not specific to asbestos-related disease, this approach is necessary to enable a physician to exclude other more probable causes for various findings. This then enables the physician to support a conclusion that the patient's medical condition is the result of asbestos exposure. These types of requirements are typical for assessment of disability or impairment under various legislative and regulatory systems, including Social Security, the Federal Employees Compensation Act (FECA), and state worker compensation programs.

As a result, the Commission's medical criteria in the recommended Standard include several elements. There was virtually unanimous agreement among the doctors that diagnosis of asbestosis that causes functional impairment requires several components, including (1) a history of occupational and other asbestos exposure, as well as a complete medical and smoking history, (2) a latency period of at least 15 years between asbestos exposure and the onset of disease, (3) an x-ray or other radiographic reading that suggests the presence of asbestosis, and (4) pulmonary function test ("PFT') results that establish decreased lung function and rule out the probability that the impairment was caused solely by something other than asbestos. Each of these requirements is incorporated into the Commission's recommended Standard, but certain key issues are discussed more fully below.

In drafting this Standard, the Commission has attempted to achieve its goal of deferring only those claims involving individuals who have no functional impairment as a result of exposure to asbestos. As will be seen below, in several instances the Standard adopts less restrictive alternatives than some physicians recommended. The Commission recognizes that the effect of this may be to allow claims that do not really belong in the tort system, but prefers to take that approach rather than to unfairly exclude any significant number of deserving claims. As a result, however, the Commission strongly feels that to weaken the Standard further would render it ineffective in achieving its goal of ending the flood of premature claims that clog the courts and sap resources from the system and from truly sick claimants. Accordingly, the Commission believes that its Standard sho uld be adopted "as is."

A. **X-ray Standards**

A positive x-ray reading is almost always viewed as a necessary component of the diagnosis of asbestosis. It is not by itself a finding of functional impairment or a diagnosis of asbestos-related disease. X-ray readings have governing standards, but often depend upon the judgment of the individual doing the reading. All of the doctors interviewed by the Commission believed, and most had seen extensive examples, that x-ray readings can be subject to bias and have been increasingly abused in many of the litigation screenings discussed earlier in this report.

1. **ILO Readings**: The International Labor Office, in an attempt to standardize the classification of chest x-rays involving pneumoconiosis, created the ILO scale as a means of grading dust-related changes on chest x-rays. The ILO scale attempts to gauge the severity of the irregularities found by the reader, using a scale from 0 (normal) to 3. A grade of 0/0 would indicate a normal lung. A grade of 1/0 indicates that the reader found evidence of lung irregularities – the "1" – but also considered whether the x-ray should be read as normal, or "0." A reading of 1/1 means that the reader found clear evidence of lung irregularities, and is a stronger finding than a 1/0. A 2/1 or greater normally indicates more extensive lung abnormalities.

The ILO has stated that a 1/1 reading is an important factor in the diagnosis of asbestosis, but allows a diagnosis of mild asbestosis based upon a chest x-ray reading graded 1/0 in the presence of other confirming diagnostic findings. However, some settlement agreements and court orders creating "inactive dockets" have used 1/1 as an appropriate standard. The doctors interviewed by the Commission agreed that there have been numerous instances of probable bias and over-diagnosis, primarily based on x-ray readings from mass screenings. Most doctors interviewed had seen hundreds or even thousands of examples of over-reading of x-rays for litigation purposes. One doctor concluded after reviewing 15,000 cases of asbestos disease previously diagnosed on x-ray readings alone that only 10% of the persons could validly be diagnosed with asbestosis. Another doctor reported a 62% error rate on review of x-ray screening results previously read as "consistent with asbestosis." Another doctor's research of 22,000 asbestos-related bankruptcy claims found a presumptive x-ray review error rate of up to 86% among 5 readers, none of whose results matched the general patterns in epidemiological studies.

These and similar anecdotes, as well as the findings of courts and audits discussed in section I.A., clearly illustrate a widespread pattern of x-ray over-reading in litigation screenings. A number of doctors described the negative impact on patients of these misdiagnoses. They had dealt with many instances of unnecessary distress and confusion caused in individuals who had been given "diagnoses" of asbestosis (or conditions "consistent with" asbestosis) through litigation-based x-ray screenings, when the individuals had no evidence of disease at all.

As a result of this evidence, the Commission gave strong consideration to requiring a reading of 1/1 to offset the inherent litigation bias associated with litigation-based x-ray readings. Several of the doctors consulted by the Commission recommended that a 1/1 standard be implemented. Others, although favoring a 1/0, cautioned that such a standard assumes impartial readings that are conservative and unbiased, and preferred a system that would utilize an impartial panel of B readers who had no financial incentive in the litigation or diagnosis process. However, the Commission recognized the many issues inherent in establishing an independent panel of B readers and did not consider the creation of such a panel to be either necessary or feasible.

After extensive discussion, the Commission elected to incorporate a 1/0 standard into its medical criteria, for several reasons. First, as stated above, the Commission intends that its standards not be unfairly exclusionary. Second, some doctors indicated that there appears to be little difference in the error rate whether one looks at 1/0 or 1/1 readings. Stated another way, B readers who over-read x-rays as 1/0 for litigation purposes might just as easily over-read them as 1/1 if necessary to meet a medical standard. Finally, properly administered PFT's (discussed below) are the most important screening tool to determine significant asbestos-related functional impairment, and x-ray readings are of lesser importance.

2. **B readers:** The minimum standard recommended by the Commission requires a positive chest x-ray finding by a NIOSH certified B reader. A B reader is a person, usually but not necessarily a doctor, who has passed the tests necessary for certification that he or she is qualified to read x-rays according to ILO standards. The requirement of a B reading in the proposed medical criteria reflects the Commission's attempt to create a uniform standard for the diagnosis of nonmalignant asbestos-related disease. The Commission also notes that B readings are already prevalent in asbestos litigation. The Commission acknowledges that many physicians who are not certified B readers are still qualified to read chest x-rays for the presence or absence of asbestos-related disease, but the Standard adopts the B reader requirement in an attempt to obtain uniform standards.

3. **CT Scans:** A number of medical experts consulted by the Commission felt that both computer tomography scans and high-resolution computer tomography scans (CT & HRCT) can be useful diagnostic tools in distinguishing asbestosis and asbestos-related pleural disease from other chest abnormalities. However, these doctors acknowledged that no objective standard analogous to the ILO B reading scale for grading chest x-rays exists for the grading of CT and HRCT Scans. The lack of applicable standards compelled the Commission to require a positive B reading of a chest x-ray as the minimum radiologic diagnostic standard, rather than positive CT or HRCT Scans.

B. Pulmonary Function Tests

The Commission's proposed Standard requires that a claimant meet certain requirements on pulmonary function tests. The PFTs in the Standard demonstrate functional impairment, and also demonstrate that the impairment is of the type (restrictive impairment) that can be caused by asbestos exposure.

1. **Testing methodology:** It is generally accepted that pulmonary function testing provides the primary objective basis for assessment of functional impairment. However, the results of such testing can be affected by patient effort as well as technical deficiencies. Many of the doctors who met with the Commission believe that adherence to test quality standards has eroded in the asbestos litigation arena.

The American Thoracic Society (ATS) in their 1991 and 1994 Official Statements published technical standards for pulmonary function testing, including equipment, methods of calibration, technique and interpretation. Virtually all of the physicians consulted by the Commission agreed that PFT's used for purposes of satisfying the medical criteria should meet the ATS technical criteria. This includes attachment of all test results and appropriately labeled spirometric tracings. One physician who met with the Commission, who has never testified in asbestos litigation, has evaluated tens of thousands of pulmonary function test results. He believes that ATS technical criteria are met in only 1% of the cases he has seen arising from litigation; in contrast, pulmonary function results outside the litigation/claims arena me et ATS technical criteria 90% of the time.

The Commission strongly believes that PFT's must be conducted according to ATS testing standards to be reliable for use in medical criteria. In addition, to ensure compliance with quality standards, the Standard requires that all PFT reports be included as attachments. This should not be an undue burden on claimants since, under the proposed Standard, they are required to have had these tests prior to filing their claim.

2. **Impairment measures:** The proposed criteria include several measures of impairment. These are discussed below.

Forced Vital Capacity: Asbestosis can cause *restrictive* lung disease. The scarring of the lung caused by asbestosis reduces the capacity of the lung to retain and expel air. This type of lung condition is normally measured by Forced Vital Capacity (FVC), the amount of air that the lung exhales during a standard pulmonary function test. The proposed criteria require that to demonstrate impairment, a claimant demonstrate Forced Vital Capacity "below the lower limit of normal." The Commission considered whether to select a particular standard to use as "normal," but elected not to do so in order to allow medical science to continue to develop in this area. The Commission does note, however, that some standards suggest the use of racial adjustment factors in determining the measure of lung capacity. The Commission expressly intends that racial adjustment factors not be used in applying its medical criteria. Omitting these racial adjustments will have the effect of qualifying additional claims, rather than excluding claims, but is consistent with fairness and the Commission's desire that its standard be inclusive rather than overly exclusive.

FEV1/FVC ratio: It is critical to distinguish *restrictive* lung disease, which can be caused by asbestos, from *obstructive* lung disease, which is normally associated with smoking and is not associated with asbestos exposure. (Although some physicians believed that asbestosis causes a lung abnormality known as small airways obstruction, this is distinct from large airways obstruction, or chronic obstructive pulmonary disease, associated with smoking.) This is important because the population of persons exposed to asbestos includes a high percentage of smokers. When obstructive lung disease is present, the amount of air that can be expelled in the first second of a pulmonary function test falls faster than the amount that can be exhaled in the entire test. As a result, a low ratio of FEV1 (the amount of air that can be exhaled in the first second of the test) to FVC (the total amount of air exhaled during the test) indicates obstructive, rather than restrictive, lung disease. A ratio that is within normal limits is consistent with restrictive disease, assuming other tests of restrictive disease are also met, because the amount of air expelled in the first second does not fall faster than the total amount of air that can be expelled. Thus, the criteria adopt a commonly used measure that requires the FEV1/FVC ratio to be above the lower limit of normal, in order to exclude cases where the impairment is obstructive rather than restrictive.

Total Lung Capacity: An alternative method of determining restrictive impairment is Total Lung Capacity ("TLC"). Restrictive lung disease (which can be asbestos-related) reduces the total capacity of the lung, while obstructive disease (usually associated with smoking) usually does not. Thus, a TLC below the lower limit of normal would be consistent with restrictive disease but not with obstructive disease. Many doctors believe TLC's are more accurate in screening out obstructive cases than the FEV1/FVC ratio discussed above, which can result in "false positives" – findings of restriction in individuals that do not have it. However, TLC tests can be slightly more costly and less widely available than the other tests described above, and the Commission's Standard does not require them, notwithstanding that they may be the best evidence of restrictive impairment. Rather, in keeping with the Commission's goal of being overly inclusive rather than unduly strict, the Standard allows claimants to meet the impairment definition through the use of *either* FEV1/FVC ratio or TLC test results.

Paragraph 4c ("Backstop" provision): There were additional pulmonary function findings suggested by one or more of the doctors as possible ways to identify asbestos-related restriction in a small minority of individuals who have other unrelated lung problems, such as chronic obstructive pulmonary disease. Other doctors rejected these suggested findings as unreliable, non-specific, or otherwise inappropriate. Rather than attempt to resolve these disputes, the Commission drafted a provision (paragraph 4c)) that would allow some claimants to file suit even if they fail to meet the criteria set forth in paragraphs 4a) or 4b).

The physicians agreed that the overwhelming majority of persons who were functionally impaired as a result of non-malignant asbestos disease would meet the criteria of either paragraph 4a) or 4b). However, it is possible that in unusual cases, some legitimate claim might be excluded. In view of the overwhelming consensus of the doctors on the fairness of the basic criteria, the Commission felt it inappropriate to draft the general Standard based on these rare cases. Instead, the Commission adopted a "backstop" provision so that in cases of clear disease (defined in the Standard as a person whose x-ray grades at 2/1 or higher under the ILO system), a treating physician's detailed opinion that the person suffers from restrictive impairment due to asbestosis is sufficient to allow the claimant to proceed.

C. Medical Report and Diagnosis

The Commission heard extensive evidence, some of which is discussed above, that the huge increase in claims from unimpaired claimants is caused by litigation screenings that do not comply with generally accepted clinical standards. In many cases, claimants are never seen by a licensed physician and no "diagnosis" has been made. The Commission believes that cases of abuse will be minimized if true medical standards are observed. In addition to the requirement discussed above that PFT tests meet ATS standards and that supporting documentation be filed with the complaint, the Commission's proposed criteria require a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor. The Commission believes that such a requirement will dramatically enhance the integrity of the process by requiring that a licensed physician take responsibility for the diagnosis. Similar requirements exist today in many state statutes relating to medical malpractice and have helped to raise the standard for filing such cases. The Commission believes that the indisputable impact of for-profit litigation screenings that lack appropriate medical oversight justifies the simple requirement proposed in the Commission's criteria. The Commission believes that the integrity of the physician community, perhaps even more than the tests described above, is a key safeguard against the abuses that have been prevalent in the asbestos litigation.

IV. Recommended Changes to the Statute of limitations

The Commission strongly believes that it would be unfair to require that claimants wait to file suit until they develop the level of functional impairment required by the Standard, if a statute of limitations could simultaneously be running against them. Thus, in any legislation deferring asbestos-related claims involving no functional impairment, the Commission recommends that there be a concomitant provision tolling any otherwise applicable statute of limitations until the required level of diagnosis is met. No other changes in state statute of limitations are proposed.

V. Scope of the Commission's Recommendations

With few exceptions, the American Bar Association has long and consistently opposed the enactment of federal legislation that would attempt to create a national body of tort law that would apply in the fifty state justice systems. In addition to the February 1981 and February 1983 policies discussed earlier in this report, the ABA has adopted numerous other policies over the years that oppose the federalization of the tort laws in a host of areas. It has been the ABA's position that the state courts and legislatures are normally the appropriate bodies to develop product liability laws and that, *except in discrete circumstances*, Congress should not substitute its judgment for systems that have evolved in each state. However, the ABA has supported limited federal legislation in such circumstances when there exists a legitimate concern that can best be addressed by narrow federal legislation – and has since 1983 identified asbestos litigation as one such area. Asbestos litigation presents unique challenges for this country's civil justice system, and requires a national solution.

The Commission on Asbestos Litigation has drafted its recommendation with the intention that the ABA should support federal legislation that establishes medical criteria and provide for a waiver of the statute of limitations until those criteria are met. The Commission's recommendations do not propose to create original federal jurisdiction for the prosecution of asbestos claims to the extent that such jurisdiction does not currently exist. This recommendation is also not intended in any way to create artificial barriers to the filing of a cause of action.

VI. The Need for the House of Delegates to Adopt Policy on this Issue at the February Midyear Meeting

In the 107th Congress, the Senate Judiciary Committee held hearings on asbestos litigation on September 25, 2002. The hearings were held to lay the groundwork for attention to the issue in the 108th Congress. In this 108th Congress, Congressional leaders from both parties are currently working to address the situation. Senate Judiciary Committee Chairman Orrin Hatch (R-UT) and Ranking Minority Member Patrick Leahy (D-VT) are reported to be working together to develop legislation in this area. Legislation is likely to be introduced well before the Annual Meeting of the American Bar Association in August. In fact, on January 15, 2003, the *Congressional Daily AM* reported that Senator Hatch is "apt to introduce a bill in March, possibly in conjunction with Senate Judiciary ranking member Patrick Leahy (VT). Leahy's and Hatch's staffs have been working together to seek consensus on a 'medical criteria' bill that puts those already sick in line for compensation ahead of those with only an exposure to asbestos." In the House, it has been reported that Representatives Christopher Cannon (R-UT) and Calvin Dooley (D-CA) are working together on asbestos legislation.

In order for the ABA to have a voice in the Congressional debate, it is imperative that the House of Delegates adopt this policy at this Midyear Meeting. ABA leaders and ABA Governmental Affairs staff have been told by members of Congress and their staffs that ABA views on this legislation would be most welcome.

The Members of Commission on Asbestos Litigation are: Honorable Nathaniel R. Jones, Ret., Chair; Harold S. Barron; Paulette Brown; David Christensen; Robert A. Clifford; Stanley Ferguson; Julia Bennett Jagger; Steven Kazan; Peter A. Kraus; Robert S. Krause; and Philip McWeeny.

Respectfully submitted,
Honorable Nathaniel R. Jones, Ret., Chair
Commission on Asbestos Litigation
February 2003

GENERAL INFORMATION FORM

Submitting Entities: Commission on Asbestos Litigation

Submitted By: Honorable Nathaniel R. Jones, Ret., Chair, Commission on Asbestos Litigation

1. Summary of the Recommendation.

That the American Bar Association supports enactment of federal legislation consistent with the ABA Standard that would: 1) allow those alleging nonmalignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the ABA Standard; 2) toll all applicable statutes of limitations until such time as the medical criteria in the ABA Standard are met.

2. Approval by Submitting Entity.

The Commission on Asbestos Litigation approved the recommendation on Sunday, January 26, 2003.

3. Has this or a similar recommendation been submitted to the House of Delegates or Board of Governors previously?

No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In February 1983, the ABA adopted policy supporting federal legislation which addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: a) there is a long latency period between exposure to the product and manifestation of the disease; b) the number of such claims and the liability for such damages in fact threaten solvency of a significant number of manufacturers engaged in interstate commerce; and c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems. If this recommendation is adopted it would not affect the February 1983 policy.

5. What urgency exists which requires action at this meeting of the House?

Senate Judiciary Committee Chairman, Orrin Hatch, (R-UT) and Ranking Minority Member Patrick Leahy (D-VT) are working together to develop legislation in this area. They are expected to introduce their legislation well before the Annual Meeting of the American Bar Association in August. In order for the ABA to have a voice in the Congressional debate, it is imperative that the House of Delegates adopt policy at this Midyear Meeting.

6. Status of Legislation. (If applicable.)

In the 107th Congress, the Senate Judiciary Committee held hearings on asbestos litigation on September 25, 2002. No legislation has yet been introduced in the 108th Congress.

7. Cost to the Association. (Both direct and indirect costs.)

There are no costs to the Association

8. Disclosure of Interest. (If applicable.)

Members of the Commission on Asbestos Litigation represent clients who would be affected by enactment of the legislation. Adoption of the proposed resolution contained herein may benefit these clients, whether plaintiffs or defendants, and may benefit all litigants by protecting the rights of claimants when they suffer from asbestos-related diseases and preventing scarce judicial and party resources from being misdirected because of a flood of premature claims.

9. Referrals.

A copy of the recommendation has been submitted to the chairs of all ABA Sections and Divisions and Standing and Special Committees and Commissions.

10. Contact person. (Prior to the meeting).

Dennis W. Archer
Dickinson Wright PLLC
500 Woodward Ave., Suite 4000
Detroit, MI 48226
313/223-3630
Fax: 313/964-2437
Email: darcher@dickinson-wright.com

11. Contact Person. (Who will present the report to the House).

Honorable Nathaniel R. Jones, Ret.
Blank Rome Comisky McCauley LLP
201 E. Fifth Street, Suite 1700
Cincinnati, OH 45202-4156
513/362-8772
Fax: 513/362-8773 jones-n@blankrome.com

APPENDIX D

The Supreme Court of Texas

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
NATHAN L. HECHT
PRISCILLA R. OWEN
HARRIET O'NEILL
WALLACE B. JEFFERSON
MICHAEL H. SCHNEIDER
STEVEN WAYNE SMITH
DALE WAINWRIGHT
SCOTT BRISTER

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

CLERK
ANDREW WEBER

EXECUTIVE ASSISTANT
WILLIAM L. WILLIS

ADMINISTRATIVE ASSISTANT
NADINE SCHNEIDER

July 16, 2003

Mr. Charles L. Babcock, Chairman
Supreme Court Advisory Committee
Jackson Walker
901 Main Street, Suite 6000
Dallas TX 75202-3797

Dear Chip:

As you know, the Seventy-Eighth Legislature has delegated to the Supreme Court the responsibility for drafting rules to implement House Bill 4. Three major assignments are:

- MDL rules: to adopt rules of practice and procedure for the judicial panel on multidistrict litigation created by chapter 74, subchapter H of the Government Code (HB 4, § 3.02);

- Offer-of-settlement rules: to promulgate rules implementing chapter 42 of the Civil Practice and Remedies Code providing for offers of settlement (HB 4, § 2.01); and

- Class action rules: to adopt rules to provide for the fair and efficient resolution of class actions, including rules that comply with the mandatory guidelines of chapter 26 of the Civil Practice and Remedies Code (HB 4, § 1.01).

HB 4 also directs that Rule 407(a) of the Texas Rules of Evidence be amended to conform to Rule 407 of the Federal Rules of Evidence (HB 4, § 5.03). In addition, other rules changes may be necessary or appropriate because of the enactment of HB 4 and other statutes this session. Chris Griesel, the Court's Rules Attorney, has compiled the attached list of possible changes, which you will see is quite lengthy. This is only a preliminary list.

The Supreme Court is of the view that the Legislature's delegation of rule-making responsibility to the Supreme Court to effectuate the Legislature's policy choices is in the best interests of the administration of justice and of the people of Texas. The Legislature's actions this year reconfirm the statement of the Forty-Sixth Legislature that "it is essential to place the rule-making power in civil actions in the Supreme Court,

whose knowledge, experience, and intimate contact with the problems of judicial administration render that Court particularly qualified to mitigate and cure these evils [of unnecessary delay and expense to litigants]." Act of May 12, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 202 (enacting what is now Tex. Gov't Code § 22.004). The Supreme Court gladly accepts this responsibility and intends to comply fully with the Legislature's directives.

The Court relies heavily on the counsel of its Advisory Committee, as it has for sixty-four years. The members of the Committee should consider the Legislature's faith in the rule-making process a credit to their wisdom and experience and to the value of their work. I and my colleagues look forward to working with you on these new assignments.

The amendment to Rule 407(a) of the Texas Rules of Evidence is to be made "[a]s soon as practicable" after HB 4's effective date, September 1, 2003 (HB 4, § 5.03). The MDL rules also apply beginning that date. The class action rules are to be "adopted on or before December 31, 2003", and the offer-of-settlement rules "must be in effect on January 1, 2004." The Supreme Court is tentatively of the view that the deadlines specified in HB 4 take precedence over the requirements for publication and comment contained in sections 22.004 and 74.024 of the Government Code but that those requirements should be followed where possible. Therefore, the Court has adopted the following schedule:

- The Court will next meet to consider the Committee's recommendations and any other matters pertaining to rules changes the week of August 25, 2003.

- Effective September 1, 2003, the Court will amend Rule 407(a) of the Texas Rules of Evidence and adopt MDL rules, both to be disseminated to the bench and bar as widely as possible and published in the October issue of the *Texas Bar Journal* for formal comment. The changes may be revised following comments.

- The Court will also publish in the October issue of the *Texas Bar Journal* for comment an offer-of-settlement rule and a revised class action rule to comply with HB 4's mandatory guidelines, both rules to take effect January 1, 2004.

- In the October issue of the *Texas Bar Journal*, or as soon thereafter as possible, the Court will publish for comment any further changes in the class action rule, any rules changes adopted in accordance with pending recommendations by the Advisory Committee, and any rules changes to be made regarding ad litem fees and referral fees, as recommended by the Jamail Committee.

The Court believes that this schedule will comply with the mandates of HB 4, permit as much comment as possible, allow for reaction to that comment, complete related pending work before the Committee, and complete action on Committee recommendations already made. Other proposals before the Committee, and other changes that may be necessary or appropriate due to recent legislation, should be deferred until the proposed schedule has been completed.

I fully realize that this is an enormous amount of work for the Committee, but I believe the Committee is entirely capable of assisting the Court in discharging its responsibility.

The following issues are of interest to the Court:

- Rule 407(a), Texas Rules of Evidence: What impediments are there to simply conforming the language to Rule 407 of the Federal Rules of Evidence?

- MDL rules: How should the judicial panel function? Where should it meet? When must issues be decided by a hearing before the panel and when by submission? May the panel confer and decide issues by telephone, by letter, or by email? Where will records be kept? Should policies for decision be stated in the rules or left entirely for the panel to set? Assuming that policies should be thoroughly stated in the rules, what should those policies be?

- Offer-of-settlement rule: Can the work already done by the Committee on this rule be modified to comply with the requirements of HB 4? What additional parameters should be included consistent with those requirements?

- Class action rule: In addition to changes required by HB 4's mandatory guidelines, should the rule require opt-in classes for certain claims? Assuming that it should, what should those claims be?

As always, Chip, the Supreme Court extends to you and all of the members of the Committee its deepest gratitude.

Sincerely,

Nathan L. Hecht
Justice

c: The Chief Justice and Justices of the Supreme Court of Texas
The Members of the Supreme Court Advisory Committee
The Members of the Jamail Committee
The Hon. Bill Ratliff
The Hon. Joe Nixon

Appendix A

SUMMARY OF RULES CHANGES TO EXAMINE

BILL (section or article affected)	NATURE OF LEGISLATIVE CHANGE	RULES TO EXAMINE
HB 4		
Sec 1.01	By 12/31/03, the "Supreme Court shall adopt rules to provide for fair and efficient resolution of class actions". Bill lays out some guidelines for class fee recovery	TRCP 42. Consider the Committee's previous work on the subject, including review of previous Jamail committee drafts, and make suggestions
Sec. 1.02	Amends cases that are appealable by interlocutory appeal to the Supreme Court and defines "conflicts jurisdiction"	Review TRAP rules, including Rule 53.2
Sec. 1.03	Amends list of cases that may be brought by interlocutory appeal; Allows certain classes of cases to be stayed pending appellate resolution; defines "conflicts jurisdiction"	Review TRAP rules, including comment to TRAP 29 and Rule 53.2
Sec. 1.05	The effective date of this bill is 9/01/03 and appeals to all appeals filed after that date	Does the Court need to take any "emergency" rules action before 9/01/03 ?
Sec. 2.01	By 12/31/03, the "Supreme Court shall promulgate rules implementing" the offer of settlement provisions of HB 4. The bill lays out more extensive guidelines for provisions of the rules but leaves the court with a number of issues to resolve.	Compare the committee's existing work to the guidelines of HB 4 and make any additional suggestions
Sec. 3.01	The Supreme Court may adopt " rules relating to the transfer of related cases for consolidated or coordinated pretrial proceeding" (A similar, slightly narrower, grant of authority was also given the Court by HB 3386) The Legislature created a "judicial panel on multidistrict litigation". The Chief Justice will appoint 5 active court of appeals or administrative judges to the panel. The rules must allow the panel to transfer related civil actions for consolidated or coordinated pretrial proceedings; allow for transfers and remands of actions; and provide for appellate relief of the panel's orders.	Determine changes needed to TRCP or Rules of Judicial Administration. Consider the operation of existing RJA 11 and federal MDL rules

Sec. 3.03	Plaintiffs added by joinder are required to independently meet venue provisions or face mandatory transfer to county of proper venue or face dismissal	Determine if joinder rules ,TRCP 39 et.seq, require amendment. Determine if interlocutory appeal provision, including stay provision, requires TRAP change or comment.
Sec. 4.01 et seq.	Changes made to proportionate responsibility submission and designation of responsible parties. Changes in some cases the method of reducing damages from dollar amount to percentage amount	Determine if these changes require amendment to TRCP, including rules affecting submission of charge
Sec. 4.12	Requires amendment of TRCP Rule 194.2, as soon as practicable, to include disclosure of responsible third parties	TRCP Rule 194.2
Sec. 5.01 et seq.	Makes changes to liability of defendants in certain products cases	Determine if these changes require amendment to TRCP
Sec. 5.03	Requires Supreme Court to amend TRE Rule 407(a) to conform with FRE Rule 407	TRE Rule 407(a)
Sec. 7.01 et seq.	Creates statutory changes to amount of appeals bonds. Applies to any judgment filed after 9/01/03	Determine changes needed to TRAP, including TRAP 24. Does the Court need to take any “emergency” rules action before 9/01/03 ?
Sec. 8.01	HB 4 repeals evidentiary bar on seat belt non-use.	Determine if this bar is mentioned in TRCP or TRE and suggest appropriate changes

Sec. 10.01 et seq.	Revision of methods for notice, evidence, and procedure of medical liability and medical malpractice actions	HB 4 creates an new system of notice and pleadings, submission of expert reports, and discovery for health care liability claims. Determine what actions to take to modify existing TRCP, TRE, and TRAP rules relating to pleading and discovery rules to, at the minimum, place bench and bar on notice of the conflicting health care liability provisions. Consider the adoption of Section 74.002, Civil Practice and Remedies Code in Section 10.01 relating to conflicts between court rules and the statute. Also consider a method to advise bench and bar that "local rules" may not conflict with the statutory changes Change all 4590i references to Chapter 74, Civil Practice and Remedies Code.
Sec 13.03	Statutory change requiring exemplary damage jury verdict be unanimous and a jury charge must contain a instruction alerting the jury to that fact	Determine changes needed to TRCP, including TRCP 292. Does the Court need to take any "emergency" rules action before 9/01/03 ?
Sec. 23.02	Various portions of HB 4 become effective on various dates and apply to differing classes of cases	Does the Court need to take any immediate action or make "emergency" rules action on any of the changes to the court rules?

ALL		Alert the court to any other rules changes required by HB 4
Family Code Issues		
HB 821 Sec.1 HB 518 Sec. 1 HB 1815 (all) HB 883 (all)	This bill allows notice of an associate judge's report , including proposed order, to be given by fax and creates a rebuttable presumption of receipt. Creates new method of service by publication and new method for calculating the date notice is given Alters scope and duties of guardian ad litems and attorney ad litems in suits affecting parent child relationship The date an agreed order or a default order is signed by an associate family law judge is the controlling date for the purpose of an appeal to, or a request for other relief relating to the order from, a court of appeals or the supreme court.	Determine if these changes require amendment to TRCP
Other Changes		
HB 3306 HB 3386	Objections to a visiting judge must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the case is submitted to the court, whichever date occurs earlier. Notice of an assignment may be given and an objection to an assignment may be filed by electronic mail. Allows the Supreme Court to adopt Rules of Judicial Administration to allow for the conducting of proceedings under Rule 11, Rules of Judicial Administration, by a district court outside the county in which the case is pending.	Determine if these changes require amendment to TRCP or RJA

SB 352	A judge commits an offense if the judge solicits or accepts a gift or a referral fee in exchange for referring any kind of legal business to an attorney or law firm. This does not prohibit a judge from soliciting funds for appropriate campaign or officeholder expenses as permitted by Canon 4D, Code of Judicial Conduct or from accepting a gift in accordance with the provisions of Canon 4D, Code of Judicial Conduct.	Determine if this prohibition needs to be included within recusal rule before court or is already covered
SB 1601	Before entering an order approving settlement or judgment, the court shall require all defendants to report to the court by a certain date the total amount of all funds paid to the class members. After the report is received, the court may amend the settlement or judgment to direct each defendant to pay the sum of any unpaid funds to the clerk of the court. The unpaid funds will be placed in a trust fund and may be spent only to programs approved by the supreme court that provide civil legal services to the indigent.	Determine if a change to TRCP, including Rule 42 is appropriate.

APPENDIX B

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.

APPENDIX B

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

APPENDIX B

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, <u>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);</u>

(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.

Appendix C

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 167of 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.

Appendix C

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.

Appendix C

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.

Appendix C

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~~ from the class 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 subdivision~~s~~ (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)(43), 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.

(gi) 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 lawmay 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. 04-9041

AMENDMENT TO RULE 194.2, TEXAS RULES OF CIVIL PROCEDURE

ORDERED that:

1. As required by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.12, 2003 Tex. Gen. Laws 847, 859, Rule 194.2, Texas Rules of Civil Procedure, is amended as follows, effective in cases filed on or after July 1, 2003, in which a request for disclosure under Rule 194.1 is made on or after May 1, 2004.

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 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 May 1, 2004. Any interested party may submit comments in writing as follows:

by mail to: Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 78711

by fax to: 512-463-1365 — Attn: Rules Attorney

by email to: rules@courts.state.tx.us

SIGNED AND ENTERED this 3rd day of March, 2004.

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

Scott Brister, Justice

AMENDMENTS TO RULE 194.2, TEXAS RULES OF CIVIL PROCEDURE

Rule 194.2(k) is amended, and Rule 194.2(l) is added, as follows:

Rule 194. Requests for Disclosure

* * *

194.2 Content

A party may request disclosure of any or all of the following:

* * *

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party~~.~~;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Notes and Comments

2004 Amendment. Rule 194.2(l) is added as required by changes in chapter 33 of the Texas Civil Practice and Remedies Code. The amendment applies in all cases filed on or after July 1, 2003, in which a request under Rule 194.1 is made after May 1, 2004.

APPENDIX E

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 78711

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.

APPENDIX F

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 04-9226

AMENDMENTS TO JURY INSTRUCTIONS
UNDER RULE 226a, TEXAS RULES OF CIVIL PROCEDURE

ORDERED that

1. To implement Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as Tex. Civ. Prac. & Rem. Code § 41.003, Part III of the jury instructions prescribed under Rule 226a, Texas Rules of Civil Procedure, by orders dated July 20, 1966 (effective January 1, 1967), July 21, 1970 (effective January 1, 1971), October 3, 1972 (effective February 1, 1973), December 5, 1983 (effective April 1, 1984), March 10, 1987 (effective January 1, 1988), December 16, 1987 (effective January 1, 1988), and January 28, 1988 (effective January 1, 1988), is amended as follows.

2. These amendments, with any changes made after public comments are received, take effect on February 1, 2005, in all cases filed on or after September 1, 2004.

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 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 January 15, 2005. Any interested party may submit comments in writing as follows:

by mail to: Ms. Lisa Hobbs, Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 78711

by fax to: 512-463-1365
Attn: Ms. Lisa Hobbs, Rules Attorney

by email to: Lisa.Hobbs@courts.state.tx.us

SIGNED AND ENTERED this 7th day of October, 2004.

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

AMENDMENTS TO PART III OF THE
JURY INSTRUCTIONS PRESCRIBED UNDER
RULE 226a, TEXAS RULES OF CIVIL PROCEDURE

[It is ordered . . .]

III.
COURT'S CHARGE

~~That~~ Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require~~, shall be given by the court to the jury as part of the charge:~~

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed
by the instructions in this charge. In discharging your responsibility on this jury, you will observe
all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath
and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Unless otherwise instructed, y~~Y~~ou may ~~render your verdict~~ answer a question upon the vote of ten or more ~~members of the jury~~ jurors. ~~The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.~~ If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

(Definitions, questions and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

[Note: for ease of reading, the following examples, which are new, are not redlined.]

Preceding question (ii):

> Answer Question (ii) for D1 only if you unanimously answered "Yes" to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]
>
> You are instructed that in order to answer "Yes" to [any part of] Question (ii) , your answer must be unanimous. You may answer "No" to [any part of] Question (ii) only upon a vote of 10 or more jurors. Otherwise, you must not answer [that part of] Question (ii) .

Preceding question (iii):

> Answer Question (iii) for D1 only if you answered "Yes" to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2.]
>
> You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

(These examples are given by way of illustration.)

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

_____

Judge Presiding

(The jury must certify to every answer in the verdict. The presiding juror may, on the jury's behalf, make the required certificate for any answers on which the jury is unanimous. For any answers on which the jury is not unanimous, the jurors who agree must each make the

required certificate. If none of the jury's answers must be unanimous, the following certificate should be used:

[Note: For ease of reading, the following examples, which are partly new, are not redlined.]

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if the jury is unanimous.)

_____
Presiding Juror

_____
Printed Name of Presiding Juror

(To be signed by those rendering the verdict if the jury is not unanimous.)

Jurors' Signatures *Jurors' Printed Names*

[Insert the appropriate number of lines — 11 or 5 — for signatures and for printed names.]

If some of the jury's answers must be unanimous and others need not be, the court should obtain the required certificate in a clear and simple manner, which will depend on the nature of the charge. The court may consider using the following certificate at the end of the charge:

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:

Answer "All" or list answers: _____

_____
Presiding Juror

_____
Printed Name of Presiding Juror

(If the answers to some questions were not unanimous, the jurors who agreed to those answers must certify as follows:)

We agree to the answers to the following questions:

List answers: _____

Jurors' Signatures *Jurors' Printed Names*

[Insert the appropriate number of lines — 11 or 5 — for signatures and for printed names.]

The court may also determine that a clearer way of obtaining the required certificate is to segregate the questions to which the jury's answers must be unanimous and request a certificate for each part of the charge.)

APPENDIX G

TEXAS DEPARTMENT OF HEALTH
FINAL ADOPTION OF RULES FOR BOARD OF HEALTH APPROVAL
COVER MEMORANDUM
March 2004

Agenda Item No: **9 EE**

Presenter: Bruce Gunn, Ph.D., Manager
Health Provider Resources Division,
Center for Health Statistics

Summary:

These are final rules concerning the certification of non-profit hospitals and hospital systems for limited liability for non-economic damage awards. These rules implement Health and Safety Code, §311.0456, which provides a limitation on the amount of non-economic damages that can be recovered from a nonprofit hospital and hospital system that provides substantial charity care to the county in which it is located. The liability limits for a certified entity under these sections will be the same as a governmental entity. These new rules include the purpose, authority, definitions, eligible entities, certification criteria, submission deadlines, duties of the department, effective date of certification, and effect of certification under the rules.

The Board recommended publication of the proposed rules in December, 2003. Proposed rules were published in the Texas Register on December 19, 2003.

Description of stakeholder input during the public comment period:

The department received written comments from Consumer's Union and Texas Watch during the public comment period.

Comments Received: The commenters were generally in favor of the rules but expressed concern with how the department was going to calculate total charity care for a county and how consumers would know about who was certified under the rules. Changes were made to the rules as a result of the comments.

Recommended Board Action:

Approval of an order adopting rules concerning the certification of non-profit hospitals and hospital systems for limited liability for non-economic damage awards, to become effective 20 days after the rules are filed with the Texas Register Division, Office of the Secretary of State.

Title 25. HEALTH SERVICES
Part 1. TEXAS DEPARTMENT OF HEALTH
Chapter 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT
New Subchapter D. LIMITED LIABILITY CERTIFICATION
New §§13.41–13.48

Adoption Preamble

The Texas Department of Health (department) adopts new §§13.41-13.48, concerning the criteria and procedures to determine a non-profit hospital's or hospital system's eligibility for limited liability certification. Sections 13.44, 13.45, and 13.46 are adopted with changes to the proposed text as published in the Texas Register on December 19, 2003 (28 TexReg 11222). Sections 13.41-13.43 and §§13.47-13.48 are adopted without changes, and therefore the sections will not be republished.

These new sections implement the provisions of Health and Safety Code, §311.0456, which was added by House Bill 4, 78th Regular Legislative Session, 2003. The new sections include the purpose, authority, definitions, eligible entities, certification criteria, submission deadlines, duties of the department, effective date of certification, and effect of certification.

These sections establish the eligibility criteria and the submission deadlines for non-profit hospitals and hospital systems seeking certification for limited liability protection under Civil Practices and Remedies Code, §101.023(b). An entity certified under these sections will have the same limits on liability for non-economic damages as a governmental entity. The sections will apply to and may affect the limited liability status of approximately 80 non-profit hospitals and hospital systems statewide that are or may be eligible for these benefits by virtue of providing 8% or more of their net revenue as charity care to county residents and 40% of the total charity care provided in the county in which the hospital or hospital system is located.

The department added the phrase "for which certification is sought" to §13.45 for clarification due to staff comments.

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §13.44, one commenter expressed concern that the denominator for calculating charity care under the published rule included only non-profit hospitals and hospital systems, and this does not accurately reflect the total charity care provided by public and for-profit hospitals in the county.

Response: The department agrees with the comment. The rule was changed to include all hospitals that submit financial and utilization data to the department under Health and Safety Code, §311.033. Although not all hospitals are required to report under §311.033, it the most comprehensive source of charity care data available to the department. Entities that are exempt from submitting reports under §311.033, but who wish to be certified under §13.44 of the rules, will be required to submit reports under §311.033.

Comment: Concerning §13.46, one commenter expressed concern that it did not detail how the department would perform its duties.

Response: The department disagrees with the commenter. The internal procedure the department will use to perform the necessary analysis and calculations to make the certification is beyond the scope of the rule. No change was made as a result of the comment.
Comment: Concerning §13.46, one commenter expressed concern about how the public or an

interested party would obtain information about the hospitals that were certified under the section.

Response: The department agrees with the commenter. The department changed §13.46 by adding subsection (d). This subsection advises that the list of all certified hospitals and hospital systems is available on request and also accessible through the department's website.

Comments were received during the 30 day comment period from Consumer's Union and Texas Watch. The comments were generally in favor of the rules.

The new sections are adopted under the Health and Safety Code, Chapters 104 and Chapter 311, which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 311; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

Legend: New Rules
Double Underline = New language not proposed
[Bold, Underline, and Brackets] = Proposed new language now being deleted
Regular Print = Final language, same as proposed, for final adoption

§13.41. Purpose and Authority.

(a) Purpose. These sections provide the criteria and procedures the department uses to determine a non-profit hospital's or hospital system's eligibility for limited liability certification by the department.

(b) Authority. These sections are authorized by Health and Safety Code, §311.0456, which requires the department to receive, verify and certify limited liability status for non-profit hospitals or hospital systems that meet the requirements of these sections.

§13.42. Definitions. Terms used in this subchapter have the following meanings, unless the context clearly indicates otherwise. Terms not defined have their common meanings.

(1) Department--The Texas Department of Health.
(2) Charity care--Is defined in Health and Safety Code, §311.031(2).
(3) Net patient revenue--Is defined in Health and Safety Code, §311.042(8).
(4) Non-profit hospital--Is defined in Health and Safety Code, §311.042(9).
(5) Non-economic damages--Is defined in Civil Practices and Remedies Code, 41.001(12).

§13.43. Eligible Entities. These sections apply to non-profit hospitals and non-profit hospital systems that:

(1) meet the community benefits and charity care requirements of Health and Safety Code, §311.045; or

(2) are corporations certified by the Texas State Board of Medical Examiners as non-profit organizations under Occupations Code, §162.001, whose sole member is a qualifying hospital or hospital system.

§13.44. Certification Criteria. A non-profit hospital or hospital system that satisfies the eligibility criteria under §13.43 of this title (relating to Eligible Entities) must additionally meet the following certification criteria:

(1) provide charity care in an amount not less than 8% of net patient revenues for the preceding fiscal year; and

(2) provide not less than 40% of the total charity care provided in the county in which the hospital is located. **[Total charity care for the county for purposes of this section is determined by the department based on completed reports submitted not later April 30 for each reporting year under Health and Safety Code, §311.045. Charity care reports submitted after April 30 for each reporting year, but before the submission deadline under**

Health and Safety Code, §311.045, will be excluded from the total charity care denominator for purposes of this section] .

(A) Total charity care for the county for purposes of this section is determined by the department based on the most recent completed and audited prior fiscal year reports submitted by all reporting hospitals under Health and Safety Code, §311.033 (§311.033).

(B) Hospitals that are otherwise exempted from the reporting requirements of §311.033, by Health and Safety Code, §311.039, must submit §311.033 reports to be considered for certification by the department under these sections.

§13.45. Mandatory Submission Deadline. Not later than April 30 of each year for which certification is sought, an eligible entity must submit a report, based on its most recent completed and audited fiscal year, stating that the hospital or system is eligible for certification. Reports submitted after April 30 of each reporting year will not be considered for certification, and exceptions to the deadline will not be granted.

§13.46. Duties of the Department.

(a) The department will verify that all hospitals or systems that have submitted reports within the submission deadline meet the certification criteria not later than May 31 of the year in which the department receives the report.

(b) The department will compare the report under these sections against the reporting requirements under Health and Safety Code, §311.046, for accuracy and completeness.

(c) The department will certify those hospitals or systems that meet all requirements of these sections.

(d) The department will make available to the public, on request, a list of all certified hospitals and hospital systems, and maintain the list on the department's Internet website.

§13.47. Effective Date of Certification. A certification under these sections takes effect on May 31 of the year for which certification is issued, regardless of the date the department issues the certification. The certification expires on May 31 of the following year, regardless of the date the department issues the certification.

§13.48. Effect of Certification.

(a) The total combined limit of liability of a hospital or system certified under these sections for noneconomic damages for a cause of action that accrues during the period that the hospital or system is certified is subject to the limitations specified by Civil Practices and Remedies Code, §101.023(b).

(b) Civil Practices and Remedies Code, §101.023(c), does not apply to a hospital or system certified by the department under these sections.

APPENDIX H

Presentation to

House Committee

On

Civil Practices

Jose Montemayor, Commissioner
Texas Department of Insurance
April 22, 2004

NEW ENTRANTS INTO THE MEDICAL LIABILITY MARKET

- 10 New Medical Malpractice carriers have either entered the market or will soon enter the market
    - 7 risk retention groups have been registered since September 2003.
    - 1 risk retention group's application is pending.
    - 2 companies have filed for name reservations and have indicated to TDI they will soon file as admitted carriers in Texas.
- 2 companies have announced they will expand their physician writings in Texas.
    - The Doctors Company
    - The Medical Assurance Company

PHYSICIAN RATES SINCE SEPTEMBER 2003

- Rate decreases
    - The largest writer, Texas Medical Liability Trust, with $189,000,000 in written premium reduced their rates by 12% on January 01, 2004.
    - A small writer, Continental Casualty Company, with $700,000 in written premium reduced their rates by 11.5% on February 01, 2004.

- No Changes in rates

    - Most companies fall into this category

    - The Doctors Company had an indicated rate change prior to the consideration of HB 4 of about +20% but filed in October 2003 for no change. March 2004 they filed for an increase of +0.7%. Doctors Company writes $15,000,000 in physician premium.

- Rate Increases Disapproved

    - The Texas Medical Liability Insurance Underwriting Association (JUA) filed for a 35.8% increase which was disapproved November 2003. The JUA has $57,000,000 in physician premium.

    - The Medical Protective Company (Med Pro) filed for a 19% increase which was disapproved April 20, 2004. Med Pro has $133,000,000 in physician premium. Med Pro will move its physicians to its purchasing group July 01, 2004. TDI has requested Med Pro file its purchasing group rates and actuarially justify them.

- Other Rate Changes

    - Prior to September APIE filed for an increase of 16.6% above their **1994** rates. This applied to non-purchasing groups physicians only. They wrote $0 outside their purchasing groups in 2003 and $54,000,000 within their purchasing groups.

    - The Medical Assurance Company, which writes solely through their purchasing group, reported to TDI a 34.4% increase effective November 15, 2003. They write $5,000,000 in physician premium.

OTHER HB 4 ISSUES

- Insurers dealing with an influx of medical liability claims that began in June 2003 and ending September / October 2003.

- Spike in June, with elevated levels in July, August and larger spike in September. See accompanying chart.

- Anomaly must be taken into consideration, though not over-adjusted for and treated as a long-term trend.

CLASS ACTIONS

- HB 4 provides in part that "Before hearing or deciding a motion to certify a class action, a trial court must hear and rule on all pending pleas to the jurisdiction asserting that an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies."

- Since this statute was enacted, no court, to our knowledge, has ruled that TDI has exclusive or primary jurisdiction, or that a party has failed to exhaust administrative remedies. Nevertheless, TDI has always been and continues to be very active in reviewing pending class actions to determine whether it is appropriate for TDI to take action. The Office of to Attorney General, on behalf of TDI, has filed amicus briefs in class actions. Additionally, TDI frequently meets with parties to suits to determine whether TDI involvement is appropriate.

THE NEXT PHASE – CONTINUATION OF HB 4 IMPACT

- Expansion of Capacity

  Insurance companies will allocate more capital.

- More Experience with Pricing

  Once a long enough period of time has elapsed, companies will have more experience with pricing these reforms. TDI will monitor rates and take action if changes in HB 4 are not reflected.

- Other Factors

  Other factors may affect rates that are outside of HB 4, e.g. medical cost inflation.

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