

TORT REFORM IN TEXAS

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Thinking Outside the Bench
46th Annual Convention – Louisiana Trial Lawyers Association
September 18-20, 2003
New Orleans, Louisiana

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TORT REFORM IN TEXAS

I. INTRODUCTION

In one of the most contentious and rancorous sessions in memory, the 78th Legislature, dominated by Republican leadership, responded to their tort-reform activist patrons by delivering a comprehensive and radical rewrite of civil justice laws. The effort showcased a sharp contrast in approaches, with the House of Representatives passing a bill with little or no input from opponents and the Senate taking a far more deliberate and measured assessment of the proposed legislation. As a result, the House author earned himself a spot on Texas Monthly's "Ten Worst" legislators while the Senate author was rewarded with a spot on the list of "Ten Best" legislators. Ultimately, the central pieces of the legislation, HB 4 and HJR3, ended up in conference committee where the House was able to extract changes favorable to their position. The bill was signed into law by the Governor on June 11, 2003. This paper outlines features of this extensive and far-reaching legislation and summarizes the fate of other tort-related legislation.

II. HOUSE BILL 4 AND HOUSE JOINT RESOLUTION 3

A. HB 4 Nixon

Remedies in civil actions.

PASSED

SUMMARY:

Contains provisions relating to class actions, offer of settlement, venue and forum non conveniens, proportionate responsibility, and products. The Supreme Court will adopt rules for the class action and multidistrict litigation articles. The offer of settlement is two-way triggered by the defendant and contains a 20% buffer. For proportionate responsibility, the designated responsible third party (RTP) can be anonymous only if criminal conduct was involved. In addition to being designated 60 days before trial, the RTP must also be included in disclosures under TRCP 194.2. The RTP can be struck after adequate time for discovery on no evidence grounds. For products, there are separate rebuttable presumptions for medicines and other products that provide the manufacturer immunity from liability for compliance with government standards. The articles relating to proportionate responsibility (Article 4), products (Article 5) and seat belt evidence (Article 8) have an effective date of 7/1/03; Article 17 (successor liability for asbestos) takes effect immediately; all other articles take effect 9/1/03.

HOUSE BILL 4 OUTLINE

ARTICLE 1: CLASS ACTIONS (CHAPTER 26, CPRC ADDED)

- Requires the Supreme Court to adopt rules governing class actions that comply with this chapter by 12/31/2003.
- Requires that the court use the lodestar method for calculating attorney's fees in class action cases and limits the multiplier to 4 times the lodestar.
- Provides that attorney's fees awarded in actions involving noncash awards such as coupons must be in the same proportion of cash and noncash as the recovery for the class.

- Requires that a trial court consider and rule on all pleas to the jurisdiction asserting that a state agency has exclusive or primary jurisdiction before a class is certified.
- Provides for an interlocutory appeal to Texas Supreme Court on class certification including pleas to the jurisdiction. The appeal stays any proceedings in the case. Provides that article applies to cases in which a petition for review or notice of appeal is filed on or after the effective date.

ARTICLE 2: OFFER OF SETTLEMENT (CHAPTER 42, CPRC ADDED)

- Requires the Supreme Court to adopt rules governing offers of settlement that are in effect by 1/1/2004. Rules adopted will set up deadlines on when a defendant must make a declaration to trigger the settlement offer provision and by when the settlement offer must be made. Rules must also set up the procedures for making a settlement offer and must address cases with multiple parties.
- Two-Way Application: defendants or plaintiffs may make settlement offers, but defendant will make the declaration that settlement offers can be used in the case.
- Litigation costs will be awarded to offering party if the amount of the offer is within 20% of the recovery.
- Maximum award of recoverable litigation costs are calculated by adding 50% of economic damages awarded, 100% of non-economic damages awarded, 100% of exemplary damages awarded, less any statutory liens. Party may not recover costs if litigation costs are already awarded/recovered under any other law.
- Defendants have the option to trigger the offer of settlement provision. If there are multiple defendants, each must opt for the provision, otherwise it only applies to the defendant who made the offer.
- Exceptions from article: class actions; shareholder's derivative actions, actions by or against a governmental unit; actions under the Family Code, Workers Compensation actions, actions in Justice of the Peace courts; any other action the Supreme Court chooses to exempt.

ARTICLE 3: COMPLEX (MULTIDISTRICT) LITIGATION

- Establishes the judicial panel on multidistrict litigation which may transfer actions for consolidated or coordinated pretrial proceedings, including summary judgment.
- The panel will operate in accordance with Supreme Court rules which must: allow transfer only on the panel's written finding that transfer is for convenience of the parties and witnesses and will promote efficient resolution; require remand to transferor court for trial; and provide for appellate review by extraordinary writ. Amends the Gov't. Code to ensure that the Supreme Court has the authority to adopt rules on this subject.

Venue

- Provides that in multi-plaintiff actions, every plaintiff must independently establish venue; allows interlocutory appeal of venue determinations.

- Venue for personal injury, wrongful death or property damage actions brought by or against a personal representative of an estate under the probate code are determined by general venue provisions.
- Health care liability claims against a hospital district must be brought in the county in which the district is established.

Forum Non Conveniens

- Adopts federal doctrine of forum non conveniens.

ARTICLE 4: PROPORTIONATE RESPONSIBILITY (CHAPTER 33, CPRC)

- Applicable to tort actions and DTPA claims in which defendant, settling person or 3rd party is found responsible for a percentage of harm. Provides that article does not affect immunity of workers' compensation employers if submitted as RTPs.
- Creates a motion to “designate a responsible third party” which can include an employer to whom liability can be assigned. Motion to designate must be filed 60 days before trial.
- The court will grant leave to designate unless the objecting party establishes that the defendant didn't plead sufficient facts to satisfy the pleading requirement in the TRCP, and, after repleading, the defendant still didn't plead sufficient facts to satisfy the pleading requirement in the TRCP
- Any RTPs must be disclosed under TRCP 194.2.
- Does not allow submission of the RTP to the jury without sufficient evidence to support the submission.
- May designate an unknown person as an RTP, if the unknown RTP is alleged to have committed a criminal act.
- Party may make a motion to strike an RTP after adequate time for discovery on no evidence grounds. Court shall grant the motion unless the defendant raises a fact issue regarding the RTPs responsibility.
- Amends 33.012 CPRC to allow damages to be reduced by a percentage equal to each settling person's responsibility, deletes dollar-for-dollar credits. For health care liability claims, the defendant can elect dollar-for-dollar credits or settlement credits.
- Deletes specific joint & several provisions applicable to hazardous substance and toxic tort cases.
- Joint & several liability provisions apply if defendant is greater than 50% liable or if claimant can show specific intent for criminal conduct.

ARTICLE 5: PRODUCTS LIABILITY (AMENDS SEC. 16.012 AND CH. 82, CPRC)

- Broadly defines a “products liability action” to include any action against a manufacturer or seller relating to an alleged defective product.
- 15 year statute of repose for products – exempts any claim to which the General Aviation Revitalization Act of 1994 applies.

- Adds “innocent retailer” provisions: Provides that the seller of a product is not liable unless the claimant proves certain factors or unless the manufacturer is not solvent or subject to the jurisdiction of the court. May prohibit suits against seller for breach of warranty. Excludes car dealers covered under Chapter 2301, Occupations Code.

MEDICINES (Sec. 82.007): Establishes a rebuttable presumption that defendants are immune from liability in failure to warn cases regarding pharmaceuticals, if defendant includes warnings approved by FDA or those stated in monographs developed by the FDA. Factors to rebut the presumption for each defendant are:

- the defendant before or after premarket approval or licensing withheld or misrepresented information to the FDA and that information was material and relevant to the performance of the product and was causally related to the injury;
 - the product was sold in the US after an order by the FDA to remove the product from the market;
 - the defendant recommended the product for a use not approved by the FDA; the product was used as recommended and the injury was causally related to this use;
 - the defendant prescribed an off-label use not approved by the FDA and the claimant used it as prescribed and the injury was causally related to the prescribed off-label use; or
 - the defendant, before or after pre-market approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C. §201 and the conduct caused the warnings to be inadequate.
- Requires Supreme Court to amend 407(a) TRE (evidence of subsequent remedial measures) to Federal Rule 407.
 - COMPLIANCE WITH GOVERNMENT STANDARDS (SEC. 82.008): Establishes a rebuttable presumption that manufacturers or sellers are not liable for suits alleging injury from the formulation, labeling or design of a product if they comply with mandatory federal standards governing the product risk that caused harm. Sets factors to rebut the presumption: Standards or regs were inadequate to protect public or manufacturer withheld, concealed or misrepresented information material or relevant to the federal government’s or agency’s determination of compliance with the standards or regs. Section does not apply to manufacturing flaws or defects even though there was compliance with mandatory federal standards.

ARTICLE 6: INTEREST (SEC. 304.003(C), FINANCE CODE)

- Reduces rate of post-judgment interest to the prime rate. Puts in a floor of five percent and a ceiling of 15% for the interest rate.
- Disallows assessment of prejudgment interest on future damages.
- Applies to any case in which a final judgment is signed or subject to appeal on or after the effective date.

ARTICLE 7: APPEAL BONDS (SEC. 35.006, CPRC); SECURITY FOR MONEY
JUDGMENT (52.006, CPRC)

- Amount of security must equal sum of compensatory damages + interest for the estimated duration of the appeal + costs, but may not exceed 50% of the judgment debtor's net worth or \$25 million whichever is less.
- Lowers the standard for obtaining relief from the supersede as requirement of "irreparable harm" to "substantial economic harm."
- Gives the court discretion to prevent dissipation of judgment debtor's assets during the stay if it does not interfere with the debtor's normal course of business.

ARTICLE 8: SEAT BELTS

- Allows admission into evidence of the use or non-use of a seat belt or a child safety seat.

ARTICLE 9: RESERVED

ARTICLE 10: MEDICAL MALPRACTICE

Codifies the following current provisions of Article 4590i into Chapter 74 of the CPRC:

- Notice letters
- Informed consent
- Disclosure panel
- Res ipsa loquitur
- Set of uniform discovery questions
- Arbitration agreement language
- DTPA exemption for physicians & health care providers

Definitions

- "Health care provider" to include R.N.s, dentists, podiatrists, pharmacists, chiropractors, optometrists or health care institutions only. Includes independent contractors and all levels of owner/manager or affiliate of health care provider or physician.
- "Health care institution" to include hospitals, hospital systems, hospices, EMS providers, assisted living facilities, health services districts created under Ch. 287 Health and Safety Code, home/community support services agencies, nursing homes and homes for mentally retarded.
- "Physician" to include any business entity including nonprofit physician's groups and independent contractors.
- "Claimant" to include all claimants from a single injury, including estate.
- "Emergency" to include "sudden onset" conditions, could include conditions caused by negligence.
- "Economic damages" to include damages to compensate a claimant for actual economic or pecuniary loss.

- “Non-economic damages” to include past/present/future pain/suffering, mental anguish, loss of consortium/companionship/society, disfigurement, physical impairment and any other non-pecuniary loss/damage.
- “Hospital system” to include a system of hospitals under single corporate parent.
- “Gross negligence” same as new definition added in Chapter 41.
- Any other legal term or word of art not defined has the common law meaning.

Conflict

- Statute controls over TRCP except TRCP 101.023 (Tort Claims Act liability limit) and any court rules in conflict with statute; local rules of court cannot conflict with statute. Also provides that sovereign immunity is not waived.

Notice and Forms

- Provision of records now required only as to the patient, not claimant(s).
- Requires the use of a form release designed to comply with HIPPA; failure to use release form abates proceedings for 60 days.

Discovery

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

New Jury Instructions Required for emergency care

- On circumstances surrounding the delivery of emergency care (lack of medical charts, pre-existing dr/patient relationship or provider-patient relationship, etc.) N/A to care/treatment after stabilization of patient or treatment unrelated to original medical emergency. Instruction not applicable to an emergency caused by defendant.

Statute of Limitations

- Statute of repose of 10 years.

ER Care Immunity

- Provides immunity for liability for emergency care provided even if done in a hospital or emergency room, so long as it was done in good faith and without expectation of remuneration.

Caps on Non-Economic damages (Sec.74.301)

- Cannot exceed \$250K for all physicians or health care providers.

- Cannot exceed \$250K for each health care institution (hospitals, hospital systems, nursing homes, etc.), \$250K for any additional institution, not to exceed \$500,000 for all institutions.
- Aggregate cap not to exceed \$750K regardless of number of defendants.
- Alternative cap: Contains the same provisions with mandatory minimum insurance requirements.

Wrongful death damage limitations

- Cannot exceed \$500K, including punitive damages, adjusted for CPI since 1977.
- Does not include past or future in cap.
- No insurer Stowers liability above cap.
- Jurors instructed not to consider whether damages limited.

Standard of Proof in ER Care

- Now requires preponderance of the evidence, not clear and convincing. Also applies to care delivered in an ob unit and a surgical suite.

Expert Reports

- 120 day deadline to file liability and causation reports for each defendant.
- Defendant has 21 days to object; otherwise objections waived.
- Parties may agree to extend time for report
- Failure to serve report or failure to file adequate report within 120 days = award of defendant's attorney's fees/costs and dismissal with prejudice.
- Court has discretion to allow 30 day extension to cure report deficiencies.
- Eliminates cost bond requirement.
- Interlocutory appeal of the court's decision on the motion challenging the adequacy of expert report (provision appears in Article 1 of the proposal).

Expert Witnesses

- New, more specific qualifications for expert witnesses.
- Allows defendant docs to testify on his/her own behalf (only), as an expert.
- In suits vs. health care provider, expert is qualified to testify on plaintiff's behalf only if expert (1) is practicing in same field as defendant when testimony is given or when claim arose; (2) has knowledge of standards of care; and (3) is qualified on basis of training/experience, i.e. certified/licensed or other substantial training and is actively practicing health care relevant to the claim. Court may depart from such criteria in determining qualification to testify if court finds good reason to admit the testimony.

- Re: medical causation experts: qualified only if a physician and is otherwise qualified.
- Re: dental causation experts: expert can be a dentist or physician.
- Re: podiatric causation experts: expert can be a podiatrist or physician.

Interest

- Must include prejudgment interest on past damages. No prejudgment interest on future damages.

Periodic Payments

- Mandatory periodic payments of damages for medical, health care or custodial services.
- Discretionary periodic payments of all other damages.
- If plaintiff dies, payments stop, except for lost future earnings.
- Proposal is silent on mandatory periodic payment of attorney's fees on future damages.

Volunteer Immunity (Sec. 84.003, Sec. 84.004(c) CPRC)

- Volunteer health care provider immune from liability if: commits act in course and scope; act within license; statement signed by patient acknowledging volunteer status and that services are given in exchange for immunity, except that statement does not have to be signed if the patient is incapacitated or is a minor and the person responsible for the minor is unavailable.
- Definition of "Charitable Organization" includes primary and secondary schools if accredited by a member association of the Texas Private School Accreditation Commission, not including fraternities, sororities, and secret societies.
- Hospital's liability is limited to \$500K if: patient signs statement acknowledging that care is being provided with no expectation of compensation and the limit is in exchange for service, same exception for signing of statement as above.

Vendors Endorsement

- Insurer may not limit coverage based on vendor endorsement. Doctors and health care providers are vendors for purposes of coverage under vendor's endorsement or a manufacturer's CGL policy.

ARTICLE 11: CLAIMS AGAINST EMPLOYEES OR VOLUNTEERS OF A GOVERNMENTAL UNIT

- Repeals and eliminates references to CPRC 108.002(c) – list of health care providers excluded from local government immunity.
- Amends definition of “hospital district management contractor” to delete rural health qualifications.

- Adds provision regarding liability of “Nonprofit Management Contractor” – tort claims act limitations apply to a contractor and the employees of a contractor who operate a hospital for a municipality.
- Adds an election of remedies provision to the tort claims act, barring the claimant from suing both a governmental unit and an employee. Claimant must elect one or the other before the filing of suit. Functionally operates so that claimant must always only sue a governmental unit.
- Includes physician in the definition of public servant under governmental immunity if the physician provides emergency treatment in a hospital owned or operated by local government.

ARTICLE 12: RESERVED

ARTICLE 13: DAMAGES

- Amends existing exemplary damages Chapter 41, CPRC, to create a new overarching chapter for all damages in all civil cases.
- Adopts former gross negligence standard for awarding exemplary damages.
- Requires a unanimous jury verdict for the award of exemplary damages.
- Amends exceptions from exemplary damages cap to exclude penal code injury to a child, elderly or disabled individual if the injury occurred while providing health care.
- Contains definitions that apply to all civil cases for compensatory damages, future damages, future loss of earnings, gross negligence, noneconomic damages, and periodic payments.
- If compensatory damages are sought, proof of loss of earning capacity, loss of inheritance, loss of contributions of a pecuniary value must be presented in the form of a net loss after reduction for taxes and the court shall instruct the jury whether or not the recovery would be subject to income tax.

ARTICLE 14: RESERVED

ARTICLE 15: SCHOOL EMPLOYEES

- Amends Subchapter B, Chapter 22, Education Code to provide new definitions for professional employees of a school district; state immunities are not abridged; process for notice of claim, exhaustion of remedies, ADR, and attorney's fees.
- Adopts protections found in federal “No Child Left Behind Act.”
- Applies only to conduct occurring on or after 9/1/03.

ARTICLE 16: ADMISSIBILITY OF EVIDENCE RELATING TO NURSING INSTITUTIONS

- Prohibits findings in DHS survey reports or monetary penalties assessed by DHS against nursing homes from being admitted as evidence.
- Sunsets the requirement of mandatory liability insurance coverage for nursing homes

ARTICLE 17: LIMITATIONS IN ACTIONS OF LIABILITIES RELATING TO CERTAIN MERGERS OR CONSOLIDATIONS

- Includes negotiated language on limitations on liability for asbestos claims by a purchasing company.
- Applies to actions commencing on or after the effective date of the act and actions pending on the effective date.

ARTICLE 18: CHARITABLE IMMUNITY & LIABILITY

- Amends Charitable Immunity and Liability Act by:
 - deleting requirement that a volunteer be serving as an officer director or trustee;
 - deleting requirement of good faith and acting in course and scope of duties for volunteer health care provider;
 - deleting “wantonly” from definition of acts to which the chapter does not apply; and
 - repealing definitions of good faith and provision of volunteer liability for direct service volunteers.

ARTICLE 19: LIABILITY OF VOLUNTEER FIRE DEPARTMENTS AND VOLUNTEER FIRE FIGHTERS

- Limits the liability of volunteer fire departments and fire fighters to that of counties and county employees under the tort claims act.

ARTICLE 20: DESIGN PROFESSIONALS

- An action for damages against design professionals (registered architects or professional engineers) must be filed along with an affidavit from an expert (another design professional) setting forth the factual basis for the claim otherwise the action is dismissed with prejudice.

ARTICLE 21: LIMITATIONS OF LIABILITY

- Property owners or occupants not liable for trespass of air particles unless claimant can show actual and substantial damages

ARTICLE 22: COMMUNITY BENEFITS AND CHARITY CARE

- Nonprofit hospitals qualify for governmental immunity limits on non-economic damages if they provide charity care equal to at least eight percent of net patient revenue and 40% of the charity care required by the county.

ARTICLE 23: ACCELERATED APPEAL; EFFECTIVE DATE; SEVERABILITY

Declaratory Judgment/Appeals

- Creates special procedural fast track for declaratory judgment action on constitutional validity of this bill – direct appeal to Texas Supreme Court.

Effective Date

- All articles to take effect 9/1/03, except Art. 17 (asbestos successor liability) which will take immediate effect and articles 4, 5 and 8, which will take effect on 7/1/03.
- Applies only to causes of action which are filed on or after 9/1/03. Actions filed before the effective date but in which a party is joined or designated after the effective date are governed by prior law.

Severability

- Provisions of bill are severable – a finding of invalidity as to one section does not affect any other section.

B. HJR 3 Nixon Constitutional amendment allowing legislature to cap noneconomic damages. PASSED

This constitutional amendment would add a section to the Texas Constitution, authorizing the Texas Legislature to set limits on all damages, except economic damages in all civil cases. If approved by the voters of Texas, this amendment would apply to limitations on damages in medical liability cases enacted during this past session or subsequent sessions and to limitations on damages in all other types of civil cases after January 1, 2005. The election date for this constitutional amendment is September 13, 2003.

III. OTHER TORT-RELATED LEGISLATION

A. Insurance & Prompt Pay Legislation:

<u>SB 14 Jackson</u>	Gives Texas Department of Insurance more regulatory authority over previously unregulated residential and automotive insurers. Provides benchmark rate-setting authority and prior approval of forms and endorsements. Disallows some forms of credit scoring. Takes effect 6/11/03, except for two articles which take effect 2004.	Passed
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<u>S8 127 Fraser</u>	Requires Texas Department of Insurance to adopt rules for underwriting guidelines and payment of water damage claims. Sets up a licensing body for public insurance adjusters in Texas.	Passed
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<u>S8 418 Nelson</u>	Provides certain penalties for late payments of claims from insurance companies to physicians. Takes effect 6/17/03.	Passed
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B. Other Major Issues:

<u>S8 496 Janek</u> <u>HB 1240 Nixon</u>	Civil claims involving exposure to asbestos.	Failed
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<u>SB 675 Estes</u>	Status of an employer under a worker's compensation insurance policy or certificate of authority to self-insure.	Failed
<u>HB 2982 Nixon</u>	Worker's compensation insurance coverage for certain persons engaged in building or construction.	Failed
<u>SB 104 Nelson</u>	Provides additional regulatory and enforcement tools for the State Board of Medical Examiners. Takes effect 6/10/03.	Passed
<u>H8 1614 Truitt</u>	Establishes a patient safety program at the Texas Department of Health to which hospitals will report medical errors. Takes effect 6/20/03.	Passed
<u>HB 1606 Wolens</u>	Continues the Ethics Commission for 12 years. Prohibits legislators from representing clients before state agencies. Sets out new complaint proceedings and hearings. Prohibits campaign contributions until after the bill signing/veto deadline. Requires disclosure of name, address, and occupation of individual campaign contributors.	Passed
<u>S8 794 Duncan /SJR33</u>	Appointment of judges and nonpartisan retention elections.	Failed
<u>S8 1107 Duncan</u>	Duncan Assignment of visiting judges.	Failed
<u>H8 408 Miller</u>	Increases the number of landowners who receive limited liability under Chapter 75 CPRC by expanding the Chapter to include those landowners whose charges for entering onto the property do not exceed 20 times the annual ad valorem taxes for the property.	Passed
<u>HB 705 Solomons</u>	Creates a rebuttable presumption of no negligence for in-home service companies and residential delivery companies in cases involving criminal acts committed by employees.	Passed
<u>HB 1699 Kuempel</u>	Immunizes contractors who construct or repair highways, roads or streets for Texas Department of Transportation for personal injury damage or death if the contractor is in compliance with contract documents.	Passed

<u>HB 3439 Rose</u>	Immunizes non-compensated doctors, physician assistants, advanced nurse practitioners and chiropractors, from liability for physical exams and screenings at school.	Passed
<u>SB 313 C. Harris</u>	Protects the endowment of not-for-profit, religious nursing facilities for payment of damages in civil lawsuits. Applies to the payment of damages after 5/28/03.	Passed
<u>SB 319 Armbrister</u>	Creates a civil cause of action and criminal penalties for the death of or injury to an unborn child. Does not apply to physicians who perform abortions.	Passed
<u>S8 360 Deuell</u>	Includes local Chambers of Commerce in the Charitable Immunity and Liability Act, Chapter 84. CPRC.	Passed
<u>HB 1463 Eiland</u>	Medical professional liability insurance.	Failed
<u>HB 1757 Smithee</u>	Professional Liability Insurance.	Failed
<u>HB 2787 Eiland</u>	Regulation of medical professional Self-Insurance Trusts.	Failed
<u>SB 422 Bivins</u>	Requirements regarding motor vehicle insurance.	Failed
<u>SB 504 Ogden</u>	Creates a lien, not to exceed \$1,000.00 for emergency services providers if the individual receives those services in a county with a population of 575,000 or less and whose injuries were caused by the negligence of another person.	Passed
<u>HB 730 Bitter</u>	Creates the Texas Residential Construction Commission, adopts performance standards for residential construction, and establishes a state-sponsored inspection and dispute resolution process to assist consumers in resolving construction issues with home builders.	Passed
<u>HB 3009 Capelo</u>	Certain advance directives for medical treatment.	Failed

HB 3011 Capelo

Authorizes a peer review committee formed by a hospital district to compile a report and information on history of the medical care of a facility. Makes this information confidential and not subject to open records. Gives the report peer review confidentially protection.

Passed