SUBJECT: Medical liability lawsuit limits

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 6 ayes — T. Hunter, Hilbert, Culberson, Hartnett, Moffat, Tillery

0 nays

3 absent — Alvarado, Sadler, Zbranek

WITNESSES: (*On original version*)

For — Bob Glasgow, Mike Hull, Michael Wallach, Charles Neblett, M.D., Michael Bullen, M.D., H. David Cook, M.D., James Anderson Allums, M.D., and Harold Freeman, Texas Medical Association; Greg Hooser, Texas College of Emergency Physicians; Dave Kittrell, M.D., Texas Association of Obstetricians and Gynecologists; Gustavo Ramos, M.D., Texas Association of Neurological Surgeons; Charles Bailey and C. Dean Davis, Texas Hospital Association

Against — Tommy Jacks; Bill Whitehurst, Texas Trial Lawyers Association

On — David C. Warner, Texas Hospital Association; Larry L. Tonn

BACKGROUND: The Medical Liability and Insurance Improvement Act (VACS art. 4590i), enacted by the 66th Legislature in 1979, requires that a plaintiff give notice to any physician 60 days before a suit is filed and limits civil liability to $500,000, as adjusted for the consumer price index — currently about $1.25 million. The liability limit does not apply to necessary medical and hospital expenses nor in certain cases involving insurance under the *Stowers* doctrine.

The 73rd Legislature amended the act to require a bond of $2,000 or an affidavit from a medical expert be filed within 90 days of filing suit. If the plaintiff fails to file the report or bond, the most severe penalty a court could impose is a dismissal without prejudice (the case could still be refiled) and an assessment of court costs.

DIGEST:

CSHB 971 would amend the Medical Liability and Insurance Improvement Act to require a plaintiff, within 90 days of filing a suit, to either post a $5,000 bond or file an expert medical report for each defendant named in the suit. If such requirements were not met, the plaintiff would have to file a $7,500 bond in order to continue the suit. Additionally, within 180 days of filing suit, the plaintiff would have to file an expert medical report certifying the claim and supply the defendant with information regarding the expert who created the report. If a plaintiff failed to file the expert report by the 181st day, the defendant could seek sanctions against the plaintiff, including attorney's fees, forfeiture of any bonds filed and dismissal of the action with prejudice (barring the plaintiff from refiling the claim).

The court or the parties could by agreement extend these time periods. Additionally, a court could grant a 30-day grace period if it found that the failure to meet a deadline was not the result of conscious indifference, but rather mere accident or mistake.

CSHB 971 would add the requirement that an expert be qualified on the basis of training or experience to offer an expert opinion. In determining whether a witness is qualified on the basis of training and experience, the court would have to consider whether the witness was board certified or had other substantial experience in the area of medical practice relevant to the claim and is actively practicing in rendering medical care services relevant to the claim. A court could deviate from these criteria if, under the circumstances, the court found good reason to do so.

CSHB 971 would disallow adding any prejudgment interest to an award if a claim were settled before the 181st day after the suit is filed. If the claim was not settled within 181 days, CSHB 971 would only disallow any prejudgment interest on future damages (incurred after settlement or judgment), but not past damages.

If a suit was filed on behalf of a minor, the statute of limitations for that suit would begin to run on the date that the first action on the claim was taken. (Currently, the statute of limitations does not begin to run until the minor reaches the age of majority.) A medical liability suit instituted on

behalf of a minor could not be terminated unless an experienced attorney appointed ad litem (for the child) agreed the termination was appropriate.

The provisions regarding the filing of expert medical reports and new bond posting requirements would apply to all causes of action filed after the effective date of the act, September 1, 1995. The provisions relating to prejudgment interest and suits on behalf of minors would apply only to those claims that accrue after the effective date.

SUPPORTERS SAY:

CSHB 971 is a reasonable compromise that would help focus judicial resources on legitimate claims while protecting the rights of plaintiffs to sue when they are injured. The rising number of medical liability claims is fueling increased health care costs. Reducing the number of frivolous lawsuits filed against doctors and other health care professionals and making the malpractice litigation system more efficient would allow doctors to spend less time in the courtroom and more time treating patients. Eventually, cutting down on malpractice claims could lower insurance premiums and help to curb rising health care costs.

While it is true that malpractice insurance and medical liability represents only a small portion of the costs of medical care, that portion is rising faster than any other aspect of medical care. Additionally, health claims drive up costs in other ways that including:

• Supply reduction — by discouraging more doctors from entering the profession, the number of doctors becomes smaller and the costs of medical care will naturally increase.

• Medical steering — because some states and some areas within those states are more prone to successful liability claims, doctors will steer away from those locations and costs in those areas will rise. Additionally, because some specialties such as obstetrics, surgery, anesthesiology and radiology have a greater risk of liability, doctors will steer away from those areas. Finally, doctors will also steer away from high-risk patients causing those patient's costs to rise.

• Reduced innovation — the risk of liability may discourage innovative, beneficial procedures from being tried.

• Defensive medicine — many physicians may order unnecessary tests and procedures just to cover their potential liability. The American Medical Association estimates that defensive medicine represents about 13 percent of all medical costs, or, in 1989, about $15.1 billion.

The Texas experience during the last 10 years has sharply contrasted with national patterns. While claims fell nationally between 1985 and 1992 by nearly 20 percent, claims in Texas during that period rose 118 percent. In 1992 Texas recorded an average of 19 liability claims per 100 physicians compared to a national average of 8.2 claims per 100 physicians. Claims in some Texas counties are even higher; Hidalgo County reports nearly 30 claims per 100 physicians.

The greatest cause of the increase in medical liability claims is the reduction of legal costs to plaintiffs due to the contingency fee system. The decision of whether or not to file a suit now belongs to the plaintiff's attorney, who decides whether to sue based solely on whether enough money can be recovered to make the effort worthwhile.

The amount of money to be made in any particular case is distorted because of the plaintiff's ability to coerce settlements from a defendant. The high cost of defending any form of litigation forces defendants to settle. A defendant would rather pay a $10,000 settlement on a partially frivolous claim than spend $20,000 in attorney's fees defending the claim. Even if the plaintiff fails to file any expert affidavit or bond for a claim, the defendant can only recover court costs, not attorney's fees, under current law.

The *Stowers* doctrine also pressures insurance companies to settle claims. Under the *Stowers* doctrine, as the holding of *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved) has come to be known, insurance companies may be held liable for unlimited damages regardless of the original insurance policy amount if that company refused a settlement proposed by the plaintiff for an amount less than or equal to the insurance cap. As a result, claims for less than or equal to the cap have a high probability of settlement because insurance companies do not wish to open themselves up for unlimited liability.

The timetables and bond requirements are designed to ensure that the plaintiff has filed a meritorious claim before a long amount of time has elapsed. The idea behind these requirements is not new; they were originally enacted by the 73rd Legislature. The problem with those requirements is that at no time before trial is an expert required to certify that the claim of the plaintiff is meritorious. CSHB 971 requires that such a certification be made by the 90th day or, if the plaintiff files a $5,000 bond by the 90th day, the report must be filed by the 180th day. This would prevent plaintiffs from extorting settlements from defendants for non-meritorious claims. It also ensures that frivolous suits would be resolved before the 180th day to protect the reputation of the doctor and reduce the doctor's unnecessary legal costs.

The requirement that experts must either be board certified or demonstrate substantial training or experience in the specialty relevant to the claim would help ensure that only those experts whose knowledge relates to the specialty involved, rather than just general medical expertise, be allowed to testify. Droves of professional medical testifiers abound who have the current qualifications to testify on just about any medical matter and will give any opinion desired for the right price. Restricting the number of experts qualified would help ensure that those who have relevant knowledge would be offering their opinions before a jury.

One of the most bewildering aspects of damages law is the permission to receive prejudgment interest on future damages. This essentially allows someone to get interest for the duration of the trial for expenses that they have not yet incurred. Prejudgment interest for past damages is still a reasonable proposition, and CSHB 971 would not alter that, but eliminating prejudgment interest on future damages would help to reduce liability costs without reducing anything that is not a windfall to the plaintiff.

Claims on behalf of minors are also problematic. Because the statute of limitations on a minor's claim does not begin to run until the minor becomes an adult, some attorneys will litigate such claims numerous times until they get a trial that is proceeding favorably. Until such time, they can continue to non-suit any trial that does not look favorable. Such practice wastes valuable court time and is not concerned with the welfare of the minor, but rather the welfare of the attorneys. However, to ensure that

CSHB 971 and other reforms do not harm any minor's health care liability claims or affect due process, an attorney ad litem experienced in medical claims would have to be appointed to protect the interest of the minor.

OPPONENTS SAY:

CSHB 971 could limit the right of people who have meritorious claims to bring them to court. Plaintiff's attorneys would be less likely to financially support a claim on a contingency fee basis when it costs more up-front to post a bond.

Medical malpractice insurance and liability claims are such a small portion of total health care costs that reducing them would likely have no real impact on reducing overall medical costs.

The cost of obtaining an expert medical report could be especially high when dealing with new or unique specialties because there would be relatively few doctors qualified to serve as experts or create expert reports. Additionally, these services will be very expensive when they are so specialized.

The confusing timetable and bond requirements established by CSHB 971 would create a trap even for the most conscientious attorney. One slip could cost thousands of dollars in bonds and even result in dismissals for failure to keep up with a series of strict deadlines.

Starting the statute of limitations for minors before they reach the age of majority would represent a significant departure from the accepted course of litigating claims of minors. A minor's claim should not expire or be terminated by someone else because the minor often has a different interest that those people who are representing that minor on the claim.

OTHER OPPONENTS SAY:

The committee substitute for HB 971 would set no limits on damages, unlike the introduced version of the bill, but would rather rely on other tort reform legislation, like the punitive damages limit in SB 25 by Sibley, which has been finally approved by the House and the Senate, to help limit damages. Without a separate limit on noneconomic medical liability damages, health care costs would not be reduced.

A plaintiff would still have six months to harass the doctor and run up the doctor's legal fees under this bill. While attorney's fees might be recoverable as well as the bond if it is posted, the reputation of the doctor is never recoverable.

NOTES:

The committee substitute to HB 971 removed the following provisions from the bill as it was introduced:

• A cause of action created against plaintiffs who filed frivolous medical liability claims;

• A reduction of the plaintiff's total recovery award to account for any collateral sources of income (insurance, social security, etc.);

• A limitation that DTPA claims could not be used for medical related claims;

• A requirement that experts hold a license to practice in Texas and have current hospital privileges which would authorize them to perform the procedure at issue in the case;

• A limit of $250,000 on noneconomic damages;

• A limitation that no prejudgment interest would be awarded for any damages;

The substitute added the provisions concerning minor's health care liability claims.

SB 30 by Sibley, identical to HB 971 as introduced is currently pending in the Senate Economic Development committee.