HOUSE
RESEARCH
ORGANIZATION bill analysis 5/22/2001

SB 1839
Moncrief, Duncan
(Eiland, et al.)

SUBJECT: Long-Term Care Facility Improvement Act

COMMITTEE: Human Services — favorable, with amendments

VOTE: 6 ayes — Naishtat, Chavez, Ehrhardt, Noriega, Raymond, Villarreal

2 nays — J. Davis, Wohlgemuth

1 absent — Telford

SENATE VOTE: On final passage, May 10 — 18-11 (Armbrister, Barrientos, Brown, Carona, Fraser, Harris, Jackson, Nelson, Shapiro, Sibley, Whitmire)

WITNESSES: *(On Senate engrossed version:)*
For — Candice Carter, American Association of Retired Persons; Beth Ferris, Texas Advocates for Nursing Home Residents; Carlos Higgins; David Latimer, Texas Association of Services and Homes for the Aging; Abby Sandlin, Texas Watch; *Registered but did not testify:* Mike Ramsey, Texas Trial Lawyers Association

Against — *Registered but did not testify:* Angel Abitua, Texas Citizens for a Sound Economy; Farrol E. Killgore, Robert Metcalf, Mike T. Smith, Harry W. Taylor, Jr., James Tuemblay, Tom Tuttle, and Homer W. Lear, Air Force Village Residents; Shirley Lundgren

On — Will D. Davis, Texas Medical Liability Insurance Underwriting Association; Tim Graves, Texas Health Care Association; C.H. Mah, Texas Department of Insurance; *Registered but did not testify:* Karen Hale and Keith Williams, Texas Department of Mental Health and Mental Retardation

BACKGROUND: Health and Safety Code, chapter 242 provides for the regulation of nursing homes, and chapter 252 provides for the regulation of intermediate care facilities for the mentally retarded (ICF-MRs). Texas has about 1,250 certified nursing facilities with 125,900 beds. Although regulated by the state, the nursing-home industry is private, but about 80 percent of nursing-home residents receive services under Medicaid, the state-federal health benefit program for the poor, elderly, and disabled. The state reimburses

nursing homes for Medicaid patients on a per-bed basis that reflects patients' anticipated level of need.

For fiscal 2000-01, the Legislature increased payments to nursing facilities by $169.5 million in all funds ($65.5 million in general revenue) to reflect an inflation rate of 3.7 percent per year. Under the terms of this new funding, contractors could receive a rate increase of 20 cents per bed if they agreed to spend that money on attendant wages and benefits. Due to a budget shortfall at the Department of Human Services (DHS), however, the base rate was about 8 cents short for both the organizations that sought the increase and those that did not. The industry claims that even if nursing homes received the additional 20-cent funding rate, administrative costs to show that the funding went to attendant wages and benefits would not be not covered. In March 2001, the Texas Alliance for Nursing Homes filed a lawsuit claiming that the state had not fulfilled the terms of last session's agreement.

Liability insurance. Insurance Code, art. 5.15-1 regulates rate setting for liability insurance for health-care providers. It requires insurers to consider numerous factors when setting rates, including the past and prospective loss and expense experience for all professional liability insurance for Texas health-care providers and the impact of risk management courses. It requires rates to be reasonable and not excessive or inadequate. It also regulates reporting requirements and the process for changing rates. Liability insurance policies issued to health-care providers or physicians may not include coverage for punitive damages that may be assessed against the provider or physician.

Medical liability underwriting association. In 1975, the 64th Legislature established the Joint Underwriting Association (JUA) to provide medical liability insurance to physicians and other health-care providers who cannot find coverage in the voluntary, licensed insurance market. The JUA comprises all insurers engaged in writing automobile and other liability insurance in Texas. A nine-member board of directors, representing member insurers, physicians, hospitals, and the public, governs the JUA. On February 1, 2000, the insurance commissioner approved a Texas Department of Insurance (TDI) staff proposal allowing not-for-profit nursing homes to buy liability coverage from the JUA.

Under current law, any registered nurse, hospital, dentist, podiatrist, pharmacist, chiropractor, optometrist, not-for-profit nursing home, radiation therapy center, nonprofit blood bank, migrant health center, or community health center duly licensed or chartered by the state to provide health care may participate in the JUA.

Admissibility of certain evidence in civil action. Human Resources Code, sec. 32.021 sets forth administrative guidelines for the state's Medicaid program. Medicaid, administered by DHS, pays for nursing-home care for low-income elderly or disabled people. DHS also regulates nursing homes by administering the state's licensing program. As a part of its duties, DHS conducts surveys of nursing-home operations, which can include information about violations of standards for participation in Medicaid. Before 1995, the state did not regulate the use of DHS survey reports, which were governed solely by the Texas Rules of Evidence, and admissibility was largely at the judge's discretion. The 74th Legislature barred admission of these documents from use as evidence in civil cases. In 1997, the 75th Legislature authorized limited use of these documents in certain cases.

Current law prohibits surveys, complaint investigations, or other documents that show that a nursing home has violated a standard for participating in the state Medicaid program from being used as evidence in a civil trial. These documents can be used if the state is a party to the action or in other cases if they are used to establish notice to an institution of a relevant finding, or under any rule of the Texas Rules of Evidence. The law does not limit testimony by a DHS surveyor or investigator who is testifying on matters related to requirements for licensure or certification for participation in the Medicaid program.

DIGEST:

SB 1839, as amended, would establish ways for nursing homes and ICF-MRs to obtain liability insurance coverage and would make liability insurance mandatory for these facilities. It would establish a quality assurance fee for ICF-MRs to enable these facilities to draw down federal funds. It would add for-profit nursing homes to the medical liability insurance underwriting association and would raise funds through a bond offering, then repay the bonds through a maintenance surcharge tax on insurance companies' gross premiums for liability insurance.

The bill also would establish best practices for risk, surveyor standards, dispute resolution, and amelioration of violations. It would require data reporting and notification of exemplary damage awards and would allow admission of certain agency documents as evidence in civil actions. TDI would have to study and report on the bill's effects.

SB 1839 would state the Legislature's intent that the bill's legal concepts and measures not be applied outside the realm of long-term care. The measures would be temporary and should not be construed as the Legislature's interpretation of current law applicable to these legal concepts. The bill would reject any suggestion that these measures would represent solutions appropriate for any area involving liability insurance, insurance practices, or medical care other than for long-term care facilities.

The bill also would give legislative approval of all DHS rules that were effective before April 1, 2001, concerning controlling and decertifying Medicaid beds in nursing homes. It also would ratify any waiver issued by DHS between September 1, 1997, and April 1, 2001, relating to the number of certified Medicaid beds.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

Mandatory liability insurance coverage. SB 1839 would require nursing homes to carry liability insurance to hold a license after September 1, 2002. Minimum coverage would be set at $1 million per occurrence and $3 million in the aggregate, except for institutions owned and operated by the government. For those institutions, the minimum would be set to cover the extent of the governmental unit's liability.

Insurance policies would have to be written on a claims-made basis, meaning that a claim against the insured must be made during the period of insurance irrespective of when the act resulting in the claim occurred. Policies would have to be issued by an authorized Texas insurer, by the JUA, or by eligible surplus lines insurers, and in a form acceptable to the state. To the extent allowed by federal law and state rules, the cost of liability insurance would be an allowable cost for reimbursement under the state Medicaid program.

DHS could not take an enforcement action against a nursing home for a violation of the mandatory insurance provision if DHS determined that the home was financially unable to obtain coverage without jeopardizing the care of residents. This prohibition would expire September 1, 2003.

Quality assurance fee. The bill would establish a quality assurance fee to be imposed on ICF-MRs by the Health and Human Services Commission (HHSC). The daily fee would be capped at 6 percent of an ICF-MR's total annual gross receipts in Texas, the total of all compensation paid for services, excluding charitable contributions. The annual fee would be calculated by multiplying the daily fee by the number of patient days. Patient days would be calculated by adding the number of patients on a given day and the number of beds on hold. The fee would be payable monthly and would be in addition to other fees imposed. The quality assurance fee would be an allowable cost for reimbursement under Medicaid.

The initial fee, $5.25 multiplied by the number of patient days, would remain in effect until HHSC had gathered six months' data to set a new fee. The bill would direct HHSC to seek any necessary federal waivers or authorizations needed to implement the provisions of this bill. The commission could delay implementation until the federal waivers or authorization was granted.

HHSC would be responsible for collecting the fee. Within 10 days following the end of a month, a facility would have to file a report with HHSC stating the total patient days for the month and then, within 30 days following the end of the month, pay the quality assurance fee. HHSC would have to adopt any necessary rules to implement the fee as soon as possible and could not grant exceptions to the fee. An administrative penalty assessed for failure to pay on time would be capped at one-half the amount of the outstanding fee or $20,000, whichever was greater.

Funds collected through this fee would be kept by the Texas Treasury Safekeeping Trust Co. The quality assurance fund would comprise the fees and earnings of the fund. Combined with federal matching funds, the fund could be appropriated to support or maintain an increase in Medicaid reimbursement for institutions or to offset allowable expenses in Medicaid. HHSC would have to devise a formula by which these funds would increase reimbursement rates, which would have to provide incentives for institutions

to increase direct-care staffing, wages, and benefits. The amount of the increase in reimbursement could not be based solely on the amount of the quality assurance fee paid, unless authorized by federal law.

If any portion of the quality assurance fee were held invalid by a final order of a court or if HHSC determined that the fee would not generate additional federal matching funds, HHSC would have to cease collection of the fee and return unexpended funds within 30 days. The fee would expire September 1, 2005, unless continued by the 79th Legislature.

Liability insurance underwriting association. SB 1839 would modify the operation of the JUA and the participation of for-profit nursing homes in the association. A nursing home not otherwise eligible for coverage from the association would be eligible if it demonstrated that it had made a verifiable attempt to obtain coverage but could not obtain substantially equivalent coverage and rates. Not-for-profit nursing homes would be entitled to a 30 percent discount from the rates offered to nursing homes in general. This provision would apply to policies delivered or renewed on or after January 1, 2002. Prior law would govern prior policies.

Nursing homes, both for-profit and not-for-profit, would be excluded from the general stabilization fund for the JUA and from the calculation of deficits. Instead, a separate stabilization fund would be established and used to recoup deficits in the JUA that were sustained by nursing homes. Though separate and distinct, the stabilization fund for nursing homes would be administered and disbursed in a similar manner to the general JUA stabilization fund, including the charge-setting methodology and collection procedures. The revenue in the stabilization fund would be held by the comptroller outside the treasury, could be used only for the purposes of the JUA stabilization, and could be terminated only by law, whereupon the funds would become general revenue to be used for liability insurance coverage.

For-profit nursing homes would be included in the definition of health-care provider, along with nonprofit nursing homes, hospitals, and others, for the purposes of regulation of liability insurance rate setting.

The JUA would not be liable for exemplary damages not covered under a nursing home's liability insurance policy. This provision would apply

without regard to the Stowers Doctrine, which requires insurers to accept reasonable settlement offers, but would not affect that doctrine in regard to compensatory damages. It also would not affect contractual duties under an insurance policy, nor would it prohibit a nursing home from purchasing additional coverage for exemplary damages. The exemption from liability would apply only to policies written or renewed and to claims made on or after January 1, 2002, and would remain in effect only until January 1, 2006. This section would expire January 1, 2007.

Revenue bond program. SB 1839 would state the Legislature's finding that the issuance of bonds to raise funds for liability insurance through the JUA is for the benefit of the public and furthers a public purpose. It would direct the Texas Public Finance Authority to issue up to $75 million in revenue bonds on JUA's behalf to fund the nursing home stabilization fund. The bonds would be issued either at public or private sale and would have a maturity date of not more than 10 years. The bonds, any interest, and all assets to secure payment of the bonds would be tax-exempt. These bonds would be an authorized investment for life insurance companies in Texas.

The State Board of Insurance could make additional covenants with respect to the revenue generated through the bond issue and flow of funds. The bond resolution could create special accounts, including an interest and sinking fund account, reserve account, and others. Accounts would be administered in accordance with JUA regulations. Bonds would be payable only from the maintenance tax surcharge established by SB 1839 or from other sources that the JUA is authorized to collect. The bonds would be the obligations of the JUA, not general-obligation bonds of the state.

The state would pledge not to limit or alter the rights of bondholders in any way until all of their costs and expenses associated with the bonds had been discharged. The bill would provide enforcement of mandamus to require the JUA or any other party to perform duties in the bill, the Texas Constitution, or a bond resolution.

Maintenance tax surcharge. SB 1839 would authorize the insurance commissioner to set a maintenance tax surcharge, to be collected by the comptroller, in an amount sufficient to pay all debt service on the bonds, subject to the maximum maintenance tax rate. The rate of the surcharge

would be based on reported gross premiums for liability insurance and could not exceed two-fifths of 1 percent of the correctly reported gross premiums of all classes of insurance of all authorized insurers. If the resulting tax rate were too low to pay all debt service on the bonds, TDI could assess an additional surcharge of up to 1 percent of gross premiums.

The JUA and insurers could pass through the surcharge to policyholders. As a condition of doing business in Texas, an insurer would have to agree that if it left the market, it would be obligated to pay its share of the maintenance tax surcharge until the bonds were retired. The proportionate share would be based on the insurer's market share when it left the state. If the revenue from existing insurers was sufficient to cover the debt service on the bonds for that year, insurers no longer in the market would not need to pay.

Best practices. By December 1, 2001, TDI would have to adopt best practices for risk management and loss control that nursing homes could use. These would be developed in conjunction with HHSC and an advisory committee. The advisory committee would comprise representatives of insurers, the JUA, nursing homes, and consumers. A liability insurance company could consider whether a nursing home had adopted best practices when setting rates. These practices, however, would not establish standards for nursing homes applicable in a civil action against a home.

Surveyor training and survey process. DHS would have to require that a surveyor complete a training program before performing inspections. The training would have to include observation of the operations of a nursing home for at least 10 days in a 14-day period. It would include semiannual refresher courses on subjects related to the 10 most common violations by nursing homes. Surveyors who were pharmacists would have to receive at least 30 percent of their continuing education credits in gerontology or care for disabled people, as appropriate, and all other surveyors would have to receive at least 50 percent of their credits in those subjects.

DHS would have to adopt procedures to review violations and penalties assessed against a nursing home considering the number of violations by region, patterns of violations in the region, and outcomes following citation or penalty. The department also would have to review the performance of agency employees related to complaints or violations of standards by the

agency. DHS would have to report its findings annually to the governor, lieutenant governor, and House speaker.

Dispute resolution. SB 1839 would repeal DHS' current dispute-resolution process and would direct HHSC to establish an informal dispute-resolution process for DHS enforcement actions. To use this process, a facility would have to request it within 10 days of notification of a violation. HHSC then would have 30 days to complete the process. Any person representing an facility in a dispute resolution would have to register with HHSC and would have to disclose the person's five-year employment history, any ownership of the facility represented, and other entities represented before HHSC in the past two years. HHSC would have to adopt rules to implement this process by January 1, 2002, and could not delegate the responsibility.

All of the records, funds, and rules that DHS has in relation to the current dispute-resolution process would be transferred to HHSC. Assumption of the dispute-resolution process by HHSC would not affect any decision made by DHS under the prior process. Any claims in process would be governed by the rules in effect when the function was transferred.

Amelioration of violation. In lieu of payment, DHS could allow a nursing home or ICF-MR to use some or all of a penalty to correct the violation, as long as the violation did not place a resident in immediate harm. These amelioration provisions would apply only to a violation that occurred on or after the bill's effective date.

The bill would define "immediate jeopardy to health and safety" as a situation in which immediate corrective action is necessary because noncompliance with a licensure requirement puts a resident in jeopardy.

Amelioration could not be offered to a facility with more than three violations in two years or with two of the same violations in a two-year period. Within 10 days of a determination, DHS would have to inform a facility if amelioration would be required. The facility then would have 45 days to file an amelioration plan. At a minimum, the plan would have to include:

- proposed changes that would improve the quality of the facility;
- identification, through measurable outcomes, of how the changes would improve quality of life in the facility;
- goals and time lines for the changes; and
- specific actions to implement the plan.

Optional elements of the plan would include changes designed to improve staff recruitment and retention, dental services, or other quality-of-life improvements. DHS would have 45 days following receipt of the plan to approve or deny it. If the plan was approved, any hearing proceedings would have to cease.

Notice of exemplary damages in certain actions. SB 1839 would require any court that awarded exemplary damages against a nursing home to notify DHS, and the agency would have to maintain the information in the records relating to that nursing home's history. This requirement would apply only to damages awarded in a cause of action related to a violation that occurred on or after September 1, 2001.

Admissibility of certain evidence in civil action. The bill would allow DHS documents to be introduced as evidence under the Texas Rules of Evidence in a civil action, enforcement action, or related proceeding. It also would permit testimony from a department surveyor or investigator if the testimony were admissible under the Texas Rules of Evidence.

The bill would include the admission of these documents and the testimony of a DHS surveyor in a civil action involving a nursing home or an ICF-MR. It would repeal Human Resources Code, sec. 32.021(j), which governs situations in which a survey, complaint, or incident investigation is admissible as evidence in a civil action, so that the broader standard set by SB 1839 could take precedence. It would apply only to actions begun on or after the bill's effective date.

Data reporting for certain liability insurance coverage. An insurer who wrote liability insurance policies for nursing homes would have to comply with a request for information from the insurance commissioner. This requirement also would apply to insurers whose rates were not regulated by

TDI. The request for information could include rate filings, special data calls, informational hearings, or any other means needed.

The purpose would be to determine if the savings intended by the Legislature were passed on to nursing homes through a liability insurance premium-rate reduction. Specifically, the data would determine if the limits on exposure to exemplary damages and clarification of admissibility of certain documents resulted in savings that were passed on to nursing homes. The requests for information also could be for the purpose of preparing required reports to the Legislature. The information would be privileged and confidential, consistent with current law, unless introduced into evidence.

TDI study and report. TDI would have to study the effects that changes made by mandatory liability insurance and JUA inclusion would have on developing a competitive market for liability insurance and improving the cost and availability of insurance. It also would have to determine the adequacy of Medicaid reimbursement for liability insurance costs and the impact of awards of exemplary damages on rates.

By December 1, 2002, TDI would have to publish an interim report on the study to the governor, lieutenant governor, and House speaker. The final report would have to be published by December 1, 2004. The study and report requirements would expire September 1, 2005.

SUPPORTERS SAY:

SB 1839 would keep the doors open and the lights on at Texas' nursing homes. More than one-quarter of Texas' nursing homes are in bankruptcy because rising liability insurance rates and declining Medicaid reimbursement have forced them to operate at a loss. If the state does not address this problem, its network of long-term care for the elderly will continue to deteriorate. This bill would help keep Texas nursing homes in business.

This bill would not create a tax. The only bed fee that it would contain is for ICF-MRs, nearly all of which are publicly funded. The fee on those beds would be paid by the state Medicaid program, which would draw down additional federal Medicaid matching funds. Because about 80 of the 1,100 nursing homes in Texas are substantially private-pay, a bed fee on nursing homes would have been a tax on some private payers. Medicaid beds could

not be carved out because federal law requires that health-care-related taxes be broad based and uniform. This bill only would charge a fee on public beds, while still complying with the federal "hold harmless" laws.

Including for-profit nursing homes in the JUA would help address problems of affordability associated with nursing-home liability insurance. The industry has experienced considerable premium increases, while some insurers have left the Texas market. According to TDI staff, the problem is more serious in the for-profit segment of the industry.

In the past, when other health-care providers experienced significant liability insurance cost increases or availability problems, the Legislature decided that it was sound public policy to provide them with an insurer of last resort. As long as it could do so in a manner that would not burden unduly the providers now buying insurance from the JUA, the Legislature should offer the same assistance to for-profit nursing homes, which care for the large majority of nursing-home residents in the state. This bill, by including protections for each professional group that purchased from the JUA, would allow inclusion of for-profit nursing homes in a responsible manner.

The JUA uses an "experience rating" system with tiered rates for nonprofit nursing-home coverage. Under this system, homes with better operating histories have benefitted from lower rates. If for-profit nursing homes could purchase from the JUA, the same system would apply to them.

This bill would not propose to pay for the nursing-home industry's liability insurance. Through the JUA, for-profit nursing homes, like other health-care providers, simply could buy their own coverage. Revenue from the proposed bonds would create a stabilization fund quickly, and members would service the bond debt through maintenance fees.

Mandatory insurance would be appropriate and beneficial for the nursing-home industry. Health-care professionals deal with peoples' lives and are exposed to high liability. All major providers are required, either by statute or practice, to carry liability insurance or to maintain significant reserves. The nursing-home industry should not be any different.

Allowing amelioration of penalties or correction of violations is appropriate because these measures give a facility an incentive and means to improve care. If the state imposes monetary penalties for violations, it takes scarce funds away from care of the residents. It is better for those funds to be used to improve care, rather than punishing the residents.

SB 1839 would ensure that evidence could be introduced in civil cases in accordance with the Texas Rules of Evidence. Current law is confusing because it includes various scenarios under which nursing-home surveys may be introduced and allows it when admissible by the Texas Rules of Evidence. The statute can be interpreted to mean that the evidence can be used only to support specific points in a civil case, which was not the intent of the original legislation. This bill would create a single clear standard for the use of this evidence and would ensure its uniform application.

The bill would extend the regulation of the admissibility of surveys specifically to include ICF-MRs. These facilities are substantially similar to nursing homes in that they are privately run, but beds are publicly funded, provide 24-hour care for people in a long-term care setting, and are licensed by DHS. The documents generated through the licensing oversight should be treated similarly for ICF-MRs as for nursing homes.

The Texas Rules of Evidence provide guidelines about admissibility, but the trial judge makes the final determination. This bill would not allow or disallow evidence but would leave it up to the judge to decide about the relevance or prejudice of certain documents.

OPPONENTS SAY:

A tax by any other name is still a tax. Even though the bed tax for nursing homes was removed from earlier versions of this bill, an identical tax has been added for ICF-MRs. As in nursing homes, most ICF-MR beds are Medicaid funded, but some are private-pay. It would be unfair to remove the tax for nursing homes but not to protect ICF-MR private-pay beds.

Liability insurance is an administrative cost, not a cost of care. The state should not pay for it as part of the Medicaid reimbursement rate. Just as physicians balance their caseloads to spread administrative costs across a range of populations, nursing homes should diversify their residents to ensure that their revenue is sufficient to cover administrative costs.

The bankruptcy rate is not an indicator that the state needs to take action. The industry's 30 percent vacancy rate is driving bankruptcies because nursing homes cannot fill all of their beds. Bankruptcies are a sign that the free market is working to thin out unnecessary operations.

The bill would allow documents to be introduced into a civil case that could be misleading. Surveys performed by DHS may not be accurate or representative of what is going on in a nursing home. They also are open to appeal by the nursing home or ICF-MR. These documents should not be admitted into evidence until all appeals had been exhausted to ensure that the information in the documents would be accurate and not misleading.

SB 1839 could increase nursing-home liability insurance premiums by encouraging lawsuits based on erroneous or inaccurate information. If a nursing home is sued, it can take significant time and resources to clear the matter up, even if the nursing home is not liable. Also, nursing homes sometimes are forced to settle because the cost of a defense can be so high. Meanwhile, liability insurance premiums have soared, making it difficult for well-run nursing homes to afford coverage. Because this bill could encourage lawsuits based on unverified information, nursing homes could see increases in liability insurance premiums.

OTHER OPPONENTS SAY:

The most beneficial portion of the Senate version of SB 1839 would be removed. The nursing-home industry needs additional funding that the state is unwilling or unable to provide. Accessibility to liability insurance is a relatively small part of the problem. Medicaid reimbursement rates are the larger culprit for the industry's financial troubles. Because SB 1839 would permit liability insurance premiums as a reimbursable cost under Medicaid, the key to solvency for the industry is higher Medicaid reimbursement rates. The bed fee proposed in earlier versions of this bill would have maximized the state's dollars by drawing down additional federal matching funds. The Legislature should not enact a nursing-home bill without finding a way to provide more funding for the nursing homes.

Medicaid is the primary source of funding for the nursing-home industry. Although a few private-pay beds would have had to pay the bed fee, versus the majority where the fee would be covered by Medicaid, the private beds also would have benefitted from the additional federal funds. Compensation

for services in nursing homes is used to fund all of operations of the home. This means that if nursing homes had higher compensation, then all beds — Medicaid and private-pay — would benefit.

SB 1839 would exacerbate the problems facing the nursing-home industry. Because of the high rates of insurance premiums, some operators have been forced to drop insurance coverage. This bill would make liability insurance mandatory, increasing operators' costs without offering financial relief.

The JUA is not cheaper insurance, only insurance from the provider of last resort. It can be purchased only if similar insurance at a comparable price is unavailable. Nursing homes cannot afford the "comparably priced" insurance, so there is no reason to believe that they could afford insurance through the JUA.

The state should not mandate that nursing homes carry liability insurance. The more the state regulates businesses, the higher their costs. The increased regulation proposed by SB 1839 would drive up the costs of nursing-home services. If these costs become too high and facilities have to close, both consumers and businesses will lose out.

The state should consider the differences between for-profit and not-for-profit nursing homes. Most not-for-profit nursing homes are vested in the community, have lower operating costs, and carry liability insurance with lower rates because they are sued less often. For-profit nursing homes have made poor financial decisions about market-share growth and purchase of capital assets that have lowered their profit margin. Because these nursing homes often are publicly held and are under pressure to show bottom-line growth, quality of care has declined, leading to more lawsuits and higher liability insurance premiums. Instead of bailing out these nursing homes, the state should focus on expanding its network of not-for-profit nursing homes.

The bill should limit more narrowly the use of DHS records as evidence in civil actions to prevent overblown reactions to alleged problems. DHS forms on which surveying and inspection information is kept rarely indicate any mitigating circumstances about an alleged problem or any explanation of the problem by the operator, nor do they reflect all of the qualities of the services the facility provides.

NOTES: The House committee amendments to the Senate engrossed version would:

- remove the quality assurance fee for nursing homes and extend it to ICF-MRs;
- prohibit the amount of the increase in reimbursement from being based solely on the amount of the quality assurance fee paid;
- limit the minimum liability insurance coverage for facilities owned by a governmental entity to the entity's maximum liability;
- define "immediate jeopardy to health and safety" for the purposes of amelioration of violations;
- split nursing-home stabilization funds from the broader JUA accounts;
- approve DHS rules and HHSC waivers in place before April 1, 2001, that pertain to certification of Medicaid beds in nursing homes; and
- remove the review process and rapid response teams and establish a process for surveys by DHS.

According to the fiscal note, the Quality Assurance Fee imposed on state-licensed ICF/MR facilities would raise $18.4 million in fiscal 2002 and $19.7 million by fiscal 2006. HHSC estimates that the funds generated by the fee would draw additional federal Medicaid reimbursements of $28 million for fiscal 2002 and $29.7 million by fiscal 2006. The fiscal note also assumes that during fiscal 2002, the Texas Public Finance Authority would issue the maximum $75 million in revenue bonds to fund the joint underwriting association to provide liability insurance for nursing homes. A maintenance tax surcharge on liability insurance companies would cover the cost of bond debt service, which would be $11,001,250 in fiscal 2002 and $12,005,700 by fiscal 2006.