HOUSE JOURNAL

SEVENTY-EIGHTH LEGISLATURE, REGULAR SESSION

PROCEEDINGS

EIGHTY-FOURTH DAY — SUNDAY, JUNE 1, 2003

The house met at 9 a.m. and, at the request of the speaker, was called to order by Representative Truitt.

The roll of the house was called and a quorum was announced present (Record 897).

Present — Mr. Speaker; Allen; Alonzo; Bailey; Baxter; Berman; Bohac; Bonnen; Branch; Brown, B.; Brown, F.; Burnam; Callegari; Campbell; Canales; Capelo; Casteel; Castro; Chavez; Chisum; Christian; Coleman; Cook, B.; Cook, R.; Corte; Crabb; Crownover; Davis, J.; Davis, Y.; Dawson; Delisi; Denny; Deshotel; Driver; Dukes; Dunnam; Dutton; Edwards; Eiland; Eissler; Elkins; Ellis; Escobar; Farabee; Farrar; Flores; Flynn; Gallego; Garza; Gattis; Geren; Giddings; Goodman; Goolsby; Griggs; Grusendorf; Guillen; Gutierrez; Haggerty; Hamilton; Hamric; Hardcastle; Harper-Brown; Hartnett; Heflin; Hegar; Hilderbran; Hill; Hochberg; Hodge; Homer; Hope; Hopson; Howard; Hughes; Hunter; Hupp; Isett; Jones, D.; Jones, E.; Jones, J.; Keel; Keffer, B.; Keffer, J.; King; Kolkhorst; Krusee; Kuempel; Laney; Laubenberg; Lewis; Luna; Mabry; Madden; Marchant; Martinez Fischer; McCall; McClendon; McReynolds; Menendez; Mercer; Merritt; Miller; Moreno, J.; Moreno, P.; Morrison; Mowery; Naishtat; Nixon; Noriega; Oliveira; Olivo; Paxton; Peña; Phillips; Pickett; Pitts; Puente; Quintanilla; Raymond; Reyna; Riddle; Ritter; Rodriguez; Rose; Seaman; Smith, T.; Smith, W.; Smithee; Solis; Solomons; Stick; Swinford; Talton; Taylor; Telford; Thompson; Truitt; Turner; Uresti; Van Arsdale; Villarreal; West; Wilson; Wise; Wohlgemuth; Wolens; Wong; Woolley; Zedler.

The invocation was offered by Representative Chisum, as follows:

Our great and sovereign God, we thank you that you have promised that wherever two or three are gathered in your name, you will be in their midst.

We thank you that your mercies are new every morning and that you are faithful to guide those who are willing to follow.

We thank you that your grace is extended to each of us to accomplish things with you that we cannot accomplish on our own.

And we thank you for your forgiveness, enabling us to overcome our foibles and flaws and start anew.

And we ask today that you would help us to see you in every situation we are in, in every decision that we make, so that at the end of the day, we can hear you say, "Well done my faithful servant, enter into the joy of the Lord." Amen.

that, in most cases, a manufacturer will not get the benefit of the presumption if the manufacturer has failed to comply with federal notification requirements. Also, information that is required to be disclosed by federal law is quite likely to be information that is also relevant to a factfinder's determination of the adequacy of the safety standard in question.

REMARKS ORDERED PRINTED

Representative Luna moved to print remarks between Representative Luna and Representative Nixon.

The motion prevailed without objection.

HB 4 - STATEMENT OF LEGISLATIVE INTENT

REPRESENTATIVE GATTIS: Chairman Nixon, is it your intent that Article 21 of the bill, adding 75.002(h) to the Civil Practice and Remedies Code, shall not affect any existing legal remedies for actions regarding odors?

REPRESENTATIVE NIXON: Yes, Article 21 is not intended to affect any existing legal remedies for actions regarding odors.

REMARKS ORDERED PRINTED

Representative Gattis moved to print remarks between Representative Gattis and Representative Nixon.

The motion prevailed without objection.

HB 4 - STATEMENT OF LEGISLATIVE INTENT

REPRESENTATIVE EILAND: Chairman Nixon, on the medical malpractice Section 10 portion of the claim of the bill—you and I talked about this briefly but I want to make sure—in the section on page 61, standard of proof regarding emergency medical care, we added, basically, obstetrics to the definition. You and I talked but I want to make sure I understand. A woman goes to the hospital with preterm contractions and her physician is not there, but whoever that physician has on call for their group or whatever, sees the lady and say she is hospitalized and stabilized, but later on the baby's heart rate drops because maybe the cord is wrapped around its neck or something, and they say we have to do an emergency C-section right now. Under the bill, would that situation arise where the new higher standard would be required?

REPRESENTATIVE NIXON: No, it is the intent of this legislation that emergency situations where you do not have a prior relationship with the patient is the one given the protection. If you have a prior relationship with a patient, and you know about their medical history and their background you should not be given the protection to the same extent as someone who just shows up in the emergency room. You have no history, you have to treat them. That is why we have a different standard of care.

EILAND: OK. And like an emergency arises while you're in the hospital—

NIXON: That's right. If you create the emergency, you don't get the protection either.

REPRESENTATIVE TALTON: Representative Nixon, would you talk to us a little bit about the limitations on the noneconomic damage caps that are presently in the bill that y'all worked out with the senate.

NIXON: Yes and thank you. Of course, you know that was some of the sticking points. One of the things we've done is we have one cap for doctors. I don't care how many doctors you sue, there is one $250,000 cap in noneconomic damages applied to all doctors, whether there's one or there's ten. There's a second $250,000 cap applied to an institution. It could be a hospital, it could be a nursing home, whatever the institution is that is sued. Medical health care institution is defined in the statute. You may add a third cap if there is another institution but in no event, is any one institution subject to a cap greater than $250,000. And that was really our goal, to make sure we calm down the insurance liability damage awards so now there is predictability of a particular standard.

TALTON: So the possibility could be the $250,000 regards to how many claimants or how many doctors, and then the possibility of two of the health care institutions could be up to $500,000. Is that correct? Possibly if there is vicarious liability.

NIXON: No. Only if you sued two institutions, but it would be one cap per institution.

TALTON: Correct. So if you're able to do that on two institutions and one on the doctors. A total amount, if you're able to find those three liable, is $750,000?

NIXON: You could get there.

REMARKS ORDERED PRINTED

Representative Eiland moved to print remarks between Representative Eiland and Representative Nixon and Representative Talton and Representative Nixon.

The motion prevailed without objection.

(Smithee in the chair)

Representative Nixon moved to adopt the conference committee report on **HB 4**.

A record vote was requested.

The motion prevailed by (Record 935): 110 Yeas, 34 Nays, 2 Present, not voting.

Yeas — Allen; Bailey; Baxter; Berman; Bohac; Bonnen; Branch; Brown, B.; Brown, F.; Callegari; Campbell; Capelo; Casteel; Chisum; Christian; Cook, B.; Cook, R.; Corte; Crabb; Crownover; Davis, J.; Dawson; Delisi; Denny; Driver; Eissler; Elkins; Ellis; Farabee; Flynn; Gallego; Garza; Gattis; Geren; Goodman; Goolsby; Griggs; Grusendorf; Gutierrez; Haggerty; Hamilton; Hamric; Hardcastle; Harper-Brown; Hartnett; Heflin; Hegar; Hilderbran; Hill; Hochberg; Homer; Hope; Hopson; Howard; Hughes; Hunter; Hupp; Isett; Jones, D.; Jones, E.; Jones, J.; Keel; Keffer, B.; Keffer, J.; King; Kolkhorst; Krusee; Kuempel;

SENATE JOURNAL

SEVENTY-EIGHTH LEGISLATURE — REGULAR SESSION

AUSTIN, TEXAS

PROCEEDINGS

EIGHTY-FOURTH DAY
(Sunday, June 1, 2003)

The Senate met at 9:00 a.m. pursuant to adjournment and was called to order by Senator Lucio.

The roll was called and the following Senators were present: Armbrister, Averitt, Barrientos, Bivins, Brimer, Carona, Deuell, Duncan, Ellis, Estes, Fraser, Gallegos, Harris, Hinojosa, Jackson, Janek, Lindsay, Lucio, Madla, Nelson, Ogden, Ratliff, Shapiro, Shapleigh, Staples, Van de Putte, Wentworth, West, Whitmire, Williams, Zaffirini.

The Presiding Officer announced that a quorum of the Senate was present.

Sister Linda Conner, Grant African Methodist Episcopal Church, Austin, offered the invocation as follows:

> Now, God, our father, we thank You for this great land and for these our leaders anointed and appointed by You. We ask Your blessings on them. Father, we pray for the Governor and Lieutenant Governor and their families. Please give all these leaders wisdom, patience, compassion, and fortitude to do the job placed before them. We ask for harmony in our state and unity of purpose as we rise to be the great republic You intended us to be. We thank You for Texas, God. We thank You for this great country, and we ask for the safe return of all our military personnel. Watch over their families and restore peace to our land. And now, God, we praise You for what this great body of our Senators has achieved in the 78th legislative session and we thank You for what they are about to do in Your name. Amen.

Senator Whitmire moved that the reading of the Journal of the proceedings of yesterday be dispensed with and the Journal be approved as printed.

The motion prevailed without objection.

PHYSICIAN OF THE DAY

Senator Averitt was recognized and presented Dr. Troy Fiesinger of Waco as the Physician of the Day.

The Senate welcomed Dr. Fiesinger and thanked him for his participation in the Physician of the Day program sponsored by the Texas Academy of Family Physicians.

SENATE RESOLUTION 1037

Senator Janek offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 727**, relating to disease management programs for certain Medicaid recipients, to consider and take action on the following matter:

(1) Senate Rule 12.03(4) is suspended to permit the committee to add text to Section 32.059(e), Human Resources Code, to read as follows:

(e) The department may enter into a contract under this section with a comprehensive hemophilia diagnostic treatment center that receives funding through a maternal and child health services block grant under Section 501(a)(2), Social Security Act (42 U.S.C. Section 701), and the center shall be considered a disease management provider.

Explanation: The added text is necessary to ensure that a comprehensive hemophilia diagnostic treatment center is considered a disease management provider.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 727 ADOPTED

Senator Janek called from the President's table the Conference Committee Report on **HB 727**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Janek, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

AT EASE

The Presiding Officer, Senator Lucio in Chair, at 9:43 a.m. announced the Senate would stand At Ease subject to the call of the Chair.

IN LEGISLATIVE SESSION

Senator Bivins at 10:15 a.m. called the Senate to order as In Legislative Session.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 425 ADOPTED

Senator West called from the President's table the Conference Committee Report on **HB 425**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator West, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 4 ADOPTED

Senator Zaffirini called from the President's table the Conference Committee Report on **SB 4**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Zaffirini, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE JOINT RESOLUTION 68 ADOPTED

Senator Fraser called from the President's table the Conference Committee Report on **HJR 68**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Fraser, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1042

Senator Averitt offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 3442**, relating to certain expenditures and charges of certain governmental entities, to consider and take action on the following matters:

(1) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add additional text not included in either the house or senate version of the bill, consisting of the following new SECTION to read as follows:

SECTION 14. IMPOSITION OF CERTAIN FEES. (a) Subchapter B, Chapter 1052, Occupations Code, is amended by adding Section 1052.0541 to read as follows:

Sec. 1052.0541. FEE INCREASE. (a) The fee for the issuance of a certificate of registration under this chapter and the fee for the renewal of a certificate of registration under this chapter is increased by $200.

(b) Of each fee increase collected, $50 shall be deposited in the foundation school fund and $150 shall be deposited in the general revenue fund.

(b) Subchapter B, Chapter 1053, Occupations Code, is amended by adding Section 1053.0521 to read as follows:

Sec. 1053.0521. FEE INCREASE. (a) The fee for the issuance of a certificate of registration under this chapter and the fee for the renewal of a certificate of registration under this chapter is increased by $200.

(b) Of each fee increase collected, $50 shall be deposited in the foundation school fund and $150 shall be deposited in the general revenue fund.

(c) Subchapter D, Chapter 1071, Occupations Code, is amended by adding Section 1071.1521 to read as follows:

Sec. 1071.1521. FEE INCREASE. (a) The fee for the issuance of a certificate of registration to a registered professional land surveyor under this chapter and the fee for the renewal of a certificate of registration for a registered professional land surveyor under this chapter is increased by $200.

(b) Of each fee increase collected, $50 shall be deposited in the foundation school fund and $150 shall be deposited in the general revenue fund.

(c) This section does not apply to state agency employees who are employed by the state as land surveyors.

(d) Subchapter B, Chapter 1152, Occupations Code, is amended by adding Section 1152.053 to read as follows:

Sec. 1152.053. FEE INCREASE. (a) The fee for the registration of a person under this chapter and the fee for the renewal of a registration under this chapter is increased by $200.

(b) Of each fee increase collected, $50 shall be deposited in the foundation school fund and $150 shall be deposited in the general revenue fund.

(e) The change in law made by this section applies only to the issuance or renewal of a certificate of registration under Chapter 1052, 1053, or 1071, Occupations Code, or the issuance or renewal of a registration under Chapter 1152, Occupations Code, on or after the effective date of this article. A certificate of registration or registration issued or renewed before the effective date of this section is governed by the law in effect on the date of the issuance or renewal, and the former law is continued in effect for that purpose.

Explanation: The added text is necessary to increase fees for landscape architects, interior designers, land surveyors, and property tax consultants by $200, of which $50 would be deposited in the foundation school fund and $150 would be deposited in the general revenue fund.

(2) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add additional text not included in either the house or senate version of the bill, consisting of the following new SECTION to read as follows:

SECTION 15. STATE AGENCY HUMAN RESOURCES STAFFING AND FUNCTIONS. (a) Subtitle B, Title 6, Government Code, is amended by adding Chapter 670 to read as follows:

CHAPTER 670. HUMAN RESOURCES STAFFING AND FUNCTIONS

Sec. 670.001. DEFINITIONS. In this chapter:

(1) "Human resources employee" does not include an employee whose primary job function is enforcement of Title VI or Title VII of the Civil Rights Act of 1964.

(2) "State agency" means a department, commission, board, office, authority, council, or other governmental entity in the executive branch of government that is created by the constitution or a statute of this state and has authority not limited to a geographical portion of the state. The term does not include a university system or institution of higher education as defined by Section 61.003, Education Code.

Sec. 670.002. HUMAN RESOURCES STAFFING FOR LARGE STATE AGENCIES. A state agency with 500 or more full-time equivalent employees shall adjust the agency's human resources staff to achieve a human resources employee-to-staff ratio of not more than one human resources employee for every 85 staff members.

Sec. 670.003. HUMAN RESOURCES STAFFING FOR MEDIUM-SIZED AND SMALL STATE AGENCIES; OUTSOURCING. (a) The State Council on Competitive Government shall determine the cost-effectiveness of consolidating the human resources functions of or contracting with private entities to perform the human resources functions of state agencies that employ fewer than 500 full-time equivalent employees.

(b) If the council determines that contracting with private entities is cost-effective, the council shall issue a request for proposals for vendors to perform the human resources functions of the agencies.

(c) The council shall determine which human resources functions are subject to the contract and which functions the agency may select to perform itself.

(d) Each agency shall pay for the contracts for human resources functions out of the agency's human resources budget.

(b) Not later than January 1, 2004, each state agency with 500 or more full-time equivalent employees shall comply with the human resources employee-to-staff ratio requirements in Section 670.002, Government Code, as added by this section.

(c) Not later than January 1, 2004, the State Council on Competitive Government shall conduct an initial feasibility study to determine the cost-effectiveness of consolidating the human resources functions of or contracting with private entities to perform human resources functions of state agencies under Section 670.003, Government Code, as added by this section.

Explanation: The added text is necessary to restrict agencies with 500 or more full-time equivalent employees from having human resources staffing that exceeds one for each 85 employees after January 1, 2004, and to allow for a feasibility study to determine the cost effectiveness of consolidating or contracting out for state agencies' human resources functions.

(3) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add additional text not included in either the house or senate version of the bill, consisting of the following new SECTION to read as follows:

SECTION 16. AGENCY STAFFING AND PRODUCTIVITY. (a) Effective September 1, 2003, Section 651.004, Government Code, is amended by adding Subsections (c-1) and (d) to read as follows:

(c-1) A state agency in the executive branch of state government that employs more than 100 full-time equivalent employees may not, after March 31, 2004, employ more than one full-time equivalent employee in a management position for every eight full-time equivalent employees that the agency employs in nonmanagerial staff positions. This subsection expires September 1, 2005.

(d) A state agency that believes that the minimum management-to-staff ratios required by this section are inappropriate for that agency may appeal to the Legislative Budget Board. The Legislative Budget Board by rule shall adopt appeal procedures.

(b) Effective September 1, 2004, Section 651.004, Government Code, is amended by adding Subsection (c-2) to read as follows:

(c-2) A state agency in the executive branch of state government that employs more than 100 full-time equivalent employees may not, after August 31, 2005, employ more than one full-time equivalent employee in a management position for every nine full-time equivalent employees that the agency employs in nonmanagerial staff positions. This subsection expires September 1, 2006.

(c) Effective September 1, 2005, Section 651.004, Government Code, is amended by adding Subsection (c-3) to read as follows:

(c-3) A state agency in the executive branch of state government that employs more than 100 full-time equivalent employees may not, after August 31, 2006, employ more than one full-time equivalent employee in a management position for every 10 full-time equivalent employees that the agency employs in nonmanagerial staff positions. This subsection expires September 1, 2007.

(d) Effective September 1, 2006, Section 651.004, Government Code, is amended by adding Subsection (c) to read as follows:

(c) A state agency in the executive branch of state government that employs more than 100 full-time equivalent employees may not employ more than one full-time equivalent employee in a management position for every 11 full-time equivalent employees that the agency employs in nonmanagerial staff positions.

(e) A state agency in the executive branch of government shall achieve the management-to-staff ratio required by Subsection (c), Section 651.004, Government Code, as added by this section, not later than August 31, 2007.

(f) Subchapter K, Chapter 659, Government Code, is amended by adding Section 659.262 to read as follows:

Sec. 659.262. ADDITIONAL COMPENSATION FOR CERTAIN CLASSIFIED STATE EMPLOYEES. (a) In this section, "state agency" means an agency of any branch of state government that employs individuals who are classified under Chapter 654.

(b) To enhance the recruitment of competent personnel for certain classified employee positions, a state agency may provide to a state employee, at the time of the employee's hiring for a classified position, additional compensation in the form of a one-time recruitment payment not to exceed $5,000. If the employee discontinues employment with the state agency for any reason less than three months after the date of receiving the recruitment payment, the employee shall refund to the state agency the full amount of the recruitment payment. If the employee discontinues employment with the state agency for any reason three months or longer but less than 12 months after the date of receiving the recruitment payment, the employee shall refund to the state agency an amount computed by:

(1) subtracting from 12 months the number of complete calendar months the employee worked after the date of receiving the recruitment payment;

(2) dividing the number of months computed under Subdivision (1) by 12 months; and

(3) multiplying the fraction computed under Subdivision (2) by the amount of the recruitment payment.

(c) To enhance the retention of employees who are employed in certain classified positions that are identified by the chief administrator of a state agency as essential for the state agency's operations, a state agency may enter into a deferred compensation contract with a classified employee to provide to the employee a one-time additional compensation payment not to exceed $5,000 to be added to the employee's salary payment the month after the conclusion of the 12-month period of service under the deferred compensation contract.

(d) To be eligible to enter into a contract for deferred compensation under Subsection (c), a state employee must have already completed at least 12 months of service in a classified position.

(e) The chief administrator of a state agency shall determine whether additional compensation is necessary under this section on a case-by-case basis, considering:

(1) the criticality of the employee position in the operations of the state agency;

(2) evidence of high turnover rates among employees filling the position or an extended period during which the position is or has in the past been vacant;

(3) evidence of a shortage of employees qualified to fill the position or a shortage of qualified applicants; and

(4) other relevant factors.

(f) Before an agency provides or enters into a contract to provide additional compensation to an employee under this section, the chief administrator of the state agency must certify to the comptroller in writing the reasons why the additional compensation is necessary.

(g) Additional compensation paid to an employee under this section is specifically exempted from any limitation on salary or salary increases prescribed by this chapter.

(g) Subsection (b), Section 656.048, Government Code, is repealed.

Explanation: The added text is necessary to restrict agencies with more than 100 full-time equivalent employees from having more than one manager for every 11 non-managerial full-time equivalent employees after August 31, 2006. The added text also provides for a phase-in period between March 31, 2004, and August 31, 2006. The added test also provides for additional compensation to certain state employees in the form of a one-time recruitment or retention payment not to exceed $5,000.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3442 ADOPTED

Senator Averitt called from the President's table the Conference Committee Report on **HB 3442**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Averitt, the Conference Committee Report was adopted by a viva voce vote.

(Senator Armbrister in Chair)

SENATE RESOLUTION 1039

Senator Bivins offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rules 12.03 and 12.04 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 7**, relating to making supplemental appropriations and making reductions in current appropriations, to consider and take action on the following matters:

(1) Senate Rules 12.03(1) and 12.04(2) are suspended to permit the committee to decrease the amount of the appropriation in SECTION 1 of the bill so that SECTION 1 reads as follows:

SECTION 1. HEALTH AND HUMAN SERVICES COMMISSION: MEDICAID ACUTE CARE COSTS. Out of the Economic Stabilization Fund 0599, the amount of $406,748,606 is appropriated to the Health and Human Services Commission for use during the remainder of the state fiscal year ending August 31, 2003, for the purpose of providing services under the state Medicaid acute care program.

Explanation: It is necessary to decrease the amount of the appropriation to take into account the unexpectedly more favorable federal match rate for Medicaid.

(2) Senate Rule 12.03(2) is suspended to permit the committee to omit SECTION 1(b) of the bill which reads as follows:

(b) The money described by Subsection (a) of this section may be expended only for the purpose described by Subsection (a) of this section and only if:

(1) Medicaid expenditures exceed otherwise available revenue because of changes in caseloads or costs or because of a lower federal match rate; and

(2) the Health and Human Services Commission has used all revenue available and appropriated to the Medicaid program, including but not limited to premium credits and vendor drug rebates.

Explanation: It is necessary to omit the text to ensure that the appropriations made by the bill in relation to the state Medicaid program have the effect of increasing the availability of undedicated general revenue.

(3) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add a new SECTION 3 of the bill to read as follows:

SECTION 3. LAPSE TO UNDEDICATED GENERAL REVENUE. This section is for informational purposes only. It is the intent of the legislature that the implementation of Sections 1 and 2 of this Act increase the availability of undedicated general revenue by approximately $127,448,606 by the end of the state fiscal year ending August 31, 2003.

Explanation: It is necessary to add the text to ensure that the appropriations made by the bill in relation to the state Medicaid program have the effect of increasing the availability of undedicated general revenue.

(4) Senate Rule 12.04(4) is suspended to permit the committee to increase the amount of the appropriation in SECTION 8(a) of the bill so that SECTION 8(a) reads as follows:

(a) Out of the Economic Stabilization Fund 0599, and in addition to other amounts appropriated for this purpose, the amount of $516,000,000 is appropriated to the Teacher Retirement System for use during the state fiscal biennium beginning September 1, 2003, for the purpose of funding the TRS-Care retiree health insurance program.

Explanation: It is necessary to increase the amount of the appropriation to ensure the solvency of the TRS-Care retiree health insurance program.

(5) Senate Rules 12.03(3) and (4) and 12.04(5) are suspended to permit the committee to make a new appropriation by adding a new SECTION 12 of the bill to read as follows:

SECTION 12. STATE COMMISSION ON JUDICIAL CONDUCT: MISCONDUCT PROCEEDINGS. Out of the Economic Stabilization Fund 0599, the amount of $44,000 is appropriated to the State Commission on Judicial Conduct for use during the remainder of the state fiscal year ending August 31, 2003, for purposes related to conducting misconduct proceedings.

Explanation: It is necessary to make the new appropriation to allow the State Commission on Judicial Conduct to pay costs associated with certain misconduct proceedings.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 7 ADOPTED

Senator Bivins called from the President's table the Conference Committee Report on **HB 7**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Bivins, the Conference Committee Report was adopted by the following vote: Yeas 24, Nays 7.

Yeas: Armbrister, Averitt, Bivins, Brimer, Carona, Deuell, Duncan, Ellis, Estes, Fraser, Harris, Jackson, Janek, Lindsay, Nelson, Ogden, Ratliff, Shapiro, Staples, Wentworth, West, Whitmire, Williams, Zaffirini.

Nays: Barrientos, Gallegos, Hinojosa, Lucio, Madla, Shapleigh, Van de Putte.

SENATE RESOLUTION 1040

Senator Bivins offered the following resolution:

BE IT RESOLVED, BY THE Senate of the State of Texas, that Senate Rules 12.03 and 12.04, be suspended in part as provided by Senate Rule 12.08 to enable consideration of, and action on, specific matters which may be contained in the Conference Committee Report on **HB 1**.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1 ADOPTED

Senator Bivins called from the President's table the Conference Committee Report on **HB 1**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

Senator Fraser was recognized to ask questions of Senator Bivins.

On motion of Senator Fraser, the following questions and answers to establish legislative intent on **HB 1** were ordered reduced to writing and printed in the *Senate Journal:*

Senator Fraser: Chairman Bivins, it is my understanding in Article III under Texas Tech University, the budget appropriates $874,000 for the biennium for MITC - Fredricksburg. (page III-141) Is this correct?

Senator Bivins: Yes.

Senator Fraser: Texas Tech University has established another MITC in Marble Falls as part of their hill country expansion. Is it the intent of the appropriations committee that the money appropriated for MITC - Fredricksburg should also be used to fund MITC - Marble Falls?

Senator Bivins: Yes.

On motion of Senator Gallegos and by unanimous consent, the following remarks regarding **HB 1** were ordered reduced to writing and printed in the *Senate Journal:*

Senator Bivins: Thank you Mr. President. Members, this is the General Appropriations Act, the Act that all of us have worked so hard on all this session. I would begin my remarks by something I said earlier to Senator Shapleigh. It is my belief that Texas enjoyed a great ride in the '90s. We had an economy that was on fire. We had tax revenues that were coming in at record rates and we were able to fund a lot of programs that we'd never been able to fund before. But in the beginning of this new millennium, we've seen an economic downturn. We've seen our tax revenues dwindle, plummet, in fact, so badly that the Comptroller has projected a record revenue shortfall for the upcoming biennium. And this budget, in my mind, successfully identifies core services that we all agree must be funded in attempts to economize by cutting costs in other areas and attempting to maximize nontax revenues. A few of the highlights of this bill, that I think are important for you to remember, in a time of record revenue shortfalls, this bill will provide $1.3 billion of new revenue for public education. That's $1.3 billion of new state revenue for public education. That, I think, is quite an accomplishment. The bill is $500 million over the House, in terms of funding for higher education. The higher education funding amount is within, I think, in general, community colleges, baccalaureate schools, and health-related institutions within about three and one-half or four percent of the funding levels for this biennium. In the critically important area of health and human services, the Senate, or the Conference Committee Report works out to be about $200 million over the House appropriations amount, after we had assumed the caseload

reductions that the House assumed, which allowed us to use about $500 million that was not there otherwise. The bill fully funds the Frail and Elderly Program at a functional score of 24, a very high priority of Senator Zaffirini and many of you on this floor. The bill also funds the CHIP, the Children's Health Insurance Program, at an eligibility rate of 200 percent of the federal poverty level. In this bill, we do not recommend, or do not require the closure of a single state school, or a state hospital in Mental Health and Mental Retardation Department. The bill actually increases funding for highways in Texas, Senator Shapleigh, so, because we were able to draw down more federal funds for highway funding, and we do all this by reducing spending in areas that we have agreed are noncore spending areas, and focusing available dollars on those core areas. Now let me talk about the bottom line for just a minute. The all-funds number that this bill will appropriate is for the two-year biennium that begins in September of 2003, is $117.4 billion, which is a slight increase over the current budget, mainly because of the increased federal funds that I mentioned just a moment ago. The general revenue appropriation in this bill is $58.2 billion, which is a reduction of over 10 percent from the projected spending levels for state funds. The number we've talked about for the budget has been around 59. 9. So you might logically ask, what's the difference. Did we come back with a number substantially lower than this bill as it was appropriated out of the Senate? And I will represent to you today that we did not do so. If you look at various accounting mechanisms, and you have to look at House Bill 7 and House Bill 1 together, I would submit to you that we funded $500 million in House Bill 7 that was for TRS-Care supplement that was originally in the bill, in the general revenue appropriation that came out of the Senate. There is a deferral of $800 million for the Foundation School Program which defers the last payment by five days into the next biennium, which will make that number appear $800 million lower. We adopted the revised caseload estimates for Medicaid, which I mentioned just a moment ago, which freed up $524 million. When you add all these factors into the equation, we are very close, I think, within a $100 million of the number, the GR number that we used coming out of the Senate. You each have a summary sheet on your desk that the LBB, who has done yeoman service in this project, has placed there, and I would point you to just four charts. On page 1 of that summary, at the top chart shows an all-funds pie chart that very well lays out the source, the GR, GR dedicated, federal funds, and other funds. On page 2 of their handout, in figure number 3, there is a pie chart that reflects funding by funding source, general revenue, federal funds, etcetera. Then there is a table on page 3 of the handout that is the all-funds chart which reflects the conference committee recommendation of $117.4 billion. And finally, on page 4, there's a general revenue chart that shows how each article is affected by the general revenue appropriations. Now in talking about this process throughout the session, we all know that with $54.1 billion in available revenue, and no prospect of a tax bill, we had to focus our efforts on finding additional revenues to fund core services. We did that in the following way. First and foremost, we all read this last week about federal funds that were coming from Washington to the State of Texas. There's basically $604 million of unrestricted federal funds that we can use as a method of finance to help us balance this budget. We appropriated the TRS-Care solvency piece out of the Rainy Day Fund, which I just mentioned, which is $550 million. With the TIF balances, the

Medicaid credit that we got from the Comptroller coming into this biennium, there's about $550 million, GR dedicated funds for certification, $400 million, total return, which we just passed the constitutional amendment for, $275 million, the TIF extension, $250 million, the transportation bill that Senator Ogden has on the floor today, $138 million, sale of surplus state property, $150 million, gas and other sales tax loopholes, that bill would raise $50 million, the multistate lottery, $100 million, and other revenues, $240 million. So there're a number of revenues, nontax revenue measures that form the basis, or the method of finance for this budget. And then in the area of major reductions, I would point you in Article II to the decision to delay the implementation of Medicaid simplification. Instead of going to a 12-month eligibility, we stay at six months for two years; that will save money. We move CHIP enrollments back so that there is a waiting period to enroll in CHIP, just like any other regular health insurance program that you or I would buy in Texas. We adopted a preferred drug list, which will save, I think, about $140 million in the Medicaid and CHIP programs, and other entitlement programs where drugs are a part in Texas. The restructuring of the health and human services benefits for Medicaid, ERS, TRS, and CHIP are all in pieces of legislation that have either passed or will pass, hopefully today, that save money. In the area of education, the Foundation School Program payment delays are an $800 million savings that is a cost that we will not have to recognize this biennium, and I would point out, once again, it is not a loan that we have to repay. It is a one-time benefit that we can take advantage of this biennium, and continue until we're in good enough shape to decide on our own whether we want to pay it back. And, finally, the use of unexpended or unexpected local property tax values to fund public schools, basically, this would just allow the state to anticipate the property value increases that currently have been dealt with by a settle-up process so that we can get the benefit of some property value increases, about $300 million, in our Foundation School Program in this biennium. Members, there are a host of other issues that I could talk about ad nauseam, but let me, at this time, stop and I'll be happy to attempt to answer anyone's questions on the motion to adopt the Conference Committee Report for House Bill 1.

Senator Hinojosa: Thank you, Mr. President. Senator, I know that you all have worked very hard to put a budget together within the means of the revenue that we have available, but, as you well know, I really don't like the budget because I feel that it does a lot of damage to all Texans. One of the things that I want to ask about is public education. Did we reduce the amount of money, in terms of percentage of the whole pie, for public schools?

Senator Bivins: Senator, if you will look in, I think, the LBB summary chart, I was looking at this last night and I've got to find out where. I think the general revenue analysis on page 4 of the LBB summary chart, if you look at Article III, it does show a reduction in public ed. and higher ed. And I think it's fair to represent to you that that reduction has reflected more of the cuts to the Texas Education Agency than any schools. As I pointed out, in the Foundation School Program, we anticipate appropriating a billion, $200 million of new funds, and about $115 million of facilities funds. And you'll be happy to know, Senator, that initially, the idea was to do just the Existing Debt Allotment, the EDA, but a decision that the conferees made was that the recommendation, actually we're going to do this in House Bill 3459, would be to do

about 80, I think it's, sorry, no, $95 million of EDA in the first two years of the biennium and then $20 million of IFA in the second year of the biennium, so there will be some IFA money in there.

Senator Hinojosa: Well, you know, for the last 10 sessions, that I can remember, we have cut public education to the point that we shift more and more of the cost to the local property taxpayers. In the present budget, not the one we're debating right now, but in the present budget that's in place, the state pays, I think, about 46, 48 percent of total cost to public education. This budget you're proposing, House Bill 1, reduces that to about 40 percent of the total share of financing public education. How are we going to make up that difference?

Senator Bivins: Senator, I'm not sure if that percentage is reflective of the new state funds. Somehow, I don't think it is. Let me turn to staff real quick. I'm sorry, Senator, I don't have that answer right here, but, it's my understanding that if we had done nothing, the state's share, clearly, would have gone down, but with the billion two of new money, I think, if anything, the state share should increase.

Senator Hinojosa: Well, I beg to differ, I think it's gone down, percentagewise. Let me give you an example. We didn't put any new money to buy and update textbooks, is that correct?

Senator Bivins: I'm sorry, Senator?

Senator Hinojosa: We are delaying the purchase of new textbooks to update the present textbooks, textbooks that we have in our school system.

Senator Bivins: There was proposed to be an acquisition of about $600 million worth of textbooks in the upcoming biennium. This bill contemplates the acquisition of about $420 million of textbooks. So, yes, there are some textbooks that will not be purchased in this biennium. The goal is to purchase, have a book in every student's hands that needs it for our accountability system.

Senator Hinojosa: Well, now, we also reduced the amount of money, or the state's share, that we pay for health insurance for teachers under House Bill 1. Is that true?

Senator Bivins: I'm sorry, Senator, I was talking to other, I will pay attention only to you. Would you ask that question one more time, I'm sorry.

Senator Hinojosa: Thank you, Senator. We had, last session we passed legislation to fund health insurance for teachers and help them apply for coverage. And we paid a thousand dollars of the share for health insurance. Now under House Bill 1, we're reducing that by half, is that correct?

Senator Bivins: That is correct, Senator.

Senator Hinojosa: And who is going to make up that difference?

Senator Bivins: Well, what the conferees agreed in 3459 that we would do is make that reduction a one-biennium-only reduction, again, consistent with the theory that we're in tough times now, but we wanted to keep our promise when we can.

Senator Hinojosa: So I guess what it really means is that local folks have to pay for it.

Senator Bivins: If they choose to, they may, Senator.

Senator Hinojosa: Well, the other thing that concerns me about this bill is that we do a lot of cuts in health care. Right now, we fund part of indigent health care systems throughout the state. Hidalgo County is one of the poorest counties in the state. Under House Bill 1, we're shifting, through all the cuts, about a $174 million to the County of Hidalgo. How do we pay for that? By local, local property taxes, taxes.

Senator Bivins: Senator, I'm not aware of the burden put on every county in Texas. I do know that we all are under stress, financial stress, because of the shortage of revenues.

Senator Hinojosa: Well, let me put it a different way. Statewide, are we cutting any children from enrolling in CHIP?

Senator Bivins: No, Sir. Every eligible child will receive CHIP or Medicaid services.

Senator Hinojosa: Well, did we change the eligibility rules?

Senator Bivins: The eligibility for CHIP has stayed the same. It's at 200 percent of the federal poverty level.

Senator Hinojosa: So you're telling me that there will be no reduction, the number of children who'll qualify under present law for enrollment in CHIP's program.

Senator Bivins: Senator, if they are no longer eligible, they will not be served, but the eligibility requirements are the same as we have had. People move in and out of eligibility all the time. That's one of the reasons it's so costly and time-consuming.

Senator Hinojosa: Well, let me rephrase it then. Will there be a reduction in the number of children who qualify for CHIP?

Senator Bivins: I think there is a slight reduction in the number of children that qualify for CHIP, and that has to do, and Senator Zaffirini could probably help me better with this, but I think that has to do with some of the technical requirements with regard to income disregard and assets tests that we adopted, that would be a new criteria and for eligibility in CHIP. If you're between, I think it's 150 percent and 200 percent of poverty.

Senator Hinojosa: So there is a change in the criteria for eligibility.

Senator Bivins: There is a slight change, Senator. That is correct.

Senator Hinojosa: Also are we reducing the number of women who are eligible for prenatal health care?

Senator Bivins: I would have to yield to Senator Zaffirini.

Senator Zaffirini: Will the Senator yield?

Senator Bivins: I'm sorry, Senator Ogden just was whispering that, yes, there is a reduction, but we're attempting, like in a lot of areas, to restore that eligibility level in our priority intent rider with regard to the federal funds, the federal matching funds that we're getting, about $710 million, I think, for that purpose. But, I'm sorry, Senator Zaffirini, I would yield.

Senator Zaffirini: Thank you Mr. Chairman. Senator Hinojosa, earlier on your desk, you, someone, placed, one of the sergeants, placed my latest charts, and if you look around your desk, I know you don't have much on your desk to look through, but you received the latest charts based on the Senate's priorities in Article II. And if you look through, those charts, you will see exactly what the conference committee restored, relative to the selected priorities of the Senate. And then, in a different chart, we showed exactly the client impact, by program, related to our priorities and the GR dollars that were restored, above HB 1, and then all funds in millions. And in a third chart, what you will see is what was not funded in the Conference Committee Report. Now CHIP was not among our priorities because CHIP had been funded in the Senate. So the charts were based on the priorities that weren't funded when the Senate considered the bill. That's why CHIP is not on those charts.

Senator Hinojosa: I see.

Senator Zaffirini: But then the House had CHIP at a 165 percent eligibility, and I'm glad to tell you that in the Conference Committee Report, the House went with the Senate, in terms of 200 percent of the federal poverty level.

Senator Hinojosa: Yeah, well, I'm sure it's like comparing this, is probably the lesser of two evils, so to speak. But one of my concerns is, are we losing any federal monies by the cuts we've made in health care.

Senator Zaffirini: Well wherever we reduced GR in a program that was a matching program for federal funds, federal funds were also reduced. However, in the area of CHIP, what was so good is that the House went with the Senate back to the 200 percent of the federal poverty level. And in House Bill 2292 they had a provision in there that would've made the six-month eligibility for CHIP permanent. And I'm delighted to tell you that the conference committee for 2292 restored the floor amendment that we had adopted in the Senate and made that temporary, because what the conference committee was trying to do was what the Senate was trying to do earlier, and that is, keep CHIP and Medicaid as parallel and as consistent as possible. So when the decision was made, by virtue of our passing Senate Bill 1522, not to go from six-month eligibility for Medicaid to 12-month eligibility continuous coverage until, initially, June of 2005, then later, September 1 of 2005. To be consistent, and to be parallel, we made a similar change in CHIP. CHIP had a continuous coverage of 12-month already, so we went from 12-month back to six-month for CHIP, so that CHIP and Medicaid could be identical. Now, with those changes, there will be some children who do not qualify for CHIP. But everyone who is eligible under the criteria for CHIP will receive services. The difference will be that some children and their families change, in terms of their status related to eligibility. So, if they are not eligible, they will not continue to receive the services. If they are, they will.

Senator Hinojosa: One of the things that–I haven't served on appropriations for three sessions–we always got criticized if we left any federal funds on the table. And I guess my question is, did we leave any federal monies on the table.

Senator Zaffirini: Yes, we did.

Senator Hinojosa: And how much was that?

Senator Zaffirini: Well, it depends on the program. You'll have to go through and look at the programs and see how much, there's no one ballpark figure that I could give you, but we did leave some federal funds on the table, because we did not have the GR available to bring down those federal funds.

Senator Hinojosa: Well I really would like to have, maybe staff put together, a total number as to what we left on the table, because we didn't fund some of these programs.

Senator Zaffirini: Well if you look at those charts, Senator, you'll get a better idea, and you will see it because we have a total for the GR and a total for all funds. And we tried to be as specific, really, I believe strongly in truth in advertising. I'm not going to cover anything up. And that is why we have a chart that identifies the priorities of the Senate that we could not identify. But remember, Senator, that I proposed a cigarette-user fee increase of one dollar. And I polled the Senate floor, and we could not introduce the bill in the House, but I polled the Senate in case I could attach an amendment to a bill. We did not have the votes. If we had had the votes and secured a cigarette-user tax, we would've had $1.5 billion, and we would've funded all of these priorities. But, quite frankly, this was the most excruciating experience I have had in the 16 years of the Senate. We did not have enough money to fund our priorities. And without that available revenue, we did the best we could. And I'm here to tell you, Senator, just face to face, that the budget that you see before you, with the Article II that you see before you, is significantly better than what the Senate passed initially. And that Senate bill was significantly better than what the House had done. So, we have accomplished much.

Senator Hinojosa: And that was due to your hard work and I appreciate that. I think I just want to make a couple of points, only because I heard Governor Perry say that, and he would, Senator Bivins, that we had the strong economy for the last 10 years. Even the Comptroller said that we went on a happy spree of spending. But when you look at the actual spending that we have in our state, when you adjust population growth, inflation, we have increased, on the average, 2.8 percent in our budget. We ranked number 50 in terms of expenditures per citizen. We ranked 48th in terms of tax effort. And this bill, in its present form, if we ran the numbers, Senator Bivins and Senator Zaffirini, it's going to cost my county $198 million in Medicaid alone. It's going to cost Nueces County, out of Corpus Christi, $59 million just in Medicaid cuts alone. So, of course, I'm not a happy camper. And I know you've done a good job in trying to make ends meet with what we have.

Senator Zaffirini: Senator Hinojosa, you're not alone. We can go district by district and make similar comparisons. But if you find those charts, and if you don't, we will get you another set, and I'll ask my staff right now to take a set over to be handed to you. But there are three charts, plus an intent rider. And if you look at chart 1 of 3, the Status of the Senate's Selected Priorities, and the conference committee Report for House Bill 1, Article II, in priority order. And on the last page of that chart, on page 10, you will see that clients were restored by the conference committee from the Senate version, the Senate version of House Bill 1, that number is 448,999. That is amazing. Four hundred and forty-eight thousand, nine hundred and ninety-nine were restored in terms of one service or another, and these are itemized there. Clients

restored by the Conference Committee Report from House Bill 1 Engrossed, as it was passed by the House, 69,353. And the dollar amount in millions restored was $230.9 million. Again, that money brought down additional federal funds. So that, in and of itself, is significant work, Senator. And I will tell you where the greatest difference was. And that is that the Senate did not have the revenue to fund prescription drugs for the elderly, for the TANF, for people with disabilities. The Senate did not do that in our bill. And when the Senate chose to go with the Medicaid caseload predictions of the House, we then had an additional $524 million available on the Senate side. And we use that money to provide prescription drug coverage for 208,743 elderly and persons with disabilities. And in addition to that, to restore prescription drug coverage for 140,149 TANF families, and that's where we used that money. We used it there and elsewhere. That's where we made a difference. Now, to be perfectly frank with you, Senator Hinojosa, when I first developed the list of priorities that was later adopted by the Senate finance committee workgroup, as amended, and later adopted by the Senate finance committee, as amended, and later adopted by the conference committee workgroup, as amended with the House, CHIP was number 15 on my list of priorities, on the initial list. But because CHIP was the number one priority of the Lieutenant Governor and of the Senate, we funded that before going to the other priorities. And that is how we were able to maintain the federal poverty level of 200 percent, because we funded it before we addressed all of these other priorities. But if you look at the list, it's, frankly, unbelievable that we were able to restore as much as we did.

Senator Hinojosa: Senator Zaffirini, I know that the budget came out much, much better improved, out of the conference committee meetings, due to the hard work by all Members, but especially you in health care. But as a citizen of the state, I get concerned. I get concerned because we spend more money, per day, on a prisoner in the criminal justice system, to lock him up, than we do in terms of general services to a citizen. And that's hard for me to accept and deal with, in terms of how rich we are as a state, and we are not looking on a long-term basis. We're being very shortsighted, and I'm not talking about us here in the Senate, but certainly, sometimes we need to look in terms of what do we expect in the future. This piece of legislation, House Bill 1, is going to cost us millions of dollars because we're not taking care of preventive health. We're not taking care of teaching our, keeping our kids in school. Where the cuts are so drastic in many areas, that I don't see how I can go home and tell them that we did a good job, in terms of appropriations. Yes, we softened some of the blows, because of hard work in health care, but still, some of the cuts that are being made are going to cost us three times as much than what it would cost us now if we took care of it now.

Senator Zaffirini: But, Senator, we had to deal with the available revenue. And the Senate took a bold stand under the leadership of the Lieutenant Governor in identifying $6 billion in nontax available revenue. We succeeded in some of the areas, but not in all, so we did not have the revenue that we needed to fund all the priorities for the State of Texas. Now I frankly intend to vote for this budget, and I will vote for this budget. And I believe that it is significantly improved, especially in strong areas such as Article II. But do I wish we had had more money? Absolutely.

Senator Hinojosa: Well, I just want to make sure that when my counties get their debt bills from the cuts that we made up here, and they go bankrupt, that we'll be ready to come back.

Senator Zaffirini: Right.

Senator Hinojosa: And find a way to bail them out.

Senator Zaffirini: Senator, if you look at it, it's not just about general revenue. A lot of the changes that we made focused on restructuring. For example, I know that you recall that when the Senate passed the bill initially, we were most concerned about persons with disabilities not receiving all of the services that they had. The Senate version started with a functional need score of 29 for persons with disabilities who receive services. Current services are provided for persons with a functional need score of 24. The Senate lowered the 29 number to 26 when we passed the bill. The House was at 29. In conference committee, after we went with the House's Medicaid caseload projections, we used some of that money, and additional money made available to our committee by Governor Dewhurst, another $125 million, we restored the functional need score to 24. So that would be at current services. But we couldn't afford status quo, so what we did is single out priority one clients to make sure that they received all the services that they are currently receiving, directed the agency to redevelop their assessment tool, and now what we're going to do is reassess every client, and some of the hours will have to be reduced up to 15 percent. So our priorities for the future include restoring the reduced hours for persons with disabilities who need assistance. But the other thing that we did, Senator, in addition to the money that we appropriated and that we hope will be approved today, is that we provided a rider of intent for the federal funds money that were announced last week. And so we have a rider of intent saying that our priorities for those federal funds include restoring the provider rates that were reduced, restoring the hours that were reduced for persons with disabilities, and, beyond that, listing programs in bill pattern order so that they, too, can be restored. And I am very confident, Senator, that those will be funded.

Senator Hinojosa: Senator Zaffirini, you remember, you recall, many times we looked at the studies that are made concerning health care. For every dollar we invest, we save three in the future.

Senator Zaffirini: Yes.

Senator Hinojosa: What's going to happen now is that for every dollar we reduce health care, it's going to cost three times as much in the future. And I'll let somebody ask questions. Thank you very much.

Senator Zaffirini: OK, thank you so much, Senator. Thank you Senator Bivins.

Senator Bivins: Thank you Senator Zaffirini.

Senator Wentworth: Senator Zaffirini, I heard you say that you had polled the floor and there were not the votes here. My recollection on your report to me was that there were 17 votes in favor of the tax, and 19 votes in favor of a referendum on the tax.

Senator Zaffirini: That was at one point, Senator. At one point, my initial poll was 17 in favor of the cigarette-user fee and 19 in favor of a referendum. But times change, people change, situations change as we have learned this Session. And so, the day that we considered amendments to House Bill 2292, I had those two amendments. They were Amendments 31 and 32, and withdrew them because I realized I did not have the votes. Then, Senator Gallegos took those two amendments, whited out my name, added his, and proposed the same two amendments. And as you recall, those two went down. So I knew that at that point in time, I no longer had the votes.

Senator Wentworth: They went down, Senator, on a voice vote. There was no record vote on that, and I want the record to reflect that I did not change. I was one of your 17 and I remain there.

Senator Zaffirini: Correct. Now, Senator Wentworth, I want you to know that that is still at the top of my agenda, and that I will continue to promote a cigarette-user fee of one dollar per pack. And I look forward to working with you.

Senator Wentworth: Mine, too.

Senator Zaffirini: Thank you.

Senator Wentworth: Thank you.

Senator Fraser: Senator, if I could, I'd like to make a clarification, and I would reference you to page III-141 in the bill.

Senator Bivins: All right.

Senator Fraser: And I can tell you the reference on it has to do with Texas Tech Strategy C.3.2, having to do with the MITC. It says Fredericksburg, and there is an appropriation of $437,500 per year of the biennium. And I believe the intention was that the word would not have been Fredericksburg. The issue is that there's two MITCs in the Hill Country that have common administration. There's one in Fredericksburg and one in Marble Falls, they're both in my district. They have a common administration, and they're operated together. The word here says Fredericksburg, and we were going to clarify that the intention was to put in Hill Country instead of Fredericksburg. And I would ask clarification that it is your intent that the money being appropriated is for the MITCs, for the common of both Fredericksburg and Marble Falls. Is that in your intent?

Senator Bivins: It is my intent, Senator.

Senator Fraser: And, if possible, I'd like those comments to be put into the records of the legislative intent.

Senator Bivins: Thank you, Senator Fraser.

Senator Fraser: Thank you.

Senator Shapiro: Thank you very much. Chairman Bivins, obviously, my question's going to kind of be related to education.

Senator Bivins: OK.

Senator Shapiro: I'm really trying to look for some legislative intent. I think I know what the answer is, but I prefer not wondering and making absolutely clear that when we determined that we were going to give each student, per WADA, $110 that there is not anything in that decision that is relevant to Chapter 41 districts that separates them from any of the others. Now let me be clear as to what my question is, because there seems to be some discrepancy in this. Chapter 41 districts, as you well know, do not receive funds from the state, other than the distribution of the Available School Fund and, of course, that's required by the constitution on a per capita basis.

Senator Bivins: Right.

Senator Shapiro: Given the fluctuations in the value of the Permanent School Fund, and the textbook purchases, the money that's available in the Available School Fund changes from year to year. And I want to ensure that your intent for Chapter 41 districts who receive the ASF distribution, to which they are entitled under the constitution, plus, the $110 WADA that the budget allocates for fiscal years 2004, 2005 does not change their distribution.

Senator Bivins: Right, I was just checking with staff to be sure that I can agree with your question, and the answer is, there is the ASF issue and that money is counted first, and after that, then the guarantee of the WADA distribution would afford to all school districts.

Senator Shapiro: But will the ASF amount that goes to Chapter 41 districts diminish because of the $110 WADA?

Senator Bivins: It should not, no, Ma'am.

Senator Shapiro: OK, so your intent, your legislative intent is the ASF stays the way it is, per capita.

Senator Bivins: Right.

Senator Shapiro: It is not diminished in any way by the $110 WADA that goes across for this new money.

Senator Bivins: That's correct, Senator.

Senator Shapiro: Excellent. Thank you very much.

Senator Barrientos: Senator Bivins, I am looking at, I suppose this was passed out by Senator Zaffirini?

Senator Bivins: Right.

Senator Barrientos: The side-by-side. Do you have that handy?

Senator Bivins: I do.

Senator Barrientos: This shows a document which states clients restored by the conference committee, and it's got 17,000 there and then 53,000, and the next page, clients restored, so forth, then partial restoration, clients restored. What I want to know, Senator, is what was not restored.

Senator Bivins: Well, I'm sorry, Senator Zaffirini prepared this chart and she would probably be better prepared to answer than me, and I apologize, and I notice that now she's in a conversation with a highly privileged person. And, if you had another question, maybe we can come back to her in a minute, and I'd be happy to answer any other questions you might have for me.

Senator Barrientos: OK, maybe you can answer this. It says clients restored.

Senator Bivins: Right.

Senator Barrientos: To begin with, we started as one of the measliest states in the Union on how we treat the infirm, the elderly, mental health, mental retardation, etcetera. But the word restored in all of this makes it appear to the media, to the general public that we're OK. We fixed everything. We've restored. Am I barking up the wrong tree, Senator?

Senator Bivins: No, Sir. I think that you are accurately identifying the overall problem, which is we're in rough, rough times. And thanks to Senator Zaffirini's work, really, almost single-handedly, she got the agencies before we came off the Senate floor with our bill, and then out of conference committee to work to reprioritize expenditures so that some of these clients that are listed on her list in priority order, that may not have received services. For example, in that first page, those clients, there are 17,000, evidently, in the Senate bill that would not have received services, and 53,700 in the House bill that now will receive services, because of the actions of the conference committee.

Senator Barrientos: Well, I know you have worked very, very hard. I was there all the way along, from the second week in January until today, Senator Bivins, and I applaud you for that very hard work. It just concerns me greatly that a very clear picture should go forth to the people of Texas on the money that we have and do not have, and the services that we provide and will not provide, in the number of state employees that we're going to lay off, or the ones we're going to keep, in what the individuals have to pay out of their pockets for co-pays, etcetera, etcetera, that we send out a clear message here, and don't wear out our shoulders by patting ourselves on the back.

Senator Bivins: Yes, Sir, thank you.

Senator Staples: Chairman Bivins, I certainly appreciate all your efforts and Senator Zaffirini and the entire conference committee and the entire Legislature. I know we've all wanted to make the most of what we had to do with on these limited means. I want to go back to the area of public education one more time.

Senator Bivins: All right.

Senator Staples: The enrollment growth is fully funded, and that is outside of the additional $110 per WADA, is that correct?

Senator Bivins: Yes, Sir, that is correct.

Senator Staples: So we met our funding formulas and what we're doing with the $110 per WADA is new money of about $1.2 billion that goes into the system.

Senator Bivins: That's correct, Senator.

Senator Staples: And while we were able to maintain some of the pass-through for teacher, the health care benefits, we certainly weren't able to do it all, and I know that was part of the entire budget process. But what I'm going to, the money that is flowing through, based on the $110 per WADA is unrestricted funds.

Senator Bivins: That's correct, Senator.

Senator Staples: So if a school district, if the funding formulas met the school district's needs for enrollment growth and the other changes that they have in spending structures, then this $110 is new money and there's nothing that would prohibit a school district from attributing a portion of that new money to meet that need for teacher health care, if their internal structure would allow that.

Senator Bivins: That's correct, Senator.

Senator Staples: OK, well, I just think that's an important concept, in that we are placing the 1.2 billion in new dollars, although that is not directed to be spent on that issue.

Senator Lucio: Thank you Mr. Chairman. Members, I rise today to thank Lieutenant Governor Dewhurst, Chairman Bivins, and Vice-chair Zaffirini for all the work they've done on this particular bill, and the Members of the finance committee. This is my eighth budget, Chairman Bivins, that I've been involved with since 1987. And, you know, I, very different situation that we've been in that we have here than from years past. Shifting the burden for state services to local communities, especially mine, where you have the lowest per capita income in the state and the highest unemployment in the state: it certainly worries me quite a bit. I know you did your best with all that you could do with what you had. In fact, you did better, according to Senator Zaffirini. You lessened the severe cuts that were originally proposed by the House, and for this I am grateful to each one of you. For I have, arguably, the poorest district, as I mentioned, in Texas, and my constituents will be impacted most by these cuts, and that really concerns me. But, Members, let's not, as Senator Barrientos said, let's not congratulate and rush over to pat each other on the back, because this budget, really, does not reflect where we've been in the past and where we should be in the future. I cannot overlook how many children will not be eligible for health insurance and how many senior citizens will not receive the care they deserve. That's a major, major concern for me, because as I've mentioned many times, being pro-life doesn't end right there, Senator. It means that we have to take care of them after they're born as well, and not turn our backs on them. None of us have those exact figures. I don't know how many people will be impacted. I walked over to talk to Senator Zaffirini's staff to see if I could have a breakdown of districts, senatorial districts, in terms of the impacts that we're going to see in our districts on health care, especially. And only time will tell, quite frankly, how that works out. But even if one child, and you'll agree with me, and only one senior citizen, Senator, even if there's one child and one senior citizen that we cannot serve, I think we fail. Our President, George W. Bush, signed into law last year, and I quote, Leave No Child Behind Act, an historic piece of legislation written to ensure that we educate every child in America. But have we accomplished that with this budget? Those are the questions that I ask. Have we, in this budget, Senator, made sure that we look forward to establishing and constructing

the school facilities that our children need, so they can have an environment that they will be able to learn in and be comfortable in? I learned yesterday that Comptroller Strayhorn has closed the enrollment for the Texas Tomorrow Fund because of the uncertainty of Texas' ability to honor future contracts. I don't know, Members, only time will tell. We have heard so much about how much government has grown over the last decade, and it has, and how much taxes are overburdening our taxpayers. Members, did you know that we have not raised sales taxes since the 71st Legislature back in 1989? Even then, it was only a mere quarter of a cent. The last time we raised the franchise tax was the 72nd legislative session. We really have not had any tax increases, to speak of, for the last 12 years. In fact, just a few sessions ago, you know, that we actually gave back a few million dollars to the property owners of our state. I was part of that, and I voted for that. Times were good. During that same period of time, from 1990 to 2000, the population increased by more than four million Texans. With the largest increases in population occurring along the Texas-Mexico border, Senator Bivins. Yet, we had no tax increases. In fact, we gave billions of dollars back. So, basically, the wonderful economy of the 1990s carried us at that time, not the tax increases. We were able to fund colleges, provide insurance for Texas' children, and raise our teachers' salaries, plus, enact a host of other programs that affect all Texans. But now, the bubble has burst. Do we go back to those people that we gave billions in property tax relief, and say, hey, times are tough now, can you help us till we get back on better times, or back to better times? Of course, the question's no, I mean, the answer's no. We just tighten our belts and prioritize the needs of the most vulnerable and needy of our citizens. And I happen to represent so many of those. Unfortunately, we must cut back on all the progress we made in the 1990s. I am not going home and brag about this budget, Senator. I can't, because, honestly, there's not much to brag about. Not that any one of us cares about polls, what polls say, but poll after poll said that Texans supported tax increase on cigarettes, which was mentioned a little while ago. One that would have brought in over a billion dollars that could have been used to ensure that all the children of Texas have access to affordable health care, or all Texan students access to a college education in NextStep. That would have ensured that all our senior citizens that had paid taxes in their entire lives would have some kind of security in their golden years. But that has not happened. But we did not even give it a strong consideration, unfortunately, and that's what really concerns me. Now poll after poll showed that the people of Texas, our constituents, Members, supported closing a loophole that allowed Texas companies to get around paying their fair share of the franchise tax. We didn't even talk about that. Closing this loophole would have brought in hundreds of millions of dollars, yet it is not even given any serious consideration. I hope that this Legislature can ask the leadership to do something about that between now and next session, to look at equity and how companies pay taxes in this state, compared to other states. I have read with the passing, that with passing of this budget, Senator, almost 10,000 state employees would lose their jobs. And I ask, what about them, Senator Barrientos? In fact, during the 1990s, when some state agencies experienced a turnover rate well over 20 percent, those employees stayed. Many stayed even when the computer industry was luring people with higher salaries and fancy buildings. Why did they decide to stay with government, was what I asked myself. What an opportunity to make more money. Why? Because they had

the same desire that we have in this room, to be public servants and to make a difference in the lives of Texans that they serve, that we serve together. These employees are the backbone of the state. Without them, we could not do our jobs. Not at all. Some stayed because of job security and great benefits, but almost none stayed because of their salary. How are we rewarding this loyalty today by telling almost 10,000 of them, Senator, sorry, but you cannot stay any longer. We don't need you. I would like to ask the directors of every state agency to look at every possible angle before you let go even one of these state employees. I read with interest, Senator Bivins, recently about 3,000 school teachers in Portland, Oregon, whose district was faced with the same dilemma we are facing today, a shortage in revenue. There was talk about cutting positions and programs in the district to meet the shortfall. The teachers union took a bold step, and, I mean, truly bold; they voted to take a 10-day, unpaid workdays a year off. Ten days without being paid. By this action, the school district was able to avert any layoffs, reduction of programs, cuts in insurance to the employees, and they even got a one percent pay raise. It all sounds too good to be true, but they're doing it somewhere in the country. So, I'm asking that every state director, every agency director look at what they're doing in Oregon and other parts of the state and any other ways to divert layoffs. The daily state payroll, excluding higher education, is about $35 million, I'm told. If every state employee in Texas took 10 unpaid days of vacation a year, perhaps one day a month, it would save the state almost $350 million a year. Cutting 10,000 jobs with an average salary of $32,000 a year in benefits would total about $350 million a year, Senator Bivins. I know it's not that simple. I'm just asking that we have some compassion for those loyal state employees that stuck with us during the good times and who are working hard with us during the worst of times, today. But it's more than just people having a job. They actually provide services to our citizens and they are a big part of our communities that they live in. They pay taxes. They shop in stores, put their kids through school, take care of their elderly, all while working to provide their fellow citizens with needed services. I understand that one state agency's already doing this, and I'm glad to hear that. Asking their employees to take one day a month off to meet their projected cuts in their budget next year. I hope others do the same, Senator. Yes, Members, this budget can conceivably meet a projected $10 billion shortfall with no new taxes. But at what price, and at what cost to human lives, and what will it cost us in the long run, as Senator Hinojosa mentioned a moment ago. We kept the promise made by some of last year's elections, electioneers, and those running for office: no new taxes. We kept that promise, and we're going to keep it here today. Most of these cuts are not only going to affect the less fortunate, but what happens when we come back in less than two years and face the same problem. Are we going to make more drastic cuts to meet the no new taxes pledge? I promise, Members, that it will start to hit all areas of the state, not just the Valley. Perhaps it is time to go to annual budget sessions to avert what happened this session, the math scrambled to make ends meet. I will be back next session, Senator, and I hope that I can file a, and I plan to file legislation. I hope we can work at proposing annual budget sessions where we can maximize federal dollars. I also plan to be back next session to fight to restore the cuts that we are making today. By the grace of God and the efforts of a lot of hardworking Texans, perhaps we will be in a more recovered shape financially, and we can put the

word compassion back into our budget. Let me tell you, as far as I'm concerned, Senators, the greatest thing that's happened this year in this session, is you, is Senator Ellis. That's the greatest thing that's happened, because we've got three new lives in the making here. And nothing's greater than a human life. And I want to tell you that if they fall, you've got to pick them up, you must help them, pick them up, because they're totally dependent on us. If they're hungry, we need to feed them. If they're ill, we need to make sure they get the medical attention they need, no matter who they are, or where they live in our state. We must educate them. We must continue to build bridges of opportunities like never before. They're dependent on us to make the right decisions here today. And I think this budget's going to go forward and we're going try to live within our means, and some people will prosper and others will struggle. The people that live in my district, that happen to be poor, might not want it that way, but it happened, and they are. And they look to me for the decision-making that I'm going to be involved with to be able to see if they can have a brighter day. But make no mistake that we do not want to be at the mercy of anyone. We would prefer to live on our feet than die on our knees. We're going to continue to work with the leadership of this state. With you, Senator Bivins, who has done a wonderful job as finance chairman, doing what you can best with what's available there. But, let's not revert our thinking when we talk about, you know, making sure that no one is left behind, and seeing this happen through a budget like this, because, quite frankly, there's nothing here that we can do, except pray and hope for the best that there won't be as much suffering as we think there will be. No one in our state should have to die because he or she cannot afford to live, and that's my concern. Thank you.

Senator Bivins: Thank you Senator Lucio.

Senator Shapleigh: Thank you Mr. President. First, to you, Senator Bivins, you took a tough assignment. You've had some tough ones before in education and the many programs in which you made tough decisions, but this one is the mother of all tough decisions. And to those who served on the finance committee, I learned a lot about my fellow Senators, and it was a pleasure to do that work, as hard as it was, because what shone through was leadership in nearly every subcommittee in trying to solve these issues. To Senator Zaffirini, for your tireless efforts to put money back in this budget and put people back into health care in the State of Texas. With this budget, we mark the passage in Texas from compassionate conservatism to just plain old mean spirit. We faced a choice at the beginning of this session, that every state, every community faced. We had a September 11th event that affected, disproportionately, sales taxes. We had an economy that affected another bundle of taxes and we had declining revenues. Yet, every governor and every mayor faced it with a combination of common sense, savings through administration, efficiencies, cuts to certain programs that were nonessential, and revenues. Frankly, every other state made the choice to go raise revenues and put them in this budget, and I'm not talking, Senator Whitmire, about the chain gang revenues. In New York, the Legislature there had a governor who said, no new taxes, and they overrode his veto 121 times when they put money into the budget to cover central programs in children's health insurance, Medicaid, and education. That was their choice. Governor Ratliff told us when this bill came through here that this bill, this budget, was not worthy of Texas. And he said it, I believe, for important reasons, Members. When we came here in January, Texas was

last in the country in what it put in its own citizens. We were 50th in state spending per capita. What that means is in communities like Eddie Lucio's, where a school district has $20,000 per pupil property, and we transfer $170 million of state-funded obligations to the local level, there will be tax increases. When we came here and said, the leadership said, no new taxes, what they didn't say is, we guarantee taxes at the local level. The first casualty of this process has been truth. Because as we come here and make the pledge to Texans at this state government level, no new taxes, in fact, we violate that the minute we get home in September and deal with schools, public school budgets, and community hospital budgets that are going to transfer millions of dollars of cost to those budgets, Senator West, that your public school in Dallas is going to have to deal with, just to fund teachers the way we fund them now, $170 million. And we came here, and we had three and four children that got no mental health services in the State of Texas, didn't have a slot for them, wasn't a place to go get a service, and we told them, the place for you, increasingly, is jail, because in the juvenile justice system, you might get a slot. And thousands of Texas mothers are making the choice to falsify an affidavit and put that child into a juvenile justice slot just to get some mental health services. We have done nothing with respect to that issue, Senator. Texas, number 37 in what it spends on education, number 47 on mental health, number 45 on public health, number 45 in the country on the number of high school students who complete high school, dead last in the country in the number of our Texans that are insured with health insurance. What happened to that Texas? What did we do with respect to those issues? That's why Senator Ratliff said this budget is not worthy of Texas, because we didn't make the investments in Texans so that Texans can lead productive, prosperous lives into the future. Other states made that choice. A cigarette tax is not a radical proposition. Seventy percent of Texans said, let's do it. When the Governor went to Dallas County and talked to ordinary folks about how these were tough times, and Texas faced budget issues, and when the press left, Mrs. Bradley dealt with the issue with common sense. Of course we ought to raise some new revenues. Of course we ought to put some money in the budget. Of course we ought to take care of elderly Texans. Of course we ought to do what's right in CHIP and keep it going and not have 169,000 kids lose CHIP services, which is exactly what's going to happen between now and 2005. That's common sense. That's Texas. That's the way we ought to have thought about this budget. Instead, Members, what will happen in Texas under this budget is 169,000 children in the CHIP program will no longer be covered in 2005, as a result of higher premiums, lost coverage for dental, mental health services, other optional services, and not renewing. When it came to trying to decide what to do in Medicaid cases, there was another casualty: the truth. Because the way we dealt with Medicaid cases is we just said, 500,000 cases disappear. We're going to accept a new caseload projection, different from the one we heard in January from Albert Hawkins about how many Medicaid patients we would have in 2005, and just said, poof, they go away. So, 500,000 folks, Texans, a projected caseload of 2.9 million went away in a decision that took 10 seconds. Is that how we deal with budget issues in the State of Texas? Three thousand kids won't qualify for CHIP or Medicaid, for direct primary services with respect to TDH. One hundred thousand clients will experience a 15 percent cut in the number of hours of service allowed for community care for the elderly and disabled. Eight thousand three

hundred fewer women per month will receive Medicaid maternity benefits. Teacher and retired teacher health insurance coverage, when this hits the school districts of Texas, hold on, because what we're doing is they will lose $500 of the stipend for insurance costs, and retired teachers will pay 33 percent of health care costs that they don't pay today. And school districts will have shifted to them $170 million of cost that they're not paying now. A guaranteed tax increase in the local communities across the State of Texas. Over 168 million fewer state dollars than what was spent in 2002-2003 to state higher education institutions. Members, when we look at what happened in this session, what will be remembered is that a handful of extremists hijacked state government, the state budget, and the future of Texas, in issue after issue, but nowhere more evident than in the budget. To say we will not raise taxes, one dollar on a pack of cigarettes to avoid catastrophic cuts to kids, the elderly, shifts to school districts, and cuts to retired teachers just does not make common sense. If we left this to a referendum of Texans, Senator Zaffirini, I feel confident they'd make the right choice. Why can we here not make the right choice? What has happened in this building, where extremists take a position contrary to 70 percent of what Texans say on the street? When we look back at what is happening in that part of the state that I represent, that Eddie represents, Senator Hinojosa, this budget will cause a recession in Hispanic Texas. When we take the reimbursement cuts, when we shift to the local school districts, and especially the hospitals, when we take the thousands of children that won't get CHIP coverage after this, the border of Texas will be in a recession after what we've done here. This bill disproportionately affects Hispanic Texas. This bill takes Texas back a decade in the progress that we've made. And most importantly, this bill denies the investment so essential to the future of Texas in public education, to the education of our kids. When we look at the real issues of Texas, 50 percent of Hispanic children dropping out of school, not going through the process, not getting educated, Senator Nelson, who's going to pay the pensions of those that you're worried about when we talk about, are we thinking about the taxpayers in this? Who will pay those pensions if our children are not educated? What will happen in the future of Texas if we don't have healthy kids going to school, because we have the worst immunization rates in the country. Members, those are the fundamental issues we didn't deal with this session, and the issues this budget didn't deal with. In February, we all traipsed down to San Antonio and had a big festival, a big gathering for the Toyota plant. Who's going to be the workforce for that plant 10 years in the future, when those kids aren't educated and we don't have skills invested in workers in a knowledge economy? Who'll work those plants? When the Governor takes his Enterprise Fund, $295 million, we didn't fund medical centers in the line item. We left those to this Enterprise Fund, and he looked for companies to come here, the first question they're going to ask, Senator Bivins, is what about your workforce? We spend less money than any state our size, many multiples, in adult education. When he takes a look at what's happening in the public schools, in terms of kids graduating, and kids hitting the mark, companies are going to ask, who's going to do our work? When will our state make the basic investment in human beings that we need to make to drive the prosperity of this state in education, health, workforce, and infrastructure. It didn't happen this session. When will it happen? Now, you say, Senator, I'm a political realist. We've got a choice and that choice was no new taxes, and we dealt

with a $10 billion budget deficit the best we could. Well, we do have a choice. Senator Ratliff laid it out. We can stay here till August, we can stay here till December to do what's right for the State of Texas, Senator Bivins, if that means investment in the future of Texas. When we made the choice not to do that, future generations will ask the question: why? Why did we pass a budget that was not worthy of Texas?

Senator Odgen: Mr. President and Members. There's been a pattern for the last hour, where we thank Senator Bivins for his hard work and then spend 30 minutes telling how sorry the budget is. I have a little different perspective. I appreciate Senator Shapleigh's passion. I think I appreciate his points. I'm not sure I agree with his rhetoric, however. It is true that in this budget, which is slightly more than what we appropriated in all funds two years ago, that we're actually spending more money on health and human services than two years ago, isn't that right, Senator Bivins? Not less, but more, and so, the argument on this floor, which we've addressed, is that it's not enough of an increase to be worthy of Texas. But I think it's an extraordinary effort on the part of this Legislature considering the fact that the Comptroller said we had a $9 billion deficit, to find in our hearts, and in our appropriations bill, more money than we actually spent two years ago. Now when I give graduation speeches, Senator Shapleigh, there is a line in there that I talk about to remind people of why we form governments, why Texas is the way it is. And I say, you know, the unprecedented freedom that you enjoy today was not to guarantee your security, but to give you opportunity. This state has always been about giving people opportunity. And I don't think anyone can honestly say that in this budget we deny people the opportunity to improve themselves. Senator Bivins pointed out that in public education spending, in spite of a $9 billion deficit, we're actually spending $1.2 billion more on public education. And there is nothing in this state that I can think of that the government does to create opportunity for its citizens than public education. And this Legislature, and your budget, and my budget, and Senator Shapleigh's budget, if he votes for it, makes that commitment. In the area of higher education, in the area of education for our medical schools, the cuts are modest. Higher education will continue to be able to provide opportunity for Texans who want to take advantage of it. And because of the efforts of Senator Wentworth and Senator West and Senator Ellis and others we actually increased the TEXAS Grant program by $100 million over last biennium. We are up $100 million. Last biennium, we spent $263 million on TEXAS Grants, and in order to earn a TEXAS Grant, what you've got to do is you've got to graduate under the recommended curriculum in Texas. You've got to maintain a 2.5 average in college. You've got to take 12 hours. And if you do that, the State of Texas will pay for you to go to college. And we added $100 million to that program. This budget continues the promise of Texas that we will give you an opportunity to improve yourself. And I think that we can spend all day talking about the glass being half full or half empty, but this budget was an extraordinary effort to meet the basic needs of Texas. I cannot find any place in this budget where a Texan can stand up and say, I cannot have the opportunity that I ought to have to reach my dreams and pursue my goals. And as a result of that, considering the constraints that we were under, this is a good budget. I'm proud of the work you did. I'm proud of the opportunity that it guarantees Texans. And I'm also proud of the fact that it understands that a Texas economy doesn't come out of recession because of more government spending. The

way you can eliminate a recession in South Texas, or East Texas, or West Texas, it's not more government spending. It's more economic growth. Private sector economic growth. And the problem with the complaint of those who complain about the budget is that the offsetting entry in that budget ledger is higher taxes. Higher taxes will not increase economic growth in Texas. It will not create more opportunity for Texans if we take more of their money to spend on government. And so this budget, I think, has made an honest effort to balance and take care of the legitimate needs of Texas without slowing down the economic recovery that's inevitably going to come in our great state. This budget still guarantees its citizens opportunity, and, Senator, I'm proud to stand up and say, I am for this budget. This is a good budget and you did a heck of a job.

Senator Bivins: Thank you Senator. Your remarks were refreshing.

Senator Barrientos: Thank you Mr. President. Senator Zaffirini, I think that you probably could answer this question, because it's a critical facet of this budget we're speaking about. And we're talking about children. You've heard the statements by our colleague from El Paso, Senator Shapleigh, about Texas having the most people without health insurance, not in the South, or the Southwest, but the whole country. Let's talk about the kids. Years ago, we had no health insurance available to most of them, then we implemented the CHIP program. Under this budget, exactly what are we talking about? And I don't want to hear restoration, I just want to hear cold, hard numbers. Give us a little walk-through.

Senator Zaffirini: Specifically related to the CHIP program?

Senator Barrientos: Yes, Ma'am.

Senator Zaffirini: Well as I mentioned earlier, I don't have the CHIP program detailed in my charts, because the Senate had funded CHIP when we passed the bill. However, I do have in my documents, and if you'll just give me a moment to pull out the right document from the Health and Human Services Commission. The Health and Human Services Commission sent me a report in a summary written by the staff, but sent to me by Commissioner Albert Hawkins, and it's in Article II overview of House Bill 1. And basically, related to CHIP and related to other reductions, he includes these figures. CHIP caseloads are reduced by approximately 122,000 clients in fiscal year 2004 and 161,000 clients in fiscal year 2005, due to CHIP policy changes.

Senator Barrientos: Excuse me. Those were reductions? Could you state that again?

Senator Zaffirini: I'm reading from the document sent to me by Commissioner Albert Hawkins. CHIP caseloads are reduced by approximately 122,000 clients in fiscal year 2004 and 161,000 clients in fiscal year 2005, due to CHIP policy changes.

Senator Barrientos: So, basically, what that's saying, that that administrator wrote, professional person, is that over 200,000 Texas children will no longer have health insurance.

Senator Zaffirini: Well, they're not cumulative figures. The figures are different. There may be some overlap between 2004 and 2005, so I wouldn't total them. But, basically, what he's saying is that those changes reflect the changes in policy, in CHIP.

And those were, in some cases, changes from the policies that were adopted by the Senate when we sent the bill back to the House. For example, we maintained eligibility at 200 percent of the federal poverty level, but we reduced the continuous coverage from 12 months to six months. And, because of that change, there are many children who will no longer be eligible for CHIP. So the reason that they are losing the services is that they are no longer eligible. When you maintain the eligibility for 12 months, then the children continue to receive the coverage whether their families are eligible or not.

Senator Barrientos: OK.

Senator Zaffirini: So they will lose the services because they will no longer qualify, and in some cases, there are those who will not come back and reapply. In addition to that, the other policy that was changed in the Senate and in the House, is we have a three-month delayed enrollment. In addition to that, we have minimum benefits for children from the ages of zero to 18.

Senator Barrientos: Senator, excuse me for interrupting. In good old plain Texas English, and I'm not a lawyer, I'm not an attorney, are we going to cover fewer Texas children with health insurance, thousands fewer, or not?

Senator Zaffirini: Fewer, because of the policy changes.

Senator Barrientos: Thank you.

Senator Bivins: I just wanted to clarify something. I was not aware of the communication from Albert Hawkins, but with regard to the CHIP program in general, and the number of children that he estimated may not be served, those numbers seemed very high to me from what I had heard. I checked with staff, and they pointed out that a big, big part of that number has to do with the change in the eligibility pattern because of the 90-day waiting period that you or I, or anybody else that buys insurance in Texas has to go through, but because that's a change in the system that generates a number that is quite high. And I'm told that if we adjust for that number, and we just focus on the changes that would affect children that are eligible today, like income disregard and the assets test, that the number of those children that are currently being served, that are currently eligible, it may not be, it's more like 12,000 versus 160,000.

Senator Zaffirini: Well, that is what I was stating to Senator Barrientos, that the difference reflects the changes in policy and exactly what you just mentioned, the delayed enrollment of three months, etcetera, and the different policy changes. But that means that those children will not qualify for CHIP. If you look at the actual number of persons who will actually lose eligibility, they are, will lose benefits, we, I have a figure of 16,010.

Senator Bivins: All right, thank you. That's just smaller by a factor of 10 and I just wanted to clarify that. Thank you.

Senator Zaffirini: Thank you Senator.

Senator Wentworth: Mr. President, I want to begin by saying that last year during the campaign, I think most people looked, or a lot of people did, a lot of people looked at the race for Lieutenant Governor, and on paper, they had one candidate

who'd served in the House, and the Senate, and as Railroad Commissioner, and State Comptroller, knew state government as well as, maybe anybody since Bob Bullock. And on the other hand, you had a very successful businessman who had served three years as the Land Commissioner before he announced for Lieutenant Governor. And a lot of folks, lots of folks here in Austin, particularly, went with the fellow who was the more experienced in years. And I think we have, I believe we have a unanimous Senate now, that is convinced that Texas voters did the right thing in November of last year. I am an unabashed admirer of the kind of leadership that Governor Dewhurst has exhibited for this session. His bringing us together in a very bipartisan and productive way has been a joy to participate in. Having said that, and having served as a Member of the finance committee myself in past sessions, although I'm not on the committee this session, I want to thank, really, truly and sincerely, from the bottom of my heart, Senator Bivins, Senator Ogden, Senator Duncan, Senator Zaffirini, and Senator Whitmire for their service. There were weekends when the rest of us got to go back home to our hometowns and be with our families that the finance committee was here working through the weekends. They worked late hours. And in many respects, they have done a very praiseworthy job. I don't believe that until we have the kind of fiscal situation that we have this year, we would scrub the budget like we have this year. Having said that, I am here to represent 700,000 Texans who live between San Antonio and Austin, and it's my judgment that we still have a little more work to do on this budget. We've done a lot of good in this budget, and I especially appreciate Senator Ogden's mentioning the TEXAS Grant program, but I'm concerned about some elements of it. One of those we discussed yesterday, and that was whether or not we should deregulate tuition at institutions of higher education. I don't believe we should. The Senate's position was that we incrementally increase ours in the next two years, and then totally deregulate two years from now. The House's version was that we totally deregulate immediately. And the so-called compromise was that we totally deregulate a semester from now. I understand the institutions of higher education's position. They're having to come to us to ask us to deregulate tuition, because we have failed to support them as we should have. Most of these institutions are no longer state-supported, they're really merely state-assisted, and they need the money to run their operation. And since we're not giving it to them, they'd like to charge the students. I understand that because I'm a former regent of the Texas State University System. But I will tell you that regents are not directly accountable to the voters. And education being the number one priority for Texas state government, I believe the people that set tuition ought to be directly accountable to the people of Texas. Regents are insulated and buffered by being nominated by the Governor, confirmed by the Senate, and they don't really have to answer phone calls. They never have to stand for election, and that is why I voted the way I did yesterday and part of the reason I'm opposing this budget. I served six years as a county commissioner before I ever came to the Legislature, 15 years ago. And I recall serving as a county commissioner and setting our county budget. This particular year, we were in kind of tight times, but inflation had eaten into people's income, and so we made the decision that we could raise county employee salaries somewhere, and it's been so many years ago, I don't remember the exact number, but it was somewhere around three percent or four percent for the following year. The county auditor, on the other hand, wanted to raise

his employees by 10 percent. And we said, no, we're going to treat all county employees the same. That's all the money we've got, we're going to raise them three percent or four percent. The county auditor, though, is not appointed by the commissioners court, nor is he or she elected by the people of Bexar County. And this is true in all the counties. County auditors and county purchasing agents are appointed by the sitting district judges in that county. They're not accountable, they don't have to raise the money, and so what our county auditor did was simply go to a majority of the district judges in Bexar County and got them all to sign a court order ordering us to increase salaries of his staff by 10 percent. He would not have done that, nor could he have done that had he been elected. Part of the way that we've got this budget to balance is to sell what is described as surplus state property. And in the budget it's about $150 million. And I asked, where in the world do we have $150 million worth of surplus property that we're going to sell. And the answer I was given was that we have facilities that we don't really need to own, that we can sell them for a significant amount of money. It's a one-time sale, and then simply lease them back from the new owner. So if we have an MHMR facility that people of Texas own right now, free and clear, but we need money, we sell the MHMR facility and the grounds on which it's located, and then we rent back from the new owner that facility and we pay rent from now on. Now, the 700,000 people I represent don't think that's a good deal. They don't believe that in the long term that's smart financial planning, and I don't either. Part of what we're doing here is going to have the effect of shifting burdens of indigent health care to county hospital districts. And we know that. It's passing the buck, and it's not fair. We can say when we left that we passed a budget that balanced and we didn't add any new taxes. And we kept the campaign promises that were made in the campaign in 2002. And I do understand the appeal and allure, some would say unprecedented position, of trying to keep campaign promises. Those campaign promises were made, initially, at the end of 2001 and the beginning of 2002, when the person constitutionally charged with telling us what our income is going to be, told us that we were going to be about $5 billion short. But by the time our elected officials took office in January of 2003, the person charged with the responsibility of telling us how much money we were going to have come in or how little was going to come in, essentially said, oops, I was 100 percent off, it's really $10 billion. It seems to me that in order to keep faith with the people to whom you made the promise that you weren't going to have any new taxes on the $5 billion, you keep that promise. But then you say, truthfully and candidly, when I made that promise, it was $5 billion. I didn't predict it was going to be 10. I couldn't foresee that, nor could the state official whose responsibility it is to tell us what it is. She didn't either. So we can't keep that promise in full. We'll keep it for the five, but we can't do it for the 10. But what we're winding up doing is, we're passing these costs, a significant part of them, to county hospital districts. Now, Members, counties have essentially one meaningful source of revenue, and that is property taxes. So county commissioners courts throughout the state that have county hospital districts are going to have to go to our constituents and raise their taxes. Now we'll be able to say, assuming this budget passes, we didn't raise your taxes, but, Members, indirectly, we did, by causing conditions that require them to raise county taxes. And I think it'd be more honest if we would take care of that responsibility in Austin. We're asking teachers and state employees to bear the pain of

our refusal to do what Senator Zaffirini has recommended, what Senator Ratliff has recommended, what, I believe, Senator Van de Putte has recommended, I think I'm right on that, what I have recommended, and that is a dollar a pack user fee on cigarettes is preferable to not providing the kind of support that higher education needs, that health and human services need, and I believe doing the budget right is more important than getting out of here on time or trying to keep an outdated campaign promise. We were told in the State of the State Address by Governor Perry in either late January or early February that in his campaign promise of last year, of no new taxes, that he accepted the fact that it's really not a new tax if it's a tax you should have been paying all along. And he was referring to the loophole in the franchise tax. And I agreed with him. We should have fixed that, we should have closed that loophole. I remember meeting with some, actually, future constituents at the time, because I didn't represent Hays County at the time, but I was talking with some people in Dripping Springs, and I had a married couple, a man and his wife who have a very successful business that's incorporated, and they're paying the franchise tax on an annual basis, and they asked me, they said, Senator, why is it fair that we pay the franchise tax, but Dell Computer doesn't, and SBC doesn't, and the *Austin American-Statesman* doesn't. And that's a tough question to answer. The truth of the matter is that those very large corporations have very smart CPAs and lawyers, and they realize that what we did, by the rules we put in place, is to make the franchise tax a voluntary tax. If you simply reorganize your business, in such a way that you're not required to pay the tax, you don't have to pay the tax. So I supported changing that by closing that loophole. Among other things we've done this year is to extend the telecommunications infrastructure fee for an additional 12 months. We passed it some years ago with the understanding that it would expire in a certain number of years, or when it got to $1.5 billion, which is expected to come sometime early to mid 2004. Well we've extended it for a year, and some companies will pass that fee on to their customers, but under the rules we've set, we're not allowing other companies to pass it on. Members, that to me is fundamentally unfair. They're in competition with one another, and by the rules we're setting, we're giving an advantage to some companies and taking it away from others. We ought to fix that. In fact, 20 Members of this body, as recently as within the last 48 hours said, we think that ought to be fixed. But it's not fixed. Members, I think we can, we can do better than this budget. This budget is not a bad one, as such, I prefer to consider it a work still in progress. We can do it right, we've done so much, and we can do a little more if we just stay around for a few more days. It may be that we'll be here in June on other matters, ethics and redistricting come to mind, so my vote is not so much really a no on the budget, as it is a vote to continue our work for a few more days and further improve what we've done so far. Thank you Mr. President.

Senator Gallegos: Thank you Mr. President. Members, I wasn't going to say anything about Senator Ogden's remarks but, he said something about Senator Shapleigh's remarks being rhetoric. I think Senator Ogden doesn't get it about the growth in Texas, that's what we're talking about here, the growth. If we want to, if you're talking about services under this budget, and I just wanted to add this before I really start my remarks, is that if you want to talk about services, you've got to talk about all services, including the growth that the census put out this last census during

the process for the census, that Texas is growing. And if we're going to allow people that are waiting in line for services that are not yet in this system, and they're still waiting, then you're talking about this budget is fine. But we're talking about Texans that are here, that are in the process, have already done their applications, yet they're not in this system, and that's what I'm talking about. And let me just say that, Senator Bivins, that you and Members of, not only the conference committee, but Members of the senate finance have done a tremendous job with what you've had to work with. You spent many hours, and really, what I consider a no-win situation, and including Governor Dewhurst, and yourself, Chairman Bivins, and I'd like to thank you for the efforts that you did. And when this budget first came before us, now, I said the Texas Senate was faced with tough decisions, and I still believe that that's the case. I also believe that we have certainly fallen short of what we consider a success. Yes, we did the best we could with what we had, in the term of available revenue, but we knew coming here that we were going to be in a shortfall, the exact number we didn't know, and depending on who you believed between the $5 and $14 billion, in a shortfall. And yet, I believe that we settled, and believe that the tone of many of your speeches on the budget, first when we passed it out the first time, and that showed me the same thing. I believe it's settling, and when it comes to our children's education and access to social services is a tragic decision, the effects of which we may be forced to address for many years to come as already been stated today. But I want to take a few minutes, Senator Bivins, wherever you are, to run down some of the cuts we are making, some of the needs we are leaving on the table. In Article II, on, regardless of what has been said today, reduced Medicaid community care service levels for the elderly Texans and disabled adults. Proposed funding levels for community care for the elderly and disabled will reduce the hours of support services for about 100,000 elderly or disabled Texans who now receive help to remain at home rather than a nursing home. And about 1,800 of the fiscal 2000 enrollment of 101,500 will have hours of service cut by 15 percent. In community and long-term care, we have made reductions through attrition. Community Care Medicaid Waiver enrollees are set to a specified cap reducing the number of services served by 3,452 from the current 2003 enrollment of 33,756, to a fiscal enrollment of 30,304. In-home and family support programs will be cut by 55 percent, 2003 enrollment of 4,221 clients will be reduced to 1,876 clients, and cut of 2,340 clients. And state-funded, long-term care will be reduced by 2,856 clients. Non-Medicaid 2003 enrollment of 16,827 clients versus 14,000 for fiscal 2005. Medicaid maternity coverage for low-income pregnant women has been reduced. Keep in mind, Members, this is Medicaid coverage, it is for prenatal care, delivery, postpartum care for 60 days after delivery, including treatment of any medical condition that may complicate the pregnancy. The conference budget funds cover to 158 percent of the federal poverty level. If we assume that we keep that current policy, that covers women up to 185 percent of the FPL, Health and Human Services Commission projects that a total monthly average of 113,326 women would have been covered in 2005. This will reduce coverage of about 8,300 women per month. A program that gives full Medicaid benefits on a month-to-month basis to certain families with large medical bills, called the Medically Needy Spend-Down program, temporary coverage for families with high medical bills, is eliminated. The conference committee eliminates the coverage entirely, leaving a monthly average of

9,959 medically-needy adults with dependent children in 2005, with no health coverage whatsoever. With respect to children's Medicaid simplification, we have maintained the assumptions about rollbacks and delays of children's Medicaid simplification that were built into the HHSC's budget request for 2004-2005. Maintaining current six-month continuous coverage rather than the phase-in of the 12-month period mandated in SB 43, in the 2001 session. Imposing stricter assets tests and reinstating face-to-face DHS application and renewal. While the new proposed budget maintains access to mail, and telephone application and renewal for most children, the Health and Human Services Commission projects that these changes would slow the growth in children's Medicaid enrollment to a very low rate. And it also estimates that these policy changes would reduce projected 2005 Medicaid enrollment by 332,198 children. Further, the conference committee adopted House budget Medicaid caseload assumptions, which was the basis for reduction, Medicaid state general revenue funding by $524 million. Child Medicaid enrollment projected in February of this year, 2003, to grow by 17.3 percent in 2004, and 8.4 percent in 2005, is now assumed to grow by only two and one percent. Children's CHIP, is getting some address red tape. We keep eligibility for CHIP at 200 percent of the federal poverty level, but add an asset limit to CHIP, and eliminate most income disregards. We are also going to impose a 90-day waiting period for enrollment, reduce continuous eligibility to six months from the current 12 months and require higher co-payments and premiums from clients. These changes, plus the impact of the assets test, and removal of income disregards are projected by the Health and Human Services Commission to reduce the number of children in enrollment of 169,295 below projected enrollment in 2005. For those CHIP funding levels, assume that the following benefits are eliminated: dental, durable medical equipment, wheelchairs, crutches, leg braces, prostheses, chiropractic, hearing aids, home health, hospice, mental health, physical therapy, speech therapy, substance abuse services, and vision care and eyeglasses. Medical provider rates are cut, most medical providers will have cut rates by five percent with nursing homes and other long-term care providers cut by a lower amount. For doctors, the TMA reports, this would reduce fees below 1991 payment levels. However, the temporary enhanced Medicaid matching funds, just passed by Congress as part of the tax bill cut, may be used to reduce the size of these cuts. Services eliminated for aged, disabled, and adult TANF recipients on Medicaid are reduced. There will no longer be coverage for counseling, podiatric and chiropractic care, eyeglasses, hearing aids, and other optional benefits for adults on Medicaid. MHMR reductions and community services are made in-home and family support for mental health is completely eliminated, meaning about 3,000 mental health clients, based on current levels, will not receive services. An 11 percent reduction for community services for mental retardation will result in 2,570 fewer clients being served in 2003. In-home and family support for mental retardation is cut by 61 percent under this budget, and will leave 2,500 fewer who will be served, compared to 2003. Also, there will be fewer TANF benefits to Texas' poorest families with children. Asset limits for TANF families are cut in half unless your family has an elderly or disabled family member living with them. If that is the case, then your asset limits are cut by two-thirds. This change will make nearly 700 current clients ineligible for assistance or deny assistance. The current vehicle value limit of $15

thousand for two-parent TANF families has been reduced almost $5 thousand. Can anyone imagine only being able to spend $5 thousand on a car? Sixty dollars per child, once a year supplemental payments have been cut in half, to $30, affecting 250,374 children in 2004-2005. Full family sanctions, determination of assistance, both to adults and to children, will now apply for an infraction of requirements of the personal responsibility agreement, nonpregnant adults will also lose Medicaid for noncompliance with work, with child support requirements. These new sanctions are estimated to terminate assistance to almost 60,000 clients. We are cutting, let me just, in winding down, we're cutting to really reading and math initiatives under this bill. They will only receive almost $40 million when compared to $64 million of the GR. The teacher-training portion of student success is reduced by $20 million. We only added $1.8 million for teacher training. Textbook funding has been cut by almost $200 million. We've allocated about $430 million, when $620 million was requested. Pre-K and Kinder programs will lose $15 million, and academic excellence funding is reduced by almost $15 million under this Conference Committee Report. There, Members, there are plenty of other cuts that I can sit here and list all morning. But in the final analysis, I said the first time the budget came before this body, the question that each of you has to ask yourself, can you sleep at night knowing that we've done this to our children. I know my constituents will not allow me to sleep after voting for a bill that takes us back this far. And I, you know, basically, we could have the other night, as Senator Wentworth said in his remarks, that we could have added a $1.5 billion impact on general revenue through Senator Zaffirini's one dollar tax, that I added my name to, but she gets the credit. Members, to me, on a user fee, that's a no-brainer. I mean, I come from a firehouse, all I have to do is throw that out on table and say, do it. That's a no-brainer, leave it up to Texans to decide whether they want a $1.5 billion injection in, when we're in a $10 billion shortfall. And, you know, I just, for the life of me, and we, yes, it was a voice vote, that's why I'm asking record votes from now on, because it's easy to gavel down quickly when you want to get somebody on a record, especially when you're trying to inject $1.5 billion into the economy to try to at least restore some of these services. And some of the state employees, they're going to be laid off, as Senator Lucio was talking about. I don't have to drive to Senator Lucio's district, to Senator Madla's district, to Senator Van de Putte's district, to Shapleigh's, or Zaffirini's, and we're sitting in Senator Barrientos' district, to understand that we've got a problem out there in health care, with kids. You know, I don't have to go over there, Senator Lucio, I know the problems you're having. And I'm having the same, as growth continues in the State of Texas, and that is what the issue is, it's all about growth. It's easy to put a 1,000 page Senate finance package before you, with a little nine page summary, and say this is about the best we could do. And not taking in consideration the people, not only the adults and the elderly, but also the kids that are waiting in line for the system to work, these are Texans that are already registered on the rolls, but are not, have not yet been allowed to apply. We are the only state in the Union that throws up a stone wall, a block, when we're talking about, they must reapply every six months. We're the only state of the Union that tells those people that are applying for those benefits, that they must reapply every six months. Every state does it every 12 months. Why? You ask why would we, for children, to throw a stumbling block like that every six months

they've got to apply, and if you know the way the bureaucracy is here in Texas, especially when you're applying, you're lucky to get a call back, we're asking you to apply every six months, you're lucky to get a call back in 12 months on this application. That's the stumbling block that they put on you, that's the savings that's in this package, in this 1,000 page Senate finance package. A stumbling block to our elderly that need the same level of services that they've been receiving in the past, to children that are in line and applying for CHIP, and we choose to put a stumbling block, once again, the only state of the Union that allows that. Now, I just, you know, that's why, I think that where I respect Senator Ogden's remarks, I think, it's all about growth, and you've got to, if we're going to talk about Texans, let's talk about all Texans. The ones that are waiting in line, that are not figured in this budget. The ones that live in Senator Lucio's, mine, Senator Shapleigh's, those that are waiting in line, that are legal Texans and are not going to get any kind of services because they're still standing in line. And now we're asking for a six-month application. Every six months their parents have to apply and reapply for CHIP. And that's what it's all about, Members, is those people that are waiting in line that are not figured in, and factored in, those Texans that are not factored into this finance package that has been given to us. I think that when you look at the future of Texas, and we were having a seminar in Senator Zaffirini's district, not Senator Zaffirini, Senator Van de Putte's district, and I was on the panel of growth and, are there going to be enough jobs for Hispanics that are coming in, and wanting to live in Texas. And I told them the story about Minute Maid Park during construction, plus constructions that are going on now, and who builds those stadiums, who builds these skyscrapers that you see out these windows. And I said, I don't think that you're going to have a problem in finding a job. The perimeter of Minute Maid Park, under construction, was sealed by a fence, so the only ones going in were the workers. Nobody else and their construction foremen, and I said, I don't think that there was about 50 of the portable potties there on the site, the only ones that can get in there are the workers. And I told this panel that I was in, that I don't think you're going to have a problem on finding a job, when I saw that most of the graffiti inside those portable potties was in Spanish. And I can read Spanish, and I can speak Spanish, so I told that panel, don't worry about it, you'll have a job. And that's why I think that you see a lot of the folks that are coming from Mexico, they see that, I see that, and they want to prosper here in Texas. Because they see that we are a giving, a compassionate, leave no child behind, but that's not what I see in this budget. I do not see this in this budget. With all due respect, Senator Bivins and Senator Ogden, those on the other side, I don't see that in this budget. We have, those people live in my district, the ones that the growth that we saw in the census report, they live in my district, they live in your districts. I don't see them part of this budget, and we can continue, and you can pat yourself on the back and say, hey, give yourself 10 attaboys, 10 attagirls, and go back home and say, we did our best. But I don't see those that are the new growth, the new Texans, in this budget. As long as we're not adding them and formulating them in this budget, then we're not doing our jobs, because they're Texans just like we are. And putting loopholes and stumbling blocks in front of them just to save money, save cash, and try to find a solution for a budget deficit by excluding those Texans, that's wrong. Any way you look at it, it's wrong. And that's why, Members, that I'm, you know, voting against this conference

committee. And I know that you've got to do with what you got, but I think that there were some issues that were placed before this body that couldn't allow infusion of general revenue that the cigarette tax, other issues that were on the table, for some reason that weren't allowed to be debated on this floor or across the hall. There was definitely money available that we could at least have the opportunity either for Texans to vote on them and see if they want this extra general revenue to be infused in our budget and help these folks that are standing in line. I would rather allow them to tell me, they're the ones that elected me, they're the ones that elected you, to tell me what they feel and what they think. Especially on a cigarette tax that would have added $1.5 billion to this deficit, and including Article I, where so many services are going to be cut, so many people are going to be laid off, state employees. At least, that would have been a start, we could have been looking at other areas on, looking for extra revenue for this budget. But for me, I think that I can go home with a no vote on this and tell them, I, we tried, tried to add $1.5 billion on a cigarette tax, and were voted down on the Senate floor. But I, to me, I would rather have allowed Texans to make that decision, not me, just one vote, here on the Senate floor, and that's the way it should be, Members, and then having to see services cut, children's, children across Texas cut on CHIP. And I, that's just the way that I think, and we go to tuition dereg. that, I don't know if we're going to debate it today, but we will. What that reminds me of, Senator Shapiro, is the movie, if you remember the movie, *Spencer's Mountain,* where Henry Fonda had to make a decision, it was a painful decision. He had a son who obviously was making good grades, and he was graduating at the top of his class, and he had a decision on whether to sell his land and send his son to school, or build the dream house for his family. His decision was to sell his land, because he wanted to send his child, who was the top of his class at his high school, to college. So, when this tuition dereg. bill comes up, it reminds me of that movie, Senator, are people going to have to sell their property in order to send their kids to school? And whenever tuition dereg. comes up, that picture comes into my mind, whether I, or any other Texan that wants his child to go to a Texas state school, is going to have to sell something of his because we're going to allow tuition fees to be increased at the local level, and allow colleges to do that. So, like I said, there's a lot of things that I could talk about, I could talk about this all night long. But, there are others that want to speak. That's my point of view, I'm only one of 31 on this floor. I think that if you look at it, and view it that way, like I said, with all due respect to Senator Ogden's remarks, I think what we're missing is the point, is the growth in the State of Texas, and that's who's not in this budget. I ask you to vote no on this Conference Committee Report.

Senator Lindsay: Thank you Mr. President. And I do rise to speak on this bill, and first of all, I might point out that, in many respects, I do agree with what was said by Senator Wentworth. I am going to vote for this bill, however, and I want to express my admiration for what the finance committee has done under the rules and guidelines that have been established for them. I think they've done a fantastic job, a fantastic job of putting a budget together, under the circumstances that they had. But I am concerned, and I think we're all concerned, and we should be concerned, because we're going to be looking at an issue here, not too far from now, about school finance, and we're going to have to face some of the same issues at that time. And what I've

seen, not only in the budget process here, but in some of the other pieces of legislation that has passed, the issue of passing more of the load on to local governments, as Senator Wentworth said, and has been said by many others, as I listened to them. Little things, a lot of them little things, but they're meaningful, you know, sweeping $800 thousand or so out of the legal fund for indigent, a minor thing, doesn't amount to a lot. A bigger issue, putting bigger fines on tickets that are issued, which probably, not fines but penalties, which probably means then the fine's going to be lowered, so there's going to be less money to the local governments and municipalities and counties. And then the bigger things of school, I mean the school issue and, of course, Medicaid, big numbers, and, of course, I'm really concerned that we haven't met the needs for trauma care in the metropolitan areas. And we're going to have to look at that down the road, I believe, again, because I'm not totally convinced that we've done that. So, what we have facing us, I believe, in the not too distant future, if it's not here already, and I've seen evidence in Harris County that it's here, and I think we all, with Senator Janek's bill last week, realize that there is a big, big issue, of course, of increase in ad valorem tax and the values on properties, and the increase, of course, of tax bills, because of those increasing values. And I think we're getting to the point of a real crisis that's going to affect local governments, schools, everybody that, the taxes with, ad valorem taxes. And it's going to get more serious as the baby boomers start retiring. I'm, of course, past the baby boomer stage, I'm eligible for retirement. Just because I like you guys, I haven't, I'm staying here so I can mess with you, and besides, I like that big money I make here. But, those people are caught in a fix. They retire, their property values continue, especially in the booming areas, like around Harris County, those values are going up on a big basis of big numbers, and that's going to hurt, it's going to be bad. So, although I'm voting for this, I think we've got to face this issue sometime in the not too distant future where the state picks up a bigger share of local government finance, or we definitely don't pass on any more Band-Aids along those lines. So, again, Senator Bivins, I think my hat's off to you, I know you've had a tough job. I've watched you, fortunately, I was happy I was not on finance this time. The last two times I was on, it was easy, we had a little bit of money to work with. You did a fantastic job, as did every Member of your committee. Thank you.

Senator Van de Putte: Thank you Mr. President. Chairman Bivins and the conferees, I was amazed at your endurance. Let me tell you, it's no secret to the folks back home or to Members of this body, that I voted no on the original bill when it came out of the Senate. I know that there were tough times during the negotiations, and at many times it would have been easier to succumb to the frustration and say, OK, we can't do it. But you didn't. You kept working through the problem, you kept focus, and you kept the five conferees, for the most part, in the room. What I'd like to talk about, just for a few minutes, is what has happened since this bill left the Senate floor, and what I believe are some significant improvements to it. Number one, at a critical time, when we thought all was lost and we would definitely be back here, the Senate side decided, what did we really need out of this budget, in addition to what we had had when it left this floor. And I imagine that the House conferees had this same sort of discussion. And I can tell you, that because of the priorities that you placed and the conferees placed, I am very, very proud to serve with you on this

Senate floor. The conferees on the Senate side said that if we pass this budget, we need a few things. And you stood firm at the 200 percent of poverty level for our Children's Health Insurance Program. And although the policies may be changed, that significant action said that the Senate's priorities was the health care of children. As I understand it, the second thing that you wanted, was to make sure that the frail and elderly program got back up to its level. And what that says is, that those who are the most needy, need not take the most severe cuts. And you said something also very, very important. We want CHIP, we want the restoration of the frail and elderly, and you said, we need extra money into higher ed. That's the opportunity that Senator Ogden was talking about. The higher ed. component of this was a critical part. As I understand it, let me go through what I think the House wanted, since I sat with you the last weekend. As I understand it, the House wanted something, maybe a little bit on different track than the Senate. The House wanted a program for Nobel Laureates at Southwestern. Great idea, great conference, and we needed that, but at the expense of what? As I understand it, the House thought that it was real important for a junior college in West Texas to be able to have a four-year degree at something. And as I understand it, the House demanded that we have total tuition deregulation for our institutions of higher ed., total. And so, I want to comment, Senator Bivins, on the differences between what was really important to the Senate, and what was important to the House. The things important to the Senate were CHIP, frail and elderly, and higher ed. That means taking care of kids, that means taking care of those most needy, and that means giving working families the opportunity to obtain a college degree. And I think that you did a fantastic job with that. Now, I'm not real excited about the budget. But I think you've done a tremendous job under severe circumstances. And having sat with you there, 18, 20 hours straight, that last weekend you were in negotiations, I know that those decisions were made with a lot of thought and with a lot of compassion. And so, Senator, while I am very concerned, and I, too, like Senator Wentworth, know that we may go home and we can beat our chests, and we can say, we didn't raise taxes, in essence, we have. We have forced our local communities to raise those ad valorem taxes. So, I think it's a false victory for us, but you have done a wonderful job, and the conferees have shown that what's important to this Senate, is kids, frail and elderly, and the opportunity for working families to get a college education.

Senator Bivins: Thank you Senator.

Senator Barrientos: May it please the Senate, Mr. President, there have been several here who have spoken more eloquently than I can, so I shan't prolong the discussion, Senator Shapleigh being among those. Earlier today, Senator, someone said, Texas has always been about providing opportunity. Now, Members, we can pat ourselves on the back all we want to, but I think that we Texans, every once in awhile, need a little humility. In our lifetimes, Members, there were segregated schools for African Americans, segregated schools for Hispanics, and segregated schools for whites. In our lifetimes, that was not providing opportunity for us Texans. In our lifetimes, those of us who spoke Spanish in schools got beat for it, spanked. So, Texas is not always about providing opportunity, but it is up to us today to live up to the American dream. This bill spends more, of course it spends a little bit more. We've grown a lot. But spend more compared to what? It reminds me, Members, of when I first got to the

House, as a freshman being on the appropriations committee, and asking a certain state agency how many minorities they hired. And they said, well, we're not doing very well at that. And the next session we'd come back, and say, how many minorities have you hired this time? Well, Representative, we've increased 50 percent. I said, oh, 50 percent, that's wonderful, compared to what? Well, they had hired one the previous time, they hired another one this next time. That's 100 percent. That's double. Looking for qualified ones. Oh, and by the way, the other day when we were in the other chamber, we had that session recognizing the Texans who died in Iraq, did you notice that 50 percent of them were named Anguiano, Soto, Fernandez, Garza. Providing opportunities, Members. In all of my time in the Legislature, I have had, never had such a heavy heart. I spent my years fighting for those whose voices, historically, have not been heard. And after past sessions, I have been able, sometimes, to look back and feel a sense of accomplishment, feeling that in some small way, with the help of many of you, that the sick, the elderly, the children, all Texans would enjoy a better quality of life, as a result of work we did. But this session, this budget, they do not reflect many of the ideals that I have held for the past 20 some-odd years. And as has been said before, Senator Van de Putte, the underlying theme of this session has been to favor big business. Large corporate interests and their legions of lawyers and lobbyists over the interests of working Texans. Look at the budget, Members. People like to hear that we're balancing the budget without new taxes, but, we all know this budget is balanced too heavily on the backs of the working people, and we all know we are shifting those responsibilities, Senator Lindsay, to our county and our city governments. Our constituents are going to be paying more for services, it'll just be to the city or the county, instead of the state. So we talk about local control, but in terms of money, we are not giving them an honest option. Local taxes are going to go up, and as a deli owner here in Austin says, "I gotta tell ya," Members, I would hate to be a county commissioner or a mayor right now, in Texas. "I gotta tell ya," I gotta vote against it. Thank you.

On motion of Senator Bivins, the Conference Committee Report was adopted by the following vote: Yeas 24, Nays 7.

Yeas: Armbrister, Averitt, Bivins, Brimer, Carona, Deuell, Duncan, Ellis, Estes, Fraser, Harris, Jackson, Janek, Lindsay, Nelson, Ogden, Ratliff, Shapiro, Staples, Van de Putte, West, Whitmire, Williams, Zaffirini.

Nays: Barrientos, Gallegos, Hinojosa, Lucio, Madla, Shapleigh, Wentworth.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER
Austin, Texas
June 1, 2003

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the House to inform the Senate that the House has taken the following action:

THE HOUSE HAS ADOPTED THE FOLLOWING CONFERENCE COMMITTEE REPORTS:

HB 1566 (non-record vote)
HB 1695 (House adopts ccr by a vote of 102 yeas, 36 nays, 2 pnv)
HB 2588 (non-record vote)
HJR 68 (House adopts ccr by a vote of 142 yeas, 0 nays, 3 pnv)
SB 16 (non-record vote)
SB 103 (House adopts ccr by a vote of 141 yeas, 0 nays, 2 pnv)
SB 1010 (non-record vote)
SB 1639 (House adopts ccr by a vote of 131 yeas, 8 nays, 2 pnv)
SJR 30 (House adopts ccr by a vote of 141 yeas, 0 nays, 1 pnv)

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3042 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **HB 3042**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1045

Senator Harris offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 1365**, relating to the Texas emissions reduction plan, to consider and take action on the following matter:

(1) Senate Rule 12.03(2) is suspended in order to allow the committee to omit text from Section 151.0515(a), Tax Code, as amended by both houses, so that the section reads as follows:

(a) In this section, "equipment" includes all off-road, heavy-duty diesel equipment [~~classified as construction equipment~~], other than implements of husbandry used solely for agricultural purposes, including:

(1) pavers;
(2) tampers/rammers;
(3) plate compactors;
(4) concrete pavers;
(5) rollers;
(6) scrapers;
(7) paving equipment;
(8) surface equipment;
(9) signal boards/light plants;
(10) trenchers;
(11) bore/drill rigs;
(12) excavators;
(13) concrete/industrial saws;

(14) cement and mortar mixers;
(15) cranes;
(16) graders;
(17) off-highway trucks;
(18) crushing/processing equipment;
(19) rough terrain forklifts;
(20) rubber tire loaders;
(21) rubber tire tractors/dozers;
(22) tractors/loaders/backhoes;
(23) crawler tractors/dozers;
(24) skid steer loaders;
(25) off-highway tractors; [~~and~~]
(26) Dumpsters/tenders; and
(27) mining equipment.

Explanation: This change is necessary to provide that only mining equipment but not certain drilling equipment is added to the kinds of equipment subject to the sale, lease, or rental surcharge on new or used equipment.

(2) Senate Rules 12.03(3) and (4) are suspended to allow the committee to add the following text to SECTION 27 of the bill to read as follows:

(c) The change in law made by Section 25 of this Act does not affect speed limits that have been approved by the Texas Transportation Commission before the effective date of this Act.

Explanation: This change is necessary to make clear that a speed limit approved by the Texas Transportation Commission before the effective date of the Act is not affected by the change in law made by SECTION 25 of the Act.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1365 ADOPTED

Senator Harris called from the President's table the Conference Committee Report on **HB 1365**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Harris, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1021

Senator Staples offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 1639**, relating to regulation of spacing and production of groundwater from aquifers by a groundwater district, to consider and take action on the following matter:

Senate Rule 12.03(4) is suspended to permit the committee to add new sections to the bill to read as follows:

SECTION 2. Subchapter B, Chapter 11, Water Code, is amended by adding Sections 11.0235, 11.0236, and 11.0237 to read as follows:

Sec. 11.0235. POLICY REGARDING WATERS OF THE STATE. (a) The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.

(b) Maintaining the biological soundness of the state's rivers, lakes, bays, and estuaries is of great importance to the public's economic health and general well-being.

(c) The legislature has expressly required the commission while balancing all other interests to consider and provide for the freshwater inflows necessary to maintain the viability of the state's bay and estuary systems in the commission's regular granting of permits for the use of state waters.

(d) The legislature has not expressly authorized granting water rights exclusively for:

(1) instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems; or

(2) other similar beneficial uses.

(e) The fact that greater pressures and demands are being placed on the water resources of the state makes it of paramount importance to reexamine the process for ensuring that these important priorities are effectively addressed in clear delegations of authority to the commission.

Sec. 11.0236. STUDY COMMISSION ON WATER FOR ENVIRONMENTAL FLOWS. (a) In recognition of the importance that the ecological soundness of our riverine, bay, and estuary systems and riparian lands has on the economy, health, and well-being of the state there is created the Study Commission on Water for Environmental Flows.

(b) The study commission is composed of 15 members as follows:

(1) two members appointed by the governor;

(2) five members appointed by the lieutenant governor;

(3) five members appointed by the speaker of the house of representatives;

(4) the presiding officer of the commission or the presiding officer's designee;

(5) the chairman of the board or the chairman's designee; and

(6) the presiding officer of the Parks and Wildlife Commission or the presiding officer's designee.

(c) Of the members appointed under Subsection (b)(2):

(1) one member must represent a river authority or municipal water supply agency or authority;

(2) one member must represent an entity that is distinguished by its efforts in resource protection; and

(3) three members must be members of the senate.

(d) Of the members appointed under Subsection (b)(3):

(1) one member must represent a river authority or municipal water supply agency or authority;

(2) one member must represent an entity that is distinguished by its efforts in resource protection; and

(3) three members must be members of the house of representatives.

(e) Each appointed member of the study commission serves at the will of the person who appointed the member.

(f) The appointed senator with the most seniority and the appointed house member with the most seniority serve together as co-presiding officers of the study commission.

(g) A member of the study commission is not entitled to receive compensation for service on the study commission but is entitled to reimbursement of the travel expenses incurred by the member while conducting the business of the study commission, as provided by the General Appropriations Act.

(h) The study commission may accept gifts and grants from any source to be used to carry out a function of the study commission.

(i) The commission shall provide staff support for the study commission.

(j) The study commission shall conduct public hearings and study public policy implications for balancing the demands on the water resources of the state resulting from a growing population with the requirements of the riverine, bay, and estuary systems including granting permits for instream flows dedicated to environmental needs or bay and estuary inflows, use of the Texas Water Trust, and any other issues that the study commission determines have importance and relevance to the protection of environmental flows. In evaluating the options for providing adequate environmental flows, the study commission shall take notice of the strong public policy imperative that exists in this state recognizing that environmental flows are important to the biological health of our parks, game preserves, and bay and estuary systems and are high priorities in the permitting process. The study commission shall specifically address ways that the ecological soundness of these systems will be ensured in the water allocation process.

(k) The study commission:

(1) shall appoint an advisory scientific committee that will:

(A) serve as impartial scientific advisors and reviewers for the study commission; and

(B) have a membership of no fewer than five and no more than nine total members chosen by the study commission to represent a variety of areas of relevant technical expertise;

(2) may appoint additional advisory committees to assist the study commission; and

(3) may draft proposed legislation to modify existing water-rights permitting statutes.

(l) Not later than December 1, 2004, the study commission shall issue a report summarizing:

(1) any hearings conducted by the study commission;

(2) any studies conducted by the study commission;

(3) any legislation proposed by the study commission; and

(4) any other findings and recommendations of the study commission.

(m) The study commission shall promptly deliver copies of the report to the governor, lieutenant governor, and speaker of the house of representatives.

(n) The study commission shall adopt rules to administer this section.

(o) The study commission is abolished and this section expires September 1, 2005.

Sec. 11.0237. WATER RIGHTS FOR INSTREAM FLOWS DEDICATED TO ENVIRONMENTAL NEEDS OR BAY AND ESTUARY INFLOWS. (a) The commission may not issue a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. This section does not prohibit the commission from issuing an amendment to an existing permit or certificate of adjudication to change the use to or add a use for instream flows dedicated to environmental needs or bay and estuary inflows.

(b) This section does not alter the commission's obligations under Section 11.042(b), 11.046(b), 11.085(k)(2)(F), 11.134(b)(3)(D), 11.147, 11.1491, 16.058, or 16.059.

(c) This section expires September 1, 2005.

SECTION 3. Subsections (d) and (e), Section 11.147, Water Code, are amended to read as follows:

(d) In its consideration of an application to store, take, or divert water, the commission shall include in the permit, to the extent practicable when considering all public interests, those conditions considered by the commission necessary to maintain [~~consider the effect, if any, of the issuance of the permit on~~] existing instream uses and water quality of the stream or river to which the application applies.

(e) The commission shall include in the permit, to the extent practicable when considering all public interests, those conditions considered by the commission necessary to maintain [~~also consider the effect, if any, of the issuance of the permit on~~] fish and wildlife habitats.

Explanation: This added text is necessary in order to provide for permitting of water rights for instream flows.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1639 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **SB 1639**. The Conference Committee Report was filed with the Senate on Friday, May 30, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 286 ADOPTED

Senator Shapleigh called from the President's table the Conference Committee Report on **SB 286**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapleigh, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 264 ADOPTED

Senator Lucio called from the President's table the Conference Committee Report on **SB 264**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lucio, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1576 ADOPTED

Senator Shapleigh called from the President's table the Conference Committee Report on **HB 1576**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapleigh, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1032

Senator Shapleigh offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 1538**, relating to the continuation and functions of the Texas Funeral Service Commission, including certain functions transferred to the commission from the Texas Department of Health, and the powers and duties of the Texas Finance Commission and the banking commissioner of Texas regarding cemeteries; providing administrative and civil penalties, to consider and take action on the following matter:

Senate Rule 12.03(4) is suspended to permit the committee to add SECTIONS 30 and 31 to the bill to read as follows:

SECTION 30. The heading to Subchapter N, Chapter 651, Occupations Code, is amended to read as follows:

SUBCHAPTER N. LICENSING [~~REGISTRATION~~] REQUIREMENTS: [~~CEMETERIES AND~~] CREMATORIES

SECTION 31. Section 651.652(a), Occupations Code, is amended to read as follows:

(a) This subchapter applies only to a [~~cemetery or~~] crematory that sells goods or services related to the burial or final disposition of a body.

Explanation: These changes are necessary to resolve unintentional conflicts between this bill and enrolled and signed House Bill No. 587, 78th Legislature, Regular Session, 2003. The added sections remove cemetery language to conform to this bill.

Senate Rule 12.03(1) is suspended to permit the committee to change SECTION 44 of the bill to read as follows:

SECTION 44. On March 1, 2004, Sections 651.652(b), 651.653, 651.654, and 651.655, Occupations Code, are repealed.

Explanation: The bill repealed all of Subchapter N, Chapter 651, Occupations Code, which unintentionally conflicts with enrolled and signed House Bill No. 587, 78th Legislature, Regular Session, 2003. The revised section repeals only those sections that do not conflict with the purposes of either bill.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1538 ADOPTED

Senator Shapleigh called from the President's table the Conference Committee Report on **HB 1538**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapleigh, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 280 ADOPTED

Senator Nelson called from the President's table the Conference Committee Report on **SB 280**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Nelson, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 279 ADOPTED

Senator Jackson called from the President's table the Conference Committee Report on **SB 279**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Jackson, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3578 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **HB 3578**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER
Austin, Texas
June 1, 2003

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the House to inform the Senate that the House has taken the following action:

THE HOUSE HAS PASSED THE FOLLOWING MEASURES:

HCR 286, Honoring U.S. Marine Corporal Manuel Espinoza, Jr., of Weslaco for his bravery during Operation Iraqi Freedom.

THE HOUSE HAS ADOPTED THE FOLLOWING CONFERENCE COMMITTEE REPORTS:

HB 320 (House adopts ccr by a vote of 140 yeas, 0 nays, 2 pnv)
HB 329 (non-record vote)
HB 335 (non-record vote)
HB 411 (non-record vote)
HB 471 (non-record vote)
HB 727 (House adopts ccr by a vote of 146 yeas, 0 nays, 2 pnv)
HB 1119 (non-record vote)
HB 1204 (House adopts ccr by a vote of 147 yeas, 0 nays, 1 pnv)
HB 1538 (non-record vote)
HB 2075 (non-record vote)
HB 2415 (House adopts ccr by a vote of 142 yeas, 0 nays, 2 pnv)
HB 2533 (non-record vote)
HB 2593 (non-record vote)
HB 3578 (House adopts ccr by a vote of 139 yeas, 0 nays, 3 pnv)
HB 3622 (non-record vote)
HJR 85 (House adopts ccr by a vote of 144 yeas, 0 nays, 2 pnv)
SB 76 (non-record vote)
SB 160 (non-record vote)
SB 279 (non-record vote)
SB 280 (House adopts ccr by a vote of 145 yeas, 1 nay, 1 pnv)
SB 361 (House adopts ccr by a vote of 146 yeas, 0 nays, 2 pnv)
SB 473 (non-record vote)
SB 474 (non-record vote)
SB 585 (non-record vote)
SB 610 (non-record vote)
SB 631 (non-record vote)
SB 826 (non-record vote)
SB 929 (non-record vote)

SB 970 (non-record vote)
SB 1000 (House adopts ccr by a vote of 143 yeas, 0 nays, 1 pnv)
SB 1131 (non-record vote)
SB 1182 (House adopts ccr by a vote of 146 yeas, 0 nays, 1 pnv)
SB 1413 (House adopts ccr by a vote of 144 yeas, 0 nays, 2 pnv)
SB 1551 (non-record vote)
SB 1664 (non-record vote)
SB 1708 (non-record vote)
SB 1771 (non-record vote)
SB 1835 (House adopts ccr by a vote of 86 yeas, 53 nays, 2 pnv)

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

SENATE RESOLUTION 982

Senator Ellis offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 287**, relating to changing the composition of certain state agency governing bodies with an even number of members to comply with the changes made to Section 30a, Article XVI, Texas Constitution, to consider and take action on the following matters:

(1) Senate Rule 12.03(3) is suspended to permit the committee to add new text to Section 651.008(a), Government Code, as added by the bill, so that Subsection (a) reads as follows:

(a) This section applies to the governing body of a state board or commission or other state agency only if:

(1) by statute the governing body is composed of an even number of voting members, the appointed members of whom serve staggered six-year terms; and

(2) there is no provision of the Texas Constitution under which the governing body is allowed to be composed in that manner and serve staggered six-year terms.

Explanation: The added text is necessary to clarify in Subsection (a)(2) that the length of the members' terms, as well as the composition of the governing body, must comply with applicable constitutional provisions.

(2) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add a new Section 651.0085, Government Code, to the bill to read as follows:

Sec. 651.0085. CERTAIN UNCONSTITUTIONALLY COMPOSED DISTRICTS AND AUTHORITIES WITH SIX-YEAR TERMS. (a) This section applies only to the governing body of a district or authority created under Section 52(b), Article III, Texas Constitution, or Section 59, Article XVI, Texas Constitution, and only if:

(1) by law the governing body is composed of an even number of voting members; and

(2) the elected or appointed members of the governing body serve staggered six-year terms and the only provision of the Texas Constitution under which the members of the governing body are allowed to serve staggered six-year terms is Section 30a, Article XVI.

(b) Section 651.008 does not apply to a district or authority to which this section applies.

(c) Notwithstanding the terms of the enabling statute of the district or authority that prescribes the number of members of the governing body:

(1) if some or all of the members of the governing body are appointed, the governor shall appoint an additional public or at-large member, as applicable, to the governing body for an initial term expiring on the date on which the terms of members of the governing body whose terms are scheduled to expire between four and six years after the date of the governor's appointment under this subdivision expire; and

(2) if all of the members of the governing body are elected, an additional public or at-large elected position, as applicable, is created on the governing body and the governor shall appoint the initial member to fill that position for an initial term expiring on the first date on which members' terms expire following the next election for members of the governing body.

(d) As soon as possible after it is determined that this section applies to the governing body, the administrative head of the district or authority shall inform of that fact:

(1) each appointing authority that by statute appoints one or more members to the governing body;

(2) the governor and the presiding officer of each house of the legislature;

(3) each standing committee of each house of the legislature that under the rules of either house has jurisdiction over legislative matters pertaining to the district or authority;

(4) the secretary of state, if the governing body is subject to Subsection (c)(2), for purposes of allowing the secretary of state to advise the district or authority on matters relating to preclearance under the federal Voting Rights Act (42 U.S.C. Section 1973c et seq.); and

(5) the Legislative Reference Library for purposes of including current information in the Texas Appointment System database.

(e) If the governor appoints a member to the governing body of the district or authority under Subsection (c)(1) and the legislature does not, by law, make other arrangements for electing or appointing a person to fill the position, the governor shall continue to appoint a member to fill the position as vacancies in the position occur and as a member's term in the position expires. If the governor appoints a member to the governing body of the district or authority under Subsection (c)(2) and the legislature does not, by law, make other arrangements for electing or appointing a person to fill the position, the position shall be filled by election as vacancies in the position occur and as a member's term in the position expires, except to the extent that the enabling statute for the district or authority provides a different method for filling vacancies on the governing body.

(f) After the initial term of a position created under this section expires, the term of the position is six years.

Explanation: The added text is necessary to allow districts and authorities created under Section 52(b), Article III, Texas Constitution, or Section 59, Article XVI, Texas Constitution, such as river authorities, that have a governing body composed of an even number of members who serve staggered six-year terms and that depend on Section 30a, Article XVI, Texas Constitution, for the constitutional authority to have the members of the governing body serve six-year terms, to come into compliance with the changes made to Section 30a, Article XVI.

(3) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add text to the introductory language to the SECTION of the bill adding Sections 651.008, 651.0085, and 651.009 to the Government Code so that the introductory language reads as follows:

SECTION 50.01. Chapter 651, Government Code, is amended by adding Sections 651.008, 651.0085, and 651.009 to read as follows:

Explanation: The added text is necessarily connected with adding Section 651.0085, Government Code, to the bill.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 287 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **SB 287**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1046

Senator Bivins offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That the Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 3459**, relating to fiscal matters involving certain governmental educational entities, including public school finance, program compliance monitoring by the Texas Education Agency, amounts withheld from and the use of compensatory education allotments, the public school technology allotment, the accounting for the permanent school fund, employee benefits provided by certain educational entities, the uses of the telecommunications infrastructure fund, and participation in a multijurisdiction lottery game, to consider and take action on the following matter:

Senate Rule 12.03(4) is suspended to permit the committee to add SECTIONs 5, 28, 43, 44, 45, 59, 68, 69, 73, 74, 78, and 79 to read as follows:

SECTION 5. Section 11.151, Education Code, is amended by adding Subsection (e) to read as follows:

(e) A school district may request the assistance of the attorney general on any legal matter. The district must pay any costs associated with the assistance.

SECTION 28. (a) Sections 41.0021(a) and (e), Education Code, are amended to read as follows:

(a) Notwithstanding Section 41.002, for the [~~2001-2002, 2002-2003, and~~] 2003-2004 school year [~~years~~], a school district that in the 1999-2000 school year did not offer each grade level from kindergarten through 12 may elect to have its wealth per student determined under this section.

(e) This section expires September 1, 2004.

(b) This section prevails over any other Act of the 78th Legislature, Regular Session, 2003, amending Sections 41.0021(a) and (e), Education Code.

SECTION 43. Section 822.001, Government Code, is amended by adding Subsections (c) through (f) to read as follows:

(c) Membership in the retirement system begins on the 91st day after the first day a person is employed.

(d) A person who is reemployed after withdrawing contributions for previous service credit begins membership on the 91st day after the first day the person is reemployed.

(e) Notwithstanding any other provision of law, a member may establish credit only as provided by Section 823.406 for service performed during the 90-day waiting period provided by Subsection (c) or (d).

(f) Subsections (c), (d), and (e) and this subsection expire September 1, 2005.

SECTION 44. Section 823.002, Government Code, is amended to read as follows:

Sec. 823.002. SERVICE CREDITABLE IN A YEAR. (a) The board of trustees by rule shall determine how much service in any year is equivalent to one year of service credit, but in no case may all of a person's service in one school year be creditable as more than one year of service. Service that has been credited by the retirement system on annual statements for a period of five or more years may not be deleted or corrected because of an error in crediting unless the error concerns three or more years of service credit or was caused by fraud.

(b) The rules adopted by the board of trustees under Subsection (a) must provide that the 90-day waiting periods described by Sections 822.001(c) and (d) be applied with regard to contributions during a member's first year of service under either of those subsections in a manner that, to the greatest extent possible, minimizes the cost to the retirement system. This subsection expires September 1, 2005.

SECTION 45. Subchapter E, Chapter 823, Government Code, is amended by adding Section 823.406 to read as follows:

Sec. 823.406. CREDIT PURCHASE OPTION FOR CERTAIN SERVICE. (a) A member may establish membership service credit under this section only for service performed during a 90-day waiting period to become a member after beginning employment.

(b) A member may establish service credit under this section by depositing with the retirement system, for each month of service credit, the actuarial present value, at the time of deposit, of the additional standard retirement annuity benefits that would be attributable to the purchase of the service credit under this section, based on rates and tables recommended by the retirement system's actuary and adopted by the board of trustees.

(c) After a member makes the deposits required by this section, the retirement system shall grant the member one month of equivalent membership service credit for each month of credit approved.

(d) The retirement system shall deposit the amount of the actuarial present value of the service credit purchased in the member's individual account in the employees saving account.

(e) The board of trustees may adopt rules to administer this section.

SECTION 59. Section 57.046, Utilities Code, is amended by amending Subsection (a) and adding Subsections (c) and (d) to read as follows:

(a) The board shall use money in the public schools account to:

(1) to the extent directed in the General Appropriations Act, fund the technology allotment under Section 32.005, Education Code; and

(2) award grants and loans in accordance with this subchapter to fund:

(A) [~~(1)~~] equipment for public schools, including computers, printers, computer labs, and video equipment; and

(B) [~~(2)~~] intracampus and intercampus wiring to enable those public schools to use the equipment.

(c) Section 57.047(d) does not apply to the use of money in the public schools account for the purpose specified by Subsection (a)(1).

(d) In addition to the purposes for which the qualifying entities account may be used, the board may use money in the account to award grants to the Health and Human Services Commission for technology initiatives of the commission.

SECTION 68. Notwithstanding any conflicting provision of H.B. No. 1, Acts of the 78th Legislature, Regular Session, 2003, the guaranteed level of state and local funds per weighted student per cent of tax effort is $25.81. This subsection does not affect a school district's entitlement to any additional revenue under H.B. No. 1, Acts of the 78th Legislature, Regular Session, 2003.

SECTION 69. Of the amounts appropriated by H.B. No. 1, Acts of the 78th Legislature, Regular Session, 2003, to the Texas Education Agency under Strategy A.1.2, FSP - Equalized Facilities, for purposes of the existing debt assistance program under Subchapter B, Chapter 46, Education Code, the commissioner of education may, in the fiscal year ending August 31, 2005, use an amount not to exceed $20 million for purposes of the instructional facilities allotment under Subchapter A, Chapter 46, Education Code.

SECTION 73. Section 822.001, Government Code, as amended by this Act, and Section 823.406, Government Code, as added by this Act, apply only to a person who is first employed on or after the effective date of this Act and to a former employee who has withdrawn retirement contributions under Section 822.003, Government Code, and is reemployed on or after the effective date of this Act.

SECTION 74. The requirements of Section 823.002(b), Government Code, as added by this Act, apply to persons whose employment begins on or after the effective date of this Act. The board of trustees of the Teacher Retirement System of Texas shall adopt rules implementing the requirements of that subsection as soon as practicable after the effective date of this Act.

SECTION 78. Chapter 466, Government Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. PARTICIPATION IN MULTIJURISDICTION LOTTERY GAME

Sec. 466.451. MULTIJURISDICTION AGREEMENT AUTHORIZED. The commission may enter into a written agreement with the appropriate officials of one or more other states or other jurisdictions, including foreign countries, to participate in the operation, marketing, and promotion of a multijurisdiction lottery game or games. The commission may adopt rules relating to a multijurisdiction lottery game or games.

Sec. 466.452. REVENUE FROM MULTIJURISDICTION LOTTERY. (a) Except as provided by this section, revenue received from the sale of tickets in this state for a multijurisdiction lottery game is subject to Subchapter H.

(b) The commission may deposit a portion of the revenue received from the sale of multijurisdiction lottery game tickets in this state into a fund shared with other parties to an agreement under this subchapter for the payment of prizes awarded in multijurisdiction lottery games in which the commission participates. The commission may retain that revenue in the fund for as long as necessary to pay prizes claimed during the period designated for claiming a prize in the multijurisdiction lottery game.

Sec. 466.453. PAYMENT OF COSTS AUTHORIZED. The commission may share in the payment of costs associated with participating in multijurisdiction lottery games.

SECTION 79. (a) As soon as practicable after the effective date of this Act, the Texas Lottery Commission shall adopt the rules necessary to implement multijurisdiction lottery games in accordance with Subchapter J, Chapter 466, Government Code, as added by this Act.

(b) The Texas Lottery Commission may adopt an emergency rule under Subsection (a) of this section without prior notice or hearing, or with any abbreviated notice and hearing as the commission finds practicable, for the implementation of the change in law made by Subchapter J, for multijurisdiction lottery games, Chapter 466, Government Code. Section 2001.034, Government Code, does not apply to an emergency rule adopted under this section.

(c) Notwithstanding any law to the contrary, including any law enacted during the 78th Legislature, Regular Session, 2003, to promptly implement Subchapter J, Chapter 466, Government Code, as added by this Act, a contract for the acquisition or provision of facilities, supplies, equipment, materials, or services related to the initial operation of multijurisdiction lottery games under these subchapters is not subject to:

(1) Subtitle D, Title 10, Government Code;

(2) Section 466.101, Government Code;

(3) Chapter 2161, Government Code; or

(4) any competitive bidding requirements or contract requirements provided by any other law or by rules of the Texas Lottery Commission.

Explanation: These additions are necessary to permit a school district to request the assistance of the attorney general, to provide for determining the wealth per student of certain school districts, to administer the state retirement system, including delaying participation in the state retirement system until the 91st day after employment with the state, to permit the awarding of certain grants to the Health and Human Services Commission for technology initiatives, to provide that the guaranteed level of state and local funds per weighted student per cent of tax effort is $25.81, to permit the commissioner of education to use certain funds for purposes of the instructional facilities allotment under Subchapter A, Chapter 46, Education Code, and to permit the Texas Lottery Commission to participate in a multijurisdiction lottery game or games.

The resolution was read and was adopted by the following vote: Yeas 20, Nays 9.

Yeas: Armbrister, Averitt, Barrientos, Bivins, Brimer, Deuell, Ellis, Estes, Gallegos, Harris, Hinojosa, Jackson, Janek, Lindsay, Lucio, Madla, Ogden, Van de Putte, Wentworth, Zaffirini.

Nays: Carona, Fraser, Nelson, Ratliff, Shapiro, Shapleigh, Staples, West, Williams.

Absent: Duncan, Whitmire.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3459 ADOPTED

Senator Bivins called from the President's table the Conference Committee Report on **HB 3459**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Bivins, the Conference Committee Report was adopted by the following vote: Yeas 22, Nays 8.

Yeas: Armbrister, Averitt, Barrientos, Bivins, Brimer, Deuell, Duncan, Ellis, Estes, Gallegos, Harris, Hinojosa, Jackson, Janek, Lindsay, Lucio, Madla, Ogden, Wentworth, West, Whitmire, Zaffirini.

Nays: Fraser, Nelson, Ratliff, Shapiro, Shapleigh, Staples, Van de Putte, Williams.

Absent: Carona.

AT EASE

The Presiding Officer, Senator Armbrister in Chair, at 2:40 p.m. announced the Senate would stand At Ease subject to the call of the Chair.

IN LEGISLATIVE SESSION

Senator Averitt at 3:15 p.m. called the Senate to order as In Legislative Session.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER
Austin, Texas
June 1, 2003

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the House to inform the Senate that the House has taken the following action:

THE HOUSE HAS PASSED THE FOLLOWING MEASURES:

HCR 285, Instructing the enrolling clerk of the senate to make technical corrections to S.B. No. 1108.

THE HOUSE HAS ADOPTED THE FOLLOWING CONFERENCE COMMITTEE REPORTS:

HB 425 (non-record vote)
HB 638 (House adopts ccr by a vote of 148 yeas, 0 nays, 2 pnv)
HB 1082 (non-record vote)
HB 1314 (House adopts ccr by a vote of 136 yeas, 6 nays, 2 pnv)
HB 1541 (House adopts ccr by a vote of 148 yeas, 0 nays, 2 pnv)
HB 1576 (House adopts ccr by a vote of 138 yeas, 0 nays, 2 pnv)
HB 1817 (House adopts ccr by a vote of 145 yeas, 0 nays, 2 pnv)
HB 2044 (House adopts ccr by a vote of 146 yeas, 0 nays, 2 pnv)
HB 2455 (non-record vote)
HB 3042 (House adopts ccr by a vote of 147 yeas, 0 nays, 2 pnv)
HB 3546 (non-record vote)
HJR 28 (House adopts ccr by a vote of 143 yeas, 0 nays, 2 pnv)
SB 127 (House adopts ccr by a vote of 146 yeas, 0 nays, 2 pnv)
SB 287 (House adopts ccr by a vote of 142 yeas, 0 nays, 3 pnv)
SB 755 (House adopts ccr by a vote of 144 yeas, 0 nays, 2 pnv)
SB 1059 (non-record vote)
SB 1108 (House adopts ccr by a vote of 146 yeas, 0 nays, 2 pnv)
SB 1272 (non-record vote)
SB 1303 (House adopts ccr by a vote of 147 yeas, 0 nays, 2 pnv)
SB 1387 (non-record vote)
SB 1782 (House adopts ccr by a vote of 147 yeas, 0 nays, 2 pnv)
SB 1936 (House adopts ccr by a vote of 145 yeas, 0 nays, 1 pnv)

THE HOUSE HAS DISCHARGED ITS CONFEREES AND CONCURRED IN SENATE AMENDMENTS TO THE FOLLOWING MEASURES:

HB 645 (non-record vote)

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

VOTE RECONSIDERED ON SENATE BILL 280

On motion of Senator Nelson and by unanimous consent, the vote by which the Conference Committee Report on **SB 280** was adopted was reconsidered.

Question — Shall the Conference Committee Report on **SB 280** be adopted?

The Conference Committee Report to **SB 280** was again adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1051

Senator Duncan offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 1370**, relating to certain group benefit plans provided to certain governmental officers, employees, and retirees and their dependents, to consider and take action on the following matter:

Senate Rule 12.03(4) is suspended to permit the committee to add a new section to the bill to read as follows:

SECTION 2.08. Subchapter G, Chapter 1551, Insurance Code, as effective June 1, 2003, is amended by adding Section 1551.3015 to read as follows:

Sec. 1551.3015. COST ASSESSMENT FOR CERTAIN PARTICIPANTS. Notwithstanding any other provision of law, the board of trustees may impose against an employer whose employees are not paid salaries from amounts appropriated by the General Appropriations Act and whose participation in the group benefits program begins after August 31, 2003, as a condition for participation in the program, a one-time assessment of administrative costs for participation of the employees and annuitants in the program, which may include the actuarial costs of including the group in the program and a participation premium determined by the board. The board of trustees shall deposit all amounts recovered under this section in the employees life, accident, and health insurance and benefits fund.

Explanation: The added section is necessary to authorize the board of trustees to impose a cost assessment against certain employers whose employees and annuitants participate in the group benefits program under the Texas Employees Group Benefits Act.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1370 ADOPTED

Senator Duncan called from the President's table the Conference Committee Report on **SB 1370**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Duncan, the Conference Committee Report was adopted by a viva voce vote.

RECORD OF VOTE

Senator Ratliff asked to be recorded as voting "Nay" on the adoption of the Conference Committee Report on **SB 1370**.

GUESTS PRESENTED

Senator Shapleigh was recognized and introduced to the Senate a delegation of international students: Arlene Masabo and Jennie Masabo from Burundi, and Loise Lundberg and Stephen Klongo from Kenya.

The Senate welcomed its guests.

SENATE BILL 611 WITH HOUSE AMENDMENT

Senator Nelson called **SB 611** from the President's table for consideration of the House amendment to the bill.

The Presiding Officer, Senator Averitt in Chair, laid the bill and the House amendment before the Senate.

Amendment No. 1

Amend SECTION 2 of **SB 611** by adding:

(c) A person described in Section 149.001(b)(1) of the Finance Code may request a hearing before the Credit Union Commissioner for additional time to comply with this section. If the Commissioner makes a determination that the person is unable to comply with the provisions in this section by March 1, 2005 and has made a good faith attempt to comply with this section, the Commissioner shall issue an order for the person to take the actions required and provide for up to one year for the person to come into compliance with this section. Any person not provided additional time to comply will be subject to all provisions of this section as of the effective date. Any hearing conducted and all materials related to such hearing are deemed confidential. Any request for a hearing shall be made not less than 60 days prior to March 1, 2005.

The amendment was read.

Senator Nelson moved to concur in the House amendment to **SB 611**.

The motion prevailed by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 16 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **SB 16**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1771 ADOPTED

Senator Brimer called from the President's table the Conference Committee Report on **SB 1771**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Brimer, the Conference Committee Report was adopted by a viva voce vote.

RECORD OF VOTE

Senator Ogden asked to be recorded as voting "Nay" on the adoption of the Conference Committee Report on **SB 1771**.

SENATE RESOLUTION 1047

Senator Nelson offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 2455**, relating to the governmental entities subject to, and the confidentiality of records under, the sunset review process, to consider and take action on the following matter:

Senate Rule 12.03(4) is suspended to permit the committee to add new sections to the bill to read as follows:

SECTION 1.03. TEXAS LOTTERY COMMISSION AND LOTTERY DIVISION. (a) Section 467.002, Government Code, is amended to read as follows:

Sec. 467.002. APPLICATION OF SUNSET ACT. The commission is subject to Chapter 325 (Texas Sunset Act). Unless continued in existence as provided by that chapter, the commission is abolished and this Act expires September 1, 2005 [~~2003~~]. In the review of the commission by the Sunset Advisory Commission, as required by this section, the sunset commission shall limit its review to the appropriateness of recommendations made by the sunset commission to the 78th Legislature. In the Sunset Advisory Commission's report to the 79the Legislature, the sunset commission may include any recommendations it considers appropriate.

(b) Section 466.003(a), Government Code, is amended to read as follows:

(a) The lottery division is subject to Chapter 325 (Texas Sunset Act). Unless continued in existence as provided by that chapter, the division is abolished and this chapter expires September 1, 2005 [~~2003~~]. In the review of the lottery division by the Sunset Advisory Commission, as required by this section, the sunset commission shall limit its review to the appropriateness of recommendations made by the sunset

commission to the 78th Legislature. In the Sunset Advisory Commission's report to the 79the Legislature, the sunset commission may include any recommendations it considers appropriate.

(c) This section takes effect only if the 78th Legislature, Regular Session, 2003, does not enact other legislation that becomes law and that amends Section 467.002, Government Code, to extend the sunset date of the Texas Lottery Commission. If the 78th Legislature, Regular Session, 2003, enacts legislation of that kind, this section has no effect.

SECTION 1.04. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS. (a) Section 2306.022, Government Code, is amended to read as follows:

Sec. 2306.022. APPLICATION OF SUNSET ACT. The Texas Department of Housing and Community Affairs is subject to Chapter 325 (Texas Sunset Act). Unless continued in existence as provided by that chapter, the department is abolished and this chapter expires September 1, 2005 [~~2003~~]. In the review of the department by the Sunset Advisory Commission, as required by this section, the sunset commission shall limit its review to the appropriateness of recommendations made by the sunset commission to the 78th Legislature and the extent to which the department has implemented laws enacted by the 77th Legislature in continuing the department. In the Sunset Advisory Commission's report to the 79th Legislature, the sunset commission may include any recommendations it considers appropriate.

(b) This section takes effect only if the 78th Legislature, Regular Session, 2003, does not enact other legislation that becomes law and that amends Section 2306.022, Government Code, to extend the sunset date of the Texas Department of Housing and Community Affairs. If the 78th Legislature, Regular Session, 2003, enacts legislation of that kind, this section has no effect.

SECTION 1.05. TEXAS AFFORDABLE HOUSING CORPORATION. (a) Section 2306.5521, Government Code, is amended to read as follows:

Sec. 2306.5521. SUNSET PROVISION. The Texas State Affordable Housing Corporation is subject to Chapter 325 (Texas Sunset Act). Unless continued in existence as provided by that chapter, the corporation is abolished and this subchapter expires September 1, 2005 [~~2003~~]. In the review of the corporation by the Sunset Advisory Commission, as required by this section, the sunset commission shall limit its review to the appropriateness of recommendations made by the sunset commission to the 78th Legislature. In the Sunset Advisory Commission's report to the 79th Legislature, the sunset commission may include any recommendations it considers appropriate.

(b) This section takes effect only if the 78th Legislature, Regular Session, 2003, does not enact other legislation that becomes law and that amends Section 2306.5521, Government Code, to extend the sunset date of the Texas State Affordable Housing Corporation. If the 78th Legislature, Regular Session, 2003, enacts legislation of that kind, this section has no effect.

SECTION 1.06. TEXAS HIGHER EDUCATION COORDINATING BOARD. (a) Section 61.0211, Education Code, is amended to read as follows:

Sec. 61.0211. SUNSET PROVISION. The Texas Higher Education Coordinating Board is subject to Chapter 325, Government Code (Texas Sunset Act). Unless continued in existence as provided by that chapter, the board is abolished and

this chapter expires September 1, 2005 [~~2003~~]. In the review of the board by the sunset commission, as required by this section, the commission shall limit its review to the appropriateness of recommendations made by the commission to the 78th Legislature. In the commissions report to the 79th Legislature, the commission may include any recommendations it considers appropriate.

(b) This section only takes effect if the 78th Legislature. Regular Session, 2003, does not enact other legislation that becomes law and that amends Section 61.0211, education Code, to extend the sunset date of the Texas Higher Education Coordinating Board. If the 78th Legislature, Regular Session, 2003, enacts legislation of that kind, this section has no effect.

SECTION 2.06. REGIONAL EDUCATION SERVICE CENTERS. If the 78th Legislature, Regular Session, 2003, enacts legislation that becomes law and that makes regional education service centers subject to Chapter 325, Government Code (Texas Sunset Act), the comptroller of public accounts shall assist the Sunset Advisory Commission in its review. The comptroller shall conduct a review of the regional education service centers and report the results of the review to the Sunset Advisory Commission before March 1, 2004. The comptroller shall consult the Sunset Advisory Commission regarding the scope of the review. The report shall also be transmitted to the presiding officers of the standing committee in the senate and the house of representatives responsible for public education.

Explanation: These additions are needed to ensure that the Texas Lottery Commission, the lottery division, the Texas Department of Housing and Community Affairs, the Texas Affordable Housing Corporation, the Texas Higher Education Coordinating Board, and regional education service centers are continued in existence but are reviewed without unnecessary delay by the Sunset Advisory Commission.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2455 ADOPTED

Senator Nelson called from the President's table the Conference Committee Report on **HB 2455**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Nelson, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2292 ADOPTED

Senator Nelson called from the President's table the Conference Committee Report on **HB 2292**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

Senator Nelson moved to adopt the Conference Committee Report.

Senator Gallegos was recognized to ask questions of Senator Nelson.

Senator Ratliff moved to call the previous question on the Conference Commitee Report on **HB 2292**.

The motion to call the previous question prevailed and the Conference Committee Report on **HB 2292** was adopted by a viva voce vote.

RECORD OF VOTES

Senators Barrientos, Hinojosa, Lucio, Madla, and Shapleigh asked to be recorded as voting "Nay" on the adoption of the Conference Committee Report on **HB 2292**.

STATEMENT OF LEGISLATIVE INTENT

Senator Van de Putte submitted the following statement of legislative intent on **HB 2292**:

I authored Senate Floor Amendment No. 44 on **HB 2292** which was adopted on the Senate floor and is found in the Conference Committee Report as Section 2.204 on page 258 of the Conference Committee Report on **HB 2292** regarding the Texas Health Steps Comprehensive Care Program is intended to increase the availability of providers in the Comprehensive Care Program and reduce administrative burdens on those providers.

This section is not intended to increase costs to the Comprehensive Care Program over or above those appropriated in **HB 1**, but will ensure that children receiving services have adequate access to providers. The services provided under the Comprehensive Care Program allow medically fragile children to remain at home with their families rather than being housed in hospitals or institutions at greater cost to the state.

VAN DE PUTTE

CONFERENCE COMMITTEE ON SENATE BILL 1862 DISCHARGED

On motion of Senator Bivins and by unanimous consent, the Senate conferees on **SB 1862** were discharged.

Question — Shall the Senate concur in the House amendments to **SB 1862**?

Senator Bivins moved to concur in the House amendments to **SB 1862**.

The motion prevailed by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 4 ADOPTED

Senator Ratliff called from the President's table the Conference Committee Report on **HB 4**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

Senator Hinojosa was recognized to ask questions of Senator Ratliff.

On motion of Senator Hinojosa and by unanimous consent, the following questions and answers to establish legislative intent regarding **HB 4** were ordered reduced to writing and printed in the *Senate Journal:*

Senator Hinojosa: Governor, the definitions section of Article 10 includes "affiliate" in the definition of a "health care provider." Are HMOs covered under the definition of affiliate? Is their liability also capped at $250K?

Senator Ratliff: No, this bill and the caps do not apply to HMOs. Causes of action against HMOs are governed by Chapter 88 of the Civil Practice and Remedies Code, not by this new Chapter 74. Causes of action against HMOs are not health care liability claims as defined under this chapter.

Senator Hinojosa: On page 46 at lines 8-13, there is a definition of "professional or administrative services." Are claims involving those services automatically made "health care liability claims?" What about hiring a convicted felon or extending privileges to a drug-addicted physician, or having a hazardous condition on your premises?

Senator Ratliff: No, those aren't made "health care liability claims" because if you look at the definition of "health care" (page 42, line 22) and "health care liability claim" (page 44, lines 10-17) the services must relate directly to the treatment of a particular patient. None of the examples you gave would qualify.

Senator Hinojosa: Governor, on page 61, lines 12-13, the bill adds in the words "obstetrical unit" and "surgical suite" to the new section on the standard of proof now required for emergency care. Does this mean that now the higher standard applies to emergency care in these areas of a hospital, not just the emergency room?

Senator Ratliff: Only if the same emergency that brought the patient into the ER still exists when the patient gets to the OR or Labor and Delivery area.

Senator Hinojosa: What about a case where the patient goes to the emergency room, is stabilized and then transferred to an OB unit or surgical suite and then another emergency occurs?

Senator Ratliff: No, this does not apply to emergencies that arise during surgery or labor and delivery. It only applies to emergencies that exist when the patient is brought to the ER and still exists when the patient goes immediately to an OB unit or surgical suite from the ER. This is on page 62, subsection (b)(1).

Senator Hinojosa: As a follow-up question, Governor, on page 61, line 19, the section applies to the plaintiff's burden of proof in emergency care cases. Does this mean that if a doctor's negligence causes the emergency, like in a case where a doctor is trying to intubate a child and blows air into the stomach instead of the lungs, and the case now becomes an emergency case, but only because of what the doctor did?

Senator Ratliff: No, obviously, if a doctor's negligence causes the emergency, this section does not apply. See page 62, subsection (b)(3).

Senator Hinojosa: The existing law on immunity for emergency care (page 59, lines 22-23) says that someone is liable if they are "willfully or wantonly negligent," and the new provision (page 61, line 9) speaks of "willful and wanton negligence." Is there any change to the standard?

Senator Ratliff: No, the standard is the same. Both willful and wanton negligence are covered, but this is basically a gross negligence standard. You don't have to prove intent.

Senator Hinojosa: Section 74.151(b)(1) (page 59, line 24 through page 60, line 1) says that the immunity given by 74.151(a) doesn't apply if care is rendered "for or in expectation of remuneration" and then the new language added by the bill says that "being legally entitled to receive remuneration shall not determine whether or not the care was rendered for or in anticipation of remuneration." You don't intend to let someone who is legally entitled to bill the patient decide after they've committed negligence to waive their charges after the fact, do you?

Senator Ratliff: No, of course not. The intent not to accept any remuneration of any kind must be evident before the emergency care is rendered. This is only intended to apply to the true Good Samaritan.

Senator Hinojosa: Governor, on page 91, line 13, new Sec. 84.0065 of the bill, subsection (a)(1) states that the acknowledgement that the patient signs must state that the hospital is providing care that is not administered for or in expectation of compensation. This doesn't say to whom the care is provided; the hospital could be providing care to other people for free, while I'm paying for my care and still get limited liabilty.

Senator Ratliff: No, the acknowledgement should mean that the hospital is providing my care for free and that's what they get limited liability for. Just because they're providing someone else's care for free doesn't give them limited liability.

Senator Hinojosa: Governor, on page 106, lines 6-8, does this provision mean that a patient can't recover future damages?

Senator Ratliff: No, it just means that economic damages are limited to those actually incurred. You can't recover more than you've actually paid or been charged for your health care expenses in the past or what the evidence shows you will probably be charged in the future.

Senator Hinojosa: In the authorization a patient who brings a suit has to sign when they send notice of intent to sue a health care provider, there is a place for the patient to object to providing records that aren't relevant to the case (page 50, lines 15-25). What about records that may not be irrelevant but are nevertheless privileged under the law, like mental health records?

Senator Ratliff: Nothing in this section is intended to change the law of privilege so the patient could still decline to authorize the disclosure of privileged records until the court had ruled on the patient's objection.

Senator Hinojosa: When a defendant names a responsible third party, as I understand it, the plaintiff has 60 days to bring the third party into the suit, even if limitations would otherwise have run against that person (Sec. 33.004(e), page 20, line 27 - 21, line 7). Is that true in a medical malpractice claim too, because on page 63 of the bill it seems to say that the two-year statute in those cases applies notwithstanding any other law?

Senator Ratliff: Yes, if health care providers are going to have the benefit of the designation of responsible third parties, then they have to abide by the same rules as everyone else. This 60-day provision would apply in health care liability claims.

Senator Duncan was recognized to ask questions of Senator Ratliff.

On motion of Senator Duncan and by unanimous consent, the following question and answer to establish legislative intent regarding **HB 4** were ordered reduced to writing and printed in the *Senate Journal:*

Senator Duncan: Chairman Ratliff, is it your intent that Article 21 of the bill, adding 75.002(h) to the Civil Practice and Remedies Code, shall not affect any existing legal remedies for actions regarding odors?

Senator Ratliff: Yes, Article 21 is not intended to affect any existing legal remedies for actions regarding odors.

Senator Hinojosa was recognized to ask questions of Senator Duncan.

On motion of Senator Hinojosa and by unanimous consent, the following questions and answers to establish legislative intent regarding **HB 4** were ordered reduced to writing and printed in the *Senate Journal:*

Senator Hinojosa: I would like to clarify a couple of points relating to the rebuttal presumption created by Section 82.008 of the bill. How does the presumption work in a case where the manufacturer complied with all federal standards that exist for a product but no standard exists that relates specifically to the defect that has been alleged by a plaintiff?

Senator Duncan: The presumption created by the bill would not apply in that case. The bill provides that the presumption comes into play only when there is a mandatory federal standard that governed the product risk that allegedly caused harm. The intent of this language is to have the presumption apply only when there is a federal standard that is designed to regulate the aspect of the manufacture or design of the product that the plaintiff claims is defective. The intent of the bill is to ensure that there is a relationship between the federal standard in question and the defect being alleged by the plaintiff. If there is not a relationship, the presumption will not apply.

Senator Hinojosa: I read the bill to also provide that even if there is a federal standard that applies to alleged defect that the plaintiff is complaining about, the plaintiff can rebut the presumption by showing that the federal standard is inadequate to protect the public from unreasonable risk of injury.

Senator Duncan: That's correct.

Senator Hinojosa: What happens if the manufacturer learns of a defect in a product after it is sold but fails to inform the federal government or the public of the problem? Does the presumption in the bill give the manufacturer any additional protection in that case?

Senator Duncan: No. The purpose of the government standards defense is to provide manufacturers some protection where they comply with mandatory federal standards that are specifically designed to address that alleged defect in question in a lawsuit. However, the bill does not create immunity for a manufacturer. There will only be additional protection if the manufacturer complied with the mandatory standard and the standard was, in fact, adequate to accomplish its purpose. The bill is intended to focus the debate where it should be, that is, on whether the mandatory standard is adequate. If the standard is adequate then, by definition, the product is not defective with respect to that aspect of the product. If the standard is not adequate,

then the bill offers the manufacturer no additional protection because the presumption is rebutted, and the factfinder may then determine whether the product is defective as the plaintiff has alleged. If the manufacturer learns of information that demonstrates that the standard is not, in fact, adequate and fails to share that information with the federal government, this evidence can be presented to the factfinder to show that the standard is not adequate and thereby rebut the presumption. The bill is intended to prevent having an anomalous situation where a standard is determined to be adequate, but the product is found to be defective with respect to the risk covered by the standard. If the standard is adequate and the product complies with the standard, it is not defective. If the standard is not adequate, there is no presumption and the factfinder will determine whether there is a defect.

Senator Hinojosa: How does this part of the bill affect Texas law with respect to no post-sale duty to warn? Does it create a conflict?

Senator Duncan: No. If the manufacturer has relevant information concerning the adequacy of the standard and fails to disclose that information or misrepresents that information, the manufacturer will not get the benefit of the presumption. This is expressly set out in the bill as a way of rebutting the presumption and it does not matter whether the failure to disclose occurred before or after the product was sold. This does not create a post-sale duty to warn, but it does encourage manufacturers to disclose information they obtain post-sale if they want to have the benefit of the protections provided in the bill. If they do not disclose this information to the appropriate federal agency, they will not get the benefit of the presumption.

Senator Hinojosa: How does this bill affect existing federal notification requirements, such as those governing vehicles and tires?

Senator Duncan: It does not affect any such requirements under federal law at all. However, because a manufacturer will lose the benefit of the presumption created by this bill if the manufacturer fails to disclose information that is relevant to a federal agency's determination of the adequacy of a safety standard, it is likely that, in most cases, a manufacturer will not get the benefit of the presumption if the manufacturer has failed to comply with federal notification requirements. Also, information that is required to be disclosed by federal law is quite likely to be information that is also relevant to a factfinder's determination of the adequacy of the safety standard in question.

Senator Gallegos was recognized to ask questions of Senator Ratliff.

On motion of Senator Gallegos and by unanimous consent, the following questions and answers to establish legislative intent regarding **HB 4** were ordered reduced to writing and printed in the *Senate Journal:*

Senator Gallegos: Senator, would you agree that we have been passing tort reform since the malpractice bill was passed in 1977?

Senator Ratliff: Well I haven't, Senator, but I have been passing it since 1989, or at least trying to pass some since 1989.

Senator Gallegos: And throughout this entire session we have been solving an insurance problem by taking away rights from our constituents.

Senator Ratliff: Well I'm not sure I would characterize it that way, Senator, but it's certainly your prerogative.

Senator Gallegos: Do you consider this to be the end of tort reform?

Senator Ratliff: Senator, I certainly can't answer that. I will just say this to you, I did my best. After listening to 61 hours of testimony to try to be fair to both sides or to all sides of this issue, I dare say that there are some things we tried to do that may not work, that may not have accomplished our purpose. We may have gone too far in some places and it may be that we have to come back and fine-tune this. I hope that we have struck a balance here where we don't have to do major tort reform in the future and we can only fine-tune what we have done. That would be my fondest hope.

Senator Gallegos: What if we go home and hear from our constituents that they don't like doctors getting away with negligent conduct?

Senator Ratliff: Senator, I think that's just like every law we pass here. If we pass laws and we go home and we live with them for a year or two and the people of this state believe that they are not working, that's why we have to come back every two years. We got to come back and fix it.

Senator Gallegos: If we have gone too far, will you come back in two years and help try to fix the problem?

Senator Ratliff: Senator, I would certainly commit to you that if I believe, after this goes into place, if I hear enough evidence to convince me that we have gone farther than we should have in trying to protect the medical community so that we can all continue to have medical services, if I come to that conclusion then I would certainly come back here and help you try to fix it.

On motion of Senator Ratliff, the Conference Committee Report on **HB 4** was adopted by the following vote: Yeas 27, Nays 4.

Yeas: Armbrister, Averitt, Bivins, Brimer, Carona, Deuell, Duncan, Ellis, Estes, Fraser, Harris, Hinojosa, Jackson, Janek, Lindsay, Lucio, Madla, Nelson, Ogden, Ratliff, Shapiro, Staples, Wentworth, West, Whitmire, Williams, Zaffirini.

Nays: Barrientos, Gallegos, Shapleigh, Van de Putte.

SENATE RESOLUTION 1044

Senator Janek offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 463**, relating to structures that constitute insurable property under the Texas Windstorm Insurance Association, to consider and take action on the following matter:

(1) Senate Rule 12.03(1) is suspended to permit the committee to change Section 1 of the bill to read as follows:

SECTION 1. Subsection (f), Section 3, Article 21.49, Insurance Code, is amended to read as follows:

(f) "Insurable Property" means immovable property at fixed locations in a catastrophe area or corporeal movable property located therein (as may be designated in the plan of operation) which property is determined by the Association, pursuant to the criteria specified in the plan of operation to be in an insurable condition against windstorm, hail and/or fire and explosion as appropriate, as determined by normal underwriting standards; provided, however, that insofar as windstorm and hail insurance is concerned, any structure located within a catastrophe area, commenced on or after the 30th day following the publication of the plan of operation, not built or continuing in compliance with building specifications set forth in the plan of operation shall not be an insurable risk under this Act except as otherwise provided under this Act. A structure, or an addition thereto, which is constructed in conformity with plans and specifications that comply with the specifications set forth in the plan of operation at the time construction commences shall not be declared ineligible for windstorm and hail insurance as a result of subsequent changes in the building specifications set forth in the plan of operation. Except as otherwise provided by this subsection, if [~~When~~] repair of damage to a structure involves replacement of items covered in the building specifications as set forth in the plan of operation, such repairs must be completed in a manner to comply with such specifications for the structure to continue within the definition of Insurable Property for windstorm and hail insurance. If repair of damage to a structure is based on a direct loss and claim the amount of which is equal to less than five percent of the amount of total property coverage on the structure, the repairs may be completed in a manner that returns the structure to its condition immediately before the loss without affecting the eligibility of the structure to qualify as insurable property. Nothing in this Act shall preclude special rating of individual risks as may be provided in the plan of operation. For purposes of this Act, all structures which are located within those areas designated as units under the federal Coastal Barrier Resources Act (Public Law 97-348) and for which construction has commenced on or after July 1, 1991 shall not be considered insurable property.

Explanation: The change in SECTION 1 is necessary to remove language designating certain structures as insurable property by the Texas Windstorm Insurance Association if a building permit or plat was filed with the municipality, county, or United States Army Corps of Engineers before the effective date of the bill and to provide that if a direct loss occurs, and the amount of repair constitutes five percent or less of the value of the property, the insurability of the property is not affected if the repairs are properly made.

(2) Senate Rule 12.03(4) is suspended to permit the committee to add a new section to the bill to read as follows:

SECTION 2. Subdivision (9), Subsection (h), Section 8, Article 21.49, Insurance Code, is amended to read as follows:

(9) A rate established and authorized by the commissioner under this subsection may not reflect an average rate change that is more than 10 percent higher or lower than the rate for commercial or 10 percent higher or lower than the rate for noncommercial windstorm and hail insurance in effect on the date the filing is made. The rate may not reflect a rate change for an individual rating class that is 15 percent higher or lower than the rate for that individual class in effect on the date the filing is

made. The commissioner may, after notice and hearing, suspend this subdivision upon a finding that a catastrophe loss or series of occurrences resulting in losses in the catastrophe area justify a need to assure rate adequacy in the catastrophe area and also justify a need to assure availability of insurance outside the catastrophe area. [~~This subdivision expires December 31, 2005.~~]

Explanation: The change in SECTION 2 is necessary to remove the expiration of Subsection (h) of Section 8, which establishes certain limitations on the amount of the rate the commissioner sets and requires the commissioner to justify the rate if the rate is not set within those limitations.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 463 ADOPTED

Senator Janek called from the President's table the Conference Committee Report on **SB 463**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Janek, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1052

Senator Jackson offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 14**, relating to certain insurance rates, forms, and practices; providing penalties, to consider and take action on the following matter:

Senate Rule 12.03, Subdivision (4), is suspended to permit the committee to add the following new subdivision to Section 4(c), Article 5.142, Insurance Code, as added by the bill:

(2) a "new insurer" is defined as an insurer that, as of the effective date of S.B. 14, Acts of the 78th Legislature, Regular Session, 2003, is not authorized to write residential property insurance in this state and not affiliated with another insurer that is authorized to write and is writing residential property insurance as of the effective date of S.B. 14, Acts of the 78th Legislature, Regular Session, 2003;

Explanation: This subsection is necessary to clarify certain filing requirements for certain insurers that were not writing residential property insurance or that were not affiliated with an insurer that was writing residential property insurance on the effective date of the bill.

Senate Rule 12.03, Subdivision (4), is suspended to permit the committee to add the following new article to the bill:

ARTICLE 16. RULEMAKING

SECTION 16.01. Section 36.001, Insurance Code, is amended to read as follows:

Sec. 36.001. [~~RULES FOR~~] GENERAL RULEMAKING AUTHORITY [~~AND UNIFORM APPLICATION~~]. (a) The commissioner may adopt any rules necessary and appropriate to implement [~~for the conduct and execution of~~] the powers and duties of the department under this code and other laws of this state [~~only as authorized by statute~~].

(b) Rules adopted under this section must have general and uniform application.

[~~(c) The commissioner shall publish the rules in a format organized by subject matter. The published rules shall be kept current and be available in a form convenient to any interested person.~~]

SECTION 16.02. Section 36.004, Insurance Code, is amended to read as follows:

Sec. 36.004. COMPLIANCE WITH NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS REQUIREMENTS. Except as provided by Section 36.005, the [~~The~~] department may not require an insurer to comply with a rule, regulation, directive, or standard adopted by the National Association of Insurance Commissioners, including a rule, regulation, directive, or standard relating to policy reserves, unless application of the rule, regulation, directive, or standard is expressly authorized by statute and approved by the commissioner.

SECTION 16.03. Subchapter A, Chapter 36, Insurance Code, is amended by adding Section 36.005 to read as follows:

Sec. 36.005. INTERIM RULES TO COMPLY WITH FEDERAL REQUIREMENTS. (a) The commissioner may adopt rules to implement state responsibility in compliance with a federal law or regulation or action of a federal court relating to a person or activity under the jurisdiction of the department if:

(1) federal law or regulation, or an action of a federal court, requires:

(A) a state to adopt the rules; or

(B) action by a state to ensure protection of the citizens of the state;

(2) the rules will avoid federal preemption of state insurance regulation; or

(3) the rules will prevent the loss of federal funds to this state.

(b) The commissioner may adopt a rule under this section only if the federal action requiring the adoption of a rule occurs or takes effect between sessions of the legislature or at such time during a session of the legislature that sufficient time does not remain to permit the preparation of a recommendation for legislative action or permit the legislature to act. A rule adopted under this section shall remain in effect only until 30 days following the end of the next session of the legislature unless a law is enacted that authorizes the subject matter of the rule. If a law is enacted that authorizes the subject matter of the rule, the rule will continue in effect.

SECTION 16.04. Article 3.42(p), Insurance Code, is amended to read as follows:

(p) The commissioner is hereby authorized to adopt [~~such~~] reasonable rules [~~and regulations~~] as [~~are~~] necessary to implement and accomplish the [~~specific provisions of this Article and are within the standards and~~] purposes of this Article. The commissioner shall adopt rules under this Article in compliance with Chapter 2001, Government Code [~~(Administrative Procedure Act)~~]. A rule adopted under this Article may not be repealed or amended until after the first anniversary of the adoption of the rule unless the commissioner finds that it is in the significant and material interests of

the citizens of this state or that it is necessary as a result of legislative enactment to amend, repeal, or adopt a [~~in a public hearing after notice that there is a compelling public need for the amendment or repeal of the~~] rule or part of a [~~the~~] rule.

SECTION 16.05. Section 36.002, Insurance Code, is repealed.

Explanation: This article is necessary to broaden the commissioner's general rulemaking authority and to give the commissioner the authority to adopt certain interim rules.

Senate Rule 12.03, Subdivision (4), is suspended to permit the committee to add the following new article to the bill:

ARTICLE 20A. INSURER INTERESTS IN CERTAIN REPAIR FACILITIES

SECTION 20A.01. Section 2306.001(4), Occupations Code, as added by H.B. 1131, Acts of the 78th Legislature, Regular Session, 2003, is amended to read as follows:

(4) "Insurer" means an insurer authorized by the Texas Department of Insurance to write motor vehicle insurance in this state, including a county mutual insurance company, a Lloyd's plan, and a reciprocal or interinsurance exchange if that insurer owns an interest in a repair facility in this state. The term includes an entity that is an affiliate of an insurer as described by Section 823.003, Insurance Code.

SECTION 20A.02. Section 2306.001(4), Occupations Code, as amended by this article, is contingent on the passage of H.B. 1131, Acts of the 78th Legislature, Regular Session. If that legislation does not become law, Section 2306.001(4), Occupations Code, as amended by this article, has no effect.

Explanation: This article is necessary to clarify that an insurer who owns an interest in a motor vehicle repair facility in this state is subject to Chapter 2306, Occupations Code.

Senate Rule 12.03, Subdivision (4), is suspended to permit the committee to add the following new section to the bill:

SECTION 21.405. Subchapter A, Chapter 912, Insurance Code, is amended by adding Section 912.005 to read as follows:

Sec. 912.005. LIMITATION ON TRANSFER OF BUSINESS TO COUNTY MUTUAL INSURANCE COMPANY. An insurer may not transfer more than 10 percent of the insurer's insurance policies to a county mutual insurance company without the prior approval of the commissioner.

Explanation: This section is necessary to prevent insurers from shifting business into markets that are less strictly regulated.

Senate Rule 12.03, Subdivision (2), is suspended to permit the committee to omit text which is not in disagreement:

SECTION 21.47. The following laws are repealed:

(1) Articles 5.03–2, 5.03–3, 5.03–4, and 5.03–5, Insurance Code;

(2) Articles 5.26(h), 5.33C, and 5.50, Insurance Code;

(3) Section 5(b), Article 5.13–2, Insurance Code;

(4) Section 4C, Article 5.73, Insurance Code;

(5) Article 5.33B, Insurance Code, as added by Chapter 337, Acts of the 74th Legislature, Regular Session, 1995;

(6) Articles 5.14, 5.15, and 5.15B, Insurance Code;

(7) Article 5.97(e), Insurance Code; and

(8) Section 4(b)(2), Article 21.49–3, Insurance Code.

Explanation: This section is necessary to preserve certain hearing requirements for the operation of the flexible rating program under Article 5.101, Insurance Code.

Senate Rule 12.03, Subdivision (4), is suspended to permit the committee to add the following new section to the bill:

SECTION 21.48. Article 5.33A, Insurance Code, is repealed.

Explanation: This section is necessary to conform the bill to the elimination of certain insurance premium discounts.

The resolution was read and was adopted by the following vote: Yeas 30, Nays 0, Present-not voting 1.

Present-not voting: Brimer.

(President in Chair)

(Senator Brimer in Chair)

CONFERENCE COMMITTEE REPORT ON SENATE BILL 14 ADOPTED

Senator Jackson called from the President's table the Conference Committee Report on **SB 14**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Jackson, the Conference Committee Report was adopted by the following vote: Yeas 26, Nays 4, Present-not voting 1.

Yeas: Armbrister, Averitt, Bivins, Deuell, Duncan, Ellis, Estes, Fraser, Harris, Hinojosa, Jackson, Janek, Lindsay, Lucio, Madla, Nelson, Ogden, Ratliff, Shapiro, Staples, Van de Putte, Wentworth, West, Whitmire, Williams, Zaffirini.

Nays: Barrientos, Carona, Gallegos, Shapleigh.

Present-not voting: Brimer.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER
Austin, Texas
June 1, 2003

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the House to inform the Senate that the House has taken the following action:

THE HOUSE HAS ADOPTED THE FOLLOWING CONFERENCE COMMITTEE REPORTS:

HB 1365 (House adopts ccr by a vote of 132 yeas, 11 nays, 4 pnv)
HB 2020 (non-record vote)
HB 2424 (non-record vote)

HB 3015 (House adopts ccr by a vote of 100 yeas, 43 nays, 0 pnv)
HB 3184 (House adopts ccr by a vote of 142 yeas, 1 nay, 1 pnv)
HB 3442 (House adopts ccr by a vote of 144 yeas, 1 nay, 1 pnv)
SB 264 (non-record vote)
SB 671 (House adopts ccr by a vote of 147 yeas, 0 nays, 1 pnv)
SB 1369 (non-record vote)

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

SENATE CONCURRENT RESOLUTION 65

The Presiding Officer, Senator Brimer in Chair, laid before the Senate the following resolution:

WHEREAS, The conference committee report for **HB 3588** contains technical errors that should be corrected; and

WHEREAS, Those corrections should be made after the bill has been adopted by the senate and the house of representatives and when the bill is enrolled; now, therefore, be it

RESOLVED by the 78th Legislature of the State of Texas, That the enrolling clerk of the house be instructed to correct House Bill No. 3588 as follows:

1. On page 14, line 13, insert a comma between "property" and "other".
2. On page 14, line 15, insert a comma between "facility" and "that".
3. On page 14, line 18, insert "An option to purchase property" between "property." and "Property" and strike "Property".
4. On page 25, line 10, insert a comma between "chapter" and "revenue".
5. On page 27, strike lines 3 through 16.
6. On page 33, line 9, strike "municipality" and insert "authority".
7. On page 37, line 13, strike "in this state" and insert "in the authority's area of jurisdiction".
8. Page 38, line 3, insert ", subject to the transportation project being in the authority's area of jurisdiction" between "department" and the period.
9. On page 57, strike lines 5 through 8 and on line 9, strike "(c)" and insert "(b)".
10. On page 58, strike the sentence on line 8 of Section 370.163, that starts "An authority" and ends with "361.165.".
11. On page 70, line 8, between "(j)" and "An" insert the following language: "If the transportation project is a project other than a public utility facility,".
12. On page 70, line 9, delete "other than a public utility facility".
13. On page 70, line 10, delete "other than a public".
14. On page 70, line 11, delete "utility facility".
15. On page 122, line 23, strike "amendment" and insert "section".
16. On page 125, line 11, strike "expand" and insert "expend".
17. On page 149, line 14, insert "each calendar year" between "collector" and "shall".
18. On page 149, lines 5 through 12, reinstate the deleted text and on line 6, insert "and this chapter" between "Code," and "is".

19. On page 149, line 16, insert "in the preceding calendar year" between "chapter" and the period.

20. On page 151, line 5, insert "each calendar year" between "collector" and "shall".

21. On page 151, line 7, insert ", in the preceding calendar year" between "Code" and the period.

22. On page 297, strike line 26 through page 299, line 2.

23. On page 307, strike lines 4 through 17 and insert the following:

"SECTION 20.02. (a) The comptroller shall establish the Texas Mobility Fund debt service account as a dedicated account within the general revenue fund.

(b) Notwithstanding Section 780.002(a) and (b), Health and Safety Code, as added by this Act, of the money allocated to the undedicated portion of the general revenue fund by Section 780.002(a), Health and Safety Code, as added by this Act, other than money that may only be appropriated to the Department of Public Safety, in fiscal year 2004 the comptroller shall deposit that money to the credit of the Texas Mobility Fund debt service account which is subject to the provisions of Subsection (d).

(c) Notwithstanding Section 542.4031(g)(1), Transportation Code, as added by this Act, of the money allocated to the undedicated portion of the general revenue fund in Section 542.4031(g)(1), Transportation Code, in fiscal year 2004 the comptroller shall deposit that money to the credit of the Texas Mobility Fund debt service account which is subject to the provisions of Subsection (d).

(d) Funds deposited to the Texas Mobility Fund debt service account pursuant to Subsections (b) and (c) may be transferred to the Texas Mobility Fund upon certification by the Texas Transportation Commission to the comptroller that a payment is due under an obligation pursuant to Article 3, Section 49-k of the Texas Constitution. Funds in the Texas Mobility Fund debt service account are not appropriated in the state fiscal year ending August 31, 2004."

24. On page 307, line 26, at the end of Section 20.03, add "Section 51.607, Government Code, as added by Senate Bill 325, 78th Legislature, Regular Session, does not apply to court costs imposed under this Act."

OGDEN

The resolution was read.

On motion of Senator Ogden, the resolution was considered immediately and was adopted without objection.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3588 ADOPTED

Senator Ogden called from the President's table the Conference Committee Report on **HB 3588**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ogden, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

BILLS SIGNED

The Presiding Officer announced the signing of the following enrolled bills in the presence of the Senate after the captions had been read:

HB 736, **HB 1108**, **HB 1268**, **HB 1297**, **HB 1534**, **HB 1691**, **HB 1858**, **HB 1941**, **HB 1971**, **HB 2006**, **HB 2036**, **HB 2249**, **HB 2485**, **HB 2500**, **HB 2522**, **HB 2866**, **HB 2895**, **HB 2931**, **HB 3061**, **HB 3325**, **HB 3419**, **HB 76**, **HB 532**, **HB 599**, **HB 820**, **HB 944**, **HB 1097**, **HB 1660**, **HB 1833**, **HB 1997**, **HB 2240**, **HB 2350**, **HB 2912**, **HB 2933**, **HB 3011**, **HB 3017**, **HB 3141**, **HB 3486**, **HB 3534**.

(President in Chair)

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3015 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **HB 3015**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by the following vote: Yeas 17, Nays 14.

Yeas: Armbrister, Averitt, Bivins, Brimer, Carona, Deuell, Duncan, Estes, Harris, Janek, Lindsay, Nelson, Ogden, Ratliff, Shapiro, Williams, Zaffirini.

Nays: Barrientos, Ellis, Fraser, Gallegos, Hinojosa, Jackson, Lucio, Madla, Shapleigh, Staples, Van de Putte, Wentworth, West, Whitmire.

STATEMENT OF LEGISLATIVE INTENT

Senator Ellis submitted the following statement of legislative intent on **HB 3015**:

The conference committee has approved TEXAS Grant funding of $324 million for the next biennium. While this is a significant increase over the amount awarded in grants this biennium, it falls far short of the amount needed to make awards to all eligible students. I also understand that an additional $50 million will be put into the program from the federal money being handed down to Texas.

HB 3015 will permit universities to raise their tuition substantially. This will make it more difficult for middle class families to afford to send their children to these public institutions. A key provision of the bill, as passed by the Senate, is a set aside of 40 percent of the increase that institutions will charge to be used for undergraduate work-study at the institutions, for the new B-On-time Loan program, and for TEXAS Grants.

I amended **HB 3015** on the floor to include TEXAS Grants in the set aside to provide another source of funds for this important program. It is vital that we fund this program adequately. My intent with this amendment is to increase the amount the coordinating board will have to allocate and award for TEXAS Grants in the next biennium. This set aside will increase the $324 million already appropriated to the board and will get us closer to meeting the needs of all eligible students.

ELLIS

(Senator Armbrister in Chair)

CONFERENCE COMMITTEE REPORT ON HOUSE JOINT RESOLUTION 28 ADOPTED

Senator Lucio called from the President's table the Conference Committee Report on **HJR 28**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lucio, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1038

Senator Barrientos offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That the Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 3184**, relating to the financing, construction, improvement, maintenance, and operation of toll facilities by the Texas Department of Transportation, to consider and take action on the following matter:

Senate Rule 12.03(4) is suspended to permit the committee to add new SECTIONs to the bill to read as follows:

SECTION 78. (a) Subchapter H, Chapter 201, Transportation Code, is amended by adding Section 201.6011 to read as follows:

Sec. 201.6011. INTERNATIONAL TRADE CORRIDOR PLAN. (a) To the extent possible, the department shall coordinate with appropriate entities to develop an integrated international trade corridor plan. The plan must:

(1) include strategies and projects to aid the exchange of international trade using the system of multiple transportation modes in this state; and

(2) assign priorities based on the amount of international trade, measured by weight and value, using the transportation systems of this state, including:

(A) border ports of entry;

(B) commercial ports;

(C) inland ports;

(D) highways;

(E) pipelines;

(F) railroads; and

(G) deepwater gulf ports.

(b) The department shall report on the implementation of this section to the presiding officer of each house of the legislature no later than December 1, 2004.

(b) This section takes effect September 1, 2003.

SECTION 79. (a) Section 456.022, Transportation Code, is amended to read as follows:

Sec. 456.022. FORMULA ALLOCATION [~~BY CATEGORIES~~]. The commission shall adopt rules establishing a formula allocating funds among individual eligible public transportation providers. The formula may take into account a transportation provider's performance, the number of its riders, the need of

residents in its service area for public transportation, population, population density, land area, and other factors established by the commission. [~~Under the formula program the commission shall allocate:~~

[~~(1) 50 percent of the money to municipalities that are:~~

[~~(A) designated recipients in urbanized areas or transit providers eligible under Section 456.003 and not served by a transit authority; and~~

[~~(B) designated recipients that are not included in a transit authority but are located in urbanized areas that include one or more transit authorities and received state transit funding during the biennium that ended August 31, 1997; and~~

[~~(2) 50 percent of the money to designated recipients in nonurbanized areas.~~]

(b) Section 456.024, Transportation Code, is repealed.

(c) This section takes effect September 1, 2004.

Explanation: These additions are necessary to allow the Texas Transportation Commission to establish a formula for distribution of state grants to public transportation providers and to allow the Texas Department of Transportation to develop an international trade corridor plan to aid the exchange of international trade.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3184 ADOPTED

Senator Barrientos called from the President's table the Conference Committee Report on **HB 3184**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Barrientos, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 970 ADOPTED

Senator Shapleigh called from the President's table the Conference Committee Report on **SB 970**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapleigh, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1566 ADOPTED

Senator Ratliff called from the President's table the Conference Committee Report on **HB 1566**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ratliff, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 76 ADOPTED

Senator Zaffirini called from the President's table the Conference Committee Report on **SB 76**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Zaffirini, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 474 ADOPTED

Senator Lucio called from the President's table the Conference Committee Report on **SB 474**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lucio, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 894 ADOPTED

Senator Bivins called from the President's table the Conference Committee Report on **SB 894**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Bivins, the Conference Committee Report was adopted by a viva voce vote.

STATEMENT OF LEGISLATIVE INTENT

Senator Barrientos submitted the following statement of legislative intent on **SB 894**:

The Conference Committee Report amends this bill by striking the section that requires the Texas Education Agency to publish a longitudinal dropout rate in their annual report using a particular formula.

This portion of **SB 894** is important because it requires a comprehensive formula to determine the longitudinal dropout rate in this state. While it is necessary for Texas to use the national standards for determining the dropout rate (**SB 186**, by Janek), it is equally important to track and determine which students are dropping out of school through the course of their high school years (9-12 grades). This amendment may not be used for accountability purposes, therefore will not have any impact on additional dropout count measures, and would be an important contribution in our efforts to lower the dropout rate.

BARRIENTOS

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 471 ADOPTED

Senator Lucio called from the President's table the Conference Committee Report on **HB 471**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lucio, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1015

Senator Harris offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 1493**, relating to the foreclosure of property and the authority of a mortgage servicer to administer the foreclosure on behalf of a mortgagee, to consider and take action on the following matter:

Senate Rule 12.03(1) is suspended to permit the committee to amend text that is not in disagreement in Section 51.009, Property Code, as added by the bill, by adding the phrase "except as to warranties of title", so that the section reads as follows:

Sec. 51.009. FORECLOSED PROPERTY SOLD "AS IS." A purchaser at a sale of real property under Section 51.002:

(1) acquires the foreclosed property "as is" without any expressed or implied warranties, except as to warranties of title, and at the purchaser's own risk; and

(2) is not a consumer.

Explanation: The changed text is necessary to clarify that any warranties of title granted in a foreclosure sale under Section 51.002, Property Code, are valid.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1493 ADOPTED

Senator Harris called from the President's table the Conference Committee Report on **HB 1493**. The Conference Committee Report was filed with the Senate on Friday, May 30, 2003.

On motion of Senator Harris, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 826 ADOPTED

Senator Whitmire called from the President's table the Conference Committee Report on **SB 826**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Whitmire, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1131 ADOPTED

Senator Harris called from the President's table the Conference Committee Report on **SB 1131**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Harris, the Conference Committee Report was adopted by a viva voce vote.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER
Austin, Texas
June 1, 2003

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the House to inform the Senate that the House has taken the following action:

THE HOUSE HAS PASSED THE FOLLOWING MEASURES:

HCR 284, Instructing the enrolling clerk of the house to make technical corrections to H.B. 2319.

THE HOUSE HAS ADOPTED THE FOLLOWING CONFERENCE COMMITTEE REPORTS:

HB 4 (House adopts ccr by a vote of 110 yeas, 34 nays, 2 pnv)
HB 2971 (House adopts ccr by a vote of 116 yeas, 27 nays, 3 pnv)
SB 286 (non-record vote)
SB 463 (House adopts ccr by a vote of 144 yeas, 0 nays, 2 pnv)
SB 976 (non-record vote)
SB 1828 (non-record vote)

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

SENATE RESOLUTION 972

Senator Shapiro offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 9**, relating to homeland security, to consider and take action on the following matter:

Senate Rule 12.03(1) is suspended to permit the committee to change the effective date of the bill to read as follows:

This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2003.

Explanation: This change is necessary to allow the bill to take effect immediately.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 9 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **HB 9**. The Conference Committee Report was filed with the Senate on Friday, May 30, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

(Senator Averitt in Chair)

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 638 ADOPTED

Senator Armbrister called from the President's table the Conference Committee Report on **HB 638**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Armbrister, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1272 ADOPTED

Senator Armbrister called from the President's table the Conference Committee Report on **SB 1272**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Armbrister, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 631 ADOPTED

Senator Harris called from the President's table the Conference Committee Report on **SB 631**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Harris, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1048

Senator Armbrister offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That the Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 2424**, relating to technical changes to taxes and fees administered by the comptroller and providing penalties, to consider and take action on the following matter:

(1) Senate Rule 12.03(2) is suspended to permit the committee to omit text that amends Sections 153.013(a), 153.117, 153.120, 153.205 as amended by Chapters 1263 and 1444, Acts of the 77th Legislature, Regular Session, 2001, 153.208(d), 153.219(c), 153.222(a), 153.223, and 153.403, Tax Code, to impose certain administrative requirements on certain users and suppliers of motor fuels.

Explanation: This omission is necessary to conform to the repeal of Chapter 153, Tax Code, and the adoption of new Chapter 162, Tax Code, by H.B. No. 2458, Acts of the 78th Legislature, Regular Session, 2003.

(2) Senate Rule 12.03(4) is suspended to permit the committee to add SECTION 105 to the bill to read as follows:

SECTION 105. Contingent on H.B. No. 2458, Acts of the 78th Legislature, Regular Session, 2003, being enacted and becoming law, and effective January 1, 2004, Sections 162.405(a) and (d), Tax Code, are amended to read as follows:

(a) An offense under Section 162.403(1), (2), (3), (4), (5), (6), [~~(7),~~] or (8) is a Class C misdemeanor.

(d) An offense under Section 162.403(7), (22), (23), (24), (25), (26), (27), (28), or (29) is a felony of the third degree.

Explanation: This addition is necessary to ensure that an offense under Section 162.403(7), Tax Code, as added by H.B. No. 2458, Acts of the 78th Legislature, Regular Session, 2003, is classified in accordance with the severity of the offense.

(3) Senate Rule 12.03(4) is suspended to permit the committee to add SECTION 107 to the bill to read as follows:

SECTION 107. (a) Section 141.008(a-1), Local Government Code, as added by H.B. No. 2425, Acts of the 78th Legislature, Regular Session, 2003, is repealed.

(b) If H.B. No. 2425, Acts of the 78th Legislature, Regular Session, 2003, does not become law, this section has no effect.

Explanation: This addition is necessary to eliminate a requirement that municipalities make certain payroll deductions for municipal employees.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2424 ADOPTED

Senator Armbrister called from the President's table the Conference Committee Report on **HB 2424**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Armbrister, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE CONCURRENT RESOLUTION 67

The Presiding Officer, Senator Averitt in Chair, laid before the Senate the following resolution:

WHEREAS, **HB 2424** has been adopted by the house of representatives and the senate and is being prepared for enrollment; and

WHEREAS, The bill contains technical errors that should be corrected; now, therefore, be it

RESOLVED by the 78th Legislature of the State of Texas, That the enrolling clerk of the house of representatives be instructed to correct House Bill No. 2424 by striking SECTION 107 of the bill.

ARMBRISTER

The resolution was read.

On motion of Senator Armbrister, the resolution was considered immediately and was adopted without objection.

(Senator Armbrister in Chair)

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3546 ADOPTED

Senator Lucio called from the President's table the Conference Committee Report on **HB 3546**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lucio, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1303 ADOPTED

Senator Madla called from the President's table the Conference Committee Report on **SB 1303**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Madla, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 755 ADOPTED

Senator Ratliff called from the President's table the Conference Committee Report on **SB 755**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ratliff, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE JOINT RESOLUTION 85 ADOPTED

Senator Estes called from the President's table the Conference Committee Report on **HJR 85**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Estes, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1031

Senator Estes offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 2593**, relating to winery permits, to consider and take action on the following matters:

(1) Senate Rule 12.03(1) is suspended to permit the committee to add "Except as provided by Section 16.011," to amended Section 16.01(a), Alcoholic Beverage Code.

Explanation: The language is necessary to clarify that there is an exception to a winery's authorized activities and to conform to language added by the bill relating to the authorized activities of a winery located in a dry area.

(2) Senate Rules 12.03(1) and (2) are suspended to permit the committee to amend and omit text to Section 16.011, Alcoholic Beverage Code, as added by the bill, so that the section reads as follows:

Sec. 16.011. PREMISES IN DRY AREA. A winery permit may be issued for premises in an area in which the sale of wine has not been authorized by a local option election. A holder of a permit under this section may engage in any activity authorized under Section 16.01 except that the permit holder may sell or dispense wine under that section only if the wine is:

(1) manufactured in this state; and

(2) at least 75 percent by volume fermented juice of grapes or other fruit grown in this state.

Explanation: The change is necessary to authorize wineries located in a dry area of the state to engage in the same activities, except for selling wine, as wineries located in wet areas of the state.

(3) Senate Rules 12.03(1) and (2) are suspended to permit the committee to amend SECTION 4 of the bill, so that the section reads as follows:

SECTION 4. This Act takes effect on the date on which the constitutional amendment proposed by the 78th Legislature, Regular Session, 2003, authorizing the legislature to authorize and govern the operation of wineries in this state takes effect. If that amendment is not approved by the voters, this Act has no effect.

Explanation: The change is necessary to conform the language to the language in the constitutional amendment that must be approved in order for the bill to take effect.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2593 ADOPTED

Senator Estes called from the President's table the Conference Committee Report on **HB 2593**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Estes, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1664 ADOPTED

Senator Averitt called from the President's table the Conference Committee Report on **SB 1664**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Averitt, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1036

Senator Ellis offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 1936**, relating to the creation of the Buffalo Bayou Management District; providing the authority to impose taxes and issue bonds, to consider and take action on the following matters:

(1) Senate Rule 12.03(1) is suspended to permit the committee to change text in SECTION 4 of the bill so that SECTION 4 reads as follows:

SECTION 4. BOUNDARIES. The district includes all the territory contained in the following described area:

POINT OF BEGINNING at the intersection of the west boundary line of the Houston Downtown Management District and the north boundary of Memorial Drive right-of-way, then west along the north boundary of Memorial Drive right-of-way to the north boundary of Memorial Drive's Heights North exit ramp, then northwest along the north boundary of Memorial Drive's Heights North exit ramp to the east boundary of Heights boulevard right-of-way, then west across Heights Boulevard from the east boundary of Heights Boulevard right-of-way to the west boundary of the Heights Boulevard right-of-way, then south along the west boundary of Heights boulevard right-of-way to the north boundary of Memorial Drive's Memorial West

entrance ramp, then southwest along the north boundary of Memorial Drive's Memorial West entrance ramp to the northern boundary line of Memorial Drive right-of-way, then west along the northern boundary line of Memorial Drive right-of-way to the west boundary line of Shepherd Drive right-of-way, then south along the west boundary line of Shepherd Drive right-of-way to the centerline of West Dallas, then east along the centerline of West Dallas to the intersection of the west boundary of Montrose Boulevard right-of-way and the centerline of West Dallas, then south along the west boundary line of Montrose Boulevard right-of-way to the south boundary line of U.S. Highway 59 and the west boundary line of Montrose Boulevard right-of-way, then in an easterly direction from said intersection along the south boundary line of U.S. Highway 59 to the intersection of the west boundary line of the Main Street right-of-way and then proceeding from said intersection in a northwesterly direction along the boundary line of the west Main Street right-of-way paralleling the boundary line of the Greater Southeast Management District to the intersection of the boundary line of the south Portland Street right-of-way and the boundary line of the west Main Street right-of-way, being the southern boundary line of the Midtown Management District, then proceeding from said intersection in generally a northeasterly direction the boundary line parallels the Midtown Management District boundary line to the intersection of the west boundary line of the US Hwy 45 right-of-way and the north boundary line of the Cleveland Street right-of-way, being the western boundary line of the Houston Downtown Management District, then north from said intersection along the western boundary line of the Houston Downtown Management District to the POINT OF BEGINNING.

Explanation: The new description of the area of the district is necessary to reflect a change in the area to be included in the district.

(2) Senate Rule 12.03(1) is suspended to permit the committee to change text in SECTION 9 of the bill so that SECTION 9 reads as follows:

SECTION 9. BOARD OF DIRECTORS IN GENERAL. (a) The district is governed by a board of 31 voting directors appointed under Section 10 of this Act and nonvoting directors as provided by Section 11 of this Act.

(b) Voting directors serve staggered terms of four years, with 15 directors' terms expiring June 1 of an odd-numbered year and 16 directors' terms expiring June 1 of the following odd-numbered year.

(c) The board may decrease the number of directors on the board by resolution if the board finds that it is in the best interest of the district. The board may not consist of fewer than five directors.

Explanation: The changed text is necessary to accommodate a larger board of directors for the district and to stagger terms accordingly.

(3) Senate Rule 12.03(1) is suspended to permit the committee to change text in SECTION 11(b) of the bill so that Subsection (b) reads as follows:

(b) If a department described by Subsection (a) of this section is consolidated, renamed, or changed, the board may appoint a director of the consolidated, renamed, or changed department as a nonvoting director. If a department described by Subsection (a) of this section is abolished, the board may appoint a representative of another department that performs duties comparable to those performed by the abolished department.

Explanation: The change is necessary to clarify to which section the reference to "Subsection (a)" applies.

(4) Senate Rule 12.03(1) is suspended to permit the committee to change text in SECTION 19(a) of the bill so that Subsection (a) reads as follows:

(a) If authorized at an election held in accordance with Section 18 of this Act, the district may impose an annual ad valorem tax on taxable property in the district for the:

(1) maintenance and operation of the district and the improvements constructed or acquired by the district; or

(2) provision of a service.

Explanation: The change is necessary to clarify that the Section 18 referred to is from this Act.

(5) Senate Rule 12.03(1) is suspended to permit the committee to change text in SECTIONS 31(a), (b), and (c) of the bill so that Subsections (a), (b), and (c) read as follows:

(a) The initial board consists of the following persons:

Pos. No.	Name of Director
1	Kay Crooker
2	Mike Garver
3	Jackie Martin
4	Mark Lee
5	John Chase, Jr.
6	Adrian Collins
7	Max Schuette
8	June Deadrick
9	Don Cutrer
10	Raju Adwaney
11	Mike Mark
12	Sia Ravari
13	Cherry Walker
14	John Hansen
15	John Dao
16	William Taylor
17	Karen Domino
18	Kevin Hoffman
19	Jeff Andrews
20	William Paul Thomas
21	Theola Petteway
22	Keith Wade
23	Chryisse Wilson
24	Sadie Rucker
25	Julie McClure
26	Angie Gomez
27	Tom Fricke
28	James Robert McDermaid
29	Kathy Hubbard
30	Marsha Johnson
31	Craig Jackson

(b) Of the initial directors, the terms of directors appointed for positions 1 through 15 expire June 1, 2005, and the terms of directors appointed for positions 16 through 31 expire June 1, 2007.

(c) Section 10 of this Act does not apply to this section.

Explanation: The changed text is necessary to add the complete number of initial directors authorized to serve on the board and to adjust their terms accordingly.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1936 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **SB 1936**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2533 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **HB 2533**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 411 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **HB 411**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1010 ADOPTED

Senator West called from the President's table the Conference Committee Report on **SB 1010**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator West, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 127 ADOPTED

Senator Fraser called from the President's table the Conference Committee Report on **SB 127**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Fraser, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE ON SENATE BILL 1320 DISCHARGED

On motion of Senator Nelson and by unanimous consent, the Senate conferees on **SB 1320** were discharged.

Question — Shall the Senate concur in the House amendments to **SB 1320**?

On motion of Senator Nelson, the Senate concurred in the House amendments to **SB 1320** by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 160 ADOPTED

Senator Nelson called from the President's table the Conference Committee Report on **SB 160**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Nelson, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 998

Senator Shapiro offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 361**, relating to the precedence of certain municipal highway access rules and ordinances over highway access management orders of the Texas Transportation Commission, to consider and take action on the following matter:

Senate Rules 12.03(3) and (4) are suspended to permit the committee to add text not included in either the house or senate version of the bill to add Subsection (d), Section 203.032, Transportation Code, to read as follows:

(d) The state will not be liable under Chapter 101, Civil Practice and Remedies Code, for access granted under Subsection (b) to which the department had lodged a written objection. This subsection shall neither limit nor extend liability of a municipality or county.

Explanation: The added text is necessary to provide protection to this state from liability under the Texas Tort Claims Act when a municipality grants highway access and the Texas Transportation Commission has objected in writing to the municipality's action. The added text also clarifies that the protection afforded the state does not limit or extend any liability of a municipality or a county.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 361 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **SB 361**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 585 ADOPTED

Senator Duncan called from the President's table the Conference Committee Report on **SB 585**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Duncan, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1033

Senator Van de Putte offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 103**, relating to the carrying of weapons by peace officers and by special investigators, to consider and take action on the following matter:

Senate Rule 12.03(1) is suspended to permit the committee to change text that is not in disagreement by substituting "a recognized state" for "another state that allows peace officers commissioned in Texas to carry weapons in the other state" in Section 46.15(a), Penal Code, and by adding a new Subsection (g) to that section to read as follows:

(g) In this section, "recognized state" means another state with which the attorney general of this state, with the approval of the governor of this state, negotiated an agreement after determining that the other state:

(1) has firearm proficiency requirements for peace officers; and

(2) fully recognizes the right of peace officers commissioned in this state to carry weapons in the other state.

Explanation: This change is necessary to enable state officials to evaluate on a case-by-case basis state reciprocity with respect to the ability of out-of-state peace officers to carry weapons in this state.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 103 ADOPTED

Senator Van de Putte called from the President's table the Conference Committee Report on **SB 103**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Van de Putte, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1059 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **SB 1059**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1413 ADOPTED

Senator Deuell called from the President's table the Conference Committee Report on **SB 1413**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Deuell, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1541 ADOPTED

Senator Lindsay called from the President's table the Conference Committee Report on **HB 1541**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lindsay, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1204 ADOPTED

Senator Wentworth called from the President's table the Conference Committee Report on **HB 1204**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Wentworth, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 671 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **SB 671**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1108 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **SB 1108**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1008

Senator Ellis offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 473**, relating to assisting consumers to prevent identity theft; providing penalties, to consider and take action on the following matter:

(1) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add new text to Section 35.58, Business & Commerce Code, as added by the bill, so that the section reads as follows:

Sec. 35.58. CONFIDENTIALITY OF SOCIAL SECURITY NUMBER. (a) A person, other than government or a governmental subdivision or agency, may not:

(1) intentionally communicate or otherwise make available to the general public an individual's social security number;

(2) display an individual's social security number on a card or other device required to access a product or service provided by the person;

(3) require an individual to transmit the individual's social security number over the Internet unless the connection with the Internet is secure or the number is encrypted;

(4) require an individual's social security number for access to an Internet website, unless a password or unique personal identification number or other authentication device is also required for access; or

(5) print an individual's social security number on any materials, except as provided by Subsection (f), that are sent by mail, unless state or federal law requires that the individual's social security number be included in the materials.

(b) A person that is using an individual's social security number before January 1, 2005, in a manner prohibited by Subsection (a) may continue that use if:

(1) the use is continuous; and

(2) the person provides annual disclosure to the individual, beginning January 1, 2006, stating that on written request from the individual the person will cease to use the individual's social security number in a manner prohibited by Subsection (a).

(c) A person, other than government or a governmental subdivision or agency, may not deny services to an individual because the individual makes a written request under Subsection (b).

(d) If a person receives a written request from an individual directing the person to stop using the individual's social security number in a manner prohibited by Subsection (a), the person shall comply with the request not later than the 30th day after the date the request is received. The person may not impose a fee or charge for complying with the request.

(e) This section does not apply to:

(1) the collection, use, or release of a social security number that is required by state or federal law, including Chapter 552, Government Code;

(2) the use of a social security number for internal verification or administrative purposes;

(3) documents that are recorded or required to be open to the public under Chapter 552, Government Code;

(4) court records; or

(5) an institution of higher education if the use of a social security number by the institution is regulated by Chapter 51, Education Code, or another provision of the Education Code.

(f) Subsection (a)(5) does not apply to an application or form sent by mail, including a document sent:

(1) as part of an application or enrollment process;

(2) to establish, amend, or terminate an account, contract, or policy; or

(3) to confirm the accuracy of a social security number.

Explanation: The addition is necessary to establish a date on which disclosure to an individual concerning use of the individual's social security number must begin, to allow institutions of higher education to use an individual's social security number to comply with provisions of the Education Code, and to provide that a person who receives a request to stop using an individual's social security number must honor that request free of charge by a certain time.

(2) Senate Rules 12.03(3) and (4) are suspended to permit the committee to add a new Subsection (f) to SECTION 10 of the bill, to read as follows:

(f) An institution of higher education that is not subject to the exemption prescribed by Section 35.58(e)(5), Business & Commerce Code, as added by this Act, shall begin acting in compliance with Section 35.58, Business & Commerce Code, as added by this Act, on or before September 1, 2007.

Explanation: The added text is necessary to explain when institutions of higher education must comply with Section 35.58, Business & Commerce Code.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 473 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **SB 473**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 329 ADOPTED

Senator Fraser called from the President's table the Conference Committee Report on **HB 329**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Fraser, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 610 ADOPTED

Senator Nelson called from the President's table the Conference Committee Report on **SB 610**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Nelson, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 929 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **SB 929**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 335 ADOPTED

Senator Lindsay called from the President's table the Conference Committee Report on **HB 335**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lindsay, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2971 ADOPTED

Senator Deuell called from the President's table the Conference Committee Report on **HB 2971**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Deuell, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1129 ADOPTED

Senator Gallegos called from the President's table the Conference Committee Report on **HB 1129**. The Conference Committee Report was filed with the Senate on Friday, May 30, 2003.

On motion of Senator Gallegos, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1835 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **SB 1835**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1551 ADOPTED

Senator Duncan called from the President's table the Conference Committee Report on **SB 1551**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Duncan, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1314 ADOPTED

Senator Averitt called from the President's table the Conference Committee Report on **HB 1314**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Averitt, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1119 ADOPTED

Senator Brimer called from the President's table the Conference Committee Report on **HB 1119**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Brimer, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1082 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **HB 1082**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 976 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **SB 976**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3587 ADOPTED

Senator Lindsay called from the President's table the Conference Committee Report on **HB 3587**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lindsay, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1182 ADOPTED

Senator Deuell called from the President's table the Conference Committee Report on **SB 1182**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Deuell, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2415 ADOPTED

Senator Averitt called from the President's table the Conference Committee Report on **HB 2415**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Averitt, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1369 ADOPTED

Senator Duncan called from the President's table the Conference Committee Report on **SB 1369**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Duncan, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1029

Senator West offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **SB 1000**, relating to a statistical or demographic analysis conducted by the Texas Legislative Council for a state agency and to information collected by the council in the course of performing the analysis, to consider and take action on the following matters:

(1) Senate Rule 12.03(2) is suspended to permit the committee to omit the section of the bill that adds Section 2113.108, Government Code, which reads as follows:

SECTION 1. Subchapter C, Chapter 2113, Government Code, is amended by adding Section 2113.108 to read as follows:

Sec. 2113.108. CERTAIN STUDIES INVOLVING STATISTICAL OR DEMOGRAPHIC ANALYSIS. (a) A state agency may not use appropriated money to contract with a consultant or other nongovernmental entity to perform or assist the agency in performing a statistical or demographic analysis of information collected by or for the agency in the course of conducting a study that the agency is required to conduct under state law unless the agency first contacts the Texas Legislative Council to determine whether the resources of the council are available to perform or assist the agency in performing that analysis. For purposes of this section, performing a statistical or demographic analysis of information in the course of conducting a study includes designing the analysis and collecting the information required for purposes of the study.

(b) If the Texas Legislative Council determines that council resources are available to perform or assist the state agency in performing all or part of the statistical or demographic analysis, the agency must contract with the council to perform or assist the agency in performing that analysis to the extent that the council determines that council resources are available to the agency.

Explanation: It is necessary to omit the text to ensure that under the bill state agencies may, but are not required to, contract with the Texas Legislative Council to perform certain statistical or demographic analyses.

(2) Senate Rule 12.03(1) is suspended to permit the committee to alter text in proposed Section 323.020, Government Code, so that Section 323.020(b) reads as follows:

(b) At the request of a state agency, the council may determine whether and the extent to which council resources are available to contract or otherwise agree with the agency to perform a statistical or demographic analysis of information for the agency or to assist the agency in performing the analysis. A reference in this section to performing an analysis includes assisting an agency to perform the analysis.

Explanation: It is necessary to alter the text to remove references to the omitted Section 2113.108 and to clarify that references to performing an analysis include references to assisting an agency to perform an analysis.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1000 ADOPTED

Senator West called from the President's table the Conference Committee Report on **SB 1000**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator West, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1652 ADOPTED

Senator Shapiro called from the President's table the Conference Committee Report on **SB 1652**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Shapiro, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2075 ADOPTED

Senator Fraser called from the President's table the Conference Committee Report on **HB 2075**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Fraser, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1782 ADOPTED

Senator Lindsay called from the President's table the Conference Committee Report on **SB 1782**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Lindsay, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1014

Senator Deuell offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 3622**, relating to the creation, administration, powers, duties, operation, and financing of the Kingsborough Municipal Utility District No. 1 of Kaufman County, to consider and take action on the following matter:

Senate Rules 12.03(1) and (3) are suspended to permit the committee to amend SECTION 15(a) of the bill to read as follows:

(a) This Act takes effect on the date on or after September 1, 2003, on which a settlement agreement between the City of Crandall and the developer of the districts is legally executed regarding a pending petition before the Texas Commission on Environmental Quality for the right to provide retail water service to certain areas within the districts. If the settlement agreement is legally executed before September 1, 2003, this Act takes effect September 1, 2003.

Explanation: This change is necessary to ensure that the bill takes effect on a more appropriate date.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 3622 ADOPTED

Senator Deuell called from the President's table the Conference Committee Report on **HB 3622**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Deuell, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1828 ADOPTED

Senator Averitt called from the President's table the Conference Committee Report on **SB 1828**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Averitt, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 320 ADOPTED

Senator Fraser called from the President's table the Conference Committee Report on **HB 320**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Fraser, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1708 ADOPTED

Senator Wentworth called from the President's table the Conference Committee Report on **SB 1708**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Wentworth, the Conference Committee Report was adopted by a viva voce vote.

SENATE RESOLUTION 1035

Senator Staples offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 2044**, relating to the powers and duties of the General Land Office and the accounting and disposition of state-owned real property, to consider and take action on the following matter:

Senate Rule 12.03(1) is suspended to permit the committee to amend text that is not in disagreement in SECTION 16 of the bill, in Section 31.1572, Natural Resources Code, as added by the bill, to read as follows:

Sec. 31.1572. REAL ESTATE TRANSACTIONS BY PARKS AND WILDLIFE DEPARTMENT PROHIBITED IN CERTAIN AREAS. (a) The Parks and Wildlife Department may not offer for sale real property it owns or controls if the real property is located in a county:

(1) with a population of one million or more; and

(2) in which at least two municipalities with a population of 300,000 or more are located.

(b) This section expires September 1, 2004.

Explanation: The changed text is necessary to narrow the scope of the authority granted to the Parks and Wildlife Department to dispose of state-owned real property.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2044 ADOPTED

Senator Staples called from the President's table the Conference Committee Report on **HB 2044**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Staples, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE RESOLUTION 1053

Senator Ellis offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08, to enable the conference committee appointed to resolve the differences on **HB 1606**, relating to ethics of public servants, including the functions and duties of the Texas Ethics Commission; the regulation of political contributions, political advertising, lobbying, and conduct of public servants; and the reporting of political contributions and personal financial information; providing civil and criminal penalties, to consider and take action on the following matters:

(1) Senate Rule 12.03(4) is suspended to permit the committee to add text to Subchapter C, Chapter 11, Education Code, to read as follows:

SECTION 6.04. Subchapter C, Chapter 11, Education Code, is amended by adding Section 11.064 to read as follows:

Sec. 11.064. FILING OF FINANCIAL STATEMENT BY TRUSTEE. (a) A trustee of an independent school district with an enrollment of at least 500 students shall file the financial statement required of state officers under Subchapter B, Chapter 572, Government Code, with:

(1) the board of trustees; and

(2) the Texas Ethics Commission.

(b) Subchapter B, Chapter 572, Government Code:

(1) applies to a trustee subject to this section as if the trustee were a state officer; and

(2) governs the contents, timeliness of filing, and public inspection of a statement filed under this section.

(c) A trustee subject to this section commits an offense if the trustee fails to file the statement required by this section. An offense under this section is a Class B misdemeanor.

Explanation: This change is necessary to require the filing of personal financial statements by members of the boards of trustees of certain school districts.

(2) Senate Rule 12.03(4) is suspended to permit the committee to add text to Chapter 60, Water Code, to read as follows:

SECTION 6.05. Chapter 60, Water Code, is amended by adding Subchapter O to read as follows:

SUBCHAPTER O. FINANCIAL DISCLOSURE BY MEMBERS OF GOVERNING BODY

Sec. 60.451. APPLICABILITY OF SUBCHAPTER. This subchapter applies only to a port authority or navigation district created or operating under Section 52, Article III, or Section 59, Article XVI, Texas Constitution.

Sec. 60.452. FILING OF FINANCIAL STATEMENT BY MEMBER OF GOVERNING BODY. (a) A member of the governing body of a port authority or navigation district shall file the financial statement required of state officers under Subchapter B, Chapter 572, Government Code, with:

(1) the authority or district, as appropriate; and

(2) the Texas Ethics Commission.

(b) Subchapter B, Chapter 572, Government Code:

(1) applies to a member of the governing body of an authority or district as if the member were a state officer; and

(2) governs the contents, timeliness of filing, and public inspection of a statement filed under this section.

(c) A member of the governing body of an authority or district commits an offense if the member fails to file the statement required by this section. An offense under this section is a Class B misdemeanor.

Explanation: This change is necessary to require the filing of personal financial statements by members of the governing bodies or boards of certain port authorities and navigation districts.

(3) Senate Rule 12.03(4) is suspended to permit the committee to add text to read as follows:

SECTION 6.08. Section 11.064, Education Code, as added by this Act, applies beginning January 1, 2005. A trustee subject to Section 11.064, Education Code, as added by this Act, is not required to include financial activity occurring before January 1, 2004, in a financial disclosure statement under that section.

Explanation: This change is necessary to provide for the applicability of the requirement that members of the boards of trustees of certain school districts file personal financial statements.

(4) Senate Rule 12.03(4) is suspended to permit the committee to add text to read as follows:

SECTION 6.09. Subchapter O, Chapter 60, Water Code, as added by this Act, applies beginning January 1, 2005. A member of the governing body of a port authority or navigation district subject to Subchapter O, Chapter 60, Water Code, is not required to include financial activity occurring before January 1, 2004, in a financial disclosure statement under Section 60.452, Water Code, as added by this Act.

Explanation: This change is necessary to provide for the applicability of the requirement that members of the governing bodies of certain port authorities and navigation districts file personal financial statements.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1606 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on **HB 1606**. The Conference Committee Report was filed with the Senate on Sunday, June 1, 2003.

On motion of Senator Ellis, the Conference Committee Report was adopted by a viva voce vote.

STATEMENT OF LEGISLATIVE INTENT

Senator Ellis submitted the following statement of legislative intent on **HB 1606**:

SECTION 2.21 of the Conference Committee Report creates new Section 254.1581 of the Election Code. This new section requires reporting by out-of-state political committees.

I strongly support this new requirement. Given the expressed legislative policy encouraging the electronic transmission of campaign reports, including strengthened requirements in this bill to submit campaign reports in electronic format, it is my intent that SECTION 2.21 of the bill be interpreted by the Ethics Commission in a manner that maximizes use of electronic transmission or connection to information via the Internet. As an example, the Senate in its version of the bill required electronic filing of all campaign reports. The reason is simple. Electronic filing increases availability to the public of information about their elected officials.

I strongly encourage the Ethics Commission, in adopting any rules or procedures to implement reporting by out-of-state political committees, to abide by the intent of the Senate to maximize use of electronic solutions for meeting the reporting requirements of this new section.

ELLIS

BILLS AND RESOLUTIONS SIGNED

The Presiding Officer, Senator Armbrister in Chair, announced the signing of the following enrolled bills and resolutions in the presence of the Senate after the captions had been read:

SB 19, **SB 275**, **SB 284**, **SB 392**, **SB 396**, **SB 418**, **SB 827**, **SB 1007**, **SB 1184**, **SB 1252**, **SB 1477**, **SB 1488**, **SB 1494**, **SB 1570**, **SB 1696**, **SB 1725**, **SB 1820**, **SB 1904**, **SB 1932**, **SJR 42**, **HB 59**, **HB 151**, **HB 325**, **HB 518**, **HB 555**, **HB 849**, **HB 897**, **HB 1282**, **HB 1326**, **HB 1363**, **HB 1378**, **HB 1420**, **HB 1470**, **HB 1487**, **HB 1649**, **HB 1844**, **HB 1869**, **HB 1883**, **HB 1979**, **HB 2019**, **HB 2053**, **HB 2072**, **HB 2073**, **HB 2095**, **HB 2188**, **HB 2189**, **HB 2212**, **HB 2457**, **HB 2519**, **HB 2881**, **HB 2947**, **HB 2964**, **HB 3378**, **HB 3384**, **HB 3562**, **HB 3592**, **HB 3629**, **HCR 250**, **HCR 256**, **HCR 281**, **HJR 44**, **HJR 84**.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1817 ADOPTED

Senator Duncan called from the President's table the Conference Committee Report on **HB 1817**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

On motion of Senator Duncan, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

(Senator Ogden in Chair)

SENATE RESOLUTION 1055

Senator Armbrister offered the following resolution:

BE IT RESOLVED by the Senate of the State of Texas, 78th Legislature, Regular Session, 2003, That Senate Rule 12.03 be suspended in part as provided by Senate Rule 12.08 to enable the conference committee appointed to resolve the differences on **HB 2359**, relating to the programs and systems administered by the Employees Retirement System of Texas, to consider and take action on the following matter:

Senate Rules 12.03(3) and (4) are suspended to permit the committee to add additional text not included in either the house or senate version of the bill, consisting of the following new SECTIONs to read as follows:

SECTION ___. Section 812.003, Government Code, is amended by amending Subsection (d) and adding Subsections (e) through (h) to read as follows:

(d) For persons whose employment or office holding begins on or after September 1, 2005, membership [~~Membership~~] in the employee class begins on the first day the [~~a~~] person is employed or holds office.

(e) For persons whose employment or office holding begins before September 1, 2005, membership in the employee class begins on the 91st day after the first day a person is employed or holds office.

(f) A person who is reemployed or who again holds office after withdrawing contributions under Subchapter B for previous service credited in the employee class begins membership in the employee class on the 91st day after the first day the person is reemployed or again holds office.

(g) Notwithstanding any other provision of law, a member may establish service credit only as provided by Section 813.514 for service performed during the 90-day waiting period provided by Subsection (e) or (f).

(h) Subsections (e), (f), and (g) and this subsection expire September 1, 2005.

SECTION ___. Subchapter F, Chapter 813, Government Code, is amended by adding Section 813.514 to read as follows:

Sec. 813.514. CREDIT PURCHASE OPTION FOR CERTAIN SERVICE. (a) A member may establish service credit under this section in the employee class only for service performed during a 90-day waiting period to become a member after beginning employment or holding office.

(b) A member may establish service credit under this section by depositing with the retirement system, for each month of service credit, the actuarial present value, at the time of deposit, of the additional standard retirement annuity benefits that would

be attributable to the purchase of the service credit under this section based on rates and tables recommended by the retirement system's actuary and adopted by the board of trustees.

(c) After a member makes the deposits required by this section, the retirement system shall grant the member one month of equivalent membership service credit for each month of credit approved. A member may establish not more than three months of equivalent membership service credit under this section.

(d) The retirement system shall deposit the amount of the actuarial present value of the service credit purchased in the member's individual account in the employees saving account.

(e) The board of trustees may adopt rules to administer this section, including rules that impose restrictions on the application of this section as necessary to cost-effectively administer this section.

SECTION ___. Section 812.003, Government Code, as amended by this Act, and Section 813.514, Government Code, as added by this Act, apply only to a person who is first employed by or begins to hold an office of the state on or after the effective date of this Act and to a former employee or office holder who has withdrawn retirement contributions under Subchapter B, Chapter 812, Government Code, and is reemployed by or begins to again hold an office of the state on or after the effective date of this Act.

Explanation: The added text is needed to provide that a new state employee or a reemployed state employee who has withdrawn contributions for previous service does not begin to receive service credit until the 91st day of employment. Such employees have the option to purchase service credit for the 90-day period at the actuarial value. This is a temporary change that expires September 1, 2005.

The resolution was read and was adopted by the following vote: Yeas 31, Nays 0.

SENATE RULES 12.09 AND 12.10 SUSPENDED
(Printing and Notice of Conference Committee Reports)
(Section-by-Section Analysis)

On motion of Senator Armbrister and by unanimous consent, Senate Rule 12.09 as it relates to the Conference Committee Report on **HB 2359** and Senate Rule 12.10 as it relates to the section-by-section analysis of the Conference Committee Report on **HB 2359** were suspended.

CONFERENCE COMMITTEE REPORT ON
HOUSE BILL 2359 ADOPTED

Senator Armbrister called from the President's table the Conference Committee Report on **HB 2359**. The Conference Committee Report was filed with the Senate on Sunday, June 1, 2003.

On motion of Senator Armbrister, the Conference Committee Report was adopted by a viva voce vote.

MESSAGE FROM THE HOUSE

HOUSE CHAMBER
Austin, Texas
June 1, 2003

The Honorable President of the Senate
Senate Chamber
Austin, Texas

Mr. President:

I am directed by the House to inform the Senate that the House has taken the following action:

THE HOUSE HAS ADOPTED THE FOLLOWING CONFERENCE COMMITTEE REPORTS:

HB 1 (House adopts ccr by a vote of 105 yeas, 41 nays, 2 pnv)
HB 7 (House adopts ccr by a vote of 138 yeas, 5 nays, 1 pnv)
HB 3588 (House adopts ccr by a vote of 146 yeas, 0 nays, 1 pnv)
SB 4 (House adopts ccr by a vote of 143 yeas, 0 nays, 1 pnv)
SB 86 (non-record vote)
SB 1652 (House adopts ccr by a vote of 147 yeas, 0 nays, 1 pnv)

Respectfully,

/s/Robert Haney, Chief Clerk
House of Representatives

AT EASE

The Presiding Officer, Senator Ogden in Chair, at 9:18 p.m. announced the Senate would stand At Ease subject to the call of the Chair.

IN LEGISLATIVE SESSION

Senator Ogden at 9:30 p.m. called the Senate to order as In Legislative Session.

MOTION TO ADOPT CONFERENCE COMMITTEE REPORT ON SENATE BILL 86

Senator Wentworth called from the President's table the Conference Committee Report on **SB 86**. The Conference Committee Report was filed with the Senate on Saturday, May 31, 2003.

Senator Wentworth moved to adopt the Conference Committee Report on **SB 86**.

Senator West at 9:35 p.m. was recognized to speak on the Conference Committee Report on **SB 86**.

(Senator Williams occupied the Chair during the discussion of SB 86)

(Senator Janek occupied the Chair during the discussion of SB 86)

(Monday, June 2, 2003)

POINT OF ORDER

Senator Shapleigh at 12:02 a.m. raised a point of order against further discussion of **SB 86**, stating that the legislative deadline for the adoption of Conference Committee Reports had passed.

POINT OF ORDER RULING

The Presiding Officer, Senator Janek in Chair, stated that the point of order was well-taken and sustained.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 1606

Senator Ellis submitted the following Conference Committee Report:

Austin, Texas
June 1, 2003

Honorable David Dewhurst
President of the Senate

Honorable Tom Craddick
Speaker of the House of Representatives

Sirs:

We, Your Conference Committee, appointed to adjust the differences between the Senate and the House of Representatives on **HB 1606** have had the same under consideration, and beg to report it back with the recommendation that it do pass.

ELLIS	WOLENS
BRIMER	DENNY
OGDEN	KEEL
RATLIFF	MADDEN
WHITMIRE	WILSON
On the part of the Senate	On the part of the House

The Conference Committee Report was filed with the Secretary of the Senate.

CONFERENCE COMMITTEE REPORT ON HOUSE BILL 2359

Senator Armbrister submitted the following Conference Committee Report:

Austin, Texas
June 1, 2003

Honorable David Dewhurst
President of the Senate

Honorable Tom Craddick
Speaker of the House of Representatives

Sirs:

We, Your Conference Committee, appointed to adjust the differences between the Senate and the House of Representatives on **HB 2359** have had the same under consideration, and beg to report it back with the recommendation that it do pass.

ARMBRISTER	RITTER
DUNCAN	KING
ZAFFIRINI	HILL
On the part of the Senate	On the part of the House

The Conference Committee Report was filed with the Secretary of the Senate.

RESOLUTIONS OF RECOGNITION

The following resolutions were adopted by the Senate:

Memorial Resolution

SR 1049 by Armbrister, In memory of Quentin Ware Martin.

Congratulatory Resolutions

SR 1043 by Fraser, Commending Linda K. Ahrens for her contributions to the educational system of Texas.

SR 1050 by Lucio, Congratulating Pete Avila of Brownsville on his graduation from college.

SR 1054 by West, Congratulating the God's Leading Ladies Conference graduates.

HCR 278 (Duncan), Honoring Shirley Igo of Plainview on her distinguished tenure as National PTA president.

HCR 282 (Wentworth), Commending Warren B. Branch, D.D.S., on his professional accomplishments.

HCR 286 (Lucio), Honoring U.S. Marine Corporal Manuel Espinoza, Jr., of Weslaco for his bravery during Operation Iraqi Freedom.

ADJOURNMENT

On motion of Senator Wentworth, the Senate at 12:03 a.m. adjourned until 10:00 a.m. today.

GENERAL AND SPECIAL LAWS
OF
THE STATE OF TEXAS

Passed By The

REGULAR SESSION

of the

SEVENTY-EIGHTH LEGISLATURE

Convened at the

City of Austin, January 14, 2003

and

Adjourned June 2, 2003

Published under the Authority of The State of Texas

GEOFFREY S. CONNOR ..... Secretary of State

ARTICLE 9. RESERVED

ARTICLE 10. HEALTH CARE

SECTION 10.01. Chapter 74, Civil Practice and Remedies Code, is amended to read as follows:

CHAPTER 74. *MEDICAL LIABILITY* [~~GOOD SAMARITAN LAW; LIABILITY FOR EMERGENCY CARE~~]

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 74.001. *DEFINITIONS. (a) In this chapter:*

(1) "Affiliate" means a person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, including any direct or indirect parent or subsidiary.

(2) "Claimant" means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(3) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the person, whether through ownership of equity or securities, by contract, or otherwise.

(4) "Court" means any federal or state court.

(5) "Disclosure panel" means the Texas Medical Disclosure Panel.

(6) "Economic damages" has the meaning assigned by Section 41.001.

(7) "Emergency medical care" means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

(8) "Emergency medical services provider" means a licensed public or private provider to which Chapter 773, Health and Safety Code, applies.

(9) "Gross negligence" has the meaning assigned by Section 41.001.

(10) "Health care" means any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(11) "Health care institution" includes:

(A) an ambulatory surgical center;

(B) an assisted living facility licensed under Chapter 247, Health and Safety Code;

(C) an emergency medical services provider;

(D) a health services district created under Chapter 287, Health and Safety Code;

(E) a home and community support services agency;

(F) a hospice;

(G) a hospital;

(H) a hospital system;

(I) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended;

(J) a nursing home; or

(K) an end stage renal disease facility licensed under Section 251.011, Health and Safety Code.

(12)(A) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including:

(i) a registered nurse;

(ii) a dentist;

(iii) a podiatrist;

(iv) a pharmacist;

(v) a chiropractor;

(vi) an optometrist; or

(vii) a health care institution.

(B) The term includes:

(i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and

(ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

(13) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

(14) "Home and community support services agency" means a licensed public or provider agency to which Chapter 142, Health and Safety Code, applies.

(15) "Hospice" means a hospice facility or activity to which Chapter 142, Health and Safety Code, applies.

(16) "Hospital" means a licensed public or private institution as defined in Chapter 241, Health and Safety Code, or licensed under Chapter 577, Health and Safety Code.

(17) "Hospital system" means a system of hospitals located in this state that are under the common governance or control of a corporate parent.

(18) "Intermediate care facility for the mentally retarded" means a licensed public or private institution to which Chapter 252, Health and Safety Code, applies.

(19) "Medical care" means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

(20) "Noneconomic damages" has the meaning assigned by Section 41.001.

(21) "Nursing home" means a licensed public or private institution to which Chapter 242, Health and Safety Code, applies.

(22) "Pharmacist" means one licensed under Chapter 551, Occupations Code, who, for the purposes of this chapter, performs those activities limited to the dispensing of prescription medicines which result in health care liability claims and does not include any other cause of action that may exist at common law against them, including but not limited to causes of action for the sale of mishandled or defective products.

(23) "Physician" means:

(A) an individual licensed to practice medicine in this state;

(B) a professional association organized under the Texas Professional Association Act (Article 1528f, Vernon's Texas Civil Statutes) by an individual physician or group of physicians;

(C) a partnership or limited liability partnership formed by a group of physicians;

(D) a nonprofit health corporation certified under Section 162.001, Occupations Code; or

(E) a company formed by a group of physicians under the Texas Limited Liability Company Act (Article 1528n, Vernon's Texas Civil Statutes).

(24) "Professional or administrative services" means those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs.

(25) "Representative" means the spouse, parent, guardian, trustee, authorized attorney, or other authorized legal agent of the patient or claimant.

(b) Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.

Sec. 74.002. CONFLICT WITH OTHER LAW AND RULES OF CIVIL PROCEDURE. (a) In the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict.

(b) Notwithstanding Subsection (a), in the event of a conflict between this chapter and Section 101.023, 102.003, or 108.002, those sections of this code control to the extent of the conflict.

(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this chapter.

Sec. 74.003. SOVEREIGN IMMUNITY NOT WAIVED. This chapter does not waive sovereign immunity from suit or from liability.

Sec. 74.004. EXCEPTION FROM CERTAIN LAWS. (a) Notwithstanding any other law, Sections 17.41–17.63, Business & Commerce Code, do not apply to physicians or health care providers with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

(b) This section does not apply to pharmacists.

[Sections 74.005–74.050 reserved for expansion]

SUBCHAPTER B. NOTICE AND PLEADINGS

Sec. 74.051. NOTICE. (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052.

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and Section 74.052 and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this chapter have been met.

(c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

(d) All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization in the form required by Section 74.052 executed by the claimant herein shall be considered compliance by the claimant with this subsection.

(e) For the purposes of this section, and notwithstanding Chapter 159, Occupations Code, or any other law, a request for the medical records of a deceased person or a person who is

incompetent shall be deemed to be valid if accompanied by an authorization in the form required by Section 74.052 signed by a parent, spouse, or adult child of the deceased or incompetent person.

Sec. 74.052. AUTHORIZATION FORM FOR RELEASE OF PROTECTED HEALTH INFORMATION. (a) Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

(b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.

(c) The medical authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" (45 C.F.R. Parts 160 and 164).

AUTHORIZATION FORM FOR RELEASE OF PROTECTED HEALTH INFORMATION

A. I, _____ (name of patient or authorized representative), hereby authorize _____ (name of physician or other health care provider to whom the notice of health care claim is directed) to obtain and disclose (within the parameters set out below) the protected health information described below for the following specific purposes:

1. To facilitate the investigation and evaluation of the health care claim described in the accompanying Notice of Health Care Claim; or

2. Defense of any litigation arising out of the claim made the basis of the accompanying Notice of Health Care Claim.

B. The health information to be obtained, used, or disclosed extends to and includes the verbal as well as the written and is specifically described as follows:

1. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated _____ (patient) in connection with the injuries alleged to have been sustained in connection with the claim asserted in the accompanying Notice of Health Care Claim. (Here list the name and current address of all treating physicians or health care providers). This authorization shall extend to any additional physicians or health care providers that may in the future evaluate, examine, or treat _____ (patient) for injuries alleged in connection with the claim made the basis of the attached Notice of Health Care Claim;

2. The health information in the custody of the following physicians or health care providers who have examined, evaluated, or treated _____ (patient) during a period commencing five years prior to the incident made the basis of the accompanying Notice of Health Care Claim. (Here list the name and current address of such physicians or health care providers, if applicable.)

C. Excluded Health Information—the following constitutes a list of physicians or health care providers possessing health care information concerning _____ (patient) to which this authorization does not apply because I contend that such health care information is not relevant to the damages being claimed or to the physical, mental, or emotional condition of _____ (patient) arising out of the claim made the basis of the accompanying Notice of Health Care Claim. (Here state "none" or list the name of each physician or health care provider to whom this authorization does not extend and the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure.)

D. The persons or class of persons to whom the health information of _____ (patient) will be disclosed or who will make use of said information are:

1. Any and all physicians or health care providers providing care or treatment to _____ (patient);

2. Any liability insurance entity providing liability insurance coverage or defense to any physician or health care provider to whom Notice of Health Care Claim has been given with regard to the care and treatment of _____ (patient);

3. Any consulting or testifying experts employed by or on behalf of _____ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

4. Any attorneys (including secretarial, clerical, or paralegal staff) employed by or on behalf of _____ (name of physician or health care provider to whom Notice of Health Care Claim has been given) with regard to the matter set out in the Notice of Health Care Claim accompanying this authorization;

5. Any trier of the law or facts relating to any suit filed seeking damages arising out of the medical care or treatment of _____ (patient).

E. This authorization shall expire upon resolution of the claim asserted or at the conclusion of any litigation instituted in connection with the subject matter of the Notice of Health Care Claim accompanying this authorization, whichever occurs sooner.

F. I understand that, without exception, I have the right to revoke this authorization in writing. I further understand the consequence of any such revocation as set out in Section 74.052, Civil Practice and Remedies Code.

G. I understand that the signing of this authorization is not a condition for continued treatment, payment, enrollment, or eligibility for health plan benefits.

H. I understand that information used or disclosed pursuant to this authorization may be subject to redisclosure by the recipient and may no longer be protected by federal HIPAA privacy regulations.

Signature of Patient/Representative

_____

Date

_____

Name of Patient/Representative

_____

Description of Representative's Authority

_____

Sec. 74.053. PLEADINGS NOT TO STATE DAMAGE AMOUNT; SPECIAL EXCEPTION; EXCLUSION FROM SECTION. Pleadings in a suit based on a health care liability claim shall not specify an amount of money claimed as damages. The defendant may file a special exception to the pleadings on the ground the suit is not within the court's jurisdiction, in which event the plaintiff shall inform the court and defendant in writing of the total dollar amount claimed. This section does not prevent a party from mentioning the total dollar amount claimed in examining prospective jurors on voir dire or in argument to the court or jury.

[Sections 74.054–74.100 reserved for expansion]

SUBCHAPTER C. INFORMED CONSENT

Sec. 74.101. THEORY OF RECOVERY. In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

Sec. 74.102. TEXAS MEDICAL DISCLOSURE PANEL. (a) The Texas Medical Disclosure Panel is created to determine which risks and hazards related to medical care and

surgical pro
patients or p
and substan

(b) The d
Department
panel, shall
Health and
avoid unnec
at the reque
panel shall
Department
this chapter
Department

(c) The d
practice lau
Members of

(d) At the
commission
or until his
without the
be removed
and signed
commission

(e) Meml
each panel
performanc

(f) Meeti
three memb

(g) At th
the panelist
members to
The chairm
shall presid

(h) Emp

Sec. 74.1
shall ident
procedures
determine
risks and h

(b) The
procedures
that do req
which the c

(c) Lists
and form c

(d) At le
the panel
that have
and shall
will be ma
of revising
Register.

Sec. 74.
patient or
surgical p

surgical procedures must be disclosed by health care providers or physicians to their patients or persons authorized to consent for their patients and to establish the general form and substance of such disclosure.

(b) The disclosure panel established herein is administratively attached to the Texas Department of Health. The Texas Department of Health, at the request of the disclosure panel, shall provide administrative assistance to the panel; and the Texas Department of Health and the disclosure panel shall coordinate administrative responsibilities in order to avoid unnecessary duplication of facilities and services. The Texas Department of Health, at the request of the panel, shall submit the panel's budget request to the legislature. The panel shall be subject, except where inconsistent, to the rules and procedures of the Texas Department of Health; however, the duties and responsibilities of the panel as set forth in this chapter shall be exercised solely by the disclosure panel, and the board or Texas Department of Health shall have no authority or responsibility with respect to same.

(c) The disclosure panel is composed of nine members, with three members licensed to practice law in this state and six members licensed to practice medicine in this state. Members of the disclosure panel shall be selected by the commissioner of health.

(d) At the expiration of the term of each member of the disclosure panel so appointed, the commissioner shall select a successor, and such successor shall serve for a term of six years, or until his successor is selected. Any member who is absent for three consecutive meetings without the consent of a majority of the disclosure panel present at each such meeting may be removed by the commissioner at the request of the disclosure panel submitted in writing and signed by the chairman. Upon the death, resignation, or removal of any member, the commissioner shall fill the vacancy by selection for the unexpired portion of the term.

(e) Members of the disclosure panel are not entitled to compensation for their services, but each panelist is entitled to reimbursement of any necessary expense incurred in the performance of his duties on the panel, including necessary travel expenses.

(f) Meetings of the panel shall be held at the call of the chairman or on petition of at least three members of the panel.

(g) At the first meeting of the panel each year after its members assume their positions, the panelists shall select one of the panel members to serve as chairman and one of the panel members to serve as vice chairman, and each such officer shall serve for a term of one year. The chairman shall preside at meetings of the panel, and in his absence, the vice chairman shall preside.

(h) Employees of the Texas Department of Health shall serve as the staff for the panel.

Sec. 74.102. DUTIES OF DISCLOSURE PANEL. (a) To the extent feasible, the panel shall identify and make a thorough examination of all medical treatments and surgical procedures in which physicians and health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure of the risks and hazards to the patient or person authorized to consent for the patient.

(b) The panel shall prepare separate lists of those medical treatments and surgical procedures that do and do not require disclosure and, for those treatments and procedures that do require disclosure, shall establish the degree of disclosure required and the form in which the disclosure will be made.

(c) Lists prepared under Subsection (b) together with written explanations of the degree and form of disclosure shall be published in the Texas Register.

(d) At least annually, or at such other period the panel may determine from time to time, the panel will identify and examine any new medical treatments and surgical procedures that have been developed since its last determinations, shall assign them to the proper list, and shall establish the degree of disclosure required and the form in which the disclosure will be made. The panel will also examine such treatments and procedures for the purpose of revising lists previously published. These determinations shall be published in the Texas Register.

Sec. 74.104. DUTY OF PHYSICIAN OR HEALTH CARE PROVIDER. Before a patient or a person authorized to consent for a patient gives consent to any medical care or surgical procedure that appears on the disclosure panel's list requiring disclosure, the

physician or health care provider shall disclose to the patient or person authorized to consent for the patient the risks and hazards involved in that kind of care or procedure. A physician or health care provider shall be considered to have complied with the requirements of this section if disclosure is made as provided in Section 74.105.

Sec. 74.105. MANNER OF DISCLOSURE. Consent to medical care that appears on the disclosure panel's list requiring disclosure shall be considered effective under this chapter if it is given in writing, signed by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states the risks and hazards that are involved in the medical care or surgical procedure in the form and to the degree required by the disclosure panel under Section 74.103.

Sec. 74.106. EFFECT OF DISCLOSURE. (a) In a suit against a physician or health care provider involving a health care liability claim that is based on the negligent failure of the physician or health care provider to disclose or adequately disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider:

(1) both disclosure made as provided in Section 74.104 and failure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 74.104 and 74.105 have been complied with and this presumption shall be included in the charge to the jury; and

(2) failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed under Sections 74.104 and 74.105 shall be admissible in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure set forth in Sections 74.104 and 74.105, and this presumption shall be included in the charge to the jury; but failure to disclose may be found not to be negligent if there was an emergency or if for some other reason it was not medically feasible to make a disclosure of the kind that would otherwise have been negligence.

(b) If medical care or surgical procedure is rendered with respect to which the disclosure panel has made no determination either way regarding a duty of disclosure, the physician or health care provider is under the duty otherwise imposed by law.

Sec. 74.107. INFORMED CONSENT FOR HYSTERECTOMIES. (a) The disclosure panel shall develop and prepare written materials to inform a patient or person authorized to consent for a patient of the risks and hazards of a hysterectomy.

(b) The materials shall be available in English, Spanish, and any other language the panel considers appropriate. The information must be presented in a manner understandable to a layperson.

(c) The materials must include:

(1) a notice that a decision made at any time to refuse to undergo a hysterectomy will not result in the withdrawal or withholding of any benefits provided by programs or projects receiving federal funds or otherwise affect the patient's right to future care or treatment;

(2) the name of the person providing and explaining the materials;

(3) a statement that the patient or person authorized to consent for the patient understands that the hysterectomy is permanent and nonreversible and that the patient will not be able to become pregnant or bear children if she undergoes a hysterectomy;

(4) a statement that the patient has the right to seek a consultation from a second physician;

(5) a statement that the patient or person authorized to consent for the patient has been informed that a hysterectomy is a removal of the uterus through an incision in the lower abdomen or vagina and that additional surgery may be necessary to remove or repair other organs, including an ovary, tube, appendix, bladder, rectum, or vagina;

(6) a description of the risks and hazards involved in the performance of the procedure; and

(7) a written statement to be signed by the patient or person authorized to consent for the patient indicating that the materials have been provided and explained to the patient or person authorized to consent for the patient and that the patient or person authorized to consent for the patient understands the nature and consequences of a hysterectomy.

(d) The physician or health care provider shall obtain informed consent under this section and Section 74.104 from the patient or person authorized to consent for the patient before performing a hysterectomy unless the hysterectomy is performed in a life-threatening situation in which the physician determines obtaining informed consent is not reasonably possible. If obtaining informed consent is not reasonably possible, the physician or health care provider shall include in the patient's medical records a written statement signed by the physician certifying the nature of the emergency.

(e) The disclosure panel may not prescribe materials under this section without first consulting with the Texas State Board of Medical Examiners.

[Sections 74.108–74.150 reserved for expansion]

SUBCHAPTER D. EMERGENCY CARE

Sec. 74.151. LIABILITY FOR EMERGENCY CARE. (a) A person who in good faith administers emergency care, including using an automated external defibrillator, [~~at the scene of an emergency but not in a hospital or other health care facility or means of medical transport~~] is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent.

(b) This section does not apply to care administered:

(1) for or in expectation of remuneration, *provided that being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration*; or

(2) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration.

[~~(c) If the scene of an emergency is in a hospital or other health care facility or means of medical transport, a person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent, provided that this subsection does not apply to care administered:~~

[~~(1) by a person who regularly administers care in a hospital emergency room unless such person is at the scene of the emergency for reasons wholly unrelated to the person's work in administering health care; or~~

[~~(2) by an admitting or attending physician of the patient or a treating physician associated by the admitting or attending physician of the patient in question.~~

[~~(d) For purposes of Subsections (b)(1) and (c)(1), a person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering care under such circumstances to the patient in question shall be deemed to be acting for or in expectation of remuneration even if the person waives or elects not to charge or receive remuneration on the occasion in question.~~]

(e) This section does not apply to a person whose negligent act or omission was a producing cause of the emergency for which care is being administered.

Sec. *74.152* [~~74.002~~]. UNLICENSED MEDICAL PERSONNEL. Persons not licensed *or certified* in the healing arts who in good faith administer emergency care as emergency medical service personnel are not liable in civil damages for an act performed in administering the care unless the act is wilfully or wantonly negligent. This section applies without regard to whether the care is provided for or in expectation of remuneration.

Sec. 74.153. STANDARD OF PROOF IN CASES INVOLVING EMERGENCY MEDICAL CARE. In a suit involving a health care liability claim against a physician or health care provider for injury to or death of a patient arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite

immediately following the evaluation or treatment of a patient in a hospital emergency department, the claimant bringing the suit may prove that the treatment or lack of treatment by the physician or health care provider departed from accepted standards of medical care or health care only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with wilful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances.

Sec. 74.154. JURY INSTRUCTIONS IN CASES INVOLVING EMERGENCY MEDICAL CARE. (a) In an action for damages that involves a claim of negligence arising from the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the court shall instruct the jury to consider, together with all other relevant matters:

(1) whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

(2) the presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;

(3) the circumstances constituting the emergency; and

(4) the circumstances surrounding the delivery of the emergency medical care.

(b) The provisions of Subsection (a) do not apply to medical care or treatment:

(1) that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient;

(2) that is unrelated to the original medical emergency; or

(3) that is related to an emergency caused in whole or in part by the negligence of the defendant.

[Sections 74.155–74.200 reserved for expansion]

SUBCHAPTER E. RES IPSA LOQUITUR

Sec. 74.201. APPLICATION OF RES IPSA LOQUITUR. The common law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of August 29, 1977.

[Sections 74.202–74.250 reserved for expansion]

SUBCHAPTER F. STATUTE OF LIMITATIONS

Sec. 74.251. STATUTE OF LIMITATIONS ON HEALTH CARE LIABILITY CLAIMS. (a) Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided this section applies to all persons regardless of minority or other legal disability.

(b) A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

[Sections 74.252–74.300 reserved for expansion]

Sec. 7.
health c
care pro
damages
inclusive
limited t
defendar
whom th
based.

(b) In
a single
of all pe
to an am

(c) In
more tha
for each
liability
claiman
instituti
apply, sl

Sec. 7.
the even
invalida
provisio

(1)
again
of civi
than c
liabili
claim
than
separ

(2)
again
damag
apply,

(3)
again
damag
vicari
$250,0
health
theori
claim

(b) Ef
physicia
followin

(1)
aggre
calen
progr

(2)
aggre

SUBCHAPTER G. LIABILITY LIMITS

Sec. 74.301. LIMITATION ON NONECONOMIC DAMAGES. (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.

(c) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

Sec. 74.302. ALTERNATIVE LIMITATION ON NONECONOMIC DAMAGES. (a) In the event that Section 74.301 is stricken from this subchapter or is otherwise to any extent invalidated by a method other than through legislative means, the following, subject to the provisions of this section, shall become effective:

(1) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(2) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.

(3) In an action on a health care liability claim where final judgment is rendered against more than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

(b) Effective before September 1, 2005, Subsection (a) of this section applies to any physician or health care provider that provides evidence of financial responsibility in the following amounts in effect for any act or omission to which this subchapter applies:

(1) at least $100,000 for each health care liability claim and at least $300,000 in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a physician participating in an approved residency program;

(2) at least $200,000 for each health care liability claim and at least $600,000 in aggregate for all health care liability claims occurring in an insurance policy year,

calendar year, or fiscal year for a physician or health care provider, other than a hospital; and

(3) at least $500,000 for each health care liability claim and at least $1.5 million in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a hospital.

(c) Effective September 1, 2005, Subsection (a) of this section applies to any physician or health care provider that provides evidence of financial responsibility in the following amounts in effect for any act or omission to which this subchapter applies:

(1) at least $100,000 for each health care liability claim and at least $300,000 in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a physician participating in an approved residency program;

(2) at least $300,000 for each health care liability claim and at least $900,000 in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a physician or health care provider, other than a hospital; and

(3) at least $750,000 for each health care liability claim and at least $2.25 million in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a hospital.

(d) Effective September 1, 2007, Subsection (a) of this section applies to any physician or health care provider that provides evidence of financial responsibility in the following amounts in effect for any act or omission to which this subchapter applies:

(1) at least $100,000 for each health care liability claim and at least $300,000 in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a physician participating in an approved residency program;

(2) at least $500,000 for each health care liability claim and at least $1 million in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a physician or health care provider, other than a hospital; and

(3) at least $1 million for each health care liability claim and at least $3 million in aggregate for all health care liability claims occurring in an insurance policy year, calendar year, or fiscal year for a hospital.

(e) Evidence of financial responsibility may be established at the time of judgment by providing proof of:

(1) the purchase of a contract of insurance or other plan of insurance authorized by this state or federal law or regulation;

(2) the purchase of coverage from a trust organized and operating under Article 21.49–4, Insurance Code;

(3) the purchase of coverage or another plan of insurance provided by or through a risk retention group or purchasing group authorized under applicable laws of this state or under the Product Liability Risk Retention Act of 1981 (15 U.S.C. Section 3901 et seq.), as amended, or the Liability Risk Retention Act of 1986 (15 U.S.C. Section 3901 et seq.), as amended, or any other contract or arrangement for transferring and distributing risk relating to legal liability for damages, including cost or defense, legal costs, fees, and other claims expenses; or

(4) the maintenance of financial reserves in or an irrevocable letter of credit from a federally insured financial institution that has its main office or a branch office in this state.

Sec. 74.303. LIMITATION ON DAMAGES. (a) In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant, regardless

of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI–W: Seasonally Adjusted U.S. City Average—All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.

(c) Subsection (a) does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

(d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" shall not exceed the liability of the insured.

(e) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors:

(1) "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law."

(2) "A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence."

[Sections 74.304–74.350 reserved for expansion]

SUBCHAPTER H. PROCEDURAL PROVISIONS

Sec. 74.351. EXPERT REPORT. (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30–day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120–day deadline has passed, then the 30–day extension shall run from the date the plaintiff first received the notice.

[Subsections (d)–(h) reserved]

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must

address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (t), an expert report served under this section:

(1) is not admissible in evidence by any party;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by any party during the course of the action for any purpose.

(l) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6).

[Subsections (m)–(q) reserved]

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

[(3) reserved]

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401;

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402;

(C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence;

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

(6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the

acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

(1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;

(2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and

(3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(i) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).

Sec. 74.352. DISCOVERY PROCEDURES. (a) In every health care liability claim the plaintiff shall within 45 days after the date of filing of the original petition serve on the defendant's attorney or, if no attorney has appeared for the defendant, on the defendant full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the appropriate standard set of requests for production of documents and things promulgated by the Health Care Liability Discovery Panel.

(b) Every physician or health care provider who is a defendant in a health care liability claim shall within 45 days after the date on which an answer to the petition was due serve on the plaintiff's attorney or, if the plaintiff is not represented by an attorney, on the plaintiff full and complete answers to the appropriate standard set of interrogatories and complete responses to the standard set of requests for production of documents and things promulgated by the Health Care Liability Discovery Panel.

(c) Except on motion and for good cause shown, no objection may be asserted regarding any standard interrogatory or request for production of documents and things, but no response shall be required where a particular interrogatory or request is clearly inapplicable under the circumstances of the case.

(d) Failure to file full and complete answers and responses to standard interrogatories and requests for production of documents and things in accordance with Subsections (a) and (b) or the making of a groundless objection under Subsection (c) shall be grounds for sanctions by the court in accordance with the Texas Rules of Civil Procedure on motion of any party.

(e) The time limits imposed under Subsections (a) and (b) may be extended by the court on the motion of a responding party for good cause shown and shall be extended if agreed in writing between the responding party and all opposing parties. In no event shall an extension be for a period of more than an additional 30 days.

(f) If a party is added by an amended pleading, intervention, or otherwise, the new party shall file full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the standard set of requests for production of documents and things no later than 45 days after the date of filing of the pleading by which the party first appeared in the action.

(g) If information or documents required to provide full and complete answers and responses as required by this section are not in the possession of the responding party or attorney when the answers or responses are filed, the party shall supplement the answers and responses in accordance with the Texas Rules of Civil Procedure.

(h) Nothing in this section shall preclude any party from taking additional non-duplicative discovery of any other party. The standard sets of interrogatories provided for in this section shall not constitute, as to each plaintiff and each physician or health care provider who is a defendant, the first of the two sets of interrogatories permitted under the Texas Rules of Civil Procedure.

[Sections 74.353–74.400 reserved for expansion]

SUBCHAPTER I. EXPERT WITNESSES

Sec. 74.401. QUALIFICATIONS OF EXPERT WITNESS IN SUIT AGAINST PHYSICIAN. (a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:

(1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;

(2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and

(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

(b) For the purpose of this section, "practicing medicine" or "medical practice" includes, but is not limited to, training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care, upon the request of such other physicians.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is board certified or has other substantial training or experience in an area of medical practice relevant to the claim; and

(2) is actively practicing medicine in rendering medical care services relevant to the claim.

(d) The court shall apply the criteria specified in Subsections (a), (b), and (c) in determining whether an expert is qualified to offer expert testimony on the issue of whether the physician departed from accepted standards of medical care, but may depart from those criteria if, under the circumstances, the court determines that there is a good reason to admit the expert's testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

(e) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

(f) This section does not prevent a physician who is a defendant from qualifying as an expert.

(g) In this subchapter, "physician" means a person who is:

(1) licensed to practice medicine in one or more states in the United States; or

(2) a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association only if testifying as a defendant and that testimony relates to that defendant's standard of care, the alleged departure from that standard of care, or the causal relationship between the alleged departure from that standard of care and the injury, harm, or damages claimed.

Sec. 74.402. QUALIFICATIONS OF EXPERT WITNESS IN SUIT AGAINST HEALTH CARE PROVIDER. (a) For purposes of this section, "practicing health care" includes:

(1) training health care providers in the same field as the defendant health care provider at an accredited educational institution; or

(2) serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.

(b) In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person:

(1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;

(2) has knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and

(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and

(2) is actively practicing health care in rendering health care services relevant to the claim.

(d) The court shall apply the criteria specified in Subsections (a), (b), and (c) in determining whether an expert is qualified to offer expert testimony on the issue of whether the defendant health care provider departed from accepted standards of health care but may depart from those criteria if, under the circumstances, the court determines that there is good reason to admit the expert's testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

(e) This section does not prevent a health care provider who is a defendant, or an employee of the defendant health care provider, from qualifying as an expert.

(f) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

Sec. 74.403. QUALIFICATIONS OF EXPERT WITNESS ON CAUSATION IN HEALTH CARE LIABILITY CLAIM. (a) Except as provided by Subsections (b) and (c), in a suit involving a health care liability claim against a physician or health care provider, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(b) In a suit involving a health care liability claim against a dentist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the

person is a dentist or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(c) In a suit involving a health care liability claim against a podiatrist, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a podiatrist or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

(d) A pretrial objection to the qualifications of a witness under this section must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witness's curriculum vitae or the 21st day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

[Sections 74.404–74.450 reserved for expansion]

SUBCHAPTER J. ARBITRATION AGREEMENTS

Sec. 74.451. ARBITRATION AGREEMENTS. (a) No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating:

UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

(b) A violation of this section by a physician or professional association of physicians constitutes a violation of Subtitle B, Title 3, Occupations Code, and shall be subject to the enforcement provisions and sanctions contained in that subtitle.

(c) A violation of this section by a health care provider other than a physician shall constitute a false, misleading, or deceptive act or practice in the conduct of trade or commerce within the meaning of Section 17.46 of the Deceptive Trade Practices–Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), and shall be subject to an enforcement action by the consumer protection division under that act and subject to the penalties and remedies contained in Section 17.47, Business & Commerce Code, notwithstanding Section 74.004 or any other law.

(d) Notwithstanding any other provision of this section, a person who is found to be in violation of this section for the first time shall be subject only to injunctive relief or other appropriate order requiring the person to cease and desist from such violation, and not to any other penalty or sanction.

[Sections 74.452–74.500 reserved for expansion]

SUBCHAPTER K. PAYMENT FOR FUTURE LOSSES

Sec. 74.501. DEFINITIONS. In this subchapter:

(1) "Future damages" means damages that are incurred after the date of judgment for:

(A) medical, health care, or custodial care services;

(B) physical pain and mental anguish, disfigurement, or physical impairment;

(C) loss of consortium, companionship, or society; or

(D) loss of earnings.

(2) "Future loss of earnings" means the following losses incurred after the date of the judgment:

(A) loss of income, wages, or earning capacity and other pecuniary losses; and

(B) loss of inheritance.

(3) "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

Sec. 74.502. SCOPE OF SUBCHAPTER. This subchapter applies only to an action on a health care liability claim against a physician or health care provider in which the present value of the award of future damages, as determined by the court, equals or exceeds $100,000.

Sec. 74.503. COURT ORDER FOR PERIODIC PAYMENTS. (a) At the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

(b) At the request of a defendant physician or health care provider or claimant, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.

(c) The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.

(d) The court shall specify in its judgment ordering the payment of future damages by periodic payments the:

(1) recipient of the payments;

(2) dollar amount of the payments;

(3) interval between payments; and

(4) number of payments or the period of time over which payments must be made.

Sec. 74.504. RELEASE. The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by the claimant.

Sec. 74.505. FINANCIAL RESPONSIBILITY. (a) As a condition to authorizing periodic payments of future damages, the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.

(b) The judgment must provide for payments to be funded by:

(1) an annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;

(2) an obligation of the United States;

(3) applicable and collectible liability insurance from one or more qualified insurers; or

(4) any other satisfactory form of funding approved by the court.

(c) On termination of periodic payments of future damages, the court shall order the return of the security, or as much as remains, to the defendant.

Sec. 74.506. DEATH OF RECIPIENT. (a) On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction.

(b) Periodic payments, other than future loss of earnings, terminate on the death of the recipient.

(c) If the recipient of periodic payments dies before all payments required by the judgment are paid, the court may modify the judgment to award and apportion the unpaid damages for future loss of earnings in an appropriate manner.

(d) Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant physician or health care provider to make further payments ends and any security given reverts to the defendant.

Sec. 74.507. AWARD OF ATTORNEY'S FEES. For purposes of computing the award of attorney's fees when the claimant is awarded a recovery that will be paid in periodic payments, the court shall:

(1) place a total value on the payments based on the claimant's projected life expectancy; and

(2) reduce the amount in Subdivision (1) to present value.

SECTION 10.02. Section 84.003(1), Civil Practice and Remedies Code, is amended to read as follows:

(1) "Charitable organization" means:

(A) any organization exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1986 by being listed as an exempt organization in Section 501(c)(3) or 501(c)(4) of the code, if it is a nonprofit corporation, foundation, community chest, or fund organized and operated exclusively for charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, fire protection or prevention, emergency medical or hazardous material response services, or educational purposes, *including* [~~excluding~~] private primary or secondary schools *if accredited by a member association of the Texas Private School Accreditation Commission but excluding fraternities, sororities, and secret societies,* [~~alumni associations and related on-campus organizations,~~] or is organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community;

(B) any bona fide charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, or educational organization, excluding *fraternities, sororities, and secret societies* [~~alumni associations and related on-campus organizations~~], or other organization organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community, and that:

(i) is organized and operated exclusively for one or more of the above purposes;

(ii) does not engage in activities which in themselves are not in furtherance of the purpose or purposes;

(iii) does not directly or indirectly participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office;

(iv) dedicates its assets to achieving the stated purpose or purposes of the organization;

(v) does not allow any part of its net assets on dissolution of the organization to inure to the benefit of any group, shareholder, or individual; and

(vi) normally receives more than one-third of its support in any year from private or public gifts, grants, contributions, or membership fees;

(C) a homeowners association as defined by Section 528(c) of the Internal Revenue Code of 1986 or which is exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1986 by being listed as an exempt organization in Section 501(c)(4) of the code; or

(D) a volunteer center, as that term is defined by Section 411.126, Government Code.

SECTION 10.03. Section 84.003, Civil Practice and Remedies Code, is amended by adding Subdivision (6) to read as follows:

(6) "Hospital system" means a system of hospitals and other health care providers located in this state that are under the common governance or control of a corporate parent.

(Senator Ratliff in the Chair)

CHAIRMAN : (Gavel) Senate State Affairs Committee will come to order. Since we are standing in recess we are not required to have a quorum to take testimony. We are continuing with final, the final two testimonies on Article 10 of House Bill 4. And the Chair would recognize Mike Hull.

HULL : Governor, Members of the Committee. I'm gonna see if I can use this. And, I had a real fiery opening planned but that was only if I went second after Mr. Jacks.

: (Laughter)

HULL : And it's probably too early for a real fiery opening anyway. I think almost everything that I'm going to say today has to be understood against the backdrop of a med-mal lawsuit. And, for those of you who haven't been through one, there are some fairly distinct phases. And, we spent a lot of time talking about lawsuits and I don't wanna spend a lot of time describing a lawsuit for you, but there are, really, kind of three key points, three pressure points, that if you as a Committee were going to change how this works, there's really three places that I think you can do that most effectively. By statute, one of these things gets kicked-off by a request for records. The, the lawyer files a request for records, a patient can do it. That's sometimes combined with the claims, claim letter, doesn't have to be, but it sometimes is. But in any event, at some point in time there is a claim letter. Claim letters lead to suits, and then there's discovery, typically mediation, not always, but, and then trial. Now, we, we, we know a few things already once you get to claim letter. We know that there are going to be, in any given year, and this is based on the TMA data study and a little bit of extrapolation, we know that any, in any given year there's going to be approximately 5,000 claims that are filed. We know that if, of those 5,000 claims, we know that in any given year approximately 750 of those 5,000 claims will have enough merit, or risk, or something to receive an indemnity payment. So, that's roughly 85 percent. There's, you'll hear various numbers be--about how, how many claim letters ultimately end in suit. My best data, again this is from the TMA data study, is that about 250 of the claims that are filed will be settled presuit, and approximately 500 claims will be settled postsuit. And so, the first thing that you can do, and these aren't in any order of preference, they're really more in an order of appearance, is that you're going to address the issue, or change the way that this works, is to address frequency. And by frequency I mean how can you address the other 350 claims that are filed, most of which end in suit, have cost to the doctor, to the carrier, to the hospital, to the nurse, to the defendants but ultimately results in no payment. From our perspective, jumping to the end, to this question of fairness that, at least my (sense of it would be) struggled with, or at least heard about and discussed, from our perspective the question of fairness begins with, on the one hand the 750 claims, the 750 plaintiffs and their

lawyers who have a claim with enough merit or risk that justifies (inaudible). So when you're talking about fairness the first thing we have to balance is those 750 folks, and their lawyers. Now, at some point in time after the claim is filed, and the suit is filed, and discovery has gone forward, and we've traded paper and questions, and doing discovery and (inaudible), and parties, and experts, and all the other things, at some point in time we move to the severity side of the equation. There is, in my judgement, a cap that is present today. And a cap that is present today, in your normal, average, garden variety injury medical malpractice lawsuit, is whatever coverage the doctor has. And here's why that operates as a cap. In a typical med-mal case that I handle every day, and incidentally I didn't introduce myself, and I should have. I'm Mike Hull. I'm an attorney in private practice here in Austin and I'm also General Counsel for the Texas Alliance for Patient Access. And, in a typical case, when we get to the point here, the plaintiff's lawyer will send us a letter, will send me a letter, send the doctor a letter offering to settle the case for the policy limits. It happens 99 percent of the time. I, I, I, I would dare say it happens all the time. I've never had a case where it didn't happen but I, I presume it might. And that is a very important le--letter, that's the second of the three key places, because the way it works is this, the doctors, in particular, have a consent clause in their policy. And the consent clause says that if the doctors do not consent, the insurance company cannot settle their case. And that is a mis--shifting mechanism because this is what it means. If you as a doctor get an offer to settle inside your policy limits and you do not consent, and at a later time there is a verdict, and the verdict is in excess of your policy, then probably the doctor who did not consent is on the hook for the excess. On the other hand, if there is an offer to settle within the policy limits and the doctor does consent, then by and large, most of the time, it shifts the burden to the insurance company who now becomes on the hook for the extra. So, typical case, doctor's got three thousand, three hundred thousand in, in policy limits, five hundred thousand in policy limits, two hundred thousand in policy limits. Here comes the offer to settle within policy limits and I tell my client you have a good case. You didn't do anything wrong. This case is so good, in fact, that you are going to win eight out of ten times. Now, if you lose, the damages are such that the verdict will surely be in excess of your policy. Now, from, from my perspective as a lawyer, that is a fabulous recommendation. And I, that's, I'm way out on (the limbs) here. What my client hears is that they are gonna lose two out of ten times. And the two out of ten times they lose puts their assets at risk, and the way their luck has been going this is surely one of those two times, and so they always consent. And, and they can go talk to a lawyer and I always recommend that they do go talk to a lawyer, and the lawyer always tells them to consent so that you (knew) the risk, and be careful.

CHAIRMAN : Mike, let me interrupt you.
HULL : Yes, Sir.
CHAIRMAN : I'd always heard that policy limits are not

admissible but they are discoverable?

HULL : Yes, Sir. That's correct.

CHAIRMAN : So everybody knows what the policy limits are during these negotiations.

HULL : Yes, Sir.

CHAIRMAN : Okay, go ahead.

HULL : So, now you're the insurance company, change hats. Now you know that you bought, or sold rather, a two hundred, or a three hundred, or a five hundred thousand dollar policy. You know the doctor has consented. The doctor may have hired a lawyer who has sent you a letter that says, as (opposed) to my evaluation, the doctor has hired a personal lawyer who has written a letter that says boy did my client screw up. There is no way he will ever win this case. Mr. Hull is nuts. And you have that in your file. And you say, (gosh, I bought) a half-a-million dollars wor--I sold half-a-million dollars worth of coverage, but Mike says if we lose this case it's a ten million dollar loss, or a five million dollar loss, or a fifteen, or a twenty, or a twenty-five. And at that point the carrier does, does typically one of two things. They either pay the, they either settle a case that they oughta try, or they pay a tort premium. It's a case they oughta settle. There's some risk. They ought to at least try to settle. But they have to pay more than what the case is really worth, not because of the facts of the case or the conduct of the doctor, but only because of this risk that there will be a Stowers not a verdict. And so the second thing that you can do, you can get frequency, those 4250 cases with not enough merit to get a single dollar. You can get severity, in particular the Stowers situation, because you can, you can help the doctor decide if (willing) he's to try a case where he did nothing wrong and, and you can help the carrier decide that they oughta try a case or at least not overpay a case, simply because of this risk of the outlier verdict. And then the third thing that you can do that affects severity is the high verdict. Now, we've used a variety of terms for the high verdict. There's the outlier verdict, there's the lottery verdict, there's the runaway jury, and all those I think probably reflect perhaps a prospectus. But what is true about them, regardless of which side you're on, is that they are a high verdict, and that they are an unusual verdict. In the same way that I can tell you, just based on the fact of having done this a long time, and others who have done this a long time can tell you, eight out of ten times this is what's gonna happen on terms of liability for cases (inaudible). Well, in the same relative range of certainty I can tell you what the wage loss verdict would be if we lose. I can tell you what the medical loss will be if we lose. But what I have no real chance of telling you is what the noneconomic loss would be, because it's, it's so subjective. And I have to predict days, weeks, or months in advance what 12 people will do, that I have never met. Based on how they hear testimony that hasn't been presented to them. It is one of the ironies, from my perspective, of those who complained about these so-called one way settlement offers, 'cause I, I (inaudible, banging noise) with a one way settlement offer all the time. I have to predict one way

settlement offers all the time because I get this offer right here and I have to predict what 12 people I've ne--never met are gonna do months down the road, both on liability and damages. So, what I also know, although I can look at past verdicts for this kind of injury, I can look at verdicts in this particular town. I can look at what a particular lawyer might have done with similar cases. And I can get some benchmarks. But I know for an absolute fact that I am eventually going to get tagged. And not tagged two, or three, or five million dollars. I'm gonna get tagged 25, 50, or 75 million dollars, 100 million dollars. Simply because there is no way to prevent that third element of damage, the noneconomic damage. So the, the third thing that you can do is to do something to help me predict, and help my client predict what's likely to happen.

CHAIRMAN : Is this any more predictable at the appellate level?

HULL : No, Sir. Not really. I mean, you know, I have somewhere in notes to make the argument to you that the idea of rationing down damages is not something that's here, novel here today, I mean, it's not the first idea, the first time this has come up. Trial courts have the ability to do that and appellate courts have the ability to do that but it's done very rarely. And, it's done from the, the point of prediction, which is the important point right here, can I with any certainty predict that I will have a verdict that's gonna be way out of line, so far out of line that three people, two or three years from now are gonna reverse that or cut it back. I mean, the answer is no. I, I can hope but I've never seen a lawyer who's willing to predict that outcome when things (inaudible). So, from, from my judgment there are three things that you can do to affect this situation. You can affect frequency. You can affect the pressure to settle cases that should be tried or pay a, a premium, a tax, a tort tax to settle cases for more than they're worth, and the third thing is, is that you could help with the runaway verdict, the outlier verdict, the unusual verdict that's unusually high, because, because we know that this is there, the high verdict that affects the decision to settle. And I believe it's what drives frequencies, because if you know that there's a case with that outcome, that has potentially high damages, and you know that eventually one of those cases is gonna turn into a high verdict, then you're more willing to file more of those cases in the hope that you might end up with (inaudible).

DUNCAN : I have a couple of questions. One is, most of these, unlike the nursing home cases where the insurance policies don't cover punitives, I think most of these medical policies do cover punitives, is that correct?

HULL : As written, they often, often don't. Where it gets a little bit more complicated is, is (in, in) evaluating the severity issue here. What happens is I know that there's a risk, or you as a carrier knows there's a risk of a punitive verdict. And, is that a factor that can be considered in assessing your reasonableness for not settling the case on, on behalf of the doctor. I mean, the answer to that, yes. So, back door, you couldn't get on the

boat.

DUNCAN : Well, (le' me) (sic) break it down, though. I--it's--

HULL : Yes, Sir.

DUNCAN : --do most policies exclude coverage for punitive--

HULL : Yes, Sir.

DUNCAN : --damages. So, if, and, and do you, how many of your claims have an alle--allegation of gross negligence of mal--malice in punitive damages.

HULL : Almost all of 'em.

DUNCAN : And so, as you go through the settlement process, does your, if your policy doesn't cover punitive damages but say, for example, hypothetically, you refuse, the carrier refuses to settle and the verdict comes back in with a high punitive damage verdict that would be obviously in excess of the, you, you have a high general verdict and then a high punitive verdict. Where, where does that fit in with the Stowers (Doxine) (sic).

HULL : Well--

DUNCAN : I know there's a Fifth Circuit case out there that deals with that, but with regard, du--does the insurance company become liable for the punitive damages, even though it hasn't contractually committed to covering those in a Stowers situation like that.

HULL : --I, I think the insurance company answer would be no. If the case just preceded the judgment and then was simply paid, insurance company's position would be no. That's just not, though, what typically happens. What typically happens is, that verdict will then be reduced to a settlement, and the insurance company is looking at their excess exposure when include, which includes the punitives. The plaintiff's lawyer is looking at a doctor, and he's probably asset exempt, because (of) few assets and a lotta trouble to get 'em, and so he ends up affecting the total settlement. The case will settle for less but will include the fact that there's this punitive risk there and a Stowers risk for the punitive (end burden).

DUNCAN : So is that a factor--

HULL : Yes, Sir.

DUNCAN : --even though the, the carrier doesn't provide coverage for the punitive damages, is, is that a factor then in their analysis of going ahead and paying the prem--the tort premium or whatever--

HULL : Yes, Sir.

DUNCAN : --there, there, whatever you're calling it there.

HULL : Yes, Sir. And, and a factor incidentally in the doctor's decision to consent, as well.

DUNCAN : Now, let me throw another question at you that's, I think, it th--it seems to me to be at the core of all this, is wh--the bill has a two hundred and fifty thousand dollar cap.

HULL : Yes, Sir.
DUNCAN : How do we compute a cap here? How, I mean how do we come up with a cap? Two-fifty has been given to us.
HULL : Yes, Sir.
DUNCAN : I don't know whether I've heard any evidence, and I haven't been to all the hearings, but I don't know that I've heard any evidence to give me some sort of rational basis to come forward with a two-fifty cap. I hear that predictability, and I know that predictability is the key for you to be able to advise your client before he goes to trial, this is the range of your risk, to advise the carrier this is the range of your risk. So I understand the predictability element. What I don't, I'm, I have, I think a lot of us have some discomfort with is how do you reach, how do we leave this, not as defense lawyers or plaintiff's lawyers, but as policymakers, how do we know that we've set the right cap?
HULL : Yes, Sir. What a great way of moving (these) pages ahead.
: (Laughter)
DUNCAN : Well, I didn't mean to do that--
HULL : Oh, no. Actually--
DUNCAN : --(inaudible, overlapping conversation).
HULL : --I'm glad. I'm running out of town and it's very helpful. You know, here, here's my answer to that, that question, best I can do it. I think there's, there's four answers to that question. The first is MICRA. The second is the studies. The third is the negative experience. And the fourth is common sense. My version of common sense, admittedly, but common sense nonetheless, and here's what I mean. Dr. Anderson, when he testified on the House side, I, I just don't recall if he said this on the Senate side but I, he absolute---he was asked the question, is two-fifty arbitrary? Why not three-fifty, or five, or seven-fifty, or a hundred, or any of the host of other numbers that have been tried. And his answer was, it was absolutely arbitrary, in 1977, when it was first imposed. But now, 25, 26 years later, when there is an experience that it works, there was an actuarial experience that the MICRA package works, the centerpiece of which is the two-fifty cap, then it is no longer arbitrary, it's actuarially sound. The second answer is there are a whole host of studies from people that are presumably disinterested, that you can look at to say that a two-fifty cap, or less, should be imposed. Now, we sent to everyone's office, yesterday, two notebooks. Some of y'all I think, I can see, some of y'all don't have them. There's some extra copies here. There's two thick notebooks worth of studies. But the short answer is, you know, the Keeton report started at a hundred thousand and it's in the, it's in the notebooks. The American Academy of Actuaries has looked at it and they come out at two hundred and fifty thousand. The, Senator Nelson's Committee, the Interim Committee, that looked at this, came out at two hundred and fifty thousand. The Health and Human Services study report that looked at this came out at two hundred and

fifty thousand. The Office of Technology Assessment, that looked at the issue came out at two-fifty. The Congressional Budget Office, and most recently, the Florida Commission, that spent almost two years lookin' at this, came out at two hundred and fifty thousand.

DUNCAN : When, when you say somebody comes out actuarially, what's that mean? Is that based on history of verdicts? Does, what, what--

HULL : Yes, Sir. Actuaries, as I have come to learn, are very backwards looking people, from, from my perspective. They, they base their decisions on data. They don't, you know, we, we, we try to talk to them and give them, in fact, I ho--I hope there's no actuaries that I've offended on the--

ARMBRISTER : Oh, yeah.

HULL : --Committee.

: (Laughter)

HULL : But, we, we asked them a whole series of hypotheticals about, what about this, what about that, what about thus, and, and, and, and, and the answer is, if, if they don't have a, if they did not have a body of experience to say that it would work, they would not say, would not give us an affirmative answer that this approach would work.

DUNCAN : But you say it would work, and I don't know, who did it work for?

HULL : Would work in reducing--

DUNCAN : Does it work for the patients? Does it work for the (inaudible, overlapping conversation).

HULL : --fair question. And in this context it's, work is in the--

: (Inaudible, not speaking into the microphone)

HULL : --work it, work means to reduce premiums. That, that's what we're after here. We believe that the evidence is fairly overwhelming, that if you buy that there's an access crisis, and the examples are just legion that there are. And, and really there's been no disagreement even from the, our, our friends on the other side about that issue. And if you buy that the insurance cr--the, the crisis is driven by escalating insurance premiums, the affordability and availability of insurance, and again, there's no great quarrel with that that I've heard. Then the way you fix that is you reduce insurance premiums. Now, is it insurance, I mean, one of the arguments that we've heard is well, this is just those pesky insurance companies riding on the back of doctors. And that doesn't really explain the fact that our insurance companies have dropped from 17 to 4. That they've shown a loss in every year but one since 1991, and this data's in your notebook that we wanted you to have. An--but you'll be able to look at it. It doesn't really explain that if, if, if insurance was so profitable then why aren't the companies coming in instead of (leading) (sic), and it doesn't account for the fact that in the Nelson report, the, the report itself notes that, among those who rate places to do business for insurance, Texas is

ranked dead last. So if this is an insurance problem those indicators are inconsistent with that. Well if it's not insurance then it's frequency and severity. You have to address both to pull down premiums to increase ins--to increase access. And the actuaries say the only thing that works to reduce the premiums, to increase access, is the cap at two-fifty. And that's what all the other studies come out to. And it seems to me that the question for y'all as a Committee is, you've got seven-fifty, 750 plaintiffs and their lawyers on the one hand--

CHAIRMAN : Mike, excuse me just--

HULL : --yes, Sir.

CHAIRMAN : --before I lose one, (you know), I wanna call the roll while I've--

HULL : Yes, Sir.

CHAIRMAN : --a quorum here, excuse me.

CLERK : Ratliff.

CHAIRMAN : Here.

CLERK : Staples.

STAPLES : Here.

CLERK : Armbrister.

ARMBRISTER : Here.

CLERK : Duncan.

DUNCAN : Here.

CLERK : Ellis, Fraser.

FRASER : Here.

CLERK : Harris. Madla. Nelson.

NELSON : Here.

CHAIRMAN : Quorum is present. Excuse me, Mike. Go ahead.

HULL : And then the third point, before I forget this, is the negative data. And, again in your notebooks, I think it's under Tab 1, you will see all the other states that have tried all the other things to reduce premiums. They've tried a three-fifty caps (sic). They've tried an indexed cap. They've tried an excepted cap, an exception for this situation or that situation, and always concerned, I think, about this fairness issue. They've tried a, a, a specific finding cap, a burden of proof cap where you have to prove this, you have to do that. All of these various scenarios and none of 'em have worked. And they're all on the list of people who are now trying to get back to MICRA because their premiums are going up, insurance companies are leaving the state and access is going down.

DUNCAN : So, are you saying that if we imposed a five hundred thousand dollar cap that actuarially we wouldn't, we wouldn't, is it your conclusion that we wouldn't affect insurance rates--

HULL : At all.

DUNCAN : --compress them at all.

HULL : At all. Which is consistent with what

Commissioner Montemayor reported in his letter. I, I know it went to some of the Committee members and it's in, it's, it's in, it's in the material that was reported. Makes no difference at all. Three-fifty will make a little bit, 5, 6 percent. Two-fifty will make a 12 percent difference, based on disfigures. Which is fairly consistent with what the, all the other studies have found. So you've got the actual experience, you've got the studies, you've got the negative experience of what hasn't worked. And then, you know, the last witness I think we heard on Wednesday was, was Darrell Keith who said, the MICRA caps, of course they work, of course they work. And that's just the common sense point. Well, of course, if you go back here and you take away the risk of the high verdict, because you make that third element predictable, well then of course it works. It lowers damages. It's just common sense that if you say this element of damages work less as a matter of law, that over time verdicts are gonna come down and frequency will go down.

DUNCAN : How many verdicts in Texas, in the last five years, have had, in a medical malpractice case, have had a mental anguish award in excess of two hundred and fifty thousand? Do you have that data?

HULL : I, I, I can get that data for you. I, I don't want to guess. I can say that the ones that I have seen, all of them. I, my question is whether there's any that don't. Now, I admittedly see a skewed selection of cases and so I may be wrong about that. But as far as I know they all do. But I'll, I'll--

DUNCAN : (Inaudible, overlapping conversation) see.

HULL : --see, yes, I'll see. But, I, I can follow that up, and to make sure the best data that I can give you (to) make sure we're right about that.

DUNCAN : I'd be interested in knowing what data is out there on that verdict, on that element of damages. (Anything), especially seeing how it compares with, with the severity of the, of the, you know, (inaudible) damages.

HULL : Yes, Sir.

CHAIRMAN : Mike, to say that it, to say that it works, though, that to, to take it to the ridiculous, zero would work even better wouldn't it?

HULL : Absolutely.

NELSON : Huh.

HULL : A--i--interest, I mean, I agree with you, interestingly I've asked that question to the actuaries and because there's no actual data on that I can't get them to sign off on (inaudible, overlapping conversation).

CHAIRMAN : Common se--

: Common sense.

CHAIRMAN : --you, you said common sense--

HULL : Absolutely. (Inaudible, overlapping

conversation)

CHAIRMAN : --common sense is zero would work--

HULL : Yes, Sir.

CHAIRMAN : --would work fantastically, wouldn't it?

HULL : Yes, Sir. And it's one of the interesting, really paradoxes for us, for me in particular. You know, I've, I've tried now, I quit countin' at a 1,000 cases to juries and judges. I, I really am a passionate believer in juries. I tell my clients I, I really believe, by and large, they answer the questions they're asked correctly. Our, our, I personally believe that. I'm committed to it. They're not asked some questions, you, you ask the question for example, well, why don't these juries, they, they know what it's doing to, why, why don't they do it themselves? Well, well they're not asked. In fact they're told not to consider the affect of their verdict. So, but, and judges, (coincidentally), are also told that they can't (kinda) set policy on that kind of matter. But, if you look at the, at the states where, have had a better success than MICRA, there's really two, which is Louisiana and Colorado, and they have a total cap. Which is fairly close to what the, what the Keeton report recommended, you know, 25-years ago. So, when I started this, the idea of a cap really was not where I was ending up, personally. I spent a year on this free, working for TAPA, reading their material before I wanted to sign on to, to doing what I'm doing today. And, you know, there's really, there's really kind of three places you can end up where you, you, you can end up as, at a, a cap on all damages, which is a version of the zero. And, and I do think that's the best result, in terms of you really just wanna suppress awards, raise--r--reduced premiums and raise access, absolutely. I think then you can get over into your (hope-land), which is what I hope the Committee doesn't do, and the hope-land is, is, is an idea that you hope will work, that either hasn't worked, or the actuarial data doesn't support, or the people who have looked at it don't support. And in the middle of the road is really some kind of cap that's not quite as drastic as a total cap but hopefully will get you where you wanna go. Now, we had substantial internal debate. In terms of a negotiating posture, do we start out here with a total cap, knowing we will never get there? And, just as I think some of y'all are strugglin' with what's fair, it just wasn't fair. You know, I hope that's not where we have to get. But, from our perspective if you look at seven-fifty versus all the things on the other side, you know, we think this will work. And this is certainly a better intermediate step. And that's why we don't advocate zero. So, what is it, and, and I, I think, I'm about out of time so I just wanna--

CHAIRMAN : It's all right.

HULL : --you, you let me talk for a few more minutes then--

CHAIRMAN : We're, we're gonna, we're gonna hear it all.

HULL : --well, what, what then, you know, do you have? You've got the seven-fifty on this side, 750 plaintiffs and granted that's per year,

and their lawyers, and that affects other people, but that's, the best number we've got is seven-fifty. And what do we have on this side? If you're gonna balance scales of justice, I mean, y'all do this every day, do it in budgets and laws every day, the balance being interest (from) people. You've got 750 plaintiffs over here, you've got the innocent doctor who's forced to settle. This is the doctor that's gonna win eight out of ten, who has a few nonexempt assets, who has a bad outcome in a high risk procedure and he has to consent, and the doctor has to suffer. I paid a million dollars yesterday on that very case. Case we ought to win, a doctor had five hundred thousand, roughly, dollars, 50-years-old, and nonexempt assets. He put everything he could into his house, had to settle the case. Should not have had to settle that case. Probably will not be able to renew with his carrier. Innocent doctor, forced to settle because of the current situation, so that the 750 people have an unlimited right to those damages, and 4250 people have an unlimited right to file meritless claims. There are the accidents of geography. Now how, I would ask you, is an accident of geography good policy? And here's what I mean. Last September, I settled a case, bad case, a terrible result. Probably had one person who had done something wrong on the liability side, probably did not affect the outcome. That case in Austin would have cost five million dollars to settle. And everyone would have been pleased to pay the five million dollars to settle that case. The case though wasn't filed in Austin, it was filed in the southeast part of the state, cost us 19 million. Same case, same conduct, same parties, just an accident of geography.

DUNCAN : Is that because of the juries or the judges?

HULL : Little bit of both. You know, we're not, we're not gonna, we're not gonna get a break on the discretionary calls, so everything that could go our way is not, everything that could go their way is, and then, you, you put on top of that the jury. That same case, we did the jury research on that case, you know, other verdicts, other places, that same case probably would have cost us 22 or 23 million to settle in the south part of the state. Pure accident of geography. Now how is that good policy? Just, just where? And I submit to you that it's not. There are two million women, in Texas, today, who do not have access to an OB-GYN. Two million, who certainly must wonder whether their right to have access to a specialist that covers health issues common to them--

CHAIRMAN : Where do you--

HULL : --(inaudible, overlapping conversation) justified.

CHAIRMAN : --where do you get that number?

HULL : Hundred and seventy-four counties, and we just took the census data from those counties and added it up.

CHAIRMAN : Well, but, I grew up in Sutton County, they haven't had an OB, OB-GYN there since the founding of Texas. I mean, that, they don't have but 2500 people so--

HULL : Yes, Sir.

CHAIRMAN : --you know, that's, you don't expect an OB-GYN. How many would have access in a reasonable population there, then?

HULL : I know the TDH and the TDI data says that that number has probably, it's a har--it's a difficult number, I think, personally, the data's difficult, (it has) probably doubled in the last five or six years.

CHAIRMAN : Well, I can, I can understand it probably has. Is, they're, they're more scarce but statistics like that don't mean anything to me.

HULL : Make it a million then. Cut it in half. I mean, i--if, if the data's right and the number has doubled in the last year, (have) 10 percent of that, I mean, however you cut it down you're looking at 750 people on the one (inaudible, overlapping conversation).

CHAIRMAN : I know we're losing OB-GYNs, but, you know, we've probably got a 100 counties in Texas that never ha--have never had a, a, OB-GYN, be, be my guess. West Texas, unfortunately, but that's--

HULL : You know, I was, I was raised in we--West and North Texas. We didn't have one in, where I was, county where I was born. We had two in the county where I was raised in the Panhandle. They have none now.

CHAIRMAN : Go ahead (and ask him).

HULL : The same thing though can be said about pediatricians.

ARMBRISTER : So, y'all are living proof that we can be born without an OB-GYN.

: (Laughter)

HULL : And this is, once again, (inaudible, overlapping conversation).

: (Laughter)

CHAIRMAN : May have been damaged a little bit.

: (Laughter)

NELSON : Well, I, let me, let ask a, a follow-up to that--

CHAIRMAN : Senator Nelson.

NELSON : --if I might, Mr. Chairman. How many OB-GYNs are not going to counties that have never had one that may go but for the fact that, that, the data--

HULL : Absolutely.

NELSON : --is what you're talking about.

HULL : A--absolutely. It's kind of a (inaudible) in my list. There are the victims of the day, and then there are the victims of tomorrow. There are the doctors who are not going, the OB-GYNs who are not going. There are the kids who are not going to medical school. There are people who are not moving to counties, businesses who are not moving to counties, things that are not happening because there are places, especially in South and West Texas where you can drive for an hour or more. Shoot, there's a place in Austin where you can drive for an hour or more and not find a neurosurgeon. I've got good insurance, you know, the next thing on the list is pediatricians and

you didn't like my two million dollar figure, I, two million person, I don't think you're gonna like my million dollar answer on pediatricians but it's the same. There's a million kids that don't have access to pediatricians. Now, you know, when I was born, and I, I can't speak to, to you, but when I was born, you know, we didn't have pediatricians. I think they had them in New York or something, but, they, they didn't, I don't, maybe they had them in Dallas and Houston, so the mere fact that they weren't there then, I don't think quite addresses the fact that they oughta be there today. We're turning out a lot of specialists, whereas we used to not. And we oughta have kids with access to those folks. The people that, that this falls hardest on are women and children. Those are the two hardest hit specialists, and it's because of this. If you live in the Valley, and you're an OB-GYN, by virtue of the fact that you went to medical school, you went to fellowship and residency, and trained as an OB-GYN, you buy a ticket to get sued three times a year, for no other reason, except that. And it's just not right. It's just not right. And the way to fix it is to fix these three pressure points. And you gotta fix all of them. We tried, 1995, Mr. Jacks and I sat in a room and debated the proposal that Hartley Hampton made on Wednesday. Let's put a bond on these folks, let's put, let's put a, a, expert witness thing. We debated that back and forth and produced what is the bond and expert witness requirement in 4590i today. I was a believer. I truly believed it would work. I sold it to my clients. This will work. For nine months it did and you, I can show it to you, the data supports it. Frequency dropped for nine months until folks figured out a way around it. It just, you can't do frequency without severity and if you're gonna hit frequency you have to do it in a way that will work.

CHAIRMAN : Is the Stowers (Doxtrine) (sic) part of the problem?

HULL : Yes, Sir. Yes, Sir. And, if you fix the Stowers Doctrine by removing it, let's say, which is one possibility, take open courts aside and presume you could, just get rid of it, well, that's gonna be great for the carrier. It doesn't help the doctor very much cause the doctor kinda wants the carrier to have an obligation to look out for their interest. Now, what you can do and it's a, it's a, it's a, it's an argument for the total cap, frankly, is to tell the carrier that this case, top side to bottom, is only worth this much. It's worth a million, or two million, or three million, or five million, but that's all you can get in a med-mal case no matter the circumstances. And over time that will have the effects of bringing people in the state, and you kinda get rid of the Stowers Doctrine in that way. You'll protect the doctor, you give the certainty to the carrier, question whether it's fair to the plaintiff. That's the only way, you know, there's a, there's a, I think it's Michigan, that has tried to limit Stowers exposure to the recoverable assets of the doctor. Well, you know, I've, I've sat down with some folks and tried, how would you exactly do that. When do you figure out what those recoverable assets are? Do you turn your medical malpractice file (inaudible) lawsuit into a, you know, what about the doctor that starts hiding his assets, it becomes real messy. So, is it a complete fix on Stowers? No, but, if you

pass House Bill 4, Article 10, in its, in its, in its form on the cap, here's what I would know as a doc--as a, as a lawyer. I, I, I, I can tell you today with, within a reasonable range, what the medical and the wage exposure is for the client. And I can tell you, i--with a cap I can tell you what the, what the noneconomic exposure is. And if I can tell you those three things, then you can make an informed decision as a doctor about whether to consent, and you can make an informed decision as an insurance company, on the merits of the case as opposed to an economic pressure unrelated to the merits of the case, about whether to try it. And the only way that I know to do that is, is the cap, the, the wild card. And the only cap that I know of that will reduce it enough to make the picture work is to, that's why we always end up at the same place.

DUNCAN : Mr. Chairman.

CHAIRMAN : Senator Duncan.

DUNCAN : Mike, I think you make a lot of good arguments. This is kind of a political statement but, you know, we've done tort reform s--over the years, and--

FRASER : Robert, could you get your mike a little closer please.

DUNCAN : You just turn your hearing aid up.

: (Laughter)

FRASER : I, I need both.

DUNCAN : W--we, we've heard, you know, over the years we've done tort reforms and we continue to do tort reform and I'm always worried that, you know, we do these things and it (dudn't) (sic) work. And so, you know, we've made some tough political choices and we see that, and I remember when we were doin' the rollbacks in '95, this was the one area that we never did get any response on. We got response of the rest of it but this was one area where we didn't, and, and so I'm worried about that, number one, absent a, some sort of rollback feature in the bill. You know, if we give a cap, we ought to be guaranteed a result. Number two, is that I've been lookin' at the state budget, including the Employee Retirement System, the Teacher Retirement System, the Medicaid system, and in all of those budgets we built in every, for every year, a 14 percent increase in utilization cost. That's not inflation, that's just doctors prescribing more, and, you know, I won't call it gaming the system but I, you know, I wonder about that, you know, how we, you know, where, where is the partnership here between the medical community that, you know, the le--their, the medical community comes to the Legislature and asks for this relief. Yet, they're gonna continue to practice defensive medicine because it's profitable to do so. They're gonna continue to utilize at greater rates because it's profitable to do so. And I understand all the budget pressures but I'm just, I'm trying to get a respo--I think that's a political question that a lot of people who wanna help in this situation still--(verbiage lost due to changing of the tape)--

END OF SIDE 1

SIDE 2

DUNCAN : --(inaudible) of this state who are trying to balance budgets and make this state work, when we have to deal with something we have absolutely no control over. And that's, I don't know if that's a fair question but I just lay it out there because I've heard a lot of people say (inaudible, background coughing).

HULL : You know, the, I'll take a shot at it but, the same studies that I've just referenced, man--many of 'em, not all of them, in particular I think the HHS study, Congressional, Congressional Budget Office study, I think the Office of Technology Assessment study, all three of those talk about the defensive medicine component in the, in, in, in all of this. That there's a lot of defensive medicine that's practiced. I think the HHS estimate was a 110 billion that they estimated would be saved and, you know, who knows. I--if that's a, it's a, sorry, go ahead.

DUNCAN : Well, I was just gonna say instead of using a cost assumption of 14 percent, if we pass this bill and we know the insurance rates are gonna go down, and we know that defensive medicine should go down, what if, you know, should we lower our cost assumptions for, you know, maybe to a normal growth as opposed to 14 percent a year. Over prescribing medications and things like that.

HULL : Sure.

DUNCAN : How do we get a handle on that? Where's the quid pro quo for the Legislature on that?

HULL : I, our proposal, and in, in, in House Bill 3, as originally filed, we had a proposal that you, that you actually put in a study commission, that you, that you look at that question. The, the estimates in California, and I, I personally think the numbers are softer. I think there, there's some truth to them but I think it's just a harder thing to get a handle on, but they have some data that their, that their defensive medicine costs went down. And, and there seems to be a feeling that that will happen. How long does it take before people have some degree of assurance? I think it's hard to calculate. But, we, we, we have, we, our, our suggestion, our request kind of at the end of all this, we think this needs to be done, think it needs to be done now. The, the, the, waiting two more years, studying this for two, two more years will, you know, raise how ever many women and kids there are to a higher level. But our request would be that you put together a group of people, yourselves and others, or not, and, and look at that, and try to get the handle on it. Once you know that this is constitutional, that, that, the, all the studies say that this will begin to kick in, the effects will begin to kick in, and try to get a handle on that number. And what can, what can the medical com--community do to participate in that part of the solution. Because I, I agree and I think the, the, the participants in CAPPA agree that they have a responsibility to give back and that's one of the ways they can do it.

FRASER : Mr. Chairman.
CHAIRMAN : Senator Fraser.
FRASER : The, in, in, in following up on Senator Duncan's, the, the question, the, you know, the practicing of defensive medicine, the, you know, and really there's only two answers that we have here, either we address this or, or, or not address it. If we don't address it, we, we continue with the same problem we have right now, which is nonavailability of services. And that's really what you get down to is that there's a reason that people are not providing those services in the hun--171 counties and the fact that, that in the Valley, you know, a--you know, especially, you can't, can't find someone to deliver a baby. So we, we have to address it and I, sitting here listening to the argument is that we talked about frequency and severity but the severity issue, in my mind, is clearly driving the frequency, and as long as the frequency is there and knowing that there's a, the ability for frequencies, that's gonna drive the defensive medicine, which drivin' the defensive medicine pushes the cost up. And, it's a, we have to start addressing what we think is the systemic part of this, which in my mind is the severity. I--if you remove that at least you remove one of the potential drivers for defensive medicine. Am I, I missing that?
HULL : I think it's dead on, correct. Yes, Sir.
CHAIRMAN : Senator Armbrister.
ARMBRISTER : Mike, we were talking about this, this cap.
HULL : Yes, Sir.
ARMBRISTER : And I'm looking over the, the data that you supplied here.
HULL : Yes, Sir.
ARMBRISTER : Especially in Senator Nelson's committee on Page, Tab 8, Page 2.10.
HULL : Okay.
ARMBRISTER : What about the House Bill is going to make that cap constitutional? Because the last paragraph says, recent Texas Supreme Court rulings have limited the application of statutory caps on punitive damages, and compensatory damages on constitutional and other grounds. And you, cite several ca--or they, the court cites several cases. So, what is it on noneconomic that's, in other words what are we gonna get out of this? Are we gonna get a rush to the courthouse again?
HULL : Absolutely.
ARMBRISTER : Absolutely.
HULL : Absolutely, of course we will. In fact, built into Article 10 is a provision to let us get, both sides get to the courthouse and get an answer quickly. I think the question we would pose to you is how quickly do you wanna have an answer on whether this is constitutional? The, the, all the same studies, that we talk about and y'all have heard about for days, all say that whatever effect you're going to get, you will, on rates, you will not get until you know that the cap is constitutional.

NELSON : Hum.
HULL : And that's fairly consistent with MICRA's experience as well.
ARMBRISTER : All right.
HULL : So, our proposal, therefore, is the constitutional amendment. That's the cleanest, clearest, straight ahead way to answer that question. Put it to, put it to the Senate, put it to the House, put it to the voters--
ARMBRISTER : Well--
HULL : --and there you have it.
ARMBRISTER : --well, if we were doing it right to begin with, why do we need a constitutional amendment?
HULL : Well, you need a constitutional--
ARMBRISTER : I mean that question was posed to me the other day--
HULL : --sure.
ARMBRISTER : --by somebody that vo--in the House that voted for the amendment--
: (Laughter)
ARMBRISTER : --and they said, I've been wrestlin' with this ever since my vote.
HULL : Right.
ARMBRISTER : And I didn't have an answer for him.
HULL : Well--
NELSON : 'Cause rates will stabilize more quickly.
ARMBRISTER : Are we saying there's no way to establish a cap without a constitutional amendment?
HULL : No, Sir. I, I wouldn't, I wouldn't say that.
ARMBRISTER : All right.
HULL : I, I would say there's no sure way.
ARMBRISTER : Uh-huh.
HULL : Now, i--it's, it's clear enough if you read the Keeton report, which I think is at Tab 2 in all that stuff, but anyway it's the thickest one next to Florida, if you read that, you read the minority report, you go over to the state library and actually go through the testimony, it is reasonably clear that some very bright people thought the cap they passed was constitutional.
ARMBRISTER : We, we thought we did in--
HULL : Right.
ARMBRISTER : --before.
HULL : Well, we, we thought it was, yeah. I mean, the people who voted for that and recommended it thought it was. There are, you certainly will get an argument, today, that a lot of people think had it not been for the particular court that heard it, that it would still be constitutional. But nonetheless you've got this precedent there and it is what it is. And so, the, the

s--the safest way to address that precedent is, is to simply say the question about setting damages is a policy question for the state. And it's, and the only people who can set that is the Legislature and yes, we have that power which is what we believe the amendment gives you the right to do. Now, put the amendment aside. For whatever reason it goes away, doesn't pass anywhere, whatever. Th--are, there are, there are arguments. I think there are good and persuasive arguments that a cap, unprotected by the amendment, is still constitutional. I think first place, because of the cap that Lucas looked at is different from this cap. I, you can argue that it's just a differents--different setting, different precedent, different court case, different findings, which the Lucas court looked at to support the legis--which is why the findings are in Article 10. Since Lucas has been decided there have been cases who have addressed kind of the inhou--inherent, what I call the police power of the state, which is what you passed, most of your legislation (inaudible). And, there has been an increasing emphasis, I think, especially in the last 10 or 12 years, by the Supreme Court on that power being as important as the open courts doctorate. In fact, Justice Phillips gave a speech in the last few months that, on that very point. And then the third, third point is if you get past all of those, that, that you really do have the authority, or at least you do with the police power. We have the quid, we have the quid in the bill. Which is what Lucas called for, that the, the Keeton cap did not have. So, we think we've got cracks at it anyway. What you get with the constitutional amendment is you get sure, you get surety--

ARMBRISTER : Uh-huh.

HULL : --assurance, you get assurance, and you get it faster.

NELSON : Uhm-hum.

ARMBRISTER : And if, you know, there's one thing we've left out. If the people don't pass it, does that start the run or--

HULL : Well, I think what--

ARMBRISTER : --maybe I ought to ask Tommy that (inaudible, overlapping conversation).

HULL : --right. (Laughter)

: (Laughter)

HULL : I think what the, in, in Article 10, and I forget the number but there, in there, in the back of Article 10 there's a section called declaratory judgments--

ARMBRISTER : Right.

HULL : --and injunctions. What that contemplates is that either side, including associations can file an action in Travis County to get the courts to tell us whether the, any provision in the bill, in Article 10 at least, is or is not constitutional. Who could file that without waiting on the amendment?

ARMBRISTER : Okay.

HULL : And it permits either side, it has an unusual

feature of permitting, for example if TAPA were to file this, this proceeding to get the court to tell us, it permits TAPA to appeal regardless of the ruling the court (takes). And it would prevent TTLA, if they were, an--an--and I presume a lot of people would be involved in this.

: Okay.

HULL : (And I'll appeal), we get the case to the Supreme Court as soon as possible.

ARMBRISTER : Okay. If we do all this and, and we've talked about OB-GYNs and, how come licensed mid-wives malpractice hasn't increased? There's a lady that works for me that is a licensed mid-wife and she said her insurance has remained stable ever since she's been doing that.

HULL : I don't know. I, I, I don't know. I, it's my general experience that lawsuits are a function of limits. So I, I would ask what the limits are?

ARMBRISTER : Okay. All right.

NELSON : (Well), I--

CHAIRMAN : Senator Nelson.

NELSON : --Senator Armbrister, I've, I can share with you that the Interim Committee, as it looked at the issue, felt like passing a constitutional amendment would just speed up what our goal was ultimately, and that was the stabilization of rates. And we felt like as long as this was all up in the air, we're not gonna see insurers come back to Texas and, and rates come back down. I do have a couple of questions, Mr. Chairman, if I might. You mentioned the Keeton report and I wanted to ask you a question that I had meant to ask earlier. Did, did the Keeton report propose changes in the collateral source--

HULL : It did.

NELSON : --rule? And, and the House is not recommending that?

HULL : That's correct.

NELSON : Why not? I, there were a couple of issues that I haven't heard much discussion, and I've been trying to catch everything on the tape, but, but collateral source and contingency fees, those were two things that were discussed in the Interim Committee quite a bit as possible solutions, partial solutions to the problem. And neither of those are listed in the House report, is that correct?

HULL : That's correct. They were, they were in House Bill 3 as filed. I believe, my memory's a little mucky but I believe they came out of the Committee and then taken off on the Floor. It's, it's certainly, you know, on, on a, on the contingency fees, those are typically touted as a frequency, as a frequency device because if people are, are, are going to have a, have a, a reduced recovery, down to a third or whatever it might be, that you'll be really careful. It's another layer of labor--

NELSON : Hum.

HULL : --layer of frequency protection. Now, Dr. Anderson testified that they did not see a reduction in frequency. And he, at least, on behalf of The Doctors Company, does not tout it as a frequency measure. He touts it as a way to put more dollars into the pocket of the plaintiff.

NELSON : Uh-huh.

HULL : His number is that you go from 60 cents on the dollar to 80 cents on the dollar.

NELSON : Uh-huh.

HULL : So, we, we proposed that in the House.

NELSON : They didn't take it.

HULL : And it was, it was taken out.

NELSON : Will you give me your views on an issue that I keep hearing about and it concerns me. And that is whether a homemaker can recover economic damages, you know, either--

CHAIRMAN : None economic.

NELSON : --ye--right, well, yes.

CHAIRMAN : Well, how, how much economic damages.

NELSON : Right. You know, loss of household services, loss of future earnings.

HULL : Yes, Ma'am. The, and the answer is yes. It happens today. It would happen today without House Bill 4. It would happen tomorrow with House Bill 4. A housewife, those who do not--

NELSON : Homemaker, homemaker.

HULL : --excuse me, homemaker.

NELSON : We're none of us married to houses.

HULL : Yes, Ma'am. Or, as I would say with my jury--

: (Laughter)

HULL : --those who do not work outside the home--

NELSON : That's correct.

HULL : --can all recover and do, and do. And there's two out--there's two categories for those who do not work outside the home. They can recover for loss, loss of earning capacity, which is typically calculated by an economist.

NELSON : Uh-hum.

HULL : We'll have our economist on the other side. I don't think I have had a case in recent memory where there was injury to a housewife--

HARRIS : I think she's asking, how do you calculate it?

HULL : --is that?

NELSON : How you, well, yeah, how is it calculated and is, is it, you know, there's, we're hearing a lot from the other side--

HULL : Yeah.

NELSON : --that a homemaker is, has no value in the proposed legislation.

HULL : Yeah. I--this, it's the, the homemaker can recover for loss of earning capacity and for loss of household services. It's typically calculated by an economist. And I, most recent case I had the, the house--the homemaker testified that she was about to go back to work. I probably hear that in 75 percent of the cases, that the person who does not work outside the home was about to go back to work but for the event or injury and this is what they were going to do.

NELSON : Uh-huh.

HULL : And the economist will use that figure to, the, the figure of that job to calculate lost earning capacity, then the jury is faced with the prospect of evaluating whether or not they believe, or how firmly they believe that the person was gonna do that.

NELSON : Uh-huh.

HULL : In the balance of the cases the economist will typically use some figure, a minimum wage job, a, a job consistent with the person's training or experience, or their background, or their education but they will come up with some number.

NELSON : Uh-huh.

HULL : And likewise, economists will look at the cost to replace household services, and will come up with a figure, and that happens all the time.

: (Inaudible, background conversation)

NELSON : And will continue if this legislation passes.

HULL : Right, either way.

: (Inaudible, background conversation)

HULL : In fact, you know, there's a, I think there's an ad that's running now that says House Bill 4 has the effect of capping the value of people's lives at two hundred and fifty thousand dollars and that's just wrong.

NELSON : Uh-huh.

HULL : I mean it's not even in the ballpark of right. Now the comment was made at some point in time here that--

: (Inaudible, background conversation)

HULL : --well, those who do not work out, outside the home, homemakers, they're, they're valued less.

: (Inaudible, background conversation)

HULL : I think there was a comment made, Governor, perhaps you made it, that may or may not be true, but that is not a problem that's created by House Bill 4. That's a, whatever is true about that it, it, it would exist with or without this legislation.

NELSON : Good. Thank you.

DUNCAN : Mr. Chair (sic).

CHAIRMAN : I, I, I need to make this the last one, Senator Duncan. I wanna make sure we give equal time before we have to go to the Session, so.

DUNCAN : One of the concerns that I've heard from the other side on this, and their argument is, is that the two hundred and fifty thousand doll--or at least the mental anguish portion of a, of a, an award is, in essence, the element of damages from which the cost of litigation are paid. The cost of hiring experts, and indeed the attorney's fees because obviously if you've gotta pay for the past and future medical you don't wanna deduct your attorney's fees out of that amount. And so you've got the, and when you cap the noneconomic damages, then you, you limit the resources potentially available to litigate the expensive cases.

HULL : Yes, Sir.

DUNCAN : And, I guess that's kind of what I'm, wanted to hear your response to. (Pause) In order to speed it up, too, I, I, see what you're puttin' on the board but that might be an outlier case. What about the case that, you know, is, you know, I see what your sayin' there.

HULL : Yeah. Take, take any, take any, but, but, you know, one of the, one of the arguments that, that's been addressed is, well, what is really the component between economic and noneconomic and which has gone up and which has gone down.

: (Inaudible, background conversation)

HULL : First case I had, 20 years ago, 21 years ago, was I was told to take the economic damages and multiply by two, that would cover the noneconomic, and add 'em together and that's what the case was worth.

: (Inaudible, background conversation)

NELSON : Hum.

: (Inaudible, background conversation)

HULL : I've used that for 20 years. Every defense lawyer I know uses that to evaluate a case. I learned that from the insurance company.

: (Inaudible, background conversation)

HULL : So, so, a typical case, you'll take five, to take your wages, your medical, follow that formula and it's a 30 million dollar case. I'd settle it for five hundred thousand dollars if that's the policy limit. How do you, how do you allocate which is which? I just don't know how to do that. If you don't like this case because this is an outlier case, make it a five hundred thousand dollar case. And it's now a two million dollar and it makes it a three million dollar case and I'd still settle it for five hundred thousand. In other words, that's just kinda made up.

NELSON : Funny money.

HULL : It's, it's a nice argument but that's just not the way it works.

NELSON : Huh.

HULL : There, there's a pot of money and the pot of money is what drives the settlement in all of these places. Not because of the elements but just 'cause that's the way it works.

CHAIRMAN : I'm gonna ask you to wrap up Mike but let me ask you one question before you do. Do you say you've done a, you've, you've handled a thousand cases.

HULL : Yes, Sir. Not all med-mal. But--

CHAIRMAN : Have you ever handled a med-mal case where there's not, there (wadn't) (sic) much question about there was negligence?

HULL : Yes, Sir.

CHAIRMAN : And that the results were so serious that you, in fact, believed the two hundred and fifty thousand dollars would not have approached justice.

HULL : No, I haven't, I have not. I can tell you that I can envision that case. I--I can. That's, that's not my case mix so, but, but I can envision it.

CHAIRMAN : See that's what I call the outlier.

HULL : Yes, Sir.

CHAIRMAN : The outlier, there are two kinds of outliers. There's the outlier, the runaway jury outlier. There's the outlier where truly there wouldn't be justice in a case like that. I don't know how often it happens.

HULL : Yes, Sir.

CHAIRMAN : I dare say if it happened to me or one of my children I wouldn't be too pleased with what we had done here.

HULL : Yes, Sir. I, I understand that. And that, that's why, that's really where I intended to end up is if you, I think y'all set, I think y'all balance every day. That, that's, I guess that's what you were hired to do, it's what y'all get the big bucks for. (Inaudible, overlapping conversation)

: (Inaudible, background conversation)

CHAIRMAN : I'm afraid you're right.

HULL : And, there's a, what do we know about that outlier? Well, I know it's, it's some number less than seven-fifty a year. Some number less than seven-fifty a year. And I know there are however many, and however many children, and however many other people affected. And it, and you add 'em all up, even if you go on a 10 percent of the 10 percent rule, we're into the mix. And then you, you look at the hospital. The hospitals that limit services that don't have top of the line equipment, that don't have the nurses they need or the physical therapist, or the speech therapist, or all of the (above), or the nursing homes. You know, I share a common experience and part of the problem is there's just a limited pool of money so who can they hire? And, and that's, that's part of the, that's part of the mess. And that all fits into all of this. And, put it all down the road, you know, (I'm puttin', givin') one million or two million people, a doctor versus that handful of outlier cases. Is it a hard choice? I grant you that. Everyday it's a hard choice. Is it the right choice? I, I think it is.

HARRIS : Mr. Chairman.

CHAIRMAN : Senator Harris.

HARRIS : Aren't we, ultimately, aren't what we (sic) really getting down to here is coming in with a stated amount of coverage that can be covered (okay), that can be carried by a doctor or hospital, whatever the institution is, which then gives them the right to invoke House Bill 4, where, and let's say the amount that is set upon that they need to have in coverage is five hundred thousand to cover everything. Where now they're carrying a million plus in coverage a year, if I had to guess, per occurrence. Is that not correct?

HULL : The--

HARRIS : What I'm try--what I'm trying to get at is to, to protect the institutions, to protect the doctors, the real intent of all this is to come up with X number of dollars in coverage that, and that amount of coverage will be substantially less, in dollar amount, and in turn in rate amount, than what they are currently carrying or should be carrying to protect themselves.

HULL : You know I, I wanna agree with you, a lot. But, in fact--

HARRIS : Well, your example right there, doesn't it show it?

HULL : --well, no, Sir.

HARRIS : I mean, you're saying the case settles for, in essence, whatever the policy limits are.

HULL : That's exactly right. But doctors today, most doctors, can't get a million in coverage. I, I, I think the biggest single change is in--

HARRIS : Well, but that's come about in the last year. I mean, we've seen it get to the point where a lot of the hospitals have lowered it (to) two hundred and fifty thousand in coverage for a doctor.

HULL : Yes, exactly.

HARRIS : Simply to be able to keep their specialists.

HULL : Yes, Sir.

HARRIS : But prior to that everybody was required to carry a million, were they not?

HULL : Absolutely. Yes, Sir. And that's, that's the single biggest change that's happened in tort law in my practice, in medical malpractice law, is 20 years ago a doctor could insure against a bad outcome, and today they can't.

HARRIS : But, but again, what we're really talking about is what amount do we get down to as the necessary coverage that's gonna be required and in turn that is basically what the cases are gonna settle for. Is that not correct, ultimately?

HULL : Yes, Sir. I think--

HARRIS : Okay. Thank you.

(Senator Armbrister in the Chair)

CHAIRMAN : Thank you, Mike. Tommy Jacks.

JACKS : I, Senator Armbrister, I need to, I guess begin by telling everybody I am Tommy Jacks. I'm here representing the Dallas, Texas Trial Lawyers Association, in addition to myself. I, or couldn't (inaudible) the other side. I, one other (inaudible) obvious that, I was delivered on a Saturday night by a drunk Aggie.--

: (Laughter)

JACKS : --and 'cause I was born at the end of World War II and doctors were off in the war except for two family doctors in town. And one of 'em was an Aggie (and the night of the) Baylor, A&M game it didn't come out well for the Aggies, and so he had gone out and cried in more than a few beers--

: Huh.

NELSON : Hum.

JACKS : --before coming to the hospital to deliver me. I want to thank you, Governor Ratliff, and all you Senators, and I do this on behalf of Mike Hull and me, and all those witnesses who you've heard (or of) these proceedings. So, thank you. I regard Mike Hull as friend but I disagree with a lot of what Mike had to say (inaudible, not speaking into the microphone). Let me tell you, I told you the first time I appeared before this Committee a little bit about my law practice. Let me tell you a little bit more until you know where I come from and whereof I speak. Ours is a firm that does work on the plaintiffs side of the docket, almost exclusively. It's a base of cases that includes business litigation and all sorts of things. And, and one component (out) is the malpractice cases. And we've done those cases for years. We think we do it well. We don't lose 85 percent of our cases. We don't lose 5 percent of our cases. It'd be a fraction of that. We try to be selective about the cases we take. We, when a case comes into our office, and it gets past the initial screening process, and, and, and many of them don't, I think of cases that we are presented with in one way or another, through cell phone calls, prospective client, or referring lawyers, we end up probably filing, I haven't run the numbers, it'd be somewhat in the neighborhood of one out of fifty, or sixty, or seventy of those cases. Some of those don't get past initial screening and those that do get a hard look, and many of 'em we spend money going out and hiring experts to look at for us, to help us assess the case. And in most, almost all those cases we advise the client that it's a case in our estimation they could not pursue and most of them don't. If they go to some other law office and they find out it's been looked at by our office and rejected then almost always it's rejected by any other office they go to. One of the first things Mike said and one of the first things I disagree with, and it (covers) the statistics and indemnities area is he said that request for records, or claims letters lead to suits. In, in, in my practice that's not so. It's routine that we send out a request for records, and under Section 4 of Article 4590i you do that, in the same letter in which you put the providers on notice that there may be a claim, we're investigating a claim and that's all it says. And some carriers will open a file at that point and start spending money, TMLT will. Some of them won't,

they'll wait and see if it does or doesn't ripen into a lawsuit, medical detective will do that. And, and so there are differences in the cost that carriers incur at that stage. But almost all of these letters that are sent from our firm, end up not ripening into suits, they end up with clients being told that they don't have a claim and why, a--and they go on their way. And, and, and so what I regard as responsible lawyer conduct gets reported at the Board of Medical Examiners as irresponsible lawyer conduct because every one of those letters is reported as a claim at the Board of Medical Examiners, even though a tiny fraction of them end up in a lawsuit. Now, I, I put some thoughts together and I expect to be interrupted by questions, and I hope that the interruptions have questions because it tells me that A, you're awake--

NELSON : (Laughter)

JACKS : --and B, you're, you've got things on your mind that, that, that you'd like to hear my response to. And I'll tell you that I do this as much for my benefit as anybody elses 'cause it helps me not leave things out. And I'd like to, to say to you, and, and there's a hard copy, I think it's been circulated (inaudible) if you care to follow it that way. But problems that have been talked about repeatedly in front of this Committee have to do with increasing malpractice rates, with fewer malpractice carriers, receive decreased patient access to care and, and, and too many frivolous claims, and I'd like to talk about each of, of, of those areas. With, starting with this business of rates going up. And, and the answer's yes, rates have gone up. We've seen the TDI data that shows that. The, and yet we see marked differences in the rates from one field of practice to another, one region of the state to another, in other words this is not the problem that is, is uniformly so, for all physicians, or for all fields of practice or for all areas of the state. You, you, you compare, and I picked San Antonio, and Brownsville-McAllen. Brownsville-McAllen is, is the high for (inaudible). San Antonio's not the lowest. I think Lubbock would qualify for, for that honor. But the San Antonio is, is geographically near to the counties in South Texas, and yet the physicians there--

: (Inaudible, background noise in the microphone)

JACKS : --thank you, and yet physicians there, in all fields, pay markedly lower rates than those do a little further south. And yet even the evidence that's been brought to you about differences from region to region, yet in claims experience isn't very tidy either. You remember that there was a study done by and for the, for the Texas Hospital Association by an actuarial group out of Houston, and a man named McWhorter came here, a--and, and talked about that. And he had a listing in one of his appendices, it was handed out to you, of all the claims in their study for the four regions. And Region 3 was South Texas and, and he said, about their study, that they didn't see marked differences from region to region. Now, intuitively, that doesn't seem to jive with some of the other things we've been told about the experience in South Texas. And when you look at the listing of claims in their study, this is claims against hospitals, over two million dollars, you see that there are

markedly fewer of, of those in South Texas than in the urban areas. Now, are there more hospitals in the urban areas? Sure. An--and yet we, we didn't see, but we saw over the three, they studied three three-year periods. In other words a nine year span, and there were 15 such claims reported by their hospitals in South Texas versus 45 in Houston, and, and, and 39 in Dallas, and, and there were some other, the other region was the other part of the state and the, and the o--rest of the state, likewise had, had considerably more claims. And, and, and my only point about this is that in, in this as in virtually every area, that what you've received numbers, you have to look behind the numbers because the numbers aren't that neat. And I, I s--I raise that because if it means that this problem may be more complicated than has been presented. Anecdotes can be powerful and yet you have to be watchful of 'em. We had a, a witness, Kim (Holland) (sic) who was from Methodist Hospital up in Dallas, and he was talking about some of the problems that hospital had encountered in trying to get neurosurgical care, and he talked about a group of four neurosurgeons, and one had a 200 percent increase and his partners didn't. And the question came, well why is that? And the answer was well, because he'd had some claims on, on which indemnity was paid. And, and the, there is, and so when you hear about a, you know, a, a single story of a doctor in Dallas, whose premiums went up 200 percent, that can be a powerful story but when you see that none of his partners did, and look behind the story, there, there's sometime a reasons (sic) for the anecdotes. In, with regard to the carriers writing in Texas, yeah, there are fewer. In, in fact, Mike said it had gone from 17 to 4. I found in Mr. Montemayor's testimony, on the House side, a listing, and I counted actually at, at one time when they drew the, the, the study, it was 22 carriers who were insuring physicians and surgeons. But when you look at the numbers, 18 of the 22 were writing only a handful of, of policies. That's less than 300 policies. There were ten that were less than 100 policies. And, and, and, and so, again, the, the numbers don't always tell the whole story. We know St. Paul, which was writing a number of policies here, quit the business, not just in Texas but nationwide. Jay Thompson, who testified for Medical Protective, told us that, in fact, nationwide, and, and Medical Protective, solid company, has GE Capital behind 'em, writes in all the states, said that nationwide, med-mal was turning up a loser for companies and, and so some did just quit writin' it everywhere. California, here, you name it. But, Mr. Thompson also said the market here is still a competitive market. Now, all this business about premiums going up and number of carriers go--going down really matters only when we start talking about, well, can patients get taken care of. And here, again, the evidence that's been brought to you is somewhat of a mixed bag. No one questions, I think no one questions that there are certainly parts of the state where access to certain types of care has become problematic for some folks. Not here to dispute that. But I am here to say that when you look at, at the numbers they're, they do help shed some light. If you look, for example, the, the people that came from Public Citizen, Smitty and, and that very smart young man that was with him, talked

about the number of doctors in the state had, had gone up in, in, between '91 and 2001. Well, then, the question came well what about population? Well, population adjusted. It had gone up from 188 per hundred thousand to 219 per hundred thousand. Then the question came well what about specialties. And so if you look at, at specialties, and then I pulled out, and this is Board of Medical Examiners information showing the difference between May of '97, January of '03, three months ago, in the Valley, and the Border counties, on up to El Paso, and for every category, whether it's OBs or neurosurgeons, the number actually has gone up during that period of time. Now the numbers don't show you if a particular physician quit delivering babies. And so the numbers don't tell you everything but it's, it, it does tend to suggest that doctors haven't fled that part of the state in, in droves. And again, when you're talking about access to care, it, the anecdotes can be powerful but it also pays to look behind 'em. We had a witness from the Tarrant County Medical Society who told the story of a very good surgeon, Dr. McGeehee, who quit because of malpractice. And then Dr. McGeehee came and, and couldn't have spent more than I think less than a minute, telling his story, and his story was look, I didn't quit because my rates went up. I quit because in, in three successive years I had defended three cases successfully and I was just tired of gettin' sued. Now, I don't think anyone is suggesting that anything in House Bill 4, or any other bill this Legislature will pass, will guarantee that no more doctors ever get sued. The, perhaps even, we, we talked about this, this two million mommas without access to OB and, and the one million kids without access to pediatricians and, and, and Governor Ratliff, you pointed out, well, you know, i--in your home (laughter) cou--you know, county where they don't, never did have one. In fact, of the 101 counties without OBs presently, 98 of them never had one. There are 12 counties that have OBs now that didn't have 'em six years ago. And, and so again my only point here is that in defining the problem it's, it's not as, as tidy a picture as it's sometimes portrayed as being.

HARRIS : Mr. Chairman.

(Senator Ratliff in the Chair)

CHAIRMAN : Senator Harris.

HARRIS : Now I understand how you're downplaying the, the issue, saying it's not a problem. I know for a fact a large number of the physicians in my communities, up in Arlington, Grand Prairie, that whole area of my district, if we don't get sumpin' done this Session, they're quitting. They're leaving the state. They're either going to New Mexico, some of 'em have already bought homes in New Mexico. Or the ones that are 55, each, they're totally quitting. So, you can play this game it doesn't sound it's that big a deal, but I can rattle off a dozen doctors to you right now who have already made contingency plans and who are leaving the medical practice. And, and it's gonna create a crisis for us up there in my area. And my area is one of 'em, that on your little

graphed (sic) and charts, you shoulda had one of the least problems. My own personal internist is gonna go back to being a vet. He's already bought a, a place to build his, his clinic on in Maypearl, Texas--

NELSON : Huh.

HARRIS : --so don't give me this stuff that it's not that big a problem. I can rattle off (orthopods) (sic), I can rattle off neuros, I can na--rattle off heart surgeons, doctor group after doctor group, that are either gonna quit practicin' medicine or gonna move out of state. They've had it. And, you know, this is almost a little bit hard to take, for me, and it, it (idn't) (sic) that big a problem. I know OBs are not delivering along the Border. I've been to the Border. I held hearings down there. I went through the problems with 'em. I mean, do you, do you really expect me to accept this approach you're taking with us, Sir?

JACKS : Senator Harris, I apologize if you've understood me to say there's not a problem. I have not meant to say that, at all. The only point I've tried to make is a modest one.

HARRIS : Sir?

JACKS : The only point I've tried to make is a modest point.

HARRIS : A modest point?

JACKS : Yes, Sir. I'm not here to tell you there is no problem.

HARRIS : Will you tell me how--

JACKS : And--

HARRIS : --we got all these additional (OB-GYN) (sic) in eight counties that didn't have 'em before. About how we got a greater number of doctors in this area than we had in another area, and all these kind of things. I'm watching nursing homes close left and right. We're getting ready to end up in crisis there, potentially on our elderly care, particularly in what state's willing to pay in match, matching funds. I'm looking at, potentially, the hospitals getting inundated with CHIP patients. You know, some of us really feel there's a crisis out there and that we have to do something.

JACKS : (Well, Senator)--

HARRIS : And I don't wanna be sitting here being someone trying to hurt claimants, because I do feel they're entitled to a reasonable amount of money for the injuries they receive. But at the same time I'm recognizing that we got a major problem. And it's not something that's just a numbers game where you can rely on where the current state of the industry is, 'cause there's too many doctors who are gonna quit. There're too many nursing home people are gonna close their hur--facility if we don't do something.

JACKS : Yeah. Senator, please, and again I apologize if, if I've left anyone with the impression that I'm saying there's not a problem. I, I really do not intend to say that. I, I intend only--

HARRIS : Well, you're a very good trial lawyer. You've

been very subtle on your approach and how you built up to it.

JACKS : --I--(verbiage lost due to changing of the tape)--

END OF TAPE

(Senator Ratliff in the Chair)

JACKS : --is a problem that has some complexity about it that I think is worth bearing in mind as, as we approach how do we deal with the problem. Another example was the, again Mr. (Holland) (sic), who was here from Methodist Hospital (sic) up in Dallas, talking about the, the neurosurgeons, and the things they've tried to do to get neurosurgical coverage in, in their ER. And when this one physician had quit taking call (sic) then took his partners with him, and they, you know, were gonna bring in one physician who couldn't do weekend work and, and that didn't work, so they were prepared to bring in some others from El Paso to handle the weekends. And, and, and he said, and, and said with candor, our, our malpractice rates are only one part of this, it's only a, a piece of, of this. And, but it would help long-term.

HARRIS : Well, but then--

JACKS : And the, and--

HARRIS : --the other example--

JACKS : --and I don't--

HARRIS : --you gave, the malpractice rates is part of it but also the frequency of frivolous lawsuits was a major part of it, on the Dr. McGeehee you brought up, was it not?

JACKS : In, in, in Dr. McGeehee's case, I, I gather from what he said, that those cases went to trial which I suppose means they got past the summary judgment and, and had, but I don't know anything about those cases and don't know enough to tell you whether they were frivolous cases or not. I simply don't know. I--

HARRIS : Well, the claimants didn't receive anything, according to his testimony--

JACKS : --according to his testimony--

HARRIS : --is that not true?

JACKS : --he was successful in those three cases, yes, Sir. HARRIS : Well see I find all this real ironic because a doctor I'm very, very familiar with (has) had one lawsuit against him. And was brought by a lawyer who was the guardian of a (sic) old couple. And the woman needed medical care, and the doctor recommended it. He pleaded and pleaded with the ad litem. He wouldn't authorize it, woman died. In turn the ad litem, or the guardian, for the court appointed guardian, got some malpractice lawyers in it, and they took that doctor's deposition. They filed suit, took his deposition. And when they took his deposition the doctor produced four letters that he had sent pleading with the doctor to allow him to get the woman the care she needed, and two letters back from the lawyer stating that he would not approve it because he was smarter than the doctor. The malpractice lawyers, as soon as they saw the letters, apologized to the doctor, informed the attorney that he was gettin' ready to have a malpractice lawsuit against him, and that day went down and dismissed the case against the doctor.

JACKS : Good for them. That, that's a case that never should have been brought.
HARRIS : Sir?
JACKS : It's a case that never should have been brought.
HARRIS : Uh-huh.
JACKS : Yeah.
HARRIS : It was--
JACKS : I agree with you.
HARRIS : --and that doctor's rate has jumped from sixteen thousand to eighty thousand a year.
JACKS : And, and, and Senator, I, I can tell you that the rates have gone up, dramatically, we know that. The TDI data shows it. And, and I guess the next question is why have they gone up and that's one of the things this Committee's been trying to, to take a, a look at. And, if you look at, when Mr. Presley was over here from TDI, the, he was asked what was the, the driver and, and, and talked about what he called lost cost or, or claims cost, which would include both economic and, and noneconomic categories of damage. And, and I don't know how that data falls out. There's apparently some different interpretation of the data about whether it's economic or noneconomic driving it. But, the, when asked, well what have the lost cost been doing both categories, it was about 10 percent per year, he said, that, that those costs had, had been increasing. And there was, Mr. Hampton showed you this chart which shows both frequency and severity rising. And this is in that range, in fact, showing somewhat more than 10 percent increases, but not anything close to the kinds of increases we've seen in, in premiums, that is, there seems to be other drivers at, at work, as, as well. And, and--
CHAIRMAN : I've forgotten, was that total recovery at the bottom, no matter whether it's a suit or a, a settlement? Do you know?
JACKS : Governor, my understanding is that these were figures that, that did represent the total damages. Now, I know the verdict figures are markedly different from the settlement figures. And the, I, I would raise again another caution when lookin' at verdict figures because of verdicts, particularly large verdicts, usually don't end up being, being paid at that amount. They're either settled (inaudible, overlapping conversation).
HARRIS : How many of 'em have high-low agreement going for the jury awards?
JACKS : Senator, in, in my experience, I've done two high-lows in medical malpractice cases over the years I've been doing this. And, it's, and, and a, and a high-low is simply an agreement, at some point, that puts a floor and a ceiling on, on what the eventual settlement might be and then they try the case to see where the, the jury and judge come out.
HARRIS : In our area that's very common.
JACKS : It, I, I'm sure it's more common in, in some practices than in others. And it's a--

HARRIS : The newspaper reports 20 million dollars.
JACKS : Correct.
HARRIS : For an award, (if it), it's actually only five hundred thousand.
JACKS : Exactly. And, and it's, I know there are, are firms in, in places where it's more common. It is quite common, in, in fact I'd say it's, it's rare that a verdict, that's a large verdict, is upheld in, in, through the process. Mr. Lane, who had for twenty-plus years been dealing on behalf of two hospitals in Dallas, Children's Hospital and another, with carriers, talked about some of the other causes. You've heard testimony about that. And the, but, but the, the key question, I think, we, we come back to is, well, are, are caps the answer and are caps gonna lower the rates. You had a witness from the Physicians' Insurance Association who was here, Mr. Bruce Wilson. He rep--his membership includes TMLT, APIE, The Doctors Company, the, the major writers of, of coverage in Texas. And, and what he said was, in, in talking about the rollback, was that rates are still deficient, that is that they will go up more. That the, he, he, he wouldn't go with you into any solid way about it would decrease rates. He said it will stabilize rates over time. That is, they will continue to go up, they will go up at a slower rate. At one point he said, well, there might be some slight decrease at some point and time. And, then we heard Jay Thompson, from Medical Protective, who said that for those physicians with lower coverages there's no cost savings at all. For policies over a half million, they were projecting, and this was in his written materials, I think not in his oral testimony, 5 to 6 percent cost savings over time. But the, the, the, the assurances, that by enacting this two hundred fifty thousand hard cap, that rates are gonna go down. I mean, Senator Armbrister served notice, I think, in, in his questions and comments that if anyone in the room thinks that we're gonna see an immediate decrease in rates because we pass a caps bill, please think again. The, the MICRA experience and, and the studies that Mr. Hull referred to, I think, all go back to, to MICRA as, as, as their basis. The MICRA experience is, again, one of these cases where it, it, it's a bit cloudy. The, when you look, we, we showed you a chart, I won't show it to you again. Mr. Hampton did. Showing the total premium revenues in California, at various stages. And, after MICRA was passed, and even after MICRA was upheld by the courts, they continued going up and it was only after Prop 103 passed that there was a leveling off of total revenues. Now, Governor, you raised the question, well is that, total revenues, is that rates? Well, it, it's obviously not. And yet rates must be an important component of, of premium revenues. Either there was some leveling out of rates, or, the, the coverages, or the number of policies being sold, had to have changed in some marked way. But, it's, and, and, and so all I say about that is that MICRA, again, it, it's, it's hard to get a, a firm handle on it. That, that it's an assurance. Well what about the rate rollback? We've got two rate rollbacks in, in, in this bill. An equitable rollback, which is a annual review over time of rates, by the Department of Insurance. And it becomes

effective January of next year. In other words, throughout 2003, if, if what Mr. Wilson, from the Physicians' Insurance Association, told us, rates are still gonna go up because they're still deficient. And then there are exceptions that the Department has to consider so that if a company shows that it's, it's anticipated loss experience will be different from the, the presumed then, or if it can show that it, it, it can't write the business and, and presumably that's the case, for example, that Medical Protective would make. Mr. Thompson said, we're not really saving that much money because we've got lots of, of policyholders whose, where there's no cost savings because they have lower limits. And, then the mandatory rollback, it's, it's a three year deal, going from 15, to 20, to 25 percent over a, a three year period. That becomes effective 30 days after either the Supreme Court says this is okay, or the voters say this is okay. Now, what kind of history do we have to rely on there? The, the, there are two states that I was able to find, Oregon and Florida, where a similar (provision) of this had been put on the ballot. Twice in Florida in the '80s, once in Oregon recently. In all three of those cases the voters rejected the, the amendment. No idea what will happen here. And as you all know there are polls from both sides that people tout and, and, and who knows. The Supreme Court, the, this, this business of having associations go out and file lawsuits to ask the Supreme Court to declare the cap constitutional, all I can say about those lawsuits is that they're gonna be a mess. I mean, in, in, in most cases, like the Lucas case, you have a specific set of facts, or you had a particular plaintiff, and you, you, you knew what you were lookin' at. And, and the court could say, as to that plaintiff, this is disproportionate, speaking of the old cap. And there's no quid pro quo, and, and so it's unconstitutional. Now, in the, mis--Mr. Hull said, well that may change because recently the court's been lookin' more at, at the police powers. But if you look at what the, the quid pro quo, and Senator Duncan, you asked questions about this, about the mandatory insurance provisions that are in the alternative cap in, in House Bill 4, and, and the problem with that is that, I mean, for one thing there are almost no practicing doctors who don't already carry insurance. The number's so small that TMA, in, in their annual survey, never has even asked about it. And the reason it's so small is because hospitals require it to get privileges, managed care companies require it to get on their approved list. And, and so it, it's not like we've got a, a flood of uninsured physicians who are suddenly gonna become insured. It's, and then when you go from a per defendant cap, as we have under current law, where, and, and I've looked, just out of curiosity, over the weekend at every active case in our office here in Austin, where we've got insurance information already. There's some cases early in the process where we don't have it yet. In, in, in no case, when you combine the coverages, there may be some cases where a particular physician might have a smaller policy, but that's not the only physician in the case. There may be a hospital involved. I could find no case where the coverage limits weren't at least a million dollars. And so, when you go to a per claimant cap of two hundred fifty thousand, or really a per case cap of two hundred fifty thousand, the, the, the,

the, the quid pro quo's illusionary. Currently, all physicians, virtually, have coverage and all cases, virtually, have coverage well in excess of two hundred fifty thousand. And, and so, there's no quid for the quo. Yes, Senator Duncan.

DUNCAN : Well, I won't argue with you about that. But I, I don't wanna take all your time. But, no court has held that.

JACKS : That's correct.

DUNCAN : And the availability and the assurance of availability of a fund from which to compensate a person certainly, in the abstract, has to be a quid pro quo.

JACKS : If--

DUNCAN : And the assurance of that as opposed to a situation to where you have doctors bailing out of coverage or doctors lowering coverage in order to--

: Yeah.

DUNCAN : --be able to afford the premium.

JACKS : There, and, and, and, Senator, I don't question for a second there's gonna be evidence mounted by both sides.

DUNCAN : Right. I mean, but that's just an argument--

JACKS : And--

DUNCAN : --we're not gonna (inaudible, overlapping conversation).

JACKS : --and I also concede I have no idea what the Supreme Court's gonna do with that evidence--

DUNCAN : Could, could you, could you--

JACKS : --once it's assembled.

DUNCAN : --and I think, you know, just assuming, just assuming that, and, and I don't know where the momentum is, but, House passed a cap at two-fifty--

JACKS : Uh-huh.

DUNCAN : --and it seems like the, the momentum politically is there to do a cap.

JACKS : Uh-huh.

DUNCAN : And I'm trying to figure out, in my mind, what is the best cap? Mike made a very compelling argument that the two-fifty cap is what has been used around the country, that has been shown actuarially to achieve the goal of lowering insurance, or at least stabilizing insurance. Can you respond to that and can you give us some notion about, if there is a cap, and I'm not asking you to agree that there should be a cap--

JACKS : Right.

DUNCAN : --but if there is a cap, how do we go about determining that?

JACKS : Okay. Let me give it my best shot. I, and, and I'm gonna set aside, for the minute, of, of, the question of other things that might be done that might help solve the problem, but, if, if, if there had to be a cap of

some sort, one, I think that it should be a substantially higher cap than two hundred fifty thousand. That is, and, and you can achieve predictability by a figure that, that, I mean, two hundred fifty thousand is not magical for purposes of, of predictability. I, and I've already raised the question whether it's even magical for lowering rates but I, and so I'm not gonna go back into that, but for predictability it's not. Second, I think it, it should clearly be a per defendant not a per claimant cap. I mean the, the idea is that no single defendant is exposed to more than a certain amount of liability and, and, and once you've achieved that then to make it a per claimant cap, and define all claimants as if they were one, and, and to make it a per case cap, i--is just piling on. Third, I would say, would have to be indexed to inflation, as the current cap is. Fourth, I would say that, you know, we, we keep hearing we need a cap on pain and suffering, we need a cap on mental anguish, pain and suffering, mental anguish, pain and suffering, mental anguish, and yet the cap includes some other elements of damages, in House Bill 4, that are, are much more defined than pain and suffering, and mental anguish. Disfigurement, physical and mental impairment, are, I mean, Tony Korioth came and talked about how the comp system has always been able to deal with, with those types of injury in quantitative ways. Physicians have detailed standards about how to assess impairment in, in their various fields, whether it be neurological, whether it be orthopedic. A--and so I would say it would be a cap that should be only on the elements that are, it, I'll, I'll concede that the least hard to, to get a grasp of, that is physical pain and suffering, mental anguish. I would say that, and, and this also, if, if you do that it also helps with this business of, of exceptions. Because otherwise, I think, all of us can think of cases where two hundred fifty thousand clearly isn't enough, or whatever figure you might pick, in some cases, is not gonna be fair. And, and, and those tend to be the serious ca--I mean death cases. (It) raised the question whether, you've ever seen a case, Governor, where two hundred fifty thousand wouldn't be fair. A young man who, CFO of a company that I've done some representation of came to me. An adopted son, his mother went to the dentist because she had something stuck in her teeth and was prescribed a medication that the dentist, on records, if he'd looked at 'em, showed she was allergic to and, and she died. Totally preventable, totally needless, totally reckless situation. I, for death cases, I'd say preserve the current cap but let's be honest about this, if we're talking about capping noneconomic damages let's make it so. Right now it caps lost earnings. The only thing that's not capped is, is medical. And, and I do think that there is some reason to look at exceptional cases from the standpoint of conduct. Perhaps not arising to malice but at the same time not being simple negligence. And, and, and how do you go about the amount? I think one of the things we've heard about is providing access to the legal system. And, and, and for those cases where, and we've heard about elderly, cases involving the elderly, cases involving children, cases involving poor people. Pai--where economic losses aren't a big factor. The, I also did a bit of homework over the weekend. The average, I went back for all the cases closed in our office here

in Austin, the last three years, the average expenses we incurred was o--a little over a hundred thousand, about a hundred and three thousand per case. It went up to over three hundred and fifty thousand. But the, recognizing that for people to have lawyers and to have access to the courts, true access to the courts--

ARMBRISTER : Tommy, (inaudible, not speaking into the microphone).

JACKS : --you have to take that into account in setting an amount. Yes, Senator Am--Armbrister.

ARMBRISTER : Tommy, you, you give us that figure, a hundred, a hundred and three thousand, and, and you said that's the, the cost. Are lawyer's hourly rates included in the cost?

JACKS : No.

ARMBRISTER : Okay.

JACKS : That's only out-of-pocket costs--

ARMBRISTER : Okay.

JACKS : --that is, is truly spent--

ARMBRISTER : Witness travel--

JACKS : --it, it's, it--

ARMBRISTER : --those type things.

JACKS : --the big, the biggest items are expert witnesses, because by law in medical malpractice cases, unlike any other kinds of cases, you must have experts, and you must have good experts, if, if you're gonna have any chance of success. And in most cases you have multiple experts because one may be able to talk about say, in, in a, in a anesthesia case, one may be able to talk about the standard of care, that is what the anesthesiologist did wrong, but another may have to talk about the causation aspects, and, and the, so--

ARMBRISTER : (A lot of 'em) just trying to get (inaudible, overlapping conversation)--

JACKS : Yeah.

ARMBRISTER : --here is these types of things--

JACKS : (Now) it's all hard dollars--

ARMBRISTER : --(inaudible, overlapping conversation) grasp--

JACKS : --it's all hard dollars--

ARMBRISTER : --(inaudible, overlapping conversation).

JACKS : --out-of-pocket, no overhead, no--

ARMBRISTER : Okay.

JACKS : --hourly rates, no nothing.

ARMBRISTER : Okay.

JACKS : It's just money that's spent and if, if the case is not successful it's lost.

ARMBRISTER : Okay.

JACKS : Client doesn't, can't be expected to pay it and

doesn't.

CHAIRMAN : Tommy, I don't wanna jump ahead.

JACKS : Please do.

CHAIRMAN : May, and, all this insurance talk is interesting but let me tell you the thing that concerns me the most, that Mr. Hull talked about. And that is this enormous pressure to settle within the policy limits, rather than rolling the dice. Talk to me about how in the world we address that dilemma, which it seems to me is an un--unfathomable amount of pressure on a doctor that has some assets that he puts at risk if he, if he should not agree to settle within limits.

JACKS : Let, I, that's an area I did want to address and I, and, and let me, this is one of those areas where Mike and I really don't see things the same way. And, and it is, so let me tell you about my experience. The Stowers Doctrine, old long-standing doctrine in Texas, goes back over 50 years, simply says that where an in--an insurer, who has the expertise to make judgments about settlement, screws up in a significant way, and, and doesn't accept an offer that's covered and exposes, through their negligence, the insured to damages that aren't covered, then the insured, as the consumer (laughter) o-- of that policy has, has a, a right to call that in, into question. Now, Mike said, well, they always consent. That's simply not so. And, in the real world that I practice in, that varies enormously from carrier to carrier. There's one carrier, TMLT, where there is what is to me a shocking number of cases, where the physicians withhold consent. Or if they grant consent, only grant consent up to say fifty thousand dollars. But I won't consent for anything more than that. And, and yet when I have cases against Medical Protective, for example, I, I don't see that. And I, I think that there are things going on in, in the process where doctors are being used by the, the carrier as a fire break to protect the carrier from any Stowers exposure. Because, you see, if the physician doesn't give consent there can be no Stowers exposure on the insurance company. Because they say, well, doctor wouldn't let us settle the case. Had one case against TMLT, here in town, where the doctor finally gave consent the day before trial and, and the next day withdrew consent. Now, in that time we made an offer within the limits. The verdict and the judgment exceeded the limits, and, and, and TMLT, in that case, ended up paying an amount of money that was somewhat, not greatly, but somewhat in, in excess of their limits. I don't see the Stowers being used as the bludgeon that, that Mike perceives. And, and, and that's where both lawyers who are knowledgeable, who practice this stuff day in day out, and who are here in good faith, and, and, and we don't see it the same way. This bill, it's on Page 84, would remove the Stowers exposure for the insurer above the cap, by repealing a section in current law which was put there to protect physicians. So that if there were an offer, both within the policy and within the cap, but the insurance company got hard-headed, and, and, and, and said no, negligently, then the insurance company wouldn't get, get the benefit of the cap. That's being repealed here. I think that's a colossally bad idea.

CHAIRMAN : Now does it fall on the doctor in that case?
JACKS : No. The physician stays within the protection of the cap. That is, but, but, but the idea was to en--encourage, I mean, as between physicians, or any insurer, you own your car insurance or your homeowners' insurance, or your business insurance, as between you and your carrier, you are, generally speaking, so much less able to assess litigation risk than the carrier. It's, except, I guess, in, in the, in the clear, clearest of cases.
CHAIRMAN : But now I'm talk--but as I understand it, what he was saying was that it, it works actually two ways. In one case if the, if the carrier recommends a settlement within the limits--
JACKS : Uh-huh.
CHAIRMAN : --and the doctor says no--
JACKS : Uh-huh.
CHAIRMAN : --then the doctor is liable above for that, for that that goes above the policy limits?
JACKS : Above the policy limits, yes. Above the cap, no.
CHAIRMAN : Well, but there's not a cap today.
JACKS : In a death case there is and, and--
CHAIRMAN : Well--
JACKS : --but, in--
CHAIRMAN : --(inaudible, overlapping conversation).
JACKS : --but you're right. There's not--
CHAIRMAN : In noneconomic situation.
JACKS : --correct.
CHAIRMAN : The doctor would be on the hook--
JACKS : (Yes.)
CHAIRMAN : --for above the policy limits if the doctor turns down that settlement within the, within the limits.
JACKS : Yeah.
CHAIRMAN : That's the other half of the Stowers Doctrine.
JACKS : It is and it is--
CHAIRMAN : Isn't there a, isn't there a huge pressure, then, on the doctor? Whatever it is under the limits I'm gonna settle because I, because I can't take that risk above.
JACKS : Governor, as, as a, as a practical matter, one thing Mike said that is true is that the, the amount of the policy, with almost all physicians, does serve as a cap because relatively few physicians have assets that are substantial enough above the cap, frank--above the coverage, frankly, to, to warrant, I mean, all the expense and, and litigation that goes, and, and bankruptcy, and these claims are dischargeable in bankruptcy and there's--
CHAIRMAN : If that's true why would--
JACKS : --almost never happens.
CHAIRMAN : --why wouldn't they just lower their coverage to a hundred thousand dollars if the, if, if nobody's gonna go after anymore than

that?

JACKS : Those in, in, some do, some do. And, and--

: (Inaudible, background conversation)

JACKS : --particularly those in, in lower risk areas, or those who don't have much to, to lose. And I, I guess what, what I'd encourage in, in the business about Stowers, is where there is a, a consent policy, as there is in most medical malpractice policies, to require some honest disclosures, from the carrier to the physician, about the risk, about their right to consult with a lawyer that wasn't hired by their insurance company, because what, what I see repeatedly in my practice, more with some carriers than with others, is, is physicians that are actually bullied into not consenting as, as a way of the insurance carrier protecting themselves. I mean, make no mistake about it. W--w--when asked whose help, if you abolish the Stowers Doctrine, or if you limit the Stowers Doctrine for any exposure to the carrier a--above the, the cap, that's protecting the insurance company and it's not protecting the doctor. And this, this, the, the enormous pre--you know, very few cases, I mean, Mike was talking about all these cases that settle for the cap, for the coverage. Relatively few cases, in my experience, settled for the coverage because from the carriers point of view that's the worst thing that can happen to 'em in, in most cases. And, and so, and, and particularly--

CHAIRMAN : You, you, you've used a term a few times--

JACKS : --yeah.

CHAIRMAN : --that, that the carrier negligently--

JACKS : Uh-huh.

CHAIRMAN : --turned down the, the, the offer.

JACKS : Yes.

CHAIRMAN : Do you have to prove negligence, or is negligence just a stated fact. To, i--i--if it turns out bad are they negligent for making a bad--

JACKS : No.

CHAIRMAN : --guess.

JACKS : Not at all. Because in, in fact, it, it makes--

CHAIRMAN : How do you--

JACKS : --a great, it makes a (inaudible, overlapping conversation).

CHAIRMAN : --how do you prove that they used bad judgment and negligently turned down an offer?

JACKS : The same way you prove that a lawyer used bad judgment in, in making judgmental calls in a lawsuit. Or that an engineer made bad judgment calls in building a building, or any, anything else. You bring in experts from the industry. They set their own standards. But it makes a great deal of difference, I mean, for example winning the case the offer's made. If it's early in the case, when they don't know much about the claim, you don't, frankly, have much chance at all of, of making a negligence case. It's only after

the case is fully developed, both sides know the facts, that it makes any sense to make a Stowers--

DUNCAN : But Tommy in the real--

JACKS : --type demand.

DUNCAN : --but in the real--

JACKS : Yes, Senator Duncan.

DUNCAN : --world, we never litigate this, the, the reasonableness of, typically the carriers just pay that excess. And a lot of times they even give a letter of protection, sometimes I've seen those. But--

JACKS : Sometimes they, they do.

DUNCAN : But I've never seen one or heard of, I, I hadn't read ver--very many cases where you actually litigate the reasonableness of the carrier in refusing to settle. It's just typically--

JACKS : Well, the, you're right there aren't many. There are a few. But, but there are, but, but what you don't see are those cases where there really is no case to be made for negligence and, and those (just) go away. They take the policy and, and they don't try to pursue the claim. Any time, certainly in, in my experience, any time the claim has been pursued it's only because there's a very good case, that it was just boneheaded and hardheadedness on the part of the carrier, negligent conduct, that, that led, and even those are, in my experience--

DUNCAN : You--

JACKS : --have always been heavily discounted.

DUNCAN : --but you talked about a case, while ago--

JACKS : Yes.

DUNCAN : --that you recently tried where the company just paid the excess.

JACKS : The, the case that, was a case tried here in Austin. TMLT was the carrier. That's the case with the one day window where the physician gave and then withdrew consent, and in that case the judgment, my recollection is on a five hundred thousand dollar policy exceeded two million dollars. They paid two hundred thousand dollars. They paid seven hundred thousand on a five hundred thousand dollar policy. Some of that they would have owed as interest anyhow, about half of it. And it's, which was to, I guess illustrates the point I just made that when those cases do settle they usually settle at a deep discount. And, otherwise the, that case would've been litigated if we'd tried to stick in for the whole nine yards. I, I want to point out on this business of the rate rollback that I find myself in the uncomfortable position of actually agreeing with some of the evidence you've heard from the insurance carriers. That is unless there is a sound basis for reducing cost by the 15, 20, 25 percent over three years, it's not gonna work. One of the things that got us into the problem we're in was artificially suppressed premiums throughout a time when companies were competing for business and were making money in the stock market. You heard that from Chris Lane, Doctor's Hospital. Artificially

suppressed rates for a temporary period not only are not helpful, they're, they're hurtful. And, and I, I found totally believable, Jay Thompson's testimony about Medical Protective. He said you can't do it across the board. You've got to look at it company by company. And, and, which is what the equitable rate rollback does but not what the mandatory rollback does. And he said for our company we're not saving that much money if you pass this bill. I, mean it's alluring to say well we will guarantee that rates go down by having this mandatory rollback once the constitutionality's upheld, but it's not, again I say it, it, it's illusory. Mr. Wilson said that, in fact, you're gonna exacerbate the problem of companies not wanting to come to Texas, if you pass the mandatory rollback. Another problem, frankly, when, and I, I talked to people like Jay Thompson, and, and others for other companies. One of the things they say, frankly, that keeps them from coming back into Texas is that they've got TMLT out here with the biggest chunk of the market, and being totally unregulated, not having to pay premium taxes, not having to have the same premium to reserve ratios that, that they do. So they're coming in with one arm tied behind 'em and, so unless you do something to level that playing field you're not gonna get the companies coming back in that you would otherwise. The, I'd like to mention, it got, I mean, when, when Hartley Hampton was testifying he mentioned the idea of using rate rollback, I mean, I'm sorry, the defaults on cost (inaudible). If in fact, I can't imagine what lawyer's out there losing 85 percent of their cases on a contingent fee. You show me that lawyer, I will show you a pocket of poverty. But, a--apparently, I mean, tho--those statistics are there, and maybe they're real and maybe they're not, but if, if that's so, you could, you could generate a fund and provide direct premium subsidies and you could target it to account for these actions of geography that Mr. Hull talked about on essential services in parts of the state that, that need the help and g--and give TI--TDI the discretion to do that. If, if, I mean, the, the toughest thing I can imagine is enacting a very punitive cap that hurts only meritorious cases and only the worst injured people, and hurts old people, and young people, and poor people worse than it hurts others and then not getting the results that, as Senator Duncan said, look, we've been here before. And we're told enact this tort reform, it'll work. There're two things I've seen that would work to immediately lower premiums. One is this idea of the premium subsidy. The other is an indemnification program. It's more complicated. I think there're ways to do it. But I would employ you, I mean, maybe there is a momentum that can't be withstood (inaudible) some kind of a cap but if you want to lower premiums and solve problems I, I would ask you to take a hard look. I mean, we were criticized by Mr. Trabulsi for these ideas not having been thoroughly vetted in the House. Well frankly, our ideas weren't solicited or welcome there. But I would ask you to take a serious look at those. There are, I don't wanna neglect to second the motion that Ted, Senator Lyon made in his testimony. I mean, it is a fact that there's a dipre--disproportionately small number of physicians that accounts for a disproportionately large percentage of claims. You can quibble about what those

are but you can't quibble about that fact. And under current law hospitals, unless they are shown to have acted maliciously, are immune from liability from knowingly letting bad doctors practice. We had, in his packet of materials, there's a case, KPH Consolidation against Romero, our case, our firm's case. In that case we had a physician, an orthopedic surgeon, who had a serious drug problem and had had for years, and the evidence was overwhelming that the hospital was aware of it. The chief of staff of the hospital, at the time the doctor was credentialed, testified that he thought, at that time, that this doctor posed an unreasonable risk of harm to his patients. He had been reported to the Board of Medical Examiners at least twice, perhaps three times, at the time of our trial. He had a long string of malpractice awards, two cases involving the wrong, operating on the wrong limb. In our case he let a man bleed to death on the operating table, and, except that he didn't die, and so he lived with profound brain damage. And the Court of Appeals, in that case, under the current law, said we demonstrated that the hospital had actual subjective awareness that his drug abuse posed an extreme risk to patients but they said we, we didn't prove it was consciously indifferent to let him keep operating on people in that hospital because what the hospital did behind closed doors is privileged so we can't know that they did nothing. They might have made him turn in urine samples. They might have done something. We don't know that they did nothing, and, therefore, you can't prove conscious indifference. That's what the court said and that's what they said under current law, and that's wrong and it protects those who are protecting bad doctors.

CHAIRMAN : Tommy, I thought the immunity in the law had to do with peer reviews, as opposed to credentialing committees--

JACKS : It--

CHAIRMAN : --is that not correct?

JACKS : --it was meant to, Governor, but anything that's done in a hospital committee, and anything that is done when a problem shows up with a doctor, in the way of investigating and, and doing something about it is all closed by privilege. In, in, in that case, in the Romero case, we were permitted to get not one piece of paper from his credentialing file. The, the court let us get a blank application form.

: (Inaudible, background conversation)

CHAIRMAN : But you're saying that--

JACKS : And so--

CHAIRMAN : --a, that the courts have extended that peer review immunity to the credentialing process--

JACKS : It--

CHAIRMAN : --itself.

JACKS : --it's, it's, the way the law is written, I don't know that it's really (inaudible, overlapping conversation).

CHAIRMAN : See I asked Sen--Senator Janek that, on the Floor the other--

JACKS : Yeah.
CHAIRMAN : --day because it surprised me--
JACKS : Yeah.
CHAIRMAN : --and it surprised him.
JACKS : It is, it clearly has been applied and was applied to the credentialing process. In fact, the, the privilege that the court speaks of extends to anything that happens in a hospital committee. Now there are reasons to give some privacy to the peer review process. I'm not here to argue that. But I am saying that when a hospital, and just as in Mr. Lyons case and our case it showed this doctor was responsible for, he did a lot of surgeries, and brought in a lot of revenue for that hospital. And, it is, it, it, it's, it's compounding a problem that is helping to drive up cost within this system. That doctor, about a month before this legislative Session started, and our, our case was tried in the Spring of 2000, and as I say, he'd been there either two or three times, we can't find out much, to the Board of Medical Examiners before our trial, in December, after actively practicing for another almost two years after our trial, and we wrapped up our whole record and sent it to the Board of Medical Examiners, they finally suspended him from the practice in, in, in December, about a month before the Session started. Serious problem, I'd urge you to, to take a look at it. I wanna talk for a second about this business of frivolous lawsuits and things that can be done about that. The bill creates a drastically unfair system where within 90 days of filing the case a solid report from a solid expert has to be presented to the court and yet during that 90 days the plaintiff is deprived of almost all discovery. It's allowed one deposition. Is allowed, or if you can make the case that you're entitled to something before you file your lawsuit, then you get two depositions. And you get written discovery, although in real life you frequently don't get answers, complete answers (laughter) to your written discovery, anytime within the first 90 days of a case. And the consequence, under the bill, is that if the report isn't up to snuff, solid report, solid expert with detailed findings, the case is dismissed with prejudice. That means it can never be refiled again, and you pay all the other sides attorney's fees. And there is no other place in law where that kind of protection is extended. Now, last Session, Mike Hull and I sat down and hammered out an agreement about a fair way of dealing with Article, with Section 1301. And we came--(verbiage lost due to changing of the tape)--

END OF SIDE 1

SIDE 2

JACKS : --all the way through the, the process. And, and under that bill we, we tightened up the existing language, in the current law, about the reasons for a judge being able to give an extension. You heard

from Darrell Keith that there was one judge, in Tarrant County, that was, he thought, lax about that. That means there were, I don't know how many judges they'd gotten in Fort Worth. I'd guess ten or so on the civil side, so, one out of the however many. We required the court to state on the record and the written order the detailed reasons. We made, as this bill does, expert reports admissible if the plaintiff attempts to use them for any purpose other than the statutory purpose. And we put in the provision, you know, one of the problems we've got under current law is that if I submit a report and the defendant then chooses to lie behind the log until the statute of limitations has run, let us say, or until our time for designating new experts has run, and then they raise a technical objection and it's sustained by the court, it's too late to do anything about it. Can't go out and get a new expert. And the--

CHAIRMAN : When you say technical excec--exception, you're talking about in the quality of the report, as to whether it--

JACKS : Yes.

CHAIRMAN : --meets all the requirements?

JACKS : Yes, and Paula gave the example of a case that she--

CHAIRMAN : Well let me ask you something.

JACKS : Yeah.

CHAIRMAN : It seems to me that we've got the two extremes. In the current, current bill it just allows this to go on forever. The judge can just allow it to go on forever, that the 90 days really (dudn't) (sic) mean anything or the deadline dudn't mean anything. Under the bill as drafted, it seems to me, that it's a drop dead, if you make a mistake you drop dead at the end. (Idn't) (sic) there some medium ground that you, that you, at the end of that period, that if there is a deficiency in the report that the judge can give you 30 days to--

JACKS : There, there is, Governor.

CHAIRMAN : --cure a deficiency?

JACKS : There absolutely is. In fact, in the agreement, Mike and I worked it out. The, we had a provision where the plaintiff, if they filed the report 30 days early instead, in other words a 150 days into the 180 day period, then the defendant had to say, all right, I do have problems with it and here are my problems. And then there was time to, to fix it. They could be given 30 days to fix it after the court ruled at it. But you got it teed up, you didn't slow down the process and yet you didn't have these, these technical (gotchas) (sic). Yeah, Mike and I did write this provision back in '95. But we didn't have in mind, we, we didn't have in mind that it would become the, the playing field for the kind of gamesmanship that exists now. And, and yes that can be fixed. And yes it can be fixed in a way that's straight down the middle. And, and I actually think the amendment we did, and agreed on, does that. The, but, but, but the bill as written is, as you say, it, it's a, it's a death penalty with no exceptions, no appeals, no nothing. You're dead and gone. And again, these may be perfectly mer--and usually are if, if the, if you get an expert who can pass the

qualifications to go out on a limb, but, and it's a case of merit. But it can be thrown out on technicalities.

CHAIRMAN : Tommy, you got about eight more minutes (inaudible, overlapping conversation).

JACKS : All right. Other things you can do that I think would be helpful in, in this business about frivolous lawsuits. Doctors for a long time have said give us a, the right to make a counterclaim when we're sued in a case that we think's frivolous. Under the Deceptive Trade Practices Act that right exists for cases that are groundless and brought in bad faith or purposes of harassment. And, and if that's shown, and sometimes it is, and there are cases reporting that, then the plaintiff pays the other side's attorney's fees. I think something like that could, could be done. I think the, our disciplinary process, lawyers disciplinary process, hasn't done that good a job and it is, you, you can't rewrite the bar act in, in this Committee, perhaps, but you can require judges to report to the statewide disciplinary, not the local committee, anytime there is a successful counterclaim. You can write provisions that--

NELSON : Mist--

JACKS : --would suspend a lawyer from being able to file these cases.

NELSON : Mr. Chairman.

CHAIRMAN : Senator Nelson.

: (Yeah.)

NELSON : Is, do you know if that is done in the Sunset Bill?

JACKS : Senator Nelson, I will, the honest answer is no I don't. I've been, I don't know the answer to that.

NELSON : If, if it's not, perhaps you could submit to us some language that would allow us--

JACKS : I'd be happy to.

NELSON : --to do that.

JACKS : I'd be happy to.

NELSON : Good.

JACKS : I sure would.

NELSON : Thank you.

JACKS : I think--

CHAIRMAN : But Tommy, the, the burden of showing frivolous is so high, idn't it? I mean, you, you almost have to, it almost has to be a situation where y--the person dudn't exist. At least that's my experience.

JACKS : Governor, I, I don't think it is. The, the, the, what the DTPA says is groundless.

CHAIRMAN : But the judges--

JACKS : The--

CHAIRMAN : --if there isn't one scintilla of a fact that is true, judges simply won't give--

JACKS : --if--
CHAIRMAN : --(rule a) frivolous lawsuit.
JACKS : --it's, it's a, it's a delicate balance. How do you write something that gets at the frivolous case and that doesn't get to the meritorious case that's simply lost.
CHAIRMAN : Yeah.
JACKS : A--and, I, I, I, I think there's gotta be a way to, to strike that balance. And the fact that it's hard may be the reason why nobody's made a better stab at it. But I don't think it's an impossible task. The, the, I'm not gonna talk more about meritorious cases, (laughter) the problem with, with the caps on meritorious cases, you know where I stand on that. There are some other things in the bill that I would ask you to take a hard look at. And, and some of 'em I'd ask you to take out. The, and, and some of this has been talked about but, but not a (wave) of a lot. The, requiring periodic payments of all future damages over a hundred thousand in all cases, even settled cases, i--is a bad idea. Now, if, if we've got a cap, whatever amount you arrive at, you don't need this for purposes of predictability. But it, it plays havoc when you try to make this happen in every case, whatever the circumstances. You have cases where, I mean, you know, you have a finding, let us say, of, of future medical, with a single note. And, and the jury perhaps arrived at that number by evidence of the cost and you have to show this by preponderance of the evi--possibility (dudn't) (sic) do it, you have to show a probability in given years what the number will be, have life expectancy, work life expectancy, all that comes into play through expert witnesses and the jury writes down a number for each element of, of future damages. Now under this bill, the judge then must take that and portion it out over the patient's lifetime. Well, none of us has this crystal ball. (Course) there's nothing in the bill that makes it two ways. That is if, if the money's not enough to cover the future there's nothing that says well you get to go back, and the defendant has to put in more. I--it's only that if plaintiff dies sooner than statistically they were supposed to, the, then, then, then they have to give money back. But in, in the case where, you know, say the testimony is okay, you're gonna have twenty thousand a year, on the average, expenses, every year for caring for this patient. But, in fact, you have something calamitous happen and you have a big hospitalization in year two and the bills run up to two hundred thousand dollars. Now, if the, if the plaintiff had gotten the lump sum, instead of having it doled out they could deal with that, without having to go into bankruptcy or having to go out and try to peddle their future stream of payments at a deep discount to what in the industry are called vultures. The, if, if, since it's only a hundred thousand that's free from, of the future damages, that's, that's free from this, you're gonna have cases where there are things that need to have money spent on them immediately but it's not gonna be there. Debt, because people who've suffered serious injury, or the death of the bread winner, incur debts, sometimes steep debts, y--modification to vehicles, homes, what have you, it is, again, a one-size-

fits-all effort that doesn't work. No problem with courts having the discretion. No problem, certainly, with claimants as they do now having the discretion. But having no discretion is a bad idea and it's not, i--in terms of, I mean, the evidence of, of, of the cost that's saved in, in the system by doing this is, is lacking. Emergency care, you heard Ms. Sweeney talk about what a broad definition we have and then Mr. Bailey, from the Hospital Association, said well we didn't really intend that, we're just, Senator Duncan said you're not really trying to get at every emergency that happens in the hospital, aren't you just talking about the emergency department? He said, yeah, I'm sure they're all (forgettin' that). That's not what the bill says or does. The clear and convincing burden of proof in an emergency care case, a burden that's not imposed for any other category of providers, or any other category of defendants, save punitive damages, where I think it's justified, is, again, the evidence in there. And then we've talked about Stowers so I'm not gonna talk about that. I wanted to point out to the Committee, and it's in, Professor Charles Silver, from the University of Texas Law School, testified and presented written testimony, and he references on this issue of defensive medicine because, Senator Duncan raised a very good point of, you know, we allow for a 14 percent increase because of increased utilization. And what is this bill doing about that? Well, the, the argument becomes well, maybe, maybe it's all defensive medicine and so we can do away with it. There's, there's two studies that Professor Silver references, done by the Dartmouth Medical School, appointed, published very recently in, in, in this year, 2003, in February, in the Annals of Internal Medicine, the principle journal for internists in this country. And they concluded that there is, there are vast sums wasted in our health care system. And that the, the chief driver, they actually rejected the idea that it was because of defensive medicine, they said that it's supply driven, and basically anyplace where you've got more doctors and hospitals, you're gonna have more services delivered and the costs are gonna go up. And, and so, you know, like everything else in life, you know, there's, there's bitter and, and, and sweet. Just as there can be a, a shortage of, of health care resources, there can be an oversupply of health care resources and there is in, in, in many places, and it's, it goes up and up and up. And, and that's, I suggest to you, that's why some of this data that shows the economic side of the claims cost going up. A significant component of that, I believe, and I believe the evidence will bear out, is driven by just increases in, in health care costs. In pharmaceuticals, 13 percent increase nationally, in 2002. The same's true for hospital outpatient services. About the same level of increase. And, and so it, it, that drives up claims costs. I want to, and I, and, and, and that may be why those midwives rates aren't going up (laughter) either. Again, let me thank you. You've been extremely gracious, and I appreciate your giving us a chance to be here.

CHAIRMAN : Thank you, Tommy.

ARMBRISTER : Mr. Chairman (inaudible, overlapping conversation).

CHAIRMAN : Senator Armbrister.

ARMBRISTER : I know we, we're gettin' close to the time. Can we have Phil Presley come up? I've got--

CHAIRMAN : Sure.

ARMBRISTER : --just a couple of questions.

CHAIRMAN : Thank you, Tommy.

: (Inaudible, background conversation)

CHAIRMAN : State your name for us, Phil.

PRESLEY : Yes, my name is Phil Presley. I'm the Chief Property and Casualty Actuary of TDI.

ARMBRISTER : Phil, going through the homeowners and auto, a month or so ago, those of us on the Committee became very familiar with actuarial soundness.

: (Laughter)

ARMBRISTER : You being the chief actuary over there, you heard our discussion today about caps, and caps as they're relating to the insurance. And we made statements (inaudible, not speaking into the microphone). How d--from an actuarial point, how does a cap, two-fifty, five hundred, seven-fifty, how does that scale work as far as its impact on rates, if any?

PRESLEY : All right. On the two-fifty cap, ignoring possible savings in defense costs, things like that, and behavior modification, we're estimating that the two-fifty cap would save about 12 percent of premium. A five hundred thousand dollar cap would save about 6 percent.

ARMBRISTER : (Uh-huh.) In a, in a, in medical malpractice insurance, what factors in a lawsuit, if, if you know, really have affect. I--is it the noneconomic? Is it punitive side? I mean, wha--what does a company look at?

PRESLEY : Okay. In general--

ARMBRISTER : I guess my question's are we putting it on the right place?

PRESLEY : --in general, except for hospitals and nursing homes, insurers are prohibited by law, in Texas, from providing coverage for exemplary damages. I believe one of the previous witnesses this morning said his rule of thumb was noneconomic, was twice economic. So that would give you a measure of the magnitude of the noneconomic.

ARMBRISTER : So we, we're putting it on the right place.

PRESLEY : I would say that's where the, as we say, the more subjective damages are.

ARMBRISTER : All right.

PRESLEY : And whereas, you know, future medical bills, future lost wages, things like that are, are called more substantial, more identifiable.

ARMBRISTER : Okay. We, again, it's all about rates and

TEXAS SENATE STAFF SERVICES
JGH:mms/276/SA043003T1/100603
SENATE STATE AFFAIRS COMMITTEE
APRIL 30, 2003
TAPE 1

(Senator Ratliff in the Chair)

CHAIRMAN : (Gavel) Senate State Affairs Committee will come to order. The Clerk will call the roll.
CLERK : Ratliff.
CHAIRMAN : Here.
CLERK : Staples.
STAPLES : Here.
CLERK : Armbrister.
ARMBRISTER : Here.
CLERK : Duncan. Ellis. Fraser.
FRASER : Aye. Here, here. Aye. Here.
CLERK : Harris.
HARRIS : Here.
CLERK : Madla. Nelson.
NELSON : Here.
CHAIRMAN : A quorum is present.
HARRIS : Duncan's here.
CHAIRMAN : Senator Duncan's present. Members, Ladies and Gentlemen, the purpose of this meeting is only one, and that is to layout what the Chair will be proposing as the Senate substitute for House Bill 4. Let me talk to you just a minute about schedule and logistics. It's, it's the intention to simply layout, and, and I will run down what I consider to be at least the major differences between the bill and the House version. We will not take any testimony today. We will, we will begin taking testimony Monday morning, at 8:00 o'clock. I'd, it is currently my intention not to take that testimony article by article, as we did before. Simply because we've heard most of the philosophy and I think we will hope to confine ourselves to discussion of the actual wording and the, and the differences in the two versions. So, what I intend to do Monday morning is to begin taking testimony but each person who comes forward will be allowed to speak on what, on, on all the subjects that that person is (intrajest) (sic), interested in speaking on. The other preface remark you need to understand, before we start through the bill, because in this instance it has some considerable differences in the House. Two years ago the Texas Supreme Court appointed a committee to look into certain rules of the Supreme Court. At that time, they talked to me about the possibility of, of crafting a rule on a two-way offer of settlement, which I encouraged them to do. Just in the last few weeks the Supreme Court has come forward with five new proposed rules. Three of those ha--were directly related to the bill that we're talking about. And so, as we come to those three, you will, you will hear that the, the proposal in this bill is to instruct, authorize and instruct the Supreme Court to adopt the rules on that issue, and then to set out in the bill the basic structure of what we would like the, the bill to say. And so, you need to under--and, and if, those of you that don't have a copy of the Supreme Court's draft rules, I don't know whether they

have 'em, or, our, our, our office could make 'em available to you. Members, are there any questions before I start going down the features of the bill? I'm gonna touch on the highlights. If the members have questions, you're certainly welcome to ask them, although the details of this will certainly be flushed out, fleshed out, or flushed out depending on your opinion--

: (Laughter)

CHAIRMAN : --and, at length, next week. Article 1 on class action. This is one of the articles that the Supreme Court is preparing to issue rules on. And so Article 1 on class action does, in fact, provide that the Supreme Court shall adopt rules governing class actions. There are two matters that we put in the bill that we, that are particularly instructed to the court. One, is that, first of all, the court will adopt rules for reasonable attorney's fees. And, second, the attorney's fees awarded in a class action must be in cash and non-cash amounts in the same proportion as the recovery for the class, i.e., if the recovery for the class is 50 percent coupons or other such non-cash instruments, the attorney's fee was, will be in the same proportion, with the same instrument.

HARRIS : If you have any coupons on electric bill (inaudible, not speaking into the microphone) lot of electricity.

CHAIRMAN : The second, the second matter on class actions, the section of the House bill which provides for mandatory dismissal or abatement for failure to exhaust administrative remedies is struck, and it is replaced with a section which s--which says, essentially, before 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 the state has exclusive or primary jurisdiction. And finally, under interlocutory review, it provides that for interlocutory review of class certification questions, provided that all issues relating to the certification, or refusal to certify, are consolidated in one appeal. Article 2 on settlement. Once again, this is a, an item on which the Supreme Court was prepared to prepare rules. This bill provides that the Supreme Court shall adopt rules instituting a two-way offer of settlement. Both the plaintiff and defendant may make such an offer. In an o--if an offer is made, by either party, and rejected by the offeree, and the judgment is significantl--significantly less favorable to the rejecting offeree, the party making the offer recovers litigation costs from the offeree. This bill defines significantly less favorable as less than 80 percent of the rejected offer.

HARRIS : Is that on Page 8?

CHAIRMAN : I don't have the pages numbered.

FRASER : Two-way offer starts on the (seventh), Page 16.

HARRIS : Yeah, but--

FRASER : The 80 percent.

HARRIS : --the 80 percent.

FRASER : I don't see that.

HARRIS : I'm sorry, Mr. Chairman. I'll dig it out.

CHAIRMAN : Okay. In the case, in the case of a plaintiff, as

to how, how much of a plaintiff's otherwise recovery would be at risk in covering the litigation cost of the defendant. The recovery of litigation cost from the defendant is limited to the following, 50 percent of economic damages awarded to the plaintiff plus 100 percent of non-economic damages awarded to the plaintiff, plus 100 percent of punitive damages awarded to the plaintiff. That is, the most that could be recovered from a plaintiff in a transfer of litigation costs, the least that the plaintiff could wind up with is 50 percent of economic damages. In recognition of the fact that the plaintiff chooses the court, or the jurisdiction in a lawsuit, this bill also provides that the defendant, early in the litigation, and the Supreme Court will say when, when the deadline is, the defendant has the option of stipulating whether or not the offer of settlement mechanism will be available to the parties in the cause of action. If the de--if the defendant says, nobody gets to use it, then it's not available. If the defendant says, it is available, then both sides get to make an offer, under this section. Article 3, once again, the Supreme Court was preparing to issue rules on what they refer to as complex litigation. And, in Article 3 we have, in fact, yes--

ARMBRISTER : Mr. Chairman.

CHAIRMAN : --Senator Armbrister.

ARMBRISTER : It's my understanding, when we talk about the, the court is prepared, it was my understanding and I believe that Judge Phillips, throughout the interim and prior to the interim, had convened a group of legal and interested, legal experts and interested parties, who's sole task was to do these things.

CHAIRMAN : That's right.

ARMBRISTER : And so, when we talk about (inaudible, overlapping conversation).

CHAIRMAN : It was not only Judge Phillips. As a matter of fact, I think Judge Hecht was the one that was assigned particularly to the watching this Committee and working with the Committee. It is my impression, from the court, that the court had it, enough of the court had seen these proposed rules that they believe that they will be adopted in m--maybe in, maybe in slightly different form, but that they were prepared to go forward with rules.

ARMBRISTER : Okay. Thank you.

CHAIRMAN : In complex litigation the bill says that the Supreme Court shall adopt rules that apply to complex litigation involving multiple parties, or multiple cases, or both, pending in different courts in the state, by providing for the assignment of multiple cases through a single court for a coordinated or consolidated pretrial proceedings, including, summary judgment or other dispositive motions, but not for trials on the merits. And this is regardless of original venue. Complex litigation is defined as civil actions involving one or more common questions of fact that are pending in different district courts, in the same or different counties, a single civil action involving multiple unrelated claimants, claimants seeking recoveries under theories involving claims that are derivative of claims of multiple, unrelated persons or

entities, a single civil action involving more than three interventions, mass tort litigation, mass disaster litigation, or class actions. The transfers that are provided will be made by a judicial panel for complex litigation. And, in the case of the Supreme Court, I believe that what they're, what they're proposing is that there be a five, five-judge panel, all of whom are appellate judges, my recollection, but it would be a panel appointed by the Chief Justice. Under forum non conveniens, the court, thi--this, the wording now says that the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens, and shall stay or dismiss the claim or action if the court finds that, colon, and then the six way test that is currently in law, is rep--is, is kept in the law. But the court must consider those six items and, and make a ruling based on, based on those considerations. Article 4, proportionate responsibility. The responsible third party feature is kept in the bill, but the John Doe, or unknown defendant, is removed. In Article 5, products liability, under medicines, this bill would add the rebuttable presumption to medicine warnings approved by the FDA, as it is in the, in the government standards provisions. In the compliance with government standards provisions there is a fairly significant change in that whereas the current bill, the House bill says the plaintiff may rebutt the prot--rebuttable presumption of no liability be--by establishing that, and number two, is, the manufacturer before or after marketing the product withheld information required by the federal government, or agencies determination of adequacy of the safety standards are re--regulations at issue. This provision would change that the manufacturer before or after marketing a product withheld information or material relevant to the go--federal government's determination. Article 6, interest. As you may recall, the current statute says that post-judgment interest must be between 10 and 20 percent, and then is adjusted. And of course it, for years, it has never gone above 10 percent. This bill provides that post-judgment interest rate is the prime rate as published by the Federal Reserve Bank of New York, on the date of computation. Article 7, appeal bonds. The only real significant change, I believe, is that the, the, the provision is added that in the case where, where we are reducing the amount of the appeal bond so that it is not an onerous amount, it, it adds that, and I think that everyone read this was probably current law but might need to be restated, the court may require, in conjunction with a stay under this section, any measures that the court considers necessary to prevent the dissipation of the judgment debtors assets during the period the stay is in affect. Article 9, benevolent gestures, is omitted. Article 10, health care. The Medical Liability and Insurance Improvement Act of Texas, that is Article 4590i, Vernon's Texas Civil Statutes, is repealed. And those provisions are placed in Chapter 74 of the Civil Practice and Remedies Code. Those of you that are not aware, what we now have is two complete bodies of law, one of which is, they're everybody else in the world and another is for, for the health care community, and this simply moves 4590i in, over into a chapter of the Civil Practices Code. With regard to liability limitations, the limit of civil liability for noneconomic damages, for each defendant, health care provider,

other than a physician or registered nurse, shall not exceed two hundred and fifty thousand dollars, except that such damages may exceed two hundred and fifty thousand dollars if the award of noneconomic damages in excess of two hundred and fifty thousand dollars is unanimous for that defendant. That is the jury vote must be unanimous. The limit of civil liability for noneconomic damag--damages for each defendant physician, or registered nurse, shall be limited to an amount not to exceed two hundred and fifty thousand dollars. The limit of civil liability for noneconomic damages for all the physicians and registered nurses, who are defendants in an action, shall be limited not to exceed seven hundred and fifty thousand dollars. Article 11, claims against employees or volunteers of a governmental unit. The definition of public servant is enlarged to include a licensed physician who provides emergency or post-emergency stabilization services to patients in a hospital owned or operated by a unit of local government. Article 12, juror qualifications, is omitted. Article 13, which is now called damages, provides that exemplary damages allowed based upon frau--of, exemplary damages will be allowed based upon fraud, malice, or gross negligence. And gross negligence is de--redefined as an entire want of care as to establish that the act or omission or was the result of actual conscious indifference to the rights, safety, or welfare of others. A jury may award exemplary jama--damages only if the award is unanimous. A defendant may introduce evidence of any amount payable to the claimant as a collateral benefit arising from the event and the cause of action under one, the Social Security Act, or, two, a state or federal income disability or worker's compensation act. And those are the only two collateral sources that would be admissible. Article 14, assignment of judges, is omitted. Article 15, school employees. The, this provision is, as I have, at least I have asked for it to be drafted to be 100 percent consistent with the, with the requirements of the No Child Left Behind federal legislation. Article 16, admissibility of certain evidence in civil action, restricts the a--admissibility of certain evidence and actions against not-for-profit nursing institutions, which is, I believe, identical to a bill filed by Senator Harris, and I, when we get to those hearings we--I will turn to Senator Harris for that discussion.

HARRIS : (Inaudible, not speaking into the microphone)

CHAIRMAN : Article 17, limitations in civil actions of liv--liabilities relating to certain mergers or consolidations. This, Members, is the cro--Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all the parties in this, in this matter. Article 18, charitable immunity and liability. There are no significant changes. Article 19, liability of volunteer fire departments and volunteer fire fighters. There are no significant changes. Article 20, certain provisions in contracts. A construction contract is void and unenforceable to the extent that it indemnifies the person against all or a portion of liability caused by the negligence of the indemnitee. Senator Duncan's been working on this issue for many years, and I think I'm gonna turn to him when we come to that item.

Article 21, effective date. This is a change from the House bill. Except as otherwise provided in Articles 15, 17, and 20, this act applies only to a cause of action arising from an occurrence or incident that occurs on or after the effective date of this act. In the House bill, the, the effective date wa--the, the, any, any cause of action that had not been filed at the effective date fell under the new act. What this says is, that any action arising from an occurrence or incident that occurs on or after the effective date. Members, that is my proposal to you. I can tell you right now that there a couple of small changes that I have found that I am gonna have to correct before I, I layout, formally layout, or before I layout a final committee substitute on Monday morning. I, as I have told a number of members, we will not restrict amendments, either in Committee or on the Floor. And if you have, certainly if members of this Committee have, have proposed amendments, well, they will be seriously considered and, and entertained. Thank you for puttin' up with this long process, and we will hear testimony on the bill beginning at 8:00 a.m., Monday morning. This Committee will be, stand in recess subject to call of the Chair. Excuse me.

: (Inaudible, not speaking into the microphone)

CHAIRMAN : Oh, we have copies back here. If, i--if you will please take one, a piece, they may, (there'll) probably be enough to go around. (Gavel)

END OF MEETING

TEXAS SENATE STAFF SERVICES
EV:mms/294/SA050503T3/103103
SENATE STATE AFFAIRS COMMITTEE
EXCERPT: HOUSE BILL 4
MAY 5, 2003
TAPE 3

(Senator Staples in the Chair)

MORRISON : --at this point, have been made parties to the lawsuit, and they're subject to discovery, they're subject to the order of the court. We don't have to worry about limitations of the Hague Convention on evidence on the ability of us, perhaps a European company to, to not allow deposition testimony. We've, we've only had in this area the nonparty at one (point) in the past, and that's starting with (Cypress Creek versus Mueller) where the Texas Supreme Court allowed you to submit to the jury the question of the negligence of a settling person which the Legislature, of course, codified, but that person's established a nexus to, to the facts and to the litigation with the settlement. We're striking into new territory now, and, and a concern that I have about someone who is designated, who is a designee, as opposed to a party is the limitations that, that would then place on the ability of other parties to utilize court order discovery. And, if, if language were added in a new G3, something to the sense of the proposed responsible third party, if not to be joined as a party to the suit, because you can do it both ways under the, the wording, will be subject to discovery procedures that ensure a full and fair opportunity to establish the responsibility of the designated responsible third party. And--

RATLIFF : I think the, I think the Texas for, Texans for Civil Justice just recommended that the designated third party must be subject to Texas Rules of Discovery, is that essentially what you're sayin'?

MORRISON : I, I think as long as--as the rules apply to them as they would to a party, at least to the extent that you've got a full and fair opportunity to, to understand the facts, that something along that line would be acceptable, certainly.

CHAIRMAN : Okay.

MORRISON : And, then a subparagraph 4 under G, which might address the concern that you not be allowed to designate as a nonparty someone where you have a heightened risk of collusion. For example, you have coinsurance with, with one insurance company, or you have an indemnitor-indemnitee, whereby designating someone as a responsible third party, whether they are a party or just a designee. You can then work in collusion to, to come up with testimony that allows the (lion's) share of responsibility to be shifted on to, perhaps, the, the more advantageous party from an insurance company's viewpoint, or from an indemnitor-indemnitee's viewpoint. If somebody involved has a ten thousand dollar policy and somebody has a hundred thousand dollar policy, and you're in a sit--situation like, perhaps, airline--airplane manufacturer where you have relatively few insurance carriers, the carrier might well, and add, add how many zeros you need to those numbers to make them meaningful, but the carrier might well be motivated to, I, I don't want to say the carrier would, it's, it's poss--it's conceivable that someone would be motivated to arrange testimony that allowed most of the responsibility to be shifted onto the party where there's the least exposure. And, and we think the courts are well

equipped to deal with issues of collusion. It may be unnecessary to add it, but, but we think that, when we say we, I think that this Paragraph 4 would address that--

RATLIFF : Okay.
MORRISON : --and that's all I had to say, Sir.
RATLIFF : Questions of Mr. Morrison, thank you very much.
MORRISON : Governor, Senators, thank you very much.
RATLIFF : George Roberts.
: (Inaudible, background conversation)
: Is Governor or Senator (inaudible).
: (Inaudible, background conversation)
ROBERTS : Good afternoon. I appreciate the opportunity to come here today. My name's George Roberts. I'm the Chief Executive Officer of Henderson Memorial Hospital, Henderson, Texas. We're a 100 bed hospital located in beautiful East Texas. I'm representing not only my hospital today, but also the Texas Hospital Association. I'm here today, I'm, I'm not a lawyer here, so you guys don't have to worry about that. I am representing, basically I wanna tell you all my hospital story. Over the last several years, we've experienced an unbelievable increase in our malpractice and liability insurance, and for the policy year 2000, we had a, a rate of a hundred and sixty-nine thousand dollars per year with a five thousand dollar deductible, that, and two years later, our, we were met with a, a, we first dealt with this problem, and we saw our rates go up to three hundred and thirty thousand dollars per year for a fifty thousand dollar deductible. Also at that time we only had two proposals for our business. The following year which is our current policy year we kinda cringed to see what the renewal was gonna be, and we again experienced another seventy plus percent increase in our malpractice insurance. And, that rate went to four hundred and ninety-four thousand dollars per year with a one hundred thousand dollar deductible. So, you can see that our, our rates over just a few year period of time tripled and our deductible went from five thousand dollars per case to a hundred thousand dollars per case. Our next policy year for the policy year 2004 will begin July 1, 2003. Farmer's is our current carrier, they've already de--they've already said that they're not gonna renew. I think they're not renewing a lot of hospitals in Texas, so we're not, that's not gonna be an option for us, and so we don't have a quote yet for our new premium, but I do know that hopefully we'll get some insurance come of the first of July. Really the point is, is that, as you can well imagine, our, our rates have tripled but I can guarantee you our reimbursement for Medicaid, Medicare, and our managed care contracts, we haven't seen a tripling over the last few years. As a matter of fact, our, our, our hospital's experienced overall reductions in Medicaid, Medicare payments, when you consider that our (dish) (sic), our Medicaid disproportionate share payments went from 2.3 million dollars a year in 1998 to about five hundred thousand dollars a year, this year. We're also right now, you, the, in the, in the Senate

and the House, and the conference committee's now talking about a 5 to 10 percent cut in Medicaid reimbursement. We've been faced with huge increases in liability premiums as well as other rising costs of businesses such as labor and technology that you guys are well aware of. Over the last couple of years we've had to dramatically curtail our capital acquisitions and our purchases. You know, we can do this over a short period of time but in the long haul it's gonna be really detrimental to our community. I think that you have seen the Perryman report that really showed that the economic value of health care in various communities, in the various communities all over throughout Texas. Our hospital is one of the top five employers in our community and I can imagine if, I ca--I, I shudder to think that if something ever were to happen to our hospital, what would happen to the Henderson and Rusk County community. Physicianwise, I had my, I have two OB/GYNS in the community, they experienced, one of my physicians could not get liability coverage over the last couple of years. She was forced into the Texas JUA, which is a Joint Underwriting Association pool, that initially doubled her premium, and you know, she, she did, she loves practicing. She's in her late fifties now. She wants to conee--continue to practice, but obviously in the future she's not gonna be able to continue to have a doubling of her increase in, in liability insurance and, and continue her practice. Again, I said at the first part I'm not an attorney or actuary, but what I've learned over the last few months, since I've heard about this bill, the etcetera, is that we need reforms that are gonna impact the severity and the amount of awards in health care cases, and in particular, awards for noneconomic damages. You've heard people talk today, and I've her--you, and I'm sure you, over the last month, you've heard about, I've heard MICRA and I think you've said, ad nauseam from the guy from California, you've heard about this forever, I'm not gonna do that, say that anymore, but we need it, we really feel like we need a two hundred and fifty thousand dollar cap on noneconomic damages that's applied to all providers and is, was out, is without exceptions. If there is an exception to the cap, there's no predictability in the awards. I talked to my insurance broker who's a guy in, in actually in Lufkin, Texas, actually writes our policy, he uses a broker out of Denver, Colorado. I've had, I've talked to the broker in Denver a couple times a day and asked him about the, the variations in the bill. He's advised us that our, if, if, if the cap changes, that we're probably not gonna see the reductions in our liability premiums that we really hoped for. He said, basically that there's a sense that if, if the, if there, if, if there can be unanimous verdicts, unanimous jury voir verdicts, that you're gonna see more and more lawyers take that. The insurance industry feels that more and more lawyers will take these cases to trial, and they're not gonna be able to predict the, the rates. So, we're not gonna receive the, the improvement that we'd hoped for under the cap. So, in summary I encourage you return to the HB 4 language that was passed by the, by the House on noneconomic caps, and I really appreciate you taking the time, I know, Senator Ratliff, and all you guys have sat in these Committee meetings for, for weeks now, and I really appreciate

y'all, ya'lls consideration of this and be happy to answer any questions you'd have.

RATLIFF : Thank you, George. (Any) questions? Appreciate it--

ROBERTS : Thank you.

RATLIFF : --very much. Theresa Bourdon.

: (Pause)

RATLIFF : Would you state your name for the record and who you represent, if other than yourself?

BOURDON : Good afternoon, Senator and Chairman, Members of this Committee. My name is Theresa Bourdon. I'm a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries. In addition, I am managing director of Aon Risk Consultants, which is a actuarial consulting company that provides actuarial consulting to entities that self-insure and need guidance in their risk financing. Aon Risk Consultants is affiliated with Aon Corporation, which is the second largest insurance brokerage company in the world. Aon Risk Consultants is really the leading actuarial consulting firm to the long-term care industry, and I really appreci-- appreciate the opportunity to be here this afternoon to talk to you about the patient care liability crisis that is affecting nursing homes in the state of Texas. I think it's important for the Committee to understand that I don't work for an insurance company, I'm a consultant to nursing homes and other entities that self-insure. And, I think in that context it's important to realize that I'm here to talk about the litigation crisis, more so than just the insurance crisis, 'cause it's really a litigation crisis that i--needs to be addressed here. By addressing the litigation crisis, getting the number of claims and the size of awards against nursing homes under control, you will in effect then address the insurance crisis. I think to have an understanding of the crisis you have to have a few metrics to know just what we're talking about. Aon has been collecting data on the nursing home litigation crisis for the last four years now. Our recent study is available to Members of the Committee who'd like to see a copy of it. In that study, we're finding that, w--well, this study includes about 26 percent of the nursing home operators in the State of Texas. That's about 30,000 of the licensed beds in the state, and in that study Texas costs are projected to reach six thousand per occupied nursing home bed in the state. And the number of claims in Texas against nursing homes are increasing at the rate of 18 percent per year. That's a rate of about 28 claims per thousand nursing home beds. And if you consider that the average nursing home runs, has about a 100 beds that's about three claims per facility per year. In addition, the size of Texas claims has historically been among the highest in the country. A recent study indicates an average of about two hundred and twenty-nine thousand per claim. When you combine the increase in the number of claims and the increase in the size, Texas nursing home operators are incurring annual increases on the range of about 24 percent year over year. If you compare these statistics to the rest of the country, Texas

has the second highest costs in the country, second only to Florida, and Texas costs are more than double the national average. Furthermore, the costs in Texas account for about 19 percent of a per diem Medicaid reimbursement per day. In my opinion, Senator Ratliff, substitute House Bill 4, with a few recommendations that I'll mention shortly, I think is a great start towards addressing these out of control trends. I think it shows there's been a lot of thought and research into drafting the bill and addressing the issue, but there are some loopholes that I feel if not rectified, will prevent this bill from being the model that it can be. In it's place will be an almost reform bill that will leave some segments of the Texas health care indus--Texas health care delivery system continuing to spiral towards financial and quality of care catastrophe. Four recommendations that I'd like to make include, first, remove the punitive damage cap exclusion for injury to the elderly, that's Article 13, Section 41008. The punitive damage loophole, which essentially overrides caps when claims involve injurly--injury to the elderly, I believe is clearly a factor in the reason Texas' costs, Texas has mo--one of the highest average size of loss in the country, and the corresponding bed rate of about 6,000. In, in our database of claims that we've collected, which includes over 20,000 claims against nursing homes, the largest occurred in Texas. It was for thirteen million seven hundred and fifty thousand. Our database includes 14 claims excess of five million countrywide, and this is data we've been tracking since the early '90s, 1990s. Five of these or 36 percent have occurred in Texas. Of the 323 claims greater than a million dollars, 84 or 26 percent have occurred in Texas. Independent studies report similar findings. There's a report out by Harvard's Department of Health policy that, that quotes, in Texas, punitive damages were significantly more common than they were elsewhere in the country forming part of the compensation package in 30 percent of paid claims. This compares to only 17 percent countrywide according to that study. It's important to understand that high potential punitive damages drive high settlements. Bringing punitive damage caps to long-term care patient liability will not only lower the cost of the amount of excessive of caps on very large claims, it will also lower the average settlement on many other claims as well.

RATLIFF : (Le' me) (sic), le' me ask you something. What leads you to believe that, that the punitive damage cap doesn't cover, doesn't cover injury to the elderly. Are you referring to the, to the Section 2204 injury to a child, elderly individual, or disabled individual.

BOURDON : Yes.

RATLIFF : But, that has to be, that has to be a felony, described as a felony and, and committed knowingly and intentionally, do you understand that?

BOURDON : I understand, yes, Sir, that's how the law is written. In practice that loophole, if you will, has been used in Texas to push punitive damages, or at least provide for the opportunity of punitive damages that is driving settlements up. It, it--

RATLIFF : So, you would advocate for damages, punitive damages cap even in the case of a knowing and intentional injury to a child, elderly individual, or disabled individual.

BOURDON : Oh, I'm not an attorney and I, I guess I'm just really here as an actuary trying to understand why costs in Texas are so much higher than elsewhere, and the companies that I consult to consider that component of the law a factor and why punitive damages are an issue when they are sitting down at the settlement table.

RATLIFF : Okay, go ahead.

BOURDON : I, I think it's only fair to state that, that even if that weren't a factor for nursing homes, I personally, as an actuary, think there's still a lot of unpredictability, even if the, the punitive damages cap in Texas applies to nursing homes. The cap is two times actual economic damages plus a maximum of seven hundred and fifty thousand on noneconomic damages. When you combine that with compensatory damages the starting point for settlement is a million dollars, and this is well in excess of the average Texas nursing home claim. And, quite honestly from my perspective, unless we can get frequency under control, even that size punitive damage cap is gonna create a challenge for the insurance industry to get some predictability back. But, at a minimum if we can remove the nursing home exclusion on punitive damage caps, I think we can bring a degree of actuarial uncertainty that's greater than the current level in the way the law is drafted. Moreover, I think they'll be more capacity from insurers who attach above a million, if you're able to bring nursing homes into the punitive damage cap. The second suggestion would be to strengthen the application of the two hundred and fifty thousand cap on noneconomic damages to other health care providers. This is Article 10, Section 74301. I applaud the drafters of this bill for recognizing that caps have to be in this range, at two hundred and fifty to have any effect. From an actuarial perspective I think you've hit a home run in terms of bringing some degree of predictability back to the evaluation of claims. But, I am concerned about the implications for health care providers other than doctors and nurses, given that the cap is not app--applicable to this group if there is a unanimous jury verdict. This essentially creates an unknown variable in the evaluation of losses of hospitals and long-term care providers. I think in the short term, this loophole will not bring insurance capacity back and affordability back to Texas. In the long term, it has the potential to continue to drive settlements well above reasonable levels, particularly for long-term care providers when combined with a threat of large punitive damages. I'm also concerned about the application of the two hundred and fifty cap on a per defendant basis with no aggregate cap for health care providers other than doctors and nurses. At first blush, this may seem logical to apply one cap each to a doctor, a nurse and a facility, but the concern, I believe, among actuaries and insurance companies is that the interpretation of this language may result in what we insurance professionals refer to as stacking. Consider the case, for example, a health care provider like

a nursing home that gets named as multiple defendants including the staff nurse, the LPN, the staff facility administrator, the regional vice president, the, the nursing facility, the, the parent company, the net effect is a potentially unlimited cap for one claim. I think the intent of the language is well meaning, I'm just concerned that the application and practice could undermine the bills objective of bringing litigation costs under control. At a minimum, I believe you should include health care providers other than doctors and nurses in the aggregate cap of seven hundred and fifty thousand, preferably you should limit the total liability of hospitals, nursing homes, and other health care providers to the two hundred fifty cap that applies to doctors and nurses. Third, I'd recommend that you strengthen the application of the five hundred thousand dollar cap on all compensatory damages for wrongful death. That's Article 12, Section 1307, this is really the same, kinda similar to the two hundred fifty cap on noneconomic damages. It applies on a per, per defendant basis, and I think the language needs to be strengthened to avoid stacking. The fourth, and, and, and really final recommendation is to include for-profit nursing institutions in the restrictions of admissible evidence. As a consultant to this industry I can tell you for-profits are leaving the state of Texas as they did Florida. They can't possibly operate in a current environment to even call them for-profits in Texas is a misnomer, expenses are greater than income. Many for-profits in Texas have been here but largely subsidized by their operations in other states. I, I really, I guess I have to ask can you afford to ignore the for-profit segment of elder care when delivering tort relief. Furthermore, should a for-profit nursing home be treated differently from a for-profit hospital or a physician practice. Survey data has created what I believe is an unfair playing field. As an actuary that, that works for many segments of the health care industry including physician practice groups, nurse groups, hospitals, I see the use of serveda--survey data as a clearly differentiating factor in the way nursing homes are treated with res--as compared to mid--typical medical mal litigation. Hospitals and physicians are typically put in the position of defending the specific care to the patient. Due to the availability and permissibility of survey data, long-term care providers are put in the position of defending a quality of the nursing home as measured by regulators. The impact of this on the difference, on the, the impact of this difference on the number of claims nursing homes are forced to settle out of court in their average size is staggering. Again, referring to the Harvard study, they found that for nursing homes only 8 percent reach trial. Further findings that were among claims resolved out of court 88 percent involved compensation payment to the plaintiff. This is nearly three times the rate for typical medal--medical malpractice claims. And their findings were, the average recovery among paid claims, whether resolved in or out of court, was approximately four hundred and six thousand per claim, or nearly twice the size of a typical med mal claim. For-profits are a very large segment of the nursing home industry. They are the segment most in need of relief from litigation, and they are the segment with the most statistically significant database of claims.

Many have been self-insured and they have a long history of claim data. Their data provides the credibility that insurance companies use to price the products. The experience of for-profits is a strong correlation to the pricing of all nursing homes. If this segment does not get protection, there will likely be continued ramifications for the insurance pricing, of not-for-profits despite the best ex-- efforts of actuaries and underwriters to differentiate these two classes of business. As you consider the testimony I've provided I, I would just suggest you give some thoughts to the lessons learned by the nursing home industry in California. The MICRA law in California which contains two hundred fifty cap, two hundred fifty thousand caps has been held out as the model for the nation's medical malpractice tort reform. Most insurance company underwriters I've talked to consider that it's been a success controlling liability costs for hospitals and physicians, unfortunately it's failing the nursing home industry. California's nursing home liability costs are the fourth highest in the country according to our recent study, with a cost per bed close to five thousand per bed. Their costs are increasing for nursing homes of 35 percent per year, year over year. Two factors contributing to this are the application of punitive damages to claims involving injury to the elderly and the stacking of the two hundred and fifty thousand dollar cap on nursing home claims. I think Texas has an opportunity here to pass the most comprehensive health care liability reform in the country and set the stage for other states in the nation to follow. I'd suggest you get it right now, tighten the existing loopholes in your bill. Make sure it helps all segments of our health care, including the segment affecting nursing homes. As I've already mentioned, I don't work for an insurance company so I really can't answer as to whether or not insurers will return if you address the issues I've raised, but my expectation is that hard caps, when combined with survey restrictions, will help improve the litigation crisis providing greater predictability to the cost of risks for nursing homes in this state. And that should be bring back insurance capacity to Texas nursing homes, and it may not happen overnight but it will happen a lot sooner than if you hold the status quo. I'm available to answer any questions.

RATLIFF : You say you, you don't work for an insurance company, you, you're here on behalf of the Texas Health Care Association.

BOURDON : Yes--

RATLIFF : Is that right?

BOURDON : --Sir.

RATLIFF : Are you, are you telling us that in California the two hundred and fifty thousand dollar is not a hard cap per plaintiff as it is for nursing homes as it is for others.

BOURDON : It is not.

RATLIFF : Do they have a different law with regard to nursing homes.

BOURDON : There are other laws in the state that can apply to nursing homes.

RATLIFF : So, you don't fall under the same MICRA provisions that, that doctors and hospitals, etcetera do in, in California.

BOURDON : Not in every case, no.

RATLIFF : Okay, Senator Fraser.

FRASER : The, the term stacking of the two fifty cap, explain to me how in California and in reference the, the way the bill that's before us today, de--define the word stacking.

BOURDON : Stacking is a word that refers to when an intended cap instead of the claim being limited to that dollar amount gets used, is applied once or twice or multiple times. For example, in this case the way the Texas law is written you have a per defendant cap. So then you end up stacking, if you bring a claim against a nursing home you end up stacking the two fifty by naming three defendants, all of whom are employees of the nursing home, or three entities all in a ownership relationship of a nursing home. So, instead of a two fifty cap, you end up with a seven hundred and fifty thousand dollar limit of liability in that case. In California the way the stacking is occurring is they're alleging multiple events in a nursing home with one patient. So a patient may be in for three months and they, they allege multiple events over a three month period and they stack the cap that way.

FRASER : And, I would clarify that the, the bill asks that right now before us, the two, two fifty per defendant does not apply in nursing homes because nursing homes are in another category--

BOURDON : Correct.

FRASER : --that can be, can be broken, so that only applies to doctors and nurses at the current--

BOURDON : Correct.

FRASER : --time. So, it's even (inaudible, overlapping conversation).

BOURDON : The recommendation is that the two fifty applies to the nursing home entity and all employees and affiliated companies of that entity as opposed to allowing it to be just per defendant.

FRASER : And be a true hard cap, and your, I think what you're saying is that if California had implemented a true hard cap per, on, on the occurrence that their notoriety of being the fourth highest in the country probably wouldn't be the case.

BOURDON : I think there are other language differences as well, but the, the point of that comparison is that laws are written with one intent and in their actual interpretations by the courts, they're, they're just interpreted differently in capping results. So, I'm trying to point out to you components of your law that could result in capping, in stacking that you would want to address now instead of waiting for them to be tested in the courts. And, that's the main reason insurance companies aren't gonna come here and sit down and say if you pass HR 4 (sic) with these revisions we will come back. There has to be a period of time in which they observe how that is, the

components of the law are tested in the courts. What I'm trying to do is just to advise you prospectively on what I can see as an actuary is some issues that could result in a different outcome in the law than what you are intending it to be.

FRASER : Wh--you're, are you from Maryland?
BOURDON : Yes.
FRASER : So, you observe many states--
BOURDON : Yes.
FRASER : --activity. You make the statement that for-profits are leaving Texas, as they did Florida, you're, you're seeing that now.
BOURDON : Yes, absolutely. They can't, they can't possibly operate under the current environment. They cannot make the balance sheet work cut out, quite honestly, expenses are greater than, than income in the state.
FRASER : The, the nursing homes that I hear from in Texas, I think we're, we're almost to the point where there're very few that are insuring because they can't get insurance or afford it. Most have gone bare and they're a lawsuit waiting to happen, that, once that happens, it will, will force 'em into bankruptcy.
BOURDON : Right, and--and--and th--and an obvious extension of going bare is then you have nothing for a truly in-need patient who, who has a right of a claim.
FRASER : Thank you.
BOURDON : Thank you--
RATLIFF : Senator Armbrister.
BOURDON : --for the oppor--oh we have more questions?
ARMBRISTER : Yeah. Tryin' to analyze your numbers you've given us here. You say there's in your study you did 33,000 licensed beds, and it's projected to reach over six thousand dollars per occupied bed for 2002. So, that would be a cost of about a 198 million dollars.
BOURDON : That's correct, for the participants in the study that's just 26 percent of the beds in the state, so obviously this is a cost to Texas, well in excess.
ARMBRISTER : Well, I mean 6,000 times 33 is a 198 million, right? Then you make, you also say that averages out in, current rate of 28 claims per thousand beds, so that would be about 924 claims. If there are 33 times 28, that's 924. There's 33 thousandths in 33,000, and you multiply that times what you claim is the average claim costs, that's twenty-one million, eighty-four thousand. So where're you gettin' a hundred and ninety-eight thousand dollars, if claim costs are only 21 million?
BOURDON : I'm not following your math on this, I'm (inaudible, overlapping conversation).
ARMBRISTER : Well, it's real simple, you take 924, that's 34, that's 33 times 28--

BOURDON : Nine hundred and twenty four, 924 is, is what your--

ARMBRISTER : --that's 33, 'cause there are 33 one thousandths in 33,000, right? And you say there's 28 claims per thousand, so 33 times--

BOURDON : (Inaudible, overlapping conversation)

ARMBRISTER : --28 is 924 claims per 33,000 beds, and then you take 924 times the average claim size of two hundred and twenty-nine thousand and that comes out to twenty-one thousand eighty-four. So, I'm wondering why--

BOURDON : Twenty one thousand and eighty-four, I'm not following that twenty--

ARMBRISTER : --twenty-one, excuse me, twenty-one million, eighty-four thousand, so, I'm tryin' to determine where the six thousand dollars per, per bed comes from.

BOURDON : No, nine--924 claims times that, that's just short of a 1000 claims times an average size of a little over, little over two hundred thousand is a 200 million a year pro--cost, just like six thousand times 33,000 beds is, is just roughly 200 million, they're consistent. I mean, there's some rounding going on there, but they're consistent.

ARMBRISTER : All right.

BOURDON : And, that's just 26 percen--of Tex--26 percent of Texas.

ARMBRISTER : Okay.

BOURDON : This is almost, this is at least a quarter of a billion dollar a year costs--

ARMBRISTER : Okay.

BOURDON : --to the nursing homes in Texas.

ARMBRISTER : All right. On your last page, that last paragraph, you state, actually it's the next to the last sentence, but my expectation is that hard caps when combined with survey restrictions will help improve litigation crisis. What are survey restrictions?

BOURDON : The surveys that are part of the regulation of nursing homes that receive payments from the government, Medicaid, Medicare are used as evidence in cases against nursing homes. And, the surveys usually talk to--

ARMBRISTER : Surely you're not advocating that we reduce the level of surveys on nursing homes?

BOURDON : Oh, no just the admissibility of that as evidence when the claim--

ARMBRISTER : Yeah, well, that's not what this says--

BOURDON : --is about specific care.

ARMBRISTER : --this says survey restrictions.

BOURDON : In the context of the recommendations I've made regarding surveys to not allow them as evidence in cases against a nursing home that are focused on alleged failure to provide appropriate care to a, a

patient. It, it goes to the point--

ARMBRISTER : From an actuarial standpoint, in the area of surveys, what do the actuaries look at? Do they look at surveys or do they look at surveys where actual violations have occurred?

BOURDON : --the actuaries don't look at surveys at all. Surveys are used in trials to, in cases where the allegation is about patient care, but surveys are used to really provide a picture of the overall quality of the nursing home facility, and, and it goes to the point I was making that, when you're talking about med mal claims against a hospital or a physician, typically the allega--you know, you're focused on the care provided to that patient, and how that resulted in the alleged injury. With nursing homes more often than not there really, the focus is put on the overall quality of the nursing home, as part of the, I guess the plaintiff-attorney strategy for arriving at a jury verdict or settlement, as opposed to focusing on the qua--the care specifically delivered to the patient. (I mean), we've got a problem in nursing home litigation. The number is out of control and the size if out of control. (I mean), two years ago, I thought hard caps alone would have solved the problem. Now, I realize that there's also a frequency issue here that certainly needs to be addressed as well, and I think surveys are one of the, the, the evidence, the allowing surveys as, as evidence, is one of the areas that has been recommended by the nursing homes I talked to, as an area that could help lower frequency. It, it just creates an unfair playing field, because they're generally discussing the quality care of the facility as opposed to the specific care of the patient that the claim is focused on. I'm not sure if I'm making myself clear on that, did--(will) you follow the--

ARMBRISTER : Well, I just wanna make sure because you included it in but then you told me that actuaries don't look at surveys, and--

BOURDON : --no, we look at clean counts.

ARMBRISTER : --I'm, I'm not, I'm not so much concerned about surveys where there, somebody goes out, an employee of the state goes out and does a survey and alleges some violations. No, I don't think those oughta be in, but only those that are found to be bonafide ought to be admissible. I mean when I went--

BOURDON : What, what you're--

ARMBRISTER : --I said before in this Committee, when I went in and found my mother all black and blue--

: (Inaudible, background conversation)

ARMBRISTER : --you can bet I want that admitted.

BOURDON : I think--

: (Inaudible, background conversation)

ARMBRISTER : You can bet and so would you, if it was your mother. I didn't file any lawsuit--

: (Inaudible, background conversation)

ARMBRISTER : --she was just old and she died. But I'm tellin' you, when you come in here, and you, right in here, and you, in your language

and you say survey restrictions, I'm gonna ask you what that means.

BOURDON : It's in--

ARMBRISTER : If you can't tell me what it means--

BOURDON : --yeah, it's, it's the restriction.

ARMBRISTER : --it adds an incredibility to everything you've said here, at least in my mind.

BOURDON : Yes, Sir. I'd like to reinstate the credibility, cause I'm really here to help you draft a bill that's gonna, to, to, to really do what you intend it to do. The issue here is that you've drafted a bill that does restrict the use of surveys for not-for-profits, but you've excluded for-profits in that and, and all I'm talking about there is to bring the for-profits into the law, that's all. Just to, to, to treat them exactly how he's drafted the bill for the not-for-profits, that's all.

ARMBRISTER : Thank you.

RATLIFF : Thank you Ms. Bourdon.

BOURDON : Thank you, I appreciate the opportunity.

(DISCUSSION ON OTHER BILLS)

(DISCUSSION ON HB 4 RESUMES)

RATLIFF : Michael Bunn.

: Nichol.

RATLIFF : Nichol Bunn. I did that the other day, didn't I?

: (Inaudible, background conversation)

: (Laughter)

BUNN : That's okay, Senator, my parents misspelled it, so.

RATLIFF : (Would you) state your name and who you represent please, Ma'am.

BUNN : Yes, Sir. My name is Nichol Bunn. I represent Wilson, Elser, Moskowitz, Edelman and Dicker. I'm a lawyer with that firm. I represent health care providers, specifically nursing homes. I appreciate you giving me the opportunity to speak today and to comment on the substitute bill, and I'd like to begin by reading a quote to you. We are at war. Those words were spoken by Barry Alexander, President of ATLA, the Association of Trial Lawyers in America. It is a plaintiff's organization. The words were spoken at the national convention in Hawaii, and the statement was referring to tort reform. According to the national law jural--journal, everyone interviewed at the convention characterized tort reform as a crisis for the profession, not the medical profession, not the health care profession, not the insurance profession, but a crisis for the legal profession. On April 14th, the Texas Lawyer published an article by a prominent plaintiff's attorney in Dallas, wherein he was

commenting on the effects of tort reform. And, in his article he has stated that the quote, real impact, end quote, of tort reform would be that plaintiff's attorneys would not make as much and would not be as willing to take the case. Less than a week later I received a form letter from that same plaintiff's attorney, it was a request for referrals. It was a letter he sent out assuring colleagues that he would take med mal cases even if tort reform passed. Senator, I think that the concern here should not be for the bottom line of plaintiff's lawyers, rather it should be for the accessibility and the affordability of health care, and in order to do that we have to ensure--

RATLIFF : Ms. Bunn, I'm sorry, but I take exception to that inference that what we're doing here is worrying about the bottom line of plaintiff's lawyers.

BUNN : --and, I did not mean to infer that you were doing that.

RATLIFF : Okay, I'm sorry.

BUNN : What I'd like to ensure--

RATLIFF : That's what I heard, I'm sorry.

BUNN : --well, I apologize if that's the inference that you got. What I want to ensure here though, is that, in order to make certain that we have health care accessible to the people of Texas is, that we have health care providers remaining in this state, that they're not leaving the state. And in order to do that, I think that we need to make sure that insurance companies are providing insurance to these health care providers, which my understanding is right now is what is fueling--

HARRIS : (Inaudible, not speaking into the microphone) some of us on this Committee that haven't fought for years (inaudible, not speaking into the microphone) and fought for years to try to make sure we have nursing homes available in this state to take care of our elderly.

BUNN : I believe you have, yes. And I believe that's what you're trying to do here because you have initiated a cap on noneconomic damages, which in my experience and my research is, is a possible way of encouraging insurance companies,(which), to return to Texas, and is definitely a way to help at least solve the, the crisis, the current crisis. And I appreciate your effort and I looked at the substitute bill and I have some questions and some concerns that I'd like to raise. First and fo--foremost, I noticed that the cap, i--it differentiates between positions and registered nurses and other health care providers including licensed vocational nurses, and I don't understand why there's a difference between the health care providers when the problem is the same for all of them. In fact, it may be even worse for nursing homes. For over the, initially four insurance companies in the State of Texas who are currently covering nursing homes or offering coverage to them. The premiums for nursing homes have sti--sky rocketed seven million dollars more for 57 million dollars less in coverage. The, the rate of insurance per be--per bed has increased dramatically over the years, and the re--the research is that claim costs have

absorbed some rate of Medicaid reimbursements, and this is money that could be used to improve the quality care in the homes themselves. So, I, I think that the predictability that would be afforded by a hard cap which you have extended to physicians and to registered nurses could and should be considered for other health care providers including nursing homes. I notice also, that in your substitute bill that you have changed the cap from a per claimant basis to a per defendant basis, and, and I'd like to give you a little insight with respect to dealing with insurance companies and the predictability of the cases, is you're not giving me as a lawyer who is in charge of, of reading these, the, your rules for our clients, and for evaluating the cases, you're not giving me any guidance as to who the defendants are. It's on a per defendant basis. Are you talking about the administrators and the nurses in a nursing home for which the nursing home is a vicarious liability, vicariously li--liable, is that one defendant or will you consider that as multiple defendants. It's not really spelled out in the substitute bill and it could really help us if it were. The, the loophole in the substitute bill which says that the cap of two fifty could be invalidated upon a unanimous jury verdict. Kind of a logistical nightmare for me sitting here without any guidance from you as to how I'm supposed to, in trial, determine whether or not the jury's verdict was unanimous. Are you talking about another jury question, are you talking about polling the jury afterwards?

RATLIFF : I have had it suggested that we gonna either have to stipulate that or, or require the Supreme Court to adopt rules about jur--jury instructions on that matter, because, had some long discussions about how it is that we do that. And, I know that the Supreme Court has been reluctant to, to tell the jury everything, but they probably are gonna have to know about the two hundred fifty thousand dollars if they're gonna make a, a knowledgeable decision. If they're gonna, if they're going to know whether they need to keep working to get a unanimous verdict, I guess is the, is, is the way to put it. So, I understand we (sic) probably gonna have to, to address that question.

BUNN : Well, I appreciate you noticing that there is a, a concern there for us, logistically on how to do it. I, I, I'm concerned about the provision that allows a unanimous jury to bust a cap, mostly because realistically in cases with nursing homes this, in my experience, is where plaintiff's attorneys really push to get their awards, because in nursing home cases the economic damages are limited. And, they don't want punitive damages because otherwise you have to deal with taxes and the fact that there may be no coverage for punitive damages. So the push is to pu--to really concentrate the damages in the noneconomic arena, and we have some excellent plaintiff's attorneys in Texas, and they're very good at doing that. So, do I think that they'll be successful in getting unanimous jury verdicts, yes, I do. Do I think that insurance companies think they'll be successful in doing that--(verbiage lost due to changing of the tape)--

END OF SIDE 1

SIDE 2

BUNN : --that can do taxes, and I'd like for the Senate to consider that when taking a look at, at the bill. I have a question also with how the cap is u--is to be read in conjunction with the wrongful death cap damages. I notice that under Article 13, it says that the cap on wrongful death is to be used in addition to any other cap. Well, does that mean in addition to this two hundred and fifty thousand dollar cap? It's, it's a little vague and unclear. And, then if I have a situation where I have a resident who is not deceased and the jury comes back with a unanimous verdict, and there is no hard cap cause 4590i has been repealed, does that mean sky is the limit? Is there no cap at all afforded to other health care providers in that situation? So, these are questions when I'm looking through it that, that I have concerns about. I think it'll be extremely possible that plaintiffs attorneys will get a unanimous verdict, especially if the TDHS survey results are allowed into evidence. Now, I notice that you all, under Article 16, repealed Section 32021 of the Human Resource Code (I and K) which says that the, the survey results are admissible as they would be, as any other type of evidence. My concern is, is that you also specifically said that they are not admissible in civil cases with respect to nonprofit nursing homes. Are you telling me as a, as a lawyer who has to rely on statutory interpretation laws, that you are remaining silent on this issue. And, by the mere fact that you have specifically excluded nursing homes from your language, you're only including nonprofit nursing homes. Are you telling the court then that, yes, these records are admissible.

RATLIFF : I, I swore I (wadn't) (sic) gonna say this every time somebody came up, but as a non-lawyer, it is my understanding that by being silent what we're saying is the, the records that are admissible are those that are governed by the, the rules of procedure, that is the, the rules of evidence.

BUNN : And, that would be great if the intent were spelled out.

RATLIFF : Okay.

BUNN : As a lawyer reading that I could foresee an argument by another lawyer saying, well the Legislature said what it intended to say, that the, the, the surveys are out with respect to nonprofit org--organizations. If the Legislature had intended to include for-profit organizations it would have done so. By the fact that it failed to include them means that they're admissible.

RATLIFF : I see, okay.

BUNN : So, that is a concern in the language that I, I do have with respect to the admissibility of the records. One other piece of the submitted bill that I have a question about, and I would appreciate ya'll taking a look at is Article number 1, Section 1.04, which you have gratefully cleared up the question of whether or not we can have interlocutory appeals with respect

to the expert reports. The way th--your language is written clearly states that if a plaintiff's attorney fails to file an expert report within 90 days, and a judge grants my motion to dismiss, and to award costs that, that, that order is appealable, is, is subject to an interlocutory appeal. However, what your language does not address, and which I run into in my practice moreso than the failure to file an expert report is, is that expert report sufficient. You have defined expert report to meet four, four criteria, and the Texas Supreme Court has been very good about establishing what each of those criteria mean. But, where I have an expert report that doesn't meet those four criteria or I believe it doesn't and I file a motion to dismiss, which is either granted or denied, then, (then) I take that on a interlocutory appeal. The way that your language is written under 1.04 of Article 1, it really doesn't address that, and I have, I can foresee some legal battles over that, unless it's specifically spelled out. You're kind of wrinkling your brow does that--

RATLIFF : I was under the impression that the opportunity for interlocutory appeal was as much for the defendant to, if the judge would not dismiss. It was as much for the defendant to go up to force the judge to dismiss if it were, if it were not, if the report wadn't filed.

BUNN : Absolutely, and that's what we'd like to do. I mean the way it's written now it specifically addresses the failure to file an expert report and that's great. But, I'm worried about the, the situation which, I mean most plaintiff's attorneys now are very astute and they file their expert reports timely, but they don't always meet the four criteria. So, if I'm challenging a report, saying that it has not met all of the criteria, the deadline has passed and I am entitled to a dismissal, and the judge either grants or denies my motion, may I take that up on interlocutory appeal?

RATLIFF : Well, of course, the way it's written the judge can give 'em another 30 days to cure that deficiency. You're talking about after that?

BUNN : Yes, Sir.

RATLIFF : Well I, that was my interpretation was that, that was something you could take up, but I'm surprised that there's doubt about it.

BUNN : Yeah, a--and the way I read it, and I wri--went strictly by the language, I could see an argument articulated where since it was not specifically spelled out by the Legislature, this Legislature did not intend for that to be taken up on interlocutory appeal.

RATLIFF : Okay.

BUNN : I appreciate your time. I appreciate you listening to me. Again, if you have any questions I'd be happy to answer them, or at least get you the information that you need.

RATLIFF : Okay, questions? Thank you, Ms. Bunn.

BUNN : Thank you.

RATLIFF : Dick Stebbins. State your name and who you

represent, please, Sir.

STEBBINS : My name is Dick Stebbins. I represent myself, and I'm from Longview, Texas. The, I, I urge, I urge the Committee to treat nursing homes like other health care viders--providers such as doctors and registered nurses. We have had a target on our back, that's why the insurance rates got so high, for the last several years, and this will keep a target on our back. One of the things that we'd like to see is the survey reports are not admissible unless they relate specifically to that patient. And let me explain why I say that, and, and there was some question from Committee Members about that. Hospitals have a regulatory body called joint commission that has certified them for all these years. They have not had certification by the State of Texas or by the federal government. They've relied on the joint commission. Joint commission in 1968 when Medicare started, was not available to nursing homes. We have be--joint commission has developed nursing home certification rules, but many years ago just not at the very inception. But because the exotic regulatory system that has been set up by the federal and state government, primarily the federal rules that the states adopt and try to regulate, and get paid to, through the, the fed, the federal government's work in that regard, has become, there are so many employees in that, there are so many, well, I'd say bureaucracies at stake that it has never been allowed for nursing homes to use the same form of certification. The joint commission is, is privileged information. The survey reports, which are similar to joint commission, except it's done by the government, should be privileged information. Why should it be privileged? Well, because we are about, joint commission is there to insure the hospitals, in fact, have systems in place to improve themselves, to monitor and improve themselves, since we can't use that, the state is in fact, the state regulators are in fact the quality committee. They're the quality assurance peace for nursing homes, and, and of course you can't improve quality unless you discover errors you've made, or unless you discover systems that are at fault and you correct them. And, so, when a survey report, reports that the food in refrigerator was at 46 and it shoulda been at 45 or that the freezer was at five degrees below zero, and it was supposed to be at 15 degrees below zero that, that's a part of a quality improvement. And to have e--every bit of that put out, the whole survey document put out that may or may not relate to a specific patient in the claim that a plaintiff is making, brought to the jury's attention and, and, and vilified before a jury, and these are the, like I say, the very things that we do to improve nursing homes is, is a travesty, and this is why our, our, our rates have gotten so high. This is why the plaintiff's win most cases or get a very high settlement, and, and that's what, that's why survey reports should not be admitted. That's, because that, in fact, is the quality improvement system for nursing homes as we now know them. I would love to have joint commission be the way we do it, because you're happy with hospitals, the public's ha--happy with hospitals and they're, they have vilified nursing homes. And, it has kept this large, large number of surveyors busy for many, many, many years. The

general public does not seem to be aware that we have rules that we follow and that there are people that police it but, but you all know that. So, if, if we can do those modifications, have only those regulatory reports that relate to a specific patient, not to some other patient admitted, that, that would be, go a long way to correct the problem. The, and, and if we don't do something we have now got more than half of the nursing homes that have been unable to buy insurance for two reasons, insurance is not available in the state, and, secondly, it is so costly that it exceeds the income of the, the net income of the nursing home, and so it, so it can't be purchased. Many of us have used a system of self-insurance through a captive that is under very strict Medicare rules, and I'd like that to be recognized in the, in the tort reform bill and in the insurance piece of it so that the State of Texas could, in fact, consider that in the cost reports in the rate making process. So, if there's any, I don't know if anyone has any questions, I'd be glad to try to answer 'em.

RATLIFF : Thank you, Dick, appreciate it.

STEBBINS : Thank you for your time.

RATLIFF : Pam Beachley. Pam, you're up.

BEACHLEY : I'm sorry.

RATLIFF : That's all right.

BEACHLEY : I apologize. My name is Pam Beachley, and I'm here on behalf of Texas Association of School Boards, and I struggled on what to check on the card because we're certainly not against the bill, we just have two sections, Section 4.05 and 4.08 which is on the employer's submission, the worker's comp employer's submission of fault. And, I know you've heard about this issue from other witnesses, so I won't repeat their testimony. We have provided an amendment and I don't have it with me but I can sub--resubmit. Basically, I think the only thing I would, we do have written testimony by the way, the only thing I would point out that's a little different from what you've heard from others on this issue is that in terms of the bargain on comp and to choose whether or not to buy your way out of the liability by being a comp subscriber, we don't have those choices. We have to provide worker's comp and we don't have the option of weighing whether the comp costs along with any increased discovery costs we may get because of the submission of fault. We can't look at that like a private employer and say, we don't wanna pay that price any more, we'll provide these benefits and in a different way. Comp's mandatory for political subdivisions as well as for the state and so that's why we are asking for this amendment.

RATLIFF : Thank you, Pam.

BEACHLEY : Your welcome, thank you. Thanks for waiting for me.

RATLIFF : We didn't wait, you walked in as I called your name. Keith Cole. State your name and who you represent, please, Sir.

COLE : Good afternoon, my name is Keith Cole and I represent M & I Electric Industries. I wanna go ahead and convi--confine my

comments you've heard, the testimony I guess under the first House Bill 4, as to the, the general points. But, I do have some things that I think in the wording, that could be cleared up to make this a better situation for everybody concerned. (Le' me) (sic) first say that under the current wording of Subsection B, if my employee, as a contractor, gets hurt and the plant owner is 90 percent negligent, I will end up paying 100 percent of that claim. However, if you take the converse and say that one of the plant owners employees was hurt, and I was 90 percent negligent, I'll still pay 90 percent of that claim. So, it goes one-sided, and so, Senate Bill 1693 has a provision that makes it fair across the board. Alternatively, what you could do, is if you take that, if you want that concept of Subsection B to remain in there, if you made it reciprocal, in other words you can opt out of the prohibitional in passing of indemnities down to another party by saying if both parties agree to indemnify the other for claims against their employees, in that situation it becomes fair, than in a case where my employee was hurt and they were 90 percent negligent, I'll pay 100 percent, but the reverse if their employee got hurt and I was 90 percent negligent they would pay 100 percent. It makes it fair, right now it's one-sided, I'll pay either way. N-- now if you take the, the argument against this has always been that the contract, the owners say that they need to be, to have indemnities because they are held liable for the claims of the subcontractor because you can't submit the subcontractor as a responsible third party. I believe under Article 4, although I haven't seen the proposed amendment, under Article 4 you will be able to submit the employer as a responsible third party. So, now that argument is no longer valid, they will not be held liable for any negligence of the employer 'cause they will get to submit that person. So, I think that that argument goes away and that the provisions that you have here will work well, if you make them reciprocal or just say in general, you can't pass your liabilities off no matter what, what agreement you try to make, no matter who you indemnify. Either one works out, at least to be fair. The other thing that's lacking here is the insurance provision. It was in 1693 and it was in some of the language that's got, that came along the way of House Bill 4, but got amended out. Just, the contractual part only takes care of half of the problem. If I name somebody who's additional insured under current law, they will make a claim under my insurance policy even if the indemnity is not valid or enforceable. So, I would still recommend and, and ask the Committee to put in the insurance provision that was originally in House Bill 3201 which was amended on to House Bill 4, or alternatively the same language as in thir--as in 1693 for the Senate. And then finally if I looked at some of your language under Subsection A which is, this is for Article 20 by the way, I guess I didn't mention I was testifying for Article 20. Section 145002 Subsection 1, talks about, if an independent contractor is directly responsible to indemnity, in that case, we say they must be directly responsible, and when you go to Subsection B, we say it can be any subcontractor of any tier. Again, if you wanna make them consistent, and I, I think we do, that Subsection A's provision says that any indemnity agreement

not just for a contractor directly responsible to the subcontractor, but of any tier, that allows them to be equal and to flow all the way down so that I may not be stuck in a court case where the court says, well that guy wasn't really directly responsible so therefore, you can be forced to indemnify him. Does that make sense? It's convoluted wording but--

: (Inaudible, overlapping conversation)

COLE : --we got two different concepts in there, and I apologize, it--

: (That's all right.)

COLE : --floats around in the head a little bit. Those are essentially my comments, I mean the, Article 20 has a lot of good provisions in it but right now it's a (sic) very one-sided to the subcontractor, and it needs to go both ways, one way or the other, either by making it reciprocal, under Subsection B, or taking Subsection B out of it. And then just saying, look, you cannot (then pass) your indemnities down from one party to the other, period. And, if we add the is--insurance provision, it'd pretty much wrap this up and make it a really good solid article that will help companies all over the state.

RATLIFF : Okay.

COLE : Any questions.

RATLIFF : Questions for Mr. Cole.

COLE : Thank you for your time.

RATLIFF : (Thank you.) Appreciate your coming. Bruce Malone. I'll be right back.

: (Pause)

CHAIRMAN : Dr. Malone, if you'd please state your name and who you represent?

MALONE : Yes, thank you. My name is Dr. Bruce Malone. I'm a practicing orthopaedic surgeon here in Austin. I am also a member of the Texas Medical Association, Board of Trustees, and on behalf of the 38,000 members of the TMA, I wanna thank the Members of this Committee for the tremendous efforts on this issue and their proposal at hand. The Texas Medical Association continues to be alarmed by the striking loss of access to care in our state. As a result, of, health care lawsuit abuse has driven up the cost of professional liability insurance for our members. We believe that a comprehensive effective reforms (sic) in the civil justice system will salvage health care access by providing relief from the threat of frivolous lawsuits, the burden of defending undeserved suits and the uncontrollable cost of liability insurance. We support proven solutions for this problem and, of course, the best known solution over the last two decades are the California reforms that you know as MICRA, and I'm not gonna belabor that, but they include a two hundred and fifty thousand dollar hard cap on noneconomic damages. But, because of the serious nature of this problem, we continue to evaluate all possible solutions. In response to CSHB 4, we have sought an expert opinion from an independent actuary to help us assess these proposals. We will share the final results of that

study as soon as possible with the Committee and I hope you understand that--

: (We do.)

MALONE : --we got the bill last Thursday and we hired someone over the weekend, and he's working as hard as he can but we just don't have the final report.

CHAIRMAN : Do you have a time estimate of when you expect the report?

MALONE : It'll be Wednesday, I think.

CHAIRMAN : Wednesday of this week.

MALONE : Yes. Yes, (thanks).

CHAIRMAN : So, a couple days, great.

MALONE : We are grateful for the provision in the committee substitute of a cap that applies to physicians. An important preliminary finding is that if pro--all health care providers are not protected equally litigation costs could actually increase as unprotected health care providers shift costs to the protected ones. Regarding the cap, of course, a per claim as opposed to a per defendant approach will produce the greatest predictability to ultimately provide premium relief and stabilize liability insurance markets over the longer term. The challenge to the Legislature is deciding whether to truly moderate claim severity by making the cap on a claim or mitigate claim severity by making the cap per defendant. We are afraid that making it per defendant then carrying it at, or having three and making it at seven hundred and fifty thousand dollars is not going to produce a result that will affect runaway costs. Initial feedback also indicates that the effective date of legislation is most effective when applied to claims filed. Otherwise the benefit of the legislation will be phased in, not applied immediately. Now, obviously we are seeking solutions with immediacy because of the immediacy of our problem, as in the case of allowing voters to approve a constitutional amendment to address the crisis facing us today. In addition to the reforms already under discussion I would like to draw your attention to additional consideration in addressing the, the frequency side of this program. Regarding expert witness testimony, TMA strongly supports the requirement that a medical expert witness obtain a certificate from the State Board of Medical Examiners recognizing that expert testimony. This would clarify the authority of the BME over out of state physicians who offer nonscientific or spurious testimony. We suggest the Committee consider Senator Janek's proposal, SB 1172, on the need for a certificate on medical expert testimony. TMA also supports a bad faith cause of action to allow defendant's in professional liability cases to challenge those who would file frivolous litigation. We are in the process of providing the Committee with suggested language provided for a bad faith cause of action. In closing, I would like to share with the Committee the guiding principles that TMA developed as we set out to address this medical liability crisis. The TMA believes that any medical liability tort reform package must improve patient access to care by eliminating lawsuit abuse, ensure the

availability of a fair remedy for any person harmed by medical negligence, promote improvements and patient safety, hold negligent health care professionals and facilities accountable under the law, and protect responsible health care professionals and facilities from abusive non-meritorious lawsuits, hold irresponsible attorneys accountable for filing of abusive non-meritorious lawsuits and ensure that judges enforce statutory remedies for lawsuit abuse. We look forward to continue, we look forward to continuing work with this Committee in the legislative process to find a fair and workable solution to the crisis. Thank you for considering our comments today.

RATLIFF : Thank you, Dr. Malone. George Scott Christian.

: (Pause)

CHRISTIAN : Thank you, Mr. Chairman and Members. My name is George Scott Christian. I represent the Texas Civil Justice League, and we have filed our comments with you and much of what we have to say has been covered, and I'll be very brief, make three points. The effective date which you've heard some about today. We would prefer a, a date certain in the bill that would apply to, to actions commenced on or after that date, and I believe Texans for Lawsuit Reform has submitted some language to you already. And, we fully endorse their approach and the approach that has been taken in prior tort reform bills through the years. The second issue that we have is with Article 20 and we would prefer to see that handled in another venue, in another bill. We have spoken with Senator Duncan, who we understand is working on that and, and have some ideas that we're pursuing with him and will perhaps be talking more with you about that issue. The third issue is in the Section Article 13, that deals with damages, particularly the definition of malice and gross neglect in the punitive damages section of the bill. We would like just to make sure that the 1995 definitions that were codified from the (Moreale) decision of the Supreme Court are restored to the bill and believe also the TLR is, is proposing specific language on that. Other than that, we fully endorse the comments that you have gotten from TLR and their suggested amendments and we have nothing further to add.

RATLIFF : Thank you, George Scott (sic). Questions? Appreciate it.

CHRISTIAN : Thank you, Mr. Chairman.

RATLIFF : Paula Sweeney.

: (Pause)

SWEENEY : Thank you, Mr. Chairman. I'm Paula Sweeney. I'm here on behalf of the Texas Trial Lawyers Association and against several sections here of House Bill 4. I'd like to start if we could, if it's all right with the Chair with the section on caps, and talk about some of the aspects of that, and then focus on certain specific areas of the bill. And, and first, I'd like to say as many have, thank you for the attention and the time and the effort that's bee-- been put into this. It's obvious that some of the comments previously made have

been heard and are reflected here and, and we're very, very grateful for your deliberation. Several of the comments that have just been made by witnesses to the effect that the caps are not severe enough cause me to, to want, and to need to go through with you the caps that are in place, because we have heard from starting in the House from Chairman Nixon and from a whole hosts of witnesses here that this bill intends for victims to be able to get their economic losses uncapped. This bill does not do that. This bill does cap economic losses. This bill does cap loss of earnings in all wrongful death cases, so that, not in the injury cases but in wrongful death cases. So what you have in a wrongful death case is, in addition to the other caps that have just been added, a hard cap that covers everything except medical expenses. So earnings, earning capacity in the future, household services, loss of inheritance, any other economic or pecuniary loss is, in fact, subject to the cap. And, I think the testimony that's been presented both here and in the House to the effect that we don't, that these, this bill does not cap economic loss has been incorrect. So, that's a, a critical component for this Committee to be aware of. In addition, in a wrongful death case, to capping everything at the existing CPI adjusted cap folded in on top of that will now be the two hundred and fifty thousand dollar new cap that is contained in, in the bill with which we have the same philosophical opposition that we previously had and just so you know that hasn't gone away, but I won't go, not going back there. It is however, critically important that the distinction that's made between the types of health care defendants in this bill be preserved. That there is a distinction and we've heard ad nauseam the difficulty physicians and certain nurses perhaps are having, getting coverage. We've not heard that from a host of other defendants and the, the ability with the unanimous jury verdict in those cases to be able to recover full compensation is critical. And, so we, we would urge that that distinction be retained as the bill continues through its permutations. But, there are more caps that come into this than just those and that's what I really want the Committee to focus on because we keep hearing there's no certainty here and the caps are insufficient. In addition to the death cap which caps earnings, in addition, to the two hundred and fifty thousand dollar cap that caps intangible damages in all cases, this bill folds in to the hundred thousand dollar sovereign immunity cap, all physician employees of county or state hospitals, city or county hospitals, so that there will, then in addition to all of these other caps in those cases there is a hundred thousand dollar cap, period, available to the claimant for earnings, for pain and suffering, for any element of damages. Those folks, physicians in those capacities have never been under those caps for very carefully laid out policy reasons embraced by the Legislature initially when it passed the tort claims act and created the waiver of sovereign immunity. There was never sovereign immunity for employees of the sovereign, it was for the sovereign, and, and when the limit, the waiver was created and the statute was written in was specifically written such that physicians who are engaged in the practice of doctoring, not in governing, not in allocating governmental resources, not in trying to figure out how do we

take care of large indigent populations, the policy decisions, but the folks who are practicing medicine, that they be held to the standard of care of all physicians and that they be subject to the same restrictions in the, and the same consequences of negligence as all physicians. This bill takes all of those physicians, and when, when we talked about it briefly before, very briefly, we talked about residents and interns but it's not just residents and interns, it's also any attending physician, professor or associate professor, assistant professor, the folks who come over and do a clinical rotation, a half day a month technically, probably the way this is written qualify, even though there's been certainly no showing that they have trouble obtaining insurance for those services. The residents and interns that are insured under the various schools that they work for and the physicians who are attendings are all i--invariably covered by a variety of trusts, and, and, and not the go out and get commercial insurance where they're having trouble finding coverage issue that we're hearing about. So, on the one hand, there's been no showing of need, there's been no showing of difficulty getting coverage, there's been no showing of problems getting coverage for residents, interns, attendings or, or faculty members. And, on the other hand we're having a radical departure from long established law where there is no immunity for folks who practice doctoring just because they do it in a county facility. So, that's a, one, is an enormous change, two, there's been no need shown for it, nor has it really been addressed by any body whose come before ya'll. And, three, it is an en--enormous additional cap, or actually a tiny additional cap that's being placed on recoveries of victims. In addition to which it makes the proof of liability for those folks extremely difficult because of the phrasing of the tort claims act. You, it, you, you cannot simply prove it was negligence, it was a failure to diagnose, it was below the standard of care. You've got to come within some very specific language about the negligent use of tangible property and so on. So, that, that is something that hasn't been addressed that I think may be somewhat an unattended consequence that I certainly want the, the Committee to be aware of. In addition to those caps, there's been created a cap for poor people. There's a half million dollar absolute cap for any body who is cared for in a, in a hospital that does not anticipate to be able to get compensated for that care. That cap covers earnings, medical disfigurement, physical impairment, the entire gamut of damages. If you have a child of a poor family who is malpracticed on, that child's lifetime earnings, if it is brain damaged or crippled and rendered unable to work at a young age, are capped, through no fault of its own, certainly not the child's fault nor its parents that the funding isn't available there for them to pay for the care. And, if negligent care cripples that child and deprives him of the ability to earn a living for the rest of his life, he has five hundred thousand dollar cap, he'll become a ward of the state. That, again, is something that has not been, been testified to, to this Committee at all, but is yet another cap that's being added in this bill, in addition to the ones that have been discussed. In addition, to those referring you to the defi--definition section, and to the definition of claimant and I'll talk about

it again in a second, but by calling the entire family one claimant, we have effectively created yet another cap. Because where, previously, multiple members of the family would have multiple caps they now must divide up whatever is available to them under the bill. In addition, to that you have what Mr. Hull accurately called the effective cap which is the cap created by the policy limits available in any case, and in addition, to that you have the existing punitive damages cap from general tort law which is carried into medical malpractice law. So, so the comments that were made that the caps are not sufficiently draconian and that they should be lifted or, or, or ratcheted down further, we would disagree with and point out that there are, in fact, many, many caps and would ask that in the wrongful death context, that in the section that provides that the limitations of liability do not apply for medical, hospital and custodial care, that that be modified to include earnings loss and earnings capacity to reflect the intent of the folks who have come here and said, we do mean for people to be able to recover their economic loss then we would propose that the bill so state, because it does not match the stated intent of its proponents who have come before the Committee.

RATLIFF : Ms. Sweeney, are, are you aware that I have stated that it was not my intention to move the wrongful death out of the health care, it, it, it, it only applied to health care--

SWEENEY : Yes, Sir.

RATLIFF : --and inadvertently I applied it to everybody.

SWEENEY : Yes, Sir, I--

RATLIFF : You're aware that--

SWEENEY : --I am.

RATLIFF : Okay.

SWEENEY : And, and breathed a heavy sigh of relief on receiving that news.

RATLIFF : All right.

SWEENEY : Yes, Sir. So, we would ask that in Section D of the wrongful death cap section that, that the other stated intent, that is that economic dom--damages be available to be fully compensated, be recognized and that Section D which says liability limits do not apply to medical hospitals and custodial care received before judgment also include earnings and other economic loss, as, as it's defined, economic loss as it's defined throughout the section. The second area about which there is some difficulty, beginning on Section 54 is the expert report and, and discovery area, and if I would I'd like to, a little bit, lump that together. Mr. Chairman, when Section 1301 was originally passed, it was passed after extensive discussions between TMA and TTLA and other involved groups. And the purpose of Section 1301 was solely to require that early in the case, the deadlines are well known, the plaintiff show that there is a qualified expert who does testify that there was a deviation from the standard of care that caused harm. And, we agree with that, and in fact, worked to create that. What has happened since then has been an explosion of the cost

of these cases, and, and that's very important because cost costs both sides and one of the things you're hearing is that cost of defense has gone up. Part of the reason it's gone up is because the cottage industry that has sprung up around this, these reports. In addition to the 160 some-odd cases that are in the reporters that we're, these cost bond and report cases have gone up on appeal, in virtually every case there is some sort of challenge that the plaintiff's expert report isn't good enough. There is some, some nit to pick with the report that it isn't good enough. I gave ya'll the example last time that the hospital said that the report (wadn't) (sic) good enough because the nurses who were being criticized was the nurse on the seven to three shift and the nurse on the three to eleven shift and the nurse on the eleven to seven shift and the hospital evidently didn't know who they were, because they said the report was deficient 'cause it didn't have their names in it. Now that's a game, and it's a game that this Committee shouldn't countenance. If, in fact, that's a real problem, the solution is to require the defense to say hey, your report's deficient by X deadline, and if the real problem is you don't know who your nurses are, I'll tell ya, but obviously that's not a real problem and that game would go away. If there is a real problem, if something has been left out, if an expert qualification has been left out, if some element has been left out, then as with most other instances where there is a defect in pleading or proof, there is notice of it, there's an opportunity to cure, and you get on about your business and get on down the road. But what we have and what you folded in, in addition by adding mandamus to this is a huge layer of motion practice, cost, expense, delay, and if, if you go with the mandamus section that is still in here, you're gonna build in further delay in almost every case, because in every case the way it's written and I, I do agree with the one thing the previous witness said about the appeal provision it's a little unclear in the insufficient report context who gets to appeal if it's both sides or not and that could be tinkered with. But, you're going to have an appeal in just about every case too. You've heard from the Courts of Appeals. They are drowning in under finance, too much business, and this isn't gonna help.

RATLIFF : You don't think the 30-day opportunity to cure the defect addresses that?

SWEENEY : The 30-day opportunity to cure is one, discretionary, two, it, there is still no requirement. You, well, you run into a host of problems and the case law has, has consumes about (inaudible, overlapping conversation).

RATLIFF : But don't you have to make a discretionary since it's up to the judge's discretion as to whether or not the, the report is sufficient. Dudn't it have to be discretionary also, as to whether or not to have 30 days to cure seems to follow.

SWEENEY : Well, it does but what you're, you are presupposing there that we're going to have a hearing, and what I'm saying is, the minute you do that, you're adding costs, delay, time, friction costs, all of, all

of the things that we're trying to minimize. If, on the other hand you require and, and we, we did negotiate at the request last time of the Committee, we did negotiate and agree with TMA on a provision that provided and the dates can be moved in either direction, but that provided that when the plaintiff tenders their report the defense has 30 days to say I don't like your report and here's what's wrong with it. The plaintiff then has 30 days, 21 days, however you wanna do it to fix that, and you go on about your business. If the plaintiff says there's nothing wrong with it, I'm not doing it, then go have your hearing. And if the plaintiff is wrong they live or die by the court's ruling. But it takes all of the laying behind the law to get out of it, 'cause what happens now, if, if the defense waits till after the final deadline to make their objection, there's a case in the books where they waited over 600 days, so you're, you've been operating on these reports taking depositions, getting ready for trial, making exhibits, all of those things for years, getting ready to go and then suddenly at the last minute, well (lookie) (sic) here, this report that was filed to show there was some merit to the case, that's all it was for. Well, there's a defect in it, and let's see if we can get, maybe we get a new judge, for whatever reason, let's see if we can get the case dismissed on down the road, and, at that point it's fatal. At that point, the court, under this statute or any other statute, doesn't have discretion to fix it, because you're way outside of all of the deadlines. So, what we have suggested is, take all of that gamesmanship out, go with the agreed remedy that was agreed upon last time which works. Which, and, and which typically when we can have an agreed scheduling order, which is another problem with this, is it doesn't allow the parties to agree on the sequence of their own discovery. And, I had a very difficult year last year, I had a very, very sick law partner. There were times when I needed and my colleagues on the other side agreed, yes, sure you can have another week, you can have another day, you can have, it's just human dealing with each other, that's, that's not possible under this bill. And, I think that that's gonna create even more unintended consequences. If, on the other hand, you go with a sequencing agreement and allow the parties to work toward that, you take the cost, expense and delay out. You serve the purpose, 'cause on the other hand if I don't come up, as the plaintiff if I don't come up with a report dismiss me. If I, you know, if, if I don't come up with a report that addresses each defendant, dismiss the case, that's what this is for, is to get rid of the cases early on. But, the other thing that ya'll have done to make that more difficult rather than more practical, is the elimination of discovery. And there's a huge problem with the dove tailing of the provisions here. Rule 202 was initially created by the, through the rules advisory committee, by the Supreme Court, to allow in very limited instances supervised by the court presuit discovery. The purpose of it is to allow investigation of a claim to determine whether or not certain defendants should be brought in or the claims should be brought. Those depositions have resulted in cases not being brought against wrong defendants. But, we have a case right now, where we know that a technician was involved. We know the technician messed up. We don't know the technician's name it's

only initials. We can't tell who, for sure, was doing the various steps of the procedure from the records. Without the ability to do either presuit deposition or prefiling discovery, and I submit it, it needs to be a little bit more than the one deposition that is permitted here, without the ability to do some limited discovery before the reports, you're, you're making it impossible in many cases for a reasonable report to be done. So what we would suggest to the Committee is that, in addition to the scheduling sequence that I suggested, a limited number of depositions be permitted prereport, and the Committee could pick it's number. I would suggest that five would be a reasonable number so that you can, if you can't tell who the nurses are, who are involved in the delivery, or you can't tell who was really managing the case, or who was holding the retractor because the record's not gonna tell you that, or who was wielding the device that made the lacerations surgically, then you can get the limited discovery and limit the time of the depositions. I--it's not, we're not trying to do discovery twice. One of the things plaintiff's don't wanna do is to redo things over and over again. It doesn't do us any good to spend a lot of extra time and money doing things for no purpose. So, we would suggest that--(verbiage lost due to changing of the tape)--

END OF TAPE

two hundred thousand dollars. A lot of'em now looking at getting fifty thousand dollar policies. And, there will, in effect, be a cap on recovery because these physicians will have asset protection, and all that will be available for these injured people will be fifty thousand dollars or a hundred thousand dollars. And I guess, the question is wh--what is more unfair, (where) you have someone who is seriously injured to only have fifty thousand or a hundred thousand dollars in assets available, or to have some meaningful restriction on the noneconomic, no restriction on economic, but perhaps have a million dollars or two million dollars in insurance where there can be a recovery. And I would suggest, that the second is a lot more fairer and would go a lot further to compensate the folks who were injured by medical negligence than what is being proposed by the trial lawyers in this case. This statute, this concept has worked in California. It's tried-and-trued (sic), and I would urge this Committee to adopt it for Texas as well. Thank you.

CHAIRMAN : Thank you, Mr. Cooper. Mark Seale.

: I don't need to testify, Governor (inaudible, not speaking into the microphone).

CHAIRMAN : Okay. David Bragg.

BRAGG : Governor, thank you, and Members of the Committee, I'm gonna make my testimony brief. I'm David Bragg, I am here on behalf AARP. I have three comments to make. The first two I would put in the category of technical, what I would call a technical defect in the bill, in Section 10. First Section 10.01 includes in the definition of health care facilities, an assisted living facility. And, ironically, by law, assisted living facilities, actually, are prohibited from providing regular or daily nursing care to people who live there. And so, including an assisted living facility in a health care liability bill makes about as much sense as, including an apartment complex or some other kind of residential living facility. So we would recommend that you d--delete from this particular section, an assisted living facility. It's purely a residential facility that provides shelter, food and does provide assistance with daily activities, but is prohibited from providing nursing care on a regular or daily basis.

FRASER : Mr. Chairman.

CHAIRMAN : Senator Fraser.

FRASER : Clar--clarify on that, are they subject to malpractice claims?

BRAGG : They're subject to the same kinds of claims you would find, for example, in an apartment complex, a premises liability type of claim. They may be subject to negligence claims, if they accept a resident that they really are not equipped to deal with, for example, one that does require nursing care. But it would not be a medical malpractice claim, it would be more of a negligence claim.

FRASER : There haven't been anyone (sic) filed in these assistant livings, and no one's ever had a claim filed against (them) under medical mal?

BRAGG : Not that I'm aware of. Now, I can't say that I'm, I don't know that for a fact. I know that I have handled an assistant living case, but it was in a premises liability case. And I suspect that's how most of'em would arise. The reason being, they don't have medical staffs. They don't provide medical care if they're, if they're complying with regulations. I do think you could have a claim arise, if you have a person who needs nursing care but is taken into an assistant living facility to up the census, or something like that. They would not be given the nursing care they need, but it would be by a facility that's not allowed to provide it.

FRASER : Are, are they not, legally they, and they can't offer.

BRAGG : Yes, Sir. The regulation says that, anyone who requires regular or daily nursing care cannot be admitted to an assistant living facility. The type of assistance they provide is in things like, the administration of medication, activities of daily living, as they're called, but not nursing or medical care. Except, of course, on an emergency basis or something like that.

CHAIRMAN : Okay.

BRAGG : The second, what I would call technical defect, happens when you include a nursing home, for example, in a health care bill. For example, in Section 10.18, dealing with the qualification of experts, this phrase is used repeatedly, quote, in the same field, as the defendant health care provider. That is, the expert must be in the same field as the defendant health care provider. I understand that, in a medical context, when you're talking about a doctor and having his conduct judged by a doctor that's operating (inaudible, overlapping conversation).

CHAIRMAN : Tell me, tell gi--gi--give me some page numbers.

BRAGG : I don't have your version. It's Section 10.18

: (Pause)

CHAIRMAN : Tell me again.

BRAGG : Section 10.18.

FRASER : Governor, it's on Page 71, Line 3, qualification of expert witness. Is that what you're referring to?

BRAGG : Yes, Sir.

: No.

BRAGG : And in several of those sections they use the phrase, in the same field as the defendant health care provider. Again, that makes sense to me when you're talking about a, a surgeon. A surgeon oughta be judged by another surgeon. But when the defendant.

FRASER : (Can) can you show us where it says that?

BRAGG : Yes, Sir.

CHAIRMAN : It's in almost every paragraph on that page.

: (Inaudible, background conversation)

BRAGG : It's in multiple paragraphs.

FRASER : As in the same field.

BRAGG : In the same field, appears in Paragraph 1, (a)

(1), (a) (2), (b) (1). It's kind, an--and I think the intent there is to, again, make sure that you've got, you know, a--a neurosurgeon judging a neurosurgeon's conduct. When you put it into a nursing home context, though, I don't know what that means anymore. Because, for example, a nursing home malpractice case may involve nutrition, it may involve medications, it may involve wound care, physical therapy, general nursing like catheter care, things like that, or even facility maintenance, doors and windows. Those are a number of different fields, each one a separate area of expertise, but all of which occur inside a nursing home. And so I don't know what that phrase means, in the same field as the defendant health care provider, in that context. I don't know if this is making any sense or not, but, I'm trying to figure out how I would qualify an expert to be in the same field, as that defendant health care provider, if I have a nurse who specializes in wound care, but the problem was caused by the fact, that a window would not lock.

CHAIRMAN : Okay.

BRAGG : The third thing has to do with the handout that I provided you. And this is what I would call the more substantive fundamental issue. I will not spend a lot of time on this, because of the Chairman's comments earlier, regarding the concerns about what happens with limiting noneconomic damages with elderly and, and the very young. I did wanna make one point though. The, the event I've described at the top, is the event that I testified about in the very first time I testified, dealing with the 76-year-old man who suffered scalding burns at the nursing home here in Austin, and who died 11 days later of complications from that. If we use the limit on noneconomic damages contained in this bill, the damages available to the family of Mr. Anderson, actually, would be about a hundred and fifty thousand dollars, because you've gotta deduct, of course, from that the costs of bringing these kinds of cases, and I put thirty thousand as the expense item. That's consistent with my experience for an inexpensive case. And then, of course, you deduct the 1/3 attorney's fees. And so, when you're talking about a cap, you're actually talking about, about a hundred and fifty thousand dollars. But that's not really my point, because y'all know that. My point is this, this was the first death case I ever investigated, and I did it when I was with the Attorney General's Office back in 1977. I could not handle cases in private practice 'cause I worked for the Attorney General. This case cried out to me, needing a private lawyer, needing someone to represent that family because of what had happened to this man. Keep in mind, this was a nursing home that had been warned on four separate occasions, turn down the hot water, and they'd ignored every warning. The man died. I could not find a lawyer to take this case, because back in 1977, the belief was, an elderly person's life had no value to a jury. We learned in later years that that belief back then was not true. That, in fact, juries will value an elderly person's life just as they do other peoples' lives. But when you put on a noneconomic damage limit of two hundred and fifty thousand dollars, and that's the only damages that an elderly or retired person can recover, under Texas law, except for medical expenses, which usually are covered by Medicare, you really

run the risk of closing the courthouse doors to these kinds of claims. Back then the belief was, maybe a couple hundred thousand you could get in a case like that. I couldn't find a lawyer to take it. I'm not saying that's gonna happen again, but I am saying, there's a risk of that happening again. And so I ask the Committee, as I know you've done already, think very, very, carefully about imposing that kind of limit on the damages that an elderly or retired person can recover. That's all I have.

MADLA : Mr. Chairman, could I ask (a question)?
: (Sure, Senator.)
CHAIRMAN : Senator.
MADLA : Just to follow up on Senator Fraser's question. Let me ask you, are personal care facilities and residential homes for the mentally retarded considered assisted living facilities?
BRAGG : The definition, and I didn't bring my regulations with me, but the definition with assisted living facilities is tied to the number of people, I think it's a minimum of four, unrelated to the owner of the property and a place where meals are provided. It's a very kind of minimal definition. However, there are specific types of assisted living facilities in the regulations, and I'm not an expert on that, but one of those does deal with people who are mentally retarded. There are facilities that are called assisted living in which people like that can live. I suspect there're people here who have a lot more expertise than I do on the definitional side of that. What I do know is that no assisted living facility can provide regular or daily nursing care.
MADLA : But they dispense the medication.
BRAGG : Yes, Sir. They dispense medications. They help with, help, helping people remember to go to the bathroom, you know, things, activities of daily living, help with eating, but not nursing and not medical care.
MADLA : Thank you.
BRAGG : Thank you.

(Senator Madla in the Chair)

CHAIRMAN : Dr. Frances Myers Mitchell.
: (Pause)
MITCHELL : I'm Dr. Frances Myers Mitchell. I'd like to ask that there be a correction made on my card, that I do have a written testimony that I just submitted. I'm a family practitioner. I work now in the City of Mission, Texas, down in the Lower Rio Grande Valley. I had a private practice in the City of Hidalgo, which is a little town on the Border of Mexico south of McAllen, Texas. I closed that practice in Sep--on September 30th of 2002. I went there initially because I was recruited to go to that city to work in an office by a doctor that recruited me to go down there, but after about a year the doctor decided he didn't want to renew my contract. And I had to think about whether I wanted to stay there, in that little town, which has a population at this time

conservative Republican from Texas. I'm here to tell you that medical malpractice can happen to anyone. It's not only the liberal Democrats who are harmed and filed suit, but be--but conservative Republicans as well. Repar--regardless of your political position, I ask you to put yourself in my shoes. Would you accept the experiences I have endured and continue to endure for twelve dollars a day? I really don't think so. Please do not let House Bill 4 protect dangerous doctors at the spens--at the expense of injured Texans.

CHAIRMAN : Thank you, Ms. Tutt. Gavin Gadberry. State your name and who you represent, please, Sir, if other than yourself.

GADBERRY : Governor Ratliff, my name is Gavin Gadberry. I'm an attorney from Amarillo, Texas. I'm general counsel to Texas Health Care Association and I'm here on their behalf. I'm also chair of the American Health Care Association which is the national association of nursing facility companies. Texas Health Hair (sic), Care Association is also a member of TAPA and we're here today in support of Article X and, and House Bill 4. I've provided you written remarks then, so I will try to be brief. It's late in the evening and I know everyone's wanting to go home. But I was wanting to bring a focus for a while to the access to health care for the citizens of the State of Texas and that is what one of the things we believe HB 4 will ensure, is that there be access to health care. I've been dong this for several sessions and every once in a while things drop and you get to use them that are independent, and Health Affairs, which is a Harvard University publication, in, in their March 2003 publication, identified litigation as dipord--diverting resources from resident care. And if that continues, we may have a quality of care crisis, not just a litigation crisis. Another report, in March 2003, by the United States Department of Health and Human Services, entitled Addressing the New Health Care Crisis, identified that six of the large publicly-traded companies in the United States went bankrupt. One of the factors that caused the bankruptcies was the litigation costs. In that same report, Medicare and Medicaid was identified as being required to pay for a portion of those costs and stated that taxpayers are bearing the burden of some of these costs and will continue to occur unless there is litigation reform. What's going on in Texas affecting health care access to long-term care? The average premium in the State of Texas right now for nursing facilities is two thousand nine hundred and ninety-two dollars. That's up from 1998 when it was six hundred and fifty dollars. Deductible and retention levels have increased.

CHAIRMAN : (Inaudible) talking about per bed.

GADBERRY : Per bed, yes, Sir. Excuse me. Per bed. Ms. Taylor testified today that that computes to about three hundred thousand for a 68-bed facility, I believe. One of the biggest concerns for the long-term care profession in this state is that the lack of carriers. There are several physician carriers still som--several hospital carriers, there's really only one carrier that's broadly available to the long-term care profession and that's the JUA. And if it (wadn't) for what you did last Session, Governor Ratliff, that wouldn't even be available. But even now, only about 50 percent of nursing facilities are able to

afford long-term care health insurance even through, with availability of the JUA. What's the environment like? In the past six years, punitive damage jury verdicts have exceeded a billion dollars. The average reported settlement, these are reported settlements, reported, that you could find out about in a long-term care facility over the past six years is more than three million dollars. How does this compare on the national basis? Well, the average payment rate of 85 percent, there's an average payment rate of 85 percent in nursing home malpractice cases. That means that's triple the national average of regular malpractice cases.

CHAIRMAN : Now, this bill's not gonna do anything about punitive damages, right? I mean, what, what's the revel--relevance of a billion dollars in punitive damages?

GADBERRY : There, there is a provision in wrong--on wrongful death and survival claims where the hard cap of fi--of five hundred thousand or 1.5 million dollars would include punitive damages, Governor Ratliff, in the bill. The, that i--that doesn't apply to common law claims that I'm aware of because it's, it's in modification of the five hundred thousand dollar indexed cap and that continues to be indexed under the current form of the bill, as I understand that.

CHAIRMAN : And, you're in favor of that, capping punitive damages.

GADBERRY : Yes. And, the capping of punitive damages would be a, I believe, at 1.5 if the index continues to hold. And if you use the, that 1.5 million dollars, there's several scenarios where that would be more than if the exemplary damages statute applied. If you want me to go through a scenario, I can.

CHAIRMAN : No, that's all right.

GADBERRY : The medical malpractice crisis is creating health care access issue for Texas families and as you heard Ms. Taylor testify this morning, the majority of Texas nursing homes are one lawsuit away from closing their doors. Okay, what's a nursing facility? We're talking about access, we're talking about access to, to a doctor, to RNs, LVNs, CNAs and patient access to other health professionals including therapists, dieticians, psychologists, the list goes on. Sounds an awful lot like a hospital except you don't have all the physicians there all the time. You don't have all the foot traffic all the time in a nursing facility. But, I'm from Lipscomb County, Texas, that's in, the farthest you can get away from Austin, Texas, you can get, that's where I grew up. There's one facility in the entire county and it's a nursing facility, it's a hospital district nursing facility. That's basically the only health care in that county that's available for that county. And they have problems getting a--health care insurance, professional liability insurance because of the problem in the market as a whole. There's another facility up in Hansford County that has the same issues. I get the, I have to address the, the statement that you posed because I'm the one, the first one to come up to that, has to deal with young or the elderly on a consistent basis. And one of your concerns is that, when it

comes to the elderly, the noneconomic damages cap doesn't seem fair. And I don't--

CHAIRMAN : The, the fact that there are no economic damages in most cases. All they have is a noneconomic.

GADBERRY : Exactly. Noneconomic damages is traditionally, and it's the largest part of the awards in jury verdicts for, in nursing facility ga--cases besides the punitive damages awards. And, I--I don't have an ans--a good answer but I'm gonna try, I'm gonna try to do it with a lot of respect for my elders an--in the, that, that I grew up with and was around. And my first place, the only place I can start with is my, my grandfather, and, both of my grandfathers. I had a wonderful childhood with them, and one of my grandfa--grandfathers passed away, he was what I call my baseball grandfather. And then, one of my other grandfathers, what I call my flying grandfather, and he taught me how to fly, and I had a great childhood with both of 'em but one of 'em was cut short for what I believe was probably medical error. And the mental anguish that I suffered with my grandfather that's died because of medal--medical error was no greater nor less than the, the, the mental anguish I suffered when my grandfather died who taught me how to fly. And he died three days after being diagnosed with cancer. I only hope I get to go that way. That's the only way I can bring it together logically, and to talk about logically in the civil justice system you have to put it in a vacuum. You can't bring emotions into it, we have to look at it in a vacuum. And the civil justice system has elements of damages. And part of the elements of damages are economic damages and noneconomic damages. And what House Bill 4 attempts to, to, is put a--attempts to do, is to put a maximum, a maximum on the total amount of damages that could be awarded for noneconomic damages. And, that has to be looked at across the board for everyone in the health care liability context. And if we do it different, then we're gonna have some strange results and the strange result would be again, putting myself in the shoes of the application of this statute. For my father, if he was in nursing facility and, and a malpractice event occurred, I could obtain, if we made, carved out the elderly, I could obtain a larger verdict for the noneconomic damages portion. But be--but let's take me then, as an example, if I am in a ma--medical malpractice situation, my wife, if I, and then I died, my wife would be able to recover less on that element of damages. Whereas I would be able to recover more for my father on that element of damages. And I don't think my wife's mental anguish is gonna be any different or any greater than my mental anguish for my father when he dies. So I don't know how to logically say we need to carve out that when we're talking about an element of damages within the civil justice system. And that's the best explanation I can come up with on those issues on that question.

CHAIRMAN : You didn't do any better than I did.

GADBERRY : (Laughter)

: (Laughter)

GADBERRY : Well, let me try a couple of other things.

: (Laughter)

GADBERRY : In California, that has this statute, that has the, the identical language, almost, that I've been around and represented clients involved in litigation in California, nursing facilities who care for elderly in California, nursing facilities have been under MICRA since the beginning. Just like nursing facilities have been under 4590i in Texas since 1977, and nursing facilities have been treated as health care providers and given the same benefits and protections that 4590i provides to nursing facilities in the State of Texas.

CHAIRMAN : I, I never did suggest that we would treat nursing facilities different. I mean, doctors treat old people too.

GADBERRY : Absolutely. And I understand that the--

CHAIRMAN : Podiatrists treat old people. We're not, a--all I'm saying is, is there seems to be, I have a difficulty with saying that an old person that doesn't have any earning power left the only access they have is the one we're gonna cap at a fairly low number.

GADBERRY : And they're gonna, and it's gonna be capped for me too who has an earning capacity.

CHAIRMAN : But, yeah, but you're gonna calculate a long life of earning capacity if you, if it's a serious, if you suffer serious injury.

GADBERRY : But, but is my wife's mental anguish, if I died as a result of a medical event, any less than or any greater than my mental anguish that I'd have for my father if he died as a result of a medical malpractice.

CHAIRMAN : You're back to my question about the, the soccer mom. Why is it that she has, she doesn't have hers capped when the doctor does.

GADBERRY : Soccer mom, I don't know how, I didn't come prepared (laughter) to answer that question.

: (Laughter)

GADBERRY : You caught me, you caught me with my proverbial pants--

: (Inaudible, overlapping conversation)

GADBERRY : --down with that question--

CHAIRMAN : Go ahead.

GADBERRY : --but, I haven't, I haven't thought about that issue. I'd like to address a couple of issues and I'll try to get off here. There was, Senator Madla and Senator Fraser, I believe, asked questions about assisted living facilities. Assisted living facilities have been asked to do a lot more in the health care arena. Mr. Bragg's correct. They are not nursing facilities and they're not intended to take care of pe--nurse--patients day in and day out 24-hours a day. They do provide nursing service, there is nursing service provided in assisted living facilities. In fact, you can go on hospice care in a nursing faci--I mean an assisted living facility and if you have a terminal condition, can die in place. Die in your home and if that home is your assisted living complex, that's where you could die. So, there could be different levels of medical care being

conducted in an assisted living facil--(verbiage lost due to changing of the tape)--

END OF SIDE 1

SIDE 2

: --basically.

GADBERRY : No, not currently. Under current law--

: But, but (inaudible, overlapping conversation).

GADBERRY : --not in current, not under current law, no, because assisted living is not defined as a health care provider. Under House Bill 4 they are added as a health care provider. But currently they'd be either com--common law negligence claim or premises liability claim. The--

MADLA : (Could) you remove them from the bill?

GADBERRY : --what's that?

MADLA : Do you think they should be left in the bill, House Bill 4?

GADBERRY : We represent assisted living facilities and they're getting sued just like nursing facilities and I think they deserve similar protections and they are, people are wanting to be cared for and, and have health care provided in different settings, and we're broadening the scope of that. And, if you're providing health care, it seems to me, regardless of where the setting, if you're providing health care then you oughta be protected in some form or fashion. That's not to say that if you're not providing health care that you get the protection the health care liability claim, and that's currently under the 4590i that's the law. You, if you're not providing health care you don't get the protection. It's a premises liability or it's some other kind of claim. Another statement that was made by Mr. Bragg that I wanna clear up is the provision about expert witnesses, and I believe it was on Page 71. This Section 14.02 applies to the qualifications of expert witnesses in a suit against a health care provider. This is just the, the, the standards of care with regard to what kind of health care is being delivered. If you look at the causation expert language, it specifically requires a physician to make a determination of causation on the enter--injury and then there was added in, a dentist can make a determination on causation with regard to dental care, a podiatrist can with regard to den--to podiatry care. But with regard to nursing care, it's still gonna require a physician to make the causal link between the, the violation of the standard of care and the injury. Finally, also within House Bill 4 is, is a repeal of the mandatory liability insurance with regard to nursing facilities. We believe wi--with the reforms of HB 4 there are gonna be sufficient attraction for nurs--for professional insurers to come to this state and write professional liability insurance, that we'll have a voluntar--voluntary entrance into the insurance market by nursing facilities. The mandatory provisio--provisions have not in two years attracted any more carriers, in fact, we continue to lose carriers. It's the

type of tort reform that's in HB 4 that's going to attract carriers. And with that, Governor Ratliff, I will conclude my comments. I'll answer anymore questions if you'd like.

CHAIRMAN : Thank you, Mr. Gadberry.

GADBERRY : Thank you.

CHAIRMAN : Ladies and Gentlemen, we're not gonna get through all of the out-of-towners tonight. I'm sorry. We will take a couple of more, but I think we're, we're gettin' numb up here.

: (Laughter)

CHAIRMAN : Christopher Lane. State your name and who you represent, please.

LANE : Thank you, Governor Ratliff. My name is Christopher E. Lane. I'm a fifth generation Texan and I hope I'm here on behalf of all of Texas. I've not come here today to testify specifically for or against House Bill 4. What I've come to testify in regard to is what I think is perhaps a, a misconception. And I hope in a moment that I can help answer the question that Senator Madla asked of my good friend Kim Hollon, the executive director of Methodist from Dallas. I'd like to first briefly introduce myself. My undergraduate training was in accounting, economics and mathematics. I then went to Baylor Law School and became a litigator. I practiced two years of CPA with Arthur Anders and Company and then I've been a vice president and general counsel representing major hospitals in North Texas for the last 21 years. As you can see, I am a bag-carrying member of the American Health Lawyer's Association. I was a charter member of that organization. I have handled over 500 medical malpractice cases. I have mediated over 250 of those and with my co-counsel from downtown, I've litigated over a 100 medical malpractice cases to verdict and to judgment. I believe there is a misconception regarding the affect of verdicts and judgments on medical malpractice insurance premiums. And it's my understanding that the genesis of this bill has to do with the crisis in medical malpractice insurance premiums. A major part of my responsibility the last 20 years for those hospitals I represent, St. Paul Medical Center in Dallas and then the last 14 years, Children's Medical Center of Dallas, has been to procure and manage the insurance program for those organizations. I deal with the largest and finest brokers, insurance carriers and reinsurers in the entire world and have done so for now over 20 years. I think there are at least four major components that lead to the current premium increases that we've seen since the year 2000 and that's what I would like to discuss and that's what I think will help answer the Senator's questions. I think the primary problem over the last ten years has been the soft market that we experienced starting in about 1992. Following the '85 crisis the market did soften around '91, '92 and we have actually seen premiums, at least in a hospital setting, that I have been told by underwriters and presidents of all these insurance companies that were in the range of about 50 percent of what they should be on an actuarial sound basis. The reason for that being there was too much competition in the market. The marketing divisions of the insurance companies drove the pricing

could come up with a better way or a better solution to make sure that, you know, this just doesn't occur anymore because it's a travesty.

ARMBRISTER : Okay.

CHAIRMAN : Thank you, Ms. Lombardo.

ARMBRISTER : Thank you.

CHAIRMAN : I assure you we're groping for that solution. Jim Perdue. State your name and who you represent, Sir, if other than yourself.

PERDUE : Governor, Senator, my name's Jim Perdue, Jr. I'm an attorney in Houston, Texas. I'm registered against the bill. I'm gonna be brief. I, obviously, Governor, in, in developing policy individual stories is, is important to hear, but probably not the ultimate issue, and so I, I'd wanna discuss two specific issues in the bill as written, because there seems to be some dispute about their ultimate effect. The, earlier today there was some discussion regarding the proof standard for homemakers for economic damages. This bill changes the proof standards for economic damages. Article 1005 of the bill creates this new Section 7.03. It's on Page 56, Governor, starts at Line 12.

CHAIRMAN : Okay.

PERDUE : What it, what it specifically says is that any evidence that would related to an economic damage model in a health care liability claim for loss of earnings, loss of earning capacity, or loss of contributions of pecuniary value, which is ultimately loss of household services, just an--another way to put it, must be presented in the form of a net after tax loss. And the title of the section obviously is Federal, State Income Taxes. What that section does, and I think it, when it was laid out the stated intent of that was to tie evidence of economic losses to rather than plaintiff's lawyer bringing an economist to kinda just work the numbers, but tie it to a, a person's income tax returns. Which is fine and well if they have an income tax return. But children, housewives and retired people don't file income tax returns 'cause they don't have income. So, with all due respect to what happened earlier, under this provision, a housewife cannot establish an economic loss because there's no way for an expert, whether it be an economist or CPA to bring the necessary proof under this new section of the bill. I don't know if that's an intended consequence or unintended consequence, but that's clearly the effect. And I think given what we heard earlier that may be an unintended consequence of the bill.

CHAIRMAN : You have, you have some language--

PERDUE : (Inaudible)

CHAIRMAN : --that would--

PERDUE : I, I--

CHAIRMAN : --correct that problem.

PERDUE : --I can propose some and I'll submit it to the Committee. I think it, clearly what you would say is, is that if, if there, if the loss of earnings is for a person who has income tax returns as evidence of their earnings--

CHAIRMAN : Okay.

PERDUE : --that, then this would apply, but if there's not,

then you would have--

CHAIRMAN : (Inaudible)

PERDUE : --to then create the damage model as we do now.

CHAIRMAN : (Inaudible, overlapping conversation) either has or would have.

PERDUE : Yes, yes. The second substantive comment just policywise about the bill, your honor, is, Governor, is that the, as pointed out yu-- you can't have a single-story drive a general bill. You can't have a single part of the state drive a solution that effects Harris County or Dallas, or, or San Antonio, or anywhere else. One of the, in, in May of 2001 the Palacios decision came down from the Supreme Court when we were actually in Session last year, I mean, pardon me, two years ago. And that is the opinion from the Supreme Court that deals with the expert report requirements under the bill. It seems to me that one of the primary ways to deal with an issue of increased filings of frivolous lawsuits and the defense costs that those create would be to get nonmeritorious cases out of the system as early as possible and as easy as possible. So, while I'm, I'm filed against the bill, let me say right now, there are portions of this bill related to venue and some other things that I don't think I disagree with. The expert report section of fort--of 4590i is something that can be dealt with and should be dealt with to accelerate the disposition of a nonmeritorious case. And as a plaintiff's lawyer that screens and takes one out of about 250 cases that come to our firm, if we could figure out a way to get out of the system a case that is decided by the judge to not have expert support within the first 180 days it's on file, those defense costs will now, not be incurred. The heartache and expense of doctors who have been sued that cannot be supported will not be suffered. And if, if this is driven by a certain part of the state or a certain area of the state that is affecting cases going forward even though they don't have adequate reports or they've got judges who won't dismiss 'em a lot of the amendments made in the bill to Article 13, 1301 of, of 4590i are effective, but this bill repeals Subsection (f), Subsection (g) and Subsection (h) of 1301. That is in Page 84, Line 22, the, the very last portion of Article 10 regarding the Sections of 1301 it repeals. That then takes you back, Governor, to Page 65 which is where it's rewriting 1301 to take out the cost bond requirement, I think, personally is a great idea. To move up the deadline is a fine idea. To set a deadline is fine. But Subsection (f) of 1301 is the provision of, of on the expert reports that says that if there was a good faith reason for a failure to timely file the report then you can get an extra 30 days. Subsection (g) is what says if the failure to timely file an expert report was due to an unintentional mistake then you can get an extra 30 days. Subsection (f) and I--

CHAIRMAN : If you've got a judge who's not enforcing the, the timeline anyway, (idn't) he gonna find a way to rule on it that way.

PERDUE : Well that, the, the that's one of the problems that we've got, your honor, and, and Governor, in that, I believe since Palacios came down in May of 2001, there's now been 150 reported appellate cases on

1301. We've had many trials and appellate decisions galore on this section which desperately needs to be rewritten and tightening up, but by repealing (f), (g) and (h), the (h) is actually what it says, if the two attorneys on either side agree to an extension and file that agreement in writing then that would apply. This takes out even the ability for the doctors attorney to allow for an extra 30 days and then couples that with the, the inability to conduct discovery until you have a report on file. My, my only suggestion to the Committee and again, I, I can propose some certain language if, if there would be interest, is that we still have not seen the effect of the Palacios decision on the expert report requirement translate or work its way into good solid numbers 'cause 2002 data is not out there. On the increased number of cases that are being dismissed within the first 180 days because of the failure of an expert report. If there was a way to make the 180-day requirement firm, solid and clear and the expert report requirement then on file, and not allow venue shopping where you have judges who arent' dismissing it, that is something that will stick. I, I will suggest to the Committee that when the 2002 data comes out you're going to see that, an increased number of medical malpractice cases have been successfully dismissed and, and those defense costs now have not been incurred and that nonmeritorious case, that is an expert cannot support the case, you get the case out of the system. That is a valid goal that is a way to achieve a real result on the front end as opposed to and I'm not gonna deal with the damage caps on the back end. So, I guess I'm saying, I'd like to see a rewrite of 1301. I'd like to see an effort to do that, but I think it's dangerous to take out the attorney's ability to extend it, especially if you're gonna make it a firm 90-day, nonnegotiable, dismiss with an interlocutory appeal that is set up such that the defense lawyer can hide all discovery, or stop all discovery and you cannot go forward. What I think the more reasonable approach would be is, have an ex--an absolute expert report requirement within 180 days. Have a mean for attorneys to extend that if necessary. But have a dismissal in place within, within that timeline based on the set standard that now exists that we've got a rash of appellate decisions tellin' everybody on both sides what it means now. And, and, and I think that at the end of the day you will see the data which, unfortunately, is just not up to date that we are succeeding in getting the nonmeritorious cases out of the system. This was, this is something that has changed in the last year and a half and I don't think anybody has pointed out that we've had no way to translate that into for this Committee the effect of the expert rep--the change in the expert report requirement that has been created over the last year and a half. Which to me is the most effective means in getting nonmor--nonmeritorious cases out the system early.

CHAIRMAN : I might mention to those advocates of this language that are listening that I'd be interested in hearing why H was taken out if all that, if that is an agreement by both the lawyers.

PERDUE : I, I cannot understand that and I, I was hopin' Senator Duncan was here as defense lawyer (laughter) and what he thought about that. 'Cause, you know, on the plaintiff's side, and in fact, one of the

codicils of, of practicing law is, is that reasonable request for extension should be agreed to. This, why you would take that out I, I just don't, I don't know why. But thank you for your time.

CHAIRMAN : Yes, Sir. Thank you. Clark Spencer. Mr. Spencer was registered for, or in favor of the Article 10. Matt Wall.

WALL : Good afternoon, Governor, Members of the Committee. My name is Matt Wall. I'm Associate General Counsel for the Texas Hospital Association here today to testify in support of Article 10 of House Bill 4. And what I would like to offer into the record i--are the results of a study that the Texas Hospital Association did and actually we completed it in January that she gives an analysis of hospital professional liability self-insured retention amounts, premium amounts. And just basically instead of going into the arcane details of that study which are, and available in front of you, what I'd like to mention is the following, hospitals are being squeezed. They're suffering from a triple whammy. What they are seeing is an increase in their cost of their insurance through premiums. They're also seeing an increase in their first level self-insured retention which is quite often a reserve they put aside. And they are also seeing an increase in their deductibles. With all that combined, what is happening is hospitals are having to use more and more of their funds, their dollars, that would be available for health care or for new services or for replacement of services. They're having to channel those funds into other mechanisms such as increases in self-insured retention. And from a societal standpoint we think that is an inefficient mechanism. It also creates some stability, instability in the system in that instead of having a mechanism for, for sharing the risks, spreading the risk, which is what insurance does, as we all know, you are putting dollars into this self-insured reserve or retention and the dollars are there and are subject once you have a payout you, you are subjecting that mechanism to extreme volatility. Just as when we have our own car insurance. It's much more efficient for us to be able to rely on through the, through our own car insurance payment by that insurance company then having to put aside a reserve of our own in the event we are in a collision where we are at fault. It's translatable, the same situation to the hospital setting. So, that's what we're seeing, is we're seeing an increase in the deductibles, an increase in self-insure retention, yet a lowering in the amount that the, the insurance companies are providing as their second layer, the second layer of, of insurance. We think that the tort reform proposals of Article 10 in House Bill 4 if passed will make it easier for hospitals to purchase professional liability insurance at lower rates. And I would be happy to answer any questions at this time.

CHAIRMAN : Thank you, Mr. Wall.

WALL : Sure, thank you.

CHAIRMAN : Stacy Williams. Just state your name and who you represent if other than yourself, (please).

WILLIAMS : Good afternoon, Senators. I'm Stacy Williams. I am an insurance defense attorney in the Houston area. I am here representing myself.

TEXAS SENATE STAFF SERVICES
JFS:rm:mms/246/SA041603T5/092203
SENATE STATE AFFAIRS COMMITTEE
APRIL 16, 2003
TAPE 5

(Senator Ratliff in the Chair)

: --(inaudible) together, you could bring their rates down immediately twenty-three thousand dollars. But that's not the only source of funding that's, that's potentially available. And again, Governor, what I've tried to do, what we're proposing to you is, to make the people that abuse the system fix the problem. Because the people who are th--th--the most seriously victimized are the ones who are more int--who are the most entitle to justice. The people who are abusing the system, who've caused this problem, are the ones that oughta fix it. When judges sanction lawyers and, I know it's rare now, one of the reasons it's rare is because the sanctions are paid to the other side. But if a judge sanctions a lawyer, the sanctions could be paid into this fund. Punitive damages are rare, but in nursing home cases they're not. A percentage of punitive damages could be directed to this fund. I know that one of the issues that, that you've worked very hard on, Governor, over the past five Sessions, is an offer of settlement bill. You might consider that if payments are required through the operation of your offer of settlement bill, that all, or some of those payments could be directed to this fund. Fund can be administered by the Board of Medical Examiners, the Department of Insurance, it (dudn't) (sic) require any bureaucrac--bureaucracy to speak of. The money could be directed at the high risk specialties, the high risk areas. Donna, Texas, Hidalgo, Texas, places like that, and it could provide fairly instant relief. Inside of a year we could start bringin' doctors, like the one who had to leave Hidalgo, you know, back to their communities. There's a certainty to this pro--to this proposal that we don't have with the cap. We've heard the cap may have a dampening effect, may not. (Idn't) (sic) gonna have any effect on the only regulated carrier in this state. But this would have an effect and before, before we, we--we, we try to, to balance this broken system, on the backs of the most severely injured, I'd summit to you that we oughta try makin' the people that have gotten us to this point, makin' the people that abuse the system fix it first.

CHAIRMAN : Early, you made a statement earlier that in Texas the juries don't even know there is a cap?

: Yes, Sir.

CHAIRMAN : So they come in with a verdict and then the judge is the one that says, but no matter what the verdict says, it's gonna be two hundred and fifty thousand, under this, under this code.

: That's correct.

CHAIRMAN : Is that the situation in California?

: Governor, I'm, I don't know, but I do--I know that if, first of all, I know two things. I know that in California they continue to have monstrous verdicts, tha--th--then get cut way back after judgment. But I also know--

CHAIRMAN : (Well), I would assume the jury wouldn't give that monstrous verdict if they knew it was gonna be cut back.

: --you would assume. I also know, and I, you

know, I--I--think Senator Duncan might have a better perspective than I do, but it's been my experiences--been my experience that in cases where there are limitations, for one kind--if one kind or another, the defense lawyers don't want the juries to know about it, because they're afraid they'll load up on some other element.

CHAIRMAN : Well, that (wadn't) (sic) my point. My, my point was that all this statistics that we've seen, I, I wonder if anybody knows how many verdicts and, and by how much the juries are exceeding the two hundred and fifty thousand dollars. And how many--how many times they do and by how much?

: I, I sure don't (inaudible) that, that data.

CHAIRMAN : Which, which would be the verdict if, in the absent of the cap, is that right?

: Yes, Sir.

HARRIS : (Inaudible) Mr. Chairman, shouldn't that be, I mean, we're looking at people with a ton of resources who've been here testifying and have a vested interest in this, it seems like, they ougtha be able to get us that information.

CHAIRMAN : If anybody can, I'd, I'd love to see it. (Carol), can you get it?

: Yes, Sir.

CHAIRMAN : Okay. Questions for Hartley?

: (Inaudible, background conversation)

CHAIRMAN : Senator Duncan. Oh, I thought you--

DUNCAN : No, I, I was just, I didn't hear exactly when you suggested that on the defaults or forfeitures of the bond, where, what, I didn't hear where that money, that goes into a fund to, to support--

CHAIRMAN : Subsidize doctor's insurance.

: Yes, Sir. I don't know at what point you want me to go back but, let me ju--I--I was making the point, which I'm sure I don't, don't need to re--repeat to you that, about the (cost bond) fund not being a risk now. If the bond has to be filed when--when a lawsuit's filed, and that bond is at risk, and (inaudible) for whatever reason the lawsuit's lost, then that money would go to a fund to be administered, you know, my idea would be the Department of Insurance.

HARRIS : Would, would, Hartley, would it apply even if they filed the case, posted the bond, and then dismissed it?

: Well, you know, Senator, you could do it anyway you wanna do it. But, on behalf, you know, as a representative (laughter) of my organization, you know, I would urge you to do what it takes to solve the problem. And we're ready to take the drastic step of make--of putting the bond in play, if the case is unsuccessful, for whatever reason.

HARRIS : Well, what you're bringing up is a automatic mechanism that could fund these JUAs that we've had to create concerning where doctors, or nursing homes, or hospitals who are not able to get coverages,

which really, one of the things that you're ultimately addressing is how to keep the rates low in those JUAs.

: Perhaps.

CHAIRMAN : Hartley, I'm, interesting but it (dudn't) (sic) (have) anything to do with House Bill 4. It--i--it may have something to do with whatever we filed, as--a--a-as a Senate's proposal. I'm not, I don't wanna belittle it from that standpoint. I do have 11 witnesses--

: All right, Sir.

CHAIRMAN : --I've decided I'm gonna get through tonight. And so, it's on the table, your suggestion's on the table. And I appr--

: (Inaudible)

CHAIRMAN : --appreciate you, you coming forward with something constructive.

: Thank you.

CHAIRMAN : Thank you. Helen Frances Olson. Would you state your name and who you represent, if other than yourself, please, Ma'am.

OLSON : I'm Helen Frances (Norvell) Olson, I represent myself.

CHAIRMAN : Okay.

OLSON : I am speaking in support of the Article 10 of House Bill 4, from the experience of over ten years of having family members as private-pay residents in nursing homes. My mother, Helen Frank (Norvell Stripling) has been in a nursing home for five years because of a broken hip, has left her in a wheelchair and she has dementia. Two-years-ago my brother and I were able to move mother from Tyler, mother and her 101-year-old husband from Tyler, where they'd been in nursing home, to an excellent nursing home here in Austin. It was the same home where my mother-in-law had resided for five years until her death in 1996 at age 93. Now, during the five years that my mother-in-law was in the nursing home in the '90s, the cost for her care rose only a few hundred dollars a year. For March 2001, when I brought mother and Mitchell to the nursing home here in Austin, the care was three thousand thirty-two dollars for the month of March. For March 2003, two years later, the cost was three thousand four hundred ten dollars. When we asked the administrator why the jump for this year, the increase, she told us that the major part of that is because of the monthly increase in their insurance premiums that the nursing home has to pay. Now, my husband and I have been volunteers at this nursing home for over ten years, since my mother-in-law was there, and we all become (sic) family. We are in and out of that home hours each week. We see the capable staff that is employed there. We see the tender care that they give people 24/7, people who are in, many of them, very difficult. We know n--the staff would not intentionally hurt or harm anyone. And they should not be punished for an accident by exorbitant claims against them. Now, my mother's money is running low. Even though she's almost 97, she probably is going to live a few more years because her heart is extremely strong as her body is strong, and she wheels around that home in her wheelchair and her demented mind.

Now there will be no money left for her precious grandchildren, which is what she wanted with the money that she and my father, many years ago had worked and put aside to take care of them and hoped that there would be some left for the family. And when her money is gone now, my husband and I and my brother and his wife will be paying for part of her care because she does have teacher retirement so, she will not qualify, probably, for Medicaid, and I don't know that we would want that, to put that on the state. We would, would want to do what we could to take care of her, the best possible. As I said, mother is in an excellent nursing home. Now, we want as much as possible of what we pay for her care, to go directly to taking care of her. So when you consider this bill, please consider provisions (now) to keep the cost for nursing home patients, residents' care as low as possible, please, by limiting the amount of unrealistic lawsuit settlements, which are causing all nursing homes to have to pay excessive insurance premiums. And, I do thank you so much for listening to me.

CHAIRMAN : Thank you, Ms. Olson. Paula Sweeney. State your name and who you represent, Ma'am.

SWEENEY : Yes, Sir. Thank you, Mr. Chairman, I'm Paula Sweeney. I'm here on behalf of the Texas Trial Lawyers Association, against a big chunk of House Bill 4, Section 10. What I wanna talk about is some of the specifics of the bill. Would that be all right?

CHAIRMAN : Hope so.

SWEENEY : Starting, if we could, and there are, are quite a few sections. I don't wanna go through 'em (seriatim) and hit every single little thing, I trust the Chair will prefer that we touch some of the smaller points in others ways. But, to start with some of the issues at the beginning and work our way through, more or less, in chronological order of the bill starting with the definition section. If you look at what the bill does, it hugely, hugely, hugely increases who is a health care provider under Article 4590i. Entities that have never been entitled to coverage before. One of the examples that Senator Fraser was asking about the assisted living facility. For instance, a facility that is, by law, according to the testimony we heard, not even allowed to give medical care, and yet, they wanna be health care providers, and he was asking, well, are they currently being sued under 4590i. A--as, as though, in, in, for some reason plaintiffs would want to put themselves under 4590i. No, they're not, because they don't qualify as health care providers. But they would be included under this, as would, for example, chiropractors who've been trying for a long time to come under the bill. But if you look on Page 51, Line 3, we're adding, in that definition, for instance, directors, shareholders, members, partners, managers, owners, affiliates of the health care physician. Those are extraordinarily broad terms. By way of owner, for example, I was involved in a case against a pathology group that paradoxically was owned by a CPA. He's now a health care provider under the language of this bill, and I don't hear anybody here talking about outrageous problems that CPAs are having. He's owning a for-profit business, he's running it as a business, he is taking the profits of the business and, and this bill would include him as a health care provider and protect him.

If you keep working down the very broad category of independent contractors, whatever that means, is included. Or agents of health care physici--health care providers or physicians, that could be almost anybody who's an independent contractor. The language is extremely overbroad, in terms of protecting people, actually, giving health coverage. Next clause down, Page, Line 10 and 11 on that page, health care liability claim itself is expanded extraordinarily, and no one has even mentioned this to y'all, and you need to, to flag on it, to the, the lines there that are underlined. Arising out of, or related to care and treatment. Right now, there's a whole host of cases about what is and isn't health care. For example, if you allow a, a, a demented nursing home patient, who has a history of sexual violence, a male patient, repeatedly, to assault female patients, to rape female patients, that's not considered health care under the existing case law. This, read this, related to the administration of health care, related to taking care of. If I'm defending a case, I'm gonna argue it's related to, because they're both patients, they're both in the house. We're going to open, enormously, what is or is not related to, and suddenly is now a health care claim. Right now, premises liability cases, if you're in the hospital and related to your care in the hospital, you are walking down the hall to do your exercise you're supposed to do after surgery, and you trip because they left a bucket out in the hall and you got your IV tangled up in it, that's a premises case right now. It's not a health care liability claim. There's case law on that. Under this it would be a health care liability claim. Patient dumping is specifically excluded as a health care liability claim. You could make an argument under this that it's related to, or ought to be related to treatment. Frauds, assaults, the case of a nurse who dropped a big old heavy load of equipment on a patient. They said that's not health care, you're not supposed to be stupid, you're not supposed to drop things on people. It would be related to, in this instance, and be a health care claim. So, there are a huge host of things like that in the definition section that I--I think I've made the point is, is massively overbroad. If you look over on Page 52, the next area that is of great concern, and this cuts throughout the bill, and it's something that you have alluded to, Mr. Chairman, several times, but is very important, and that's the definition of claimant. Claimant--

HARRIS : De--definition of what?

SWEENEY : --claimant.

HARRIS : Okay.

SWEENEY : Senator Harris. Currently, the definition of a claimant is an individual who is bringing a claim. In other words, if you kill a daddy, his two children are both claimants, his wife is a claimant, his estate is a claimant and under the wrongful death law, his parents are claimants. In this, and, and if he's divorced and there is an exwife, she's not a claimant, but those kids are claimants, because he's still their daddy whether or not the parents got divorced or not doesn't vitiate their claim subject to proof of the quality and extent of the relationship that he still maintains with them. So you have a lot of claimants who are bringing a suit. Now, in the case of, of loss, for instance, of a daddy, you're talking about having a two hundred and fifty thousand dollar

cap for, in that instance, you've got four kids, that I'm hypothesizing, not at all unusual, a wife, an estate, and two parents, which is seven or eight folks sharing a two hundred and fifty thousand dollar recovery for the grief over his death. That is astonishing. And, and, and in terms of what it does, in the ability to bring a case, in an instance like that, for--forgetting economic loss, looking, for instance, at the case of a situation of an elderly person who is killed, and I know your concerns about it, but just to do the math, you've got four, five, or six kids, you've got a maximum of two hundred and fifty thousand dollar cap. This in part goes directly to the very first question you asked, Mr. Chairman, to the little lady that was sittin' up here, she was right, but she couldn't explain it. That cap will prevent her from bringing suit for the death of her mom, because it's going to cost her lawyer what it costs all of us every time we bring one of these cases, between a hundred and two hundred thousand dollars in costs and expenses to bring the case. I've had some lower than that. The most I've ever had to spend is almost three hundred thousand dollars, to get the case to the courthouse and get it tried. Now, if, if my target, the most I can ever get for those folks is two hundred and fifty thousand dollars, and because, and we'll get to some of the reasons way it's so expensive, 'cause this bill makes it exponentially more expensive to prosecute the cases, but, if I'm gonna have to spend, even a hundred thousand, and I've got eight people to compensate with two hundred and fifty thousand dollars, you've got a hundred and fifty left, I'm presumably gonna take a fee, because I will have worked thousands, and thousands, and thousands of hours to get there because of the things that are in this bill and in 4590i, which is going to leave a few thousand dollars for each those folks. I'm gonna have to tell them at the outset, I can't do your case because I'm gonna end up, y'all aren't gonna get anything. So, so that little lady was right. Those cases will become impossible. She will never find out what happened to her mom. Because the only way she can find out is through a lawsuit, the only way she can be compensated is through a lawsuit. They won't tell her what happened, she cannot discover it in any other way. She certainly couldn't of done the discovery, and most folks can't, on their own. So, that, that's, that's the answer in that particular (inaudible, coughing in the background). The other reason that claimant is so critical is when you get back into the caps portion of the bill. Currently, by case law and by statutory construction of, of the existing 4590i, the cap is per defendant. In a wrongful death it's, it's calculated per defendant, of course we don't have a cap currently in an injury case, so we don't have case law on that. So, currently you've got a situation where each defendant, who is found by a jury, after an astonishing amount of proof is required of the plaintiff, each defendant who is found by a jury to have negligently caused the harm is liable to the amount of the cap, if the verdict is that high. Under this, that's not true, it is for the whole case. So if you've got two nurses on, on sequential shifts and two doctors on sequential shifts who, who negligently cause somebody's death or, or a serious injury. You've got four tortfeasor. They all have insurance, they all were responsible, they all violated the standard of care, and they all caused injury or death.

You're subsuming all of that into one claim, unless the person is a bread winner, by changing the definition of claimant as you have here. So, I--I want to emphasize the, the enormous scope of the, of the change of just that definition to Texas law. I am, I am not charged with talking further about the cap, so I'll, I won't go there. But, I'd like to move down to another very big change in the law that has not been addressed here, that I think, partially is unintentional and partially is not well drafted, and that's the emergency care definitions. We are purporting, and that's starting on the bottom of Page 52, we are purporting to carve out special protections for emergency room physicians, but that is not what we're doing. If you read that definition, emergency medical care is medi--a bonafide emergency service that's provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including pain, that absence of medical attention would be bad for the plaintiff. And it, it goes on, it's everything. There's, there's almost nothing that happens to you in a hospital that doesn't come under this definition. Having a baby, is acute under this definition. Almost anything that, that, that a, a physician, or surgeon, or nurse does to you, that then causes another problem, would come under this definition. And why that's important is gonna come up in a minute. But, but, bear in mind, as we go to the next section, how broad this definition is because then when you go to Page 56, at the bottom of that page, you've got a jury instruction that we now wanna comment completely on the evidence, and tell the jury, that in an emergency case, go back to your definition, we're gonna tell the jury that they are to consider whether the person providing the care did or didn't have the patient's medical history, whether or not it was a full history, what they knew about the preexisting condition, the preexisting physician-patient relationship and so on. This stems back to what has come before this body every Session for a longtime, which is emergency room physician (sic) saying, we need immunity or we need some special protection, because our class of patients is different, they come in, we don't have their history, all of this. That is already the law, in this sense. The jury is already instructed to consider the same or similar circumstances. So, all of these things are what constitutes the same or similar circumstances. Why is that so important? When you're commenting on the evidence, and you're telling the jury, in this particular case, for what is or is not an emergency situation, that definition carves out, by the way, the things they've caused themselves. So, that particular definition looks more like it applies just to emergency room care, but, but the definition's gonna come back in, again, in a second. But what you're doing, is you're commenting on that particular kind of cases, telling the jury, you know, these are different, here's a, here's (sic) special things that we want you to, to consider. Setting, standing really the law kind of on his head, and carving out a special class of positions when they are already protected by the definition. The last aspect of emergency care, that's also very important, is found on Page 64, and I know I'm talking like (Joe Isuzu), but I'm tryin' to flag these things for you. If you get down to the bottom of 64, we now have the standard of proof in cases involving emergency medical care. And what y'all are doing here is raising

the standard of proof in emergency medical care. Now this goes back to the definition, and it's for everything including the catastrophes they've negligently caused themselves, in the hospital. And we are raising the standard of proof, in those cases, to clear and convincing evidence. So, now we have changed, for only that class of physicians, who are already protected by the existing definition of the standard of care, from the burden of proof of ordinary negligence, and reasonable medical probability, and a preponderance of the evidence, to clear and convincing evidence, with, with no basis or justification for doing so. It is a huge change. I've heard nobody advocate it, and I'm not sure that it's not completely under the radar, and we do oppose it, strongly. All right, the next area I wanna touch on that is extremely important, and this is, is probably the thing that is of greatest concern, and that is what y'all are doing, starting on Page 55, with the abolition of the Rule 202 depositions, which plays into and will go straight into 1301, which is the expert report and discovery sections. What y'all are doing in 1301, the expert report section, in the changes in this bill, is requiring an absolute, no exceptions, no agreements, no court orders, no grace period, at 90 days have your expert reports filed. The existing law on 1301 reports, and I've written a dozen at least--

: (Inaudible, background conversation)

SWEENEY : --if not more papers on this for the state bar--

: (Inaudible, background conversation)

SWEENEY : --and other lawyer bodies across the state. There are a 155 reported cases on that one tiny section of law, or they're in Westlaw, some of them are unreported, but now they're reported, 155 cases, those are the ones that have gone up on appeal. Almost all of those are cases that have been dismissed and are up on appeal. It is a huge area of litigation, and what's been created is, at the 1301 stage, an outcome dispositive summary judgment proceeding, where all inferences are taken against the plaintiff, against the report, as opposed to the protections of summary judgment law, which is suppose to come after discovery has been done. That's already the law, but now it can be at 180 days or at another time if so agreed or by court order. Y'all are abolishing discovery, before those reports. Under 1301, you are making the plaintiff file an outcome dispositive report with no discovery. You're eliminating 202 depositions, except for a limited exception where you might get one, 202 depositions are the ones that you get to take before you file a lawsuit, if you can convince the court to allow you to do it. You're eliminating those in this class of cases only. Then, in 1301, in that section, you are staying all discovery except depositions on written questions and a few other written instruments until the report is filed. I submit to you, you are making an impossible burden for plaintiffs, literally an impossible burden. No responsible peer-review committee would ever evaluate a doctor's conduct based solely on medical records without being able to get behind 'em and ask some questions, flush 'em out, find out what they actually say, find out who really was there, what they did and why they did it. A medical entity, reviewing itself and it's own conduct, would never responsibly conduct itself that way. We want to use

high quality experts and under a lot of the terms of the statute, even the folks that don't want to have to, which is a good thing. But, if I've got someone from Harvard coming down here to look at a case, and I tell 'em, you know what, I can only give you this record. It's not complete, but I can't do anything about that. I can't flush it out. I can't ask any questions about what it means. You're gonna have take your best guess, and by the way, if you get it even a tiny bit wrong, because you couldn't read it, the court has no discretion to do a darn thing about it, because Section F and G have been taken out. The court cannot cure the problem. Now we have proposed in the past two Sessions and had an agreement with TMA, a fix for the whole 1301 mess, and right now it's just an absolute cottage industry. Everybody has got a 1301 motion to dismiss in every case. If you pass interlocutory appeal, which has already been discussed, (you know), it's in another section, but it's, it's, as you know, it's out there. You've got 1301. Now you've got no discovery. Now you've got a motion to dismiss in every case. The judge has no discretion anymore under your bill. And then if the judge does deny it, if the plaintiff manages by some voodoo to get it right, then you're gonna allow an interlocutory appeal in every single case. I submit to you a defense lawyer who feels strongly enough to challenge the report, in good faith, is gonna feel strongly enough to take a mandamus. And we're gonna start having those in every case. We're gonna, we're really gonna jam up the courts. We have proposed several times and had agreement on a fix, which is this, I, I don't mind if it's at 90 days, if I can have my discovery. But we've got to be able to have enough reasonable discovery to answer some of these question before we do the reports. When the report is filed? Right now, the defense can wait a year, wait till two days before trial and suddenly discover the inadequacy of my report, and I can be dismissed. If there's a bonafide problem with the report, give 'em a period, a window, 30 days to tell me, hey, you know what, as in a case I had in West Texas, my expert was critical of the nurse on the 7:00 to 3:00 shift, the nurse on 3:00 to 11:00 shift, and the nurse on the 11:00 to 7:00 shift, and that's how he phrased it. They filed a motion to dismiss because he didn't say the nurse on the 7:00 to 3:00 shift, comma, Jane Smith comma. Didn't put her name in, just identified her, apparently, the hospital didn't know who they were, because it was a big problem to them. The court, under the way the law is right now, was considering dismissing it. It was a game. It was a gotcha. Take that out. It's, it's just friction cost. It's just adding cost to the system. Make 'em say, here's the problem with your report, Sweeney, fix it, you screwed up. I can either fix it or take my chances with the judge. I got 30 days. If I don't fix it, and I'm wrong, dismiss me. And put my, put the cost (inaudible) Hartley talked about at risk for the fund. But right now what you're doing is making it absolutely impossible to responsibly pursue these cases. Let me skip, because I know you're gonna want me to get my rear end outta your chair. Let me skip over, if I could, Mr. Chairman, to the periodic payments, 'cause nobody's really talked about those, and that starts on Page 76. What y'all are doing is if, in every case where there's greater than a hundred thousand dollars recovered for future losses, one, you're including settlements, two you're including adults and,

and people who are not under any disability, three you're including all future damages, not just future earnings or medical. So if I've got a death case where I've got ma--mult--mostly noneconomic claims, most of my damages are future. Somebody kills my husband, my mental anguish is into the future, greater than in the past one assumes. So, it's, i--i--in other words this is gonna be in just about every case that it applies. Justification for it ordinarily is, assume you have a tragic case of a brain injured infant, it's gonna, got a probable very long life expectancy but may not make it, but huge medical expenses. What if you fund it until he's 70, but then low and behold he dies five years later. This is where that sort of sickening analogy that it's a windfall to the family comes in. It's not, obviously they've lost their child. But there's this fund of money that's residual, that what this is, ordinarily said to be aimed at, is let's not have all of that money out there when it's no longer helping the child. That, unfortunately, has almost nothing to do with this section as written, and my concern is with both aspects of it. But to look at the over breadth of the section, you're talking about all future damages, you're talking about present value as determined by the court. Okay, one, a jury is already told, do this, if paid now in cash, that is present value. So you're, you're telling the court to reduce it again. You're ordering the judge to do math. Not a good idea.

: (Laughter)

SWEENEY : You are going to have, in every case, a separate trial on this. You're, you're increasing it, you're adding a huge amount of friction cost. It cannot be agreed around, you can't settle around it, because it's in all cases, the court must, so, if, if we settle a case and it's for future losses, and we're all consenting adults and your client, and my client agree, we can't agree under this, we have to go to the court, and we have to have periodic payments. The way it's written, one of the benefits of periodic payments, and I've put a lot of clients in annuities over the years, is that they have tax benefits of that, the payments are un--non taxable over the future course. The way this is written, I believe we're completely afoul of the IRS code, and think that there is gonna be constructive receipt, and that they're gonna lose their tax benefit on down the road, so that had to be addressed.

CHAIRMAN : Were you here when Bob MacFarland testified?

SWEENEY : I did, however I was unable to hear or understand him very well, and so I'm gonna have to try and get a hold of what he submitted to you.

CHAIRMAN : (Inaudible) I think the lan--what he suggested was language which, he said would, was not sure it was not taxable. But I, some kind of IRS, referral to an IRS code.

SWEENEY : And, and I wanna check that because I, I was asking could anybody hear exactly what he said, and, and we didn't have the written materials. But that certainly needs to be fixed and be an iron-clad guarantee that we're not screwing that up by accident. It pa--it provides that the payments, if they do revert, revert to the defendant, which makes no sense, because most defendants are not making the payments, their insurers are. That

certainly needs to be clarified, and if you're going to do this, I suggest you make those payments revert, i--if--if you're going to do it, to which I object, obviously, I think it's a bad idea. Because what we're doing in a verdict is we're liquidating a claim. All right, we're already asking the jury and therefore when we settle a case we're basing it on a potential verdict. So, we are already liquidating a future claim down to reasonable probability, what is most likely to happen. And we're answering it in the now. And from an actuarial standpoint, I've tried many times over the years to get carriers to pay my folks, fine, don't pay 'em now pay 'em over the years, and I, they tell me it's impossible, they cannot do it from an actuarial standpoint, they have to have a liquidated claim so they can close it in year X and not have a contingent liability, or in this case, a contingent reversionary interest. It's also all one way. What if they out live their expectancy? You know, here the defendant gets a, a bonus if the plaintiff dies. Well, what if they live to be a 100 like some of these folks we've been hearing about, and the testimony was only 80. Where is the extra that they have to pay? Do we intend to do that? That, that seems extraordinarily unfair. You've go somebody who's won their case and they're being told that there's nothing there to protect 'em if they should live longer than the projection. It says the court my modify this on down the road in years. The court will have lost jurisdiction by then, how, how is that going to be possible? You're gonna have ancillary obligations. It doesn't make clear that the defendant is or can buy an annuity. So those are some of the concerns with the way the future payment section of the bill is written out. Last section that I'll touch on and then, and then I will go away, and, and I'd be real happy to go through some of the other specifics with whoever you direct us to go through them with, Governor. But, federal and state income taxes was touch on earlier, in response to some of the question that were asked. Homemakers, one, why are we ordering that or writing, legislating that damages to be proven to a jur--jury must be based on after tax? Why are we ordering that when what is relevant is what did they actually earn? We don't know what the future tax situation's gonna be, and the law has always been what did you earn? In terms of proving earnings, that is a factor, however, it's not the only factor, particularly, in proving earning capacity. In proving earning capacity many things other than what you earned in the past are relevant, but this says must, which is very problematic. It can also be read, in a little footnoted way, to say, maybe you don't have to, but, I think, we're building in a problem and, and the drafting needs to be cleared up on that. And for a homemaker if she must prove her value for household services with her tax return she's in a world of hurt, 'cause it's not there, it's not possible. And then the tax instruction that the court shall instruct the jury about the tax consequences of the recovery. Hartley and I tried to draft that instruction and as--based on what we know it's almost a page and a half long. I, I don't a court can do it, and I don't think a jury could understand it. So, I would urge you to take that out as not making very good sense or being very good policy. I'm happy to answer any questions, otherwise I'll move on. We are enormously grateful--

CHAIRMAN : I think you overwhelmed us.

SWEENEY : --sorry (laughter)--
: (Laughter)
SWEENEY : --we'll drink water from a fire hose. We are enormously grateful for y'alls attention to these issues, thank you.
: Thank you.
ARMBRISTER : Just--just an observation, when McFarland was in the Senate we couldn't understand him (inaudible, overlapping conversation).
SWEENEY : (Laughter)
: (Laughter)
SWEENEY : I'm glad I'm not alone. (Thank you.)
CHAIRMAN : Michael Crowe. State your name and who you represent, please, Sir.
CROWE : Good evening, Governor and Committee Members, my name is Michael Crowe. I'm an attorney and a lobbyist registered, to speak on behalf of the Texas Assisted Living Association. Texas Assisted Living Association's composed of little over 270 licensed assisted living facilities in Texas. In Texas, (there're) approximately 1300 licensed afis--assisted living facilities serving over 25,000 seniors and other disabled persons. There's been a couple of comments or commentators who have alluded to the fact that the definition of health care provider should not be expanded to include assisted living facilities, and I'd like to be on record as saying that TALA strongly supports our inclusion in the definition of health care provider. In the context of who, or, who assisted living serves, I'm gonna read from a Senate Committee Report that was generated back in 1998, that studied assisted living. The typical resident is a single or widowed woman in her mid-eighties who require assistance of three activities of daily living. Almost half of all residents have some sort of cognitive impairment such as alzheimer's and almost 40 percent use a walker or wheelchair, but a, about a third require (toileting) (sic) assistance and another third are incontinent. The majority require assistance with bathing and taking medications. The, I think, there's been some confusion drawn about who, who assisted living serves. In Texas, assisted living, we're not talking about golfing commine--communities. We're not talking about independent living centers. We're talking about an aging population that is seeking an alternative, primarily, to nursing home care. Typically, people who no longer feel like they can stay in their own homes, but, but they don't wanna take that next step to a nursing facility, and they, they come to assisted living. Assisted living is regulated by the State of Texas. We have our own special place in the Health and Safety Code, that's Chapter 247. Two-forty-seven was developed in 1989 as the result of a report to the 71st Legislature on the Special Task Force on the Future of Long Term Care (sic). We, we spun out of the, the Nursing Home Code. And, and, while we are not, while assisted living is not as heavily regulated as nursing facilities, they are definitely regulated. They are regulated by the Department of Human Services (sic), by Long-term Care Regulatory. There're many regulations that touch on the health care of residents. Assisted living facilities, under the, under the Texas Administrative Code, are subjected

to routine assessments. These assessments are developed into plans of care. There's been some inference that no assisted living facilities has nursing staff, and that's, that's incorrect. An individual who requires routine nursing care is not to be admitted into a nursing, into an assisted living facility. But a person who needs intermittent nursing care can receive that care in an assisted living facility from a nurse hired by the assisted living facility. There's also nursing provided by assisting (sic) living facilities to individuals with terminal conditions and--

ARMBRISTER : What part of the bill you're talking about?

CROWE : --th--I'm sorry.

ARMBRISTER : I mean, I don't need a commercial message about assisted living. What part of the bill we talking about?

CHAIRMAN : (Inaudible, overlapping conversation)--

CROWE : I'm sorry, Section 10.

CHAIRMAN : --adding assisted living to the definition of health care provider.

ARMBRISTER : And, and, (le' me) (sic), let me be sure, you're testifying for licensed assisted living centers?

CROWE : That is correct.

ARMBRISTER : Because, as you know, in that business, there are many, many unlicensed assisted living centers operating in the state.

CROWE : That's correct under, but under Chapter 247 there is a, a requirement that any, any community, any facility that wants to call itself an assisted living facility must be licensed.

ARMBRISTER : Right.

CROWE : So, when I speak of assisted living facilities, I, I think we're clearly talking about licensed assisted living facilities.

ARMBRISTER : All right.

CROWE : I don't wanna belabor this point, I just, as I said, I--there've been a couple of people who've come up and s--and made some inference, some illusion to the fact that, you know, that there is not health care being provided in assisted living facilities, and I--I--and I think that's, that's simply wrong. There's medication management, there's medication supervision, there's extensive regulations over the quality of care, and quality of life. Chapter 247 touches on a lot of that and, and Senator Mike Moncrief, who chaired the interim committee, the report from which I'm reading, felt very strongly about the quality of care that is being delivered in assisted living facilities, because he and the Committee came to realize that they are an ingrained and integral part, and will continue to be an ingrained and integral part in our continuum of long-term care and that's all I have.

CHAIRMAN : Okay. Thank you, Mr. Crowe. We've got a few more witnesses, but I, I think, I'm gonna rethink finishing tonight--

: (Laughter)

CHAIRMAN : Well, as you, as some of you recall when we did products I gave each side a, a fairly substantial amount of time to close, and I

had--I had scheduled Mr. Hull and Mr. Jacks' closures, but I think we're a little too numb for--to--to follow clo--an--an--and frankly, I think maybe, because there are as many places in this, in this particular one that, that people are gonna suggest changes. I--I think, I would suggest to you that those be in writing, rather than us trying to keep up with all these--

: (Inaudible, background conversation)

CHAIRMAN : --comments from both sides. So, what I would, what I would ask Mr. Hull and Mr. Jacks, could you all be here at 8:00 o'clock Tuesday morning--

: You bet.

CHAIRMAN : --to close, and then I'm gonna try to take everybody else tonight. And then I'll give you that opportunity first thing Tuesday morning. As if that's--

: (Inaudible, not speaking into the microphone) do that, we might even be able to get together and agree to the tort (inaudible, over lapping conversation).

CHAIRMAN : Maybe you could make a joint closing, you know that.

: (Laughter)

: (Inaudible, background conversation)

: (Laughter)

CHAIRMAN : Richard Mithoff.

: (We're) doing (it) high noon.

CHAIRMAN : I'll be right back.

: (Laughter)

: (Inaudible, not speaking into the microphone), Governor.

MITHOFF : Senators, my name is Richard Mithoff, I'm a lawyer--(verbiage lost due to changing of the tape)--

END OF SIDE 1

SIDE 2

MITHOFF : --I want to spend just a few minutes talking about the damage caps. And I want to begin with Lucas, which is the Supreme Court decision that declared damage caps unconstitutional as applied to the common law personal injury claims. Lucas held that it was, quote, unreasonable and arbitrary for the Legislature to conclude that arbitrary damage caps applicable to all claimants, no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded. As the Governor has already referenced several times, there is in this bill no exceptions to the cap. There is no attempt, in our view, to meet the reasonable and proportionate relationship between damages sustained and cap, as required by

Lucas. Yes, Senator.

DUNCAN : Did, did Lucas also talk about, though, the quid pro quo concept?

MITHOFF : In discussing the alternative remedy section of the bill, the Court did talk about two other states, Indiana and Louisiana, I believe, that had in the alternative remedy section provided for a victim compensation fund, and talked about a quid pro quo in that sense. Similar as you know, Senator, to the workers compensation system that exists here and exists in both states, of the rationale being that if you give up your right ta--to--to uncapped damages, then in return you got a guaranteed recovery. So there is that quid pro quo element as well. The Lucas court did make clear, I think, however, that merely reducing insurance rates, which may be a societal benefit, was not the kind of benefit to the claimant himself that would constitute a quid pro quo.

DUNCAN : Requiring though, that you have liability insurance in order to avail yourself of the cap, would that be an available--would that be an adequate quid pro quo under Lucas?

MITHOFF : That would not, in our view, be an adequate quid pro quo under Lucas, because it is, while it may be a societal benefit not a specific benefit to the claimant, such as a victim compensation fund as contemplated under the worker's compensation laws.

DUNCAN : (Inaudible, overlapping conversation) and I--I know we're late on time but (inaudible, coughing in the background) differ from the victim compensation fund, it is a victim compensation fund if you require the, if you require where it has not been required before, the health care provider to have a certain level of, of insurance to compensate for the loss.

MITHOFF : The kind if quid pro quo contemplated by Lucas, utilizing a victim compensation fund is a fund that would be available either without regard to fault, or as a supplement provided by the state. That kind of specific benefit to the claimant such as, is available in a worker's compensation claim, would be a quid pro quo under Lucas. A general societal benefit such as lowering rates, while meritorious, would not be that kind of quid pro quo. So, the, the first ob--objection we have, just as a matter of principle, and as a matter of constitutional law, is that the damage cap, as proposed, does not meet the Lucas standard. As Governor Ratliff has pointed out over the last several days, there are on exceptions for more serious injury. There is no exception--

DUNCAN : (Inaudible, overlapping conversation)

MITHOFF : --for those with, without economic loss.

DUNCAN : Quid pro quo (idn't) (sic) the only test in Lucas though, in other, in the progeny of that, as well. As I understand, there's also a compelling interest in the state to, it, it all boils down to there's a number of factors including quid pro quo, before it, it (would) satisfy the open courts.

MITHOFF : Quid pro quo is one component--

DUNCAN : One component.

MITHOFF : --that's correct. I, I agree with you, Senator. And if we look at the facts of Lucas, for example, which involved a little boy fourteen months old with a penicillin injection that was suppose to go into muscle and instead went into the artery and became paralyzed. What the court, apparently, was concerned with was the disproportion between the five hundred thousand dollar cap as it existed then, and the lifetime of paralysis for a 14-month-old child. So I think, I agree with you. I think the quid pro quo is a component, but I think the proportionality is a strong component based on the facts and based on, on the holding. There is no exception for brain injury or paralysis or blindness or burns or other forms of serious and permanent injury. There is no exception for those who have not sustained serious economic loss. There is also, in the definition section itself, a very broad definition that includes not only physical pain and mental anguish, which is the component most often discussed as having lack of predictability or lack of certainty, but is so broad, we think, as to raise a question as to whether punitive damages are included. The definition on Page 53, of noneconomic damages, includes quote, any other nonpecuniary loss or damage, or element of loss or damage. This is Item 18 on Page 53. Presumably punitive damages are nonpecuniary. If it is the intent of the drafters of the bill to include punitive damages within this proposed two hundred and fifty thousand dollar cap, then they are taking an element of damages that has already been capped, and including it within the cap that was presumably intended for elements such as physical pain and mental anguish. If that is not the intent, then we believe that should, at the very least, be clarified so that punitive damages are not double capped. That is, once under the punitive damage cap and then again under the noneconomic damage cap. If, if we look at the alternative remedy section definition on Page 60, which is Section 11.031, this being the alternative limitation in the event the first one is declared unconstitutional, in the second paragraph third and fourth lines, limitation on liability proposed there as, quote, for all damages and losses other than economic damages, unquote, which would appear to be even broader than the first def--definition and would almost certainly, I would suggest, include punitive damages. If, if again, it ha--has been the intent of the drafters to include punitive damages in the noneconomic damage cap, that has not been, we suggest fully disclosed and punitive damages should, at the very least, be taken out from that definition since it is already capped. With respect to the definition of who the cap applies to, Paula Sweeney has already touched on the fact that claimant is redefined in this act to include everyone in the family who may be impacted by a single injury or death, so that the definition is changed from a per defendant cap to a per plaintiff cap. So the proposed two hundred and fifty thousand dollar cap, that the insurance carriers have come before this Committee and said, they're prepared to live with, would, in fact, be diluted, if there's a case with more than one defendant. In a typical medical malpractice case there is more than one defendant. If there are five defendants, for example, each 20 percent responsible, then they would presumably bear under some proportion of responsibility of provision, only fifty thousand dollars of, of

noneconomic loss. So, this two hundred and fifty thousand dollar cap that the carriers are now saying they're prepared to live with because that will be predictable and that will be certain, is now serving no purpose whatsoever because it's being diluted substantially by the number of defendants. With respect to the wrongful death cap, which of course, relies on the original five hundred thousand dollar cap escalating by cost of living and is now valued at approximately 1.4 million, that cap, is one on which, I do not believe anyone has come forward with testimony suggesting that that cap is somehow not predictable, or not certain. We have lived with that cap since 1977. No carrier has come forward, to my knowledge, since I have been here, to suggest that there's anything uncertain, or unpredictable about that. And yet, this bill takes that wrongful death cap, which appears to be working, and eliminates or rather adds punitive damages into that cap. So, punitive damages, which the Supreme Court has held, are outside of that wrongful death cap, would now be included within the cap, the--

DUNCAN : When you--when you say that, that that cap is working, what do you mean?

MITHOFF : I mean that, at least to my knowledge, no one has come forward from the insurance industry to suggest that there's anything uncertain or unpredictable about that cap. In other words, I don't think there's anything to fix there, at least, insofar as any evidence that has been produced thus far before this Committee, and I've been here for 2½ days. The, the goal, presumably, of the industry, is to have something certain and something predictable, and this has been certain and predictable with that cost of living increase since 1977. The bill would not only put punitive damages into the cap, where it has not been. It would also continue to cap loss of earnings despite what the (proponents) of bill have described as a--as a--as a--as a bill that does not cap earnings. The wrongful death cap, of 1.4, would continue to cap earnings, because the current cap caps all damages, this is the wrongful death cap, except for medical expenses. So, under this bill, not only would earnings still be in the 1.4, but the punitive would be put in and presumable if the per claimant rather than per defendant language is also tacked onto the wrongful death cap, you would have further diluted a cap.

CHAIRMAN : Show me where, show me where the punitives are put into the wrongful death.

MITHOFF : That is--

: Page 53.

MITHOFF : --at Page 59--

: (Inaudible, overlapping converssation)

MITHOFF : --Section E. The limitation on health care liability claims contained in Subsection A of this section, includes punitive damages.

CHAIRMAN : Okay.

MITHOFF : And that appears to be an amendment. (Pause) We would respectfully suggest that, at the very least, the wrongful death cap

should remain as it is. That is, at approximately 1.4 increasing with the cost of living index, not including punitive damages and per defendant. The final cap that I want to talk about is, one that, I don't think anyone has talked about, and that's the cap at Page 83, Section 84.0065 entitled Organization Liability of Hospital. This provision purports to cap all damages, as we read it, for hospitals specifically including hospitals, hospital systems, and its employees for all money damages at five hundred thousand, (inaudible) arising as a result of injury or death, if the patient is indigent or uninsured and signs a statement acknowledging that there's no expectation of compensation on the part of the hospital and acknowledging limitations on the recovery of damages from the hospital. This provision appears to apply to all hospitals, both for profit and not-for-profit, appears clearly directed at those who are indigent or uninsured, would cap, presumably, all damages economic, noneconomic, and punitive, regardless of all of the other caps that are in place. It appears directed only at the poor. And the most troubling, I suppose, of a very troubling section, is contained on the next page, at Page 84, in which it says that this subsection applies even if the patient is incapacitated due to illness or injury and cannot sign the acknowledgment statement required by that subsection. What that a--means, apparently is, if you're indigent or you're uninsured, and if you're so badly incapacitated that you can't sign the acknowledgment then the damage cap of five hundred thousand dollars applies anyway. I again have heard no testimony that I can recall in behalf of any of the insurance carriers or the proponents of this bill, arguing that there ought to be a five hundred thousand dollar cap on all hospitals regardless of whether they are profit or nonprofit. Now, in the case of the patient who was indigent or uninsured, and who signs away his or her rights, so I would, respectfully, suggest that that section be stricken, particularly, if we're going to have to try to come up with a proposal to work on the other areas of this bill as it relates to damages. We are clearly prepared as both Hartley and Paula have said to work with this Committee in every way possible. And I want to say to you, Governor, and to the other Members of the Committee how much I personally, and our association, appreciates the very careful attention that you have given to this bill. This is an area of the practice of law that, quite frankly, has meant a lot to me over 30 years, and it's an area that I have tried to do something about outside of the courtroom, as Senator Ellis knows, because he--he and I've had the opportunity to work on some of these matters together. And it is a matter that, I think, based on the number of lay witnesses that who have come forward with some pretty troubling stories, as well as some physicians who need some relief, from high premiums, that this is an area that needs our attention, and we are very grateful for your careful consideration of this. I believe these damage caps will cause greater harm to the system, than they will good. But we are prepared to work with this Committee to try to put together a bill that we think will solve a lot of problems.

CHAIRMAN : Thank you.

MITHOFF : Thank you very much.

CHAIRMAN : Let me clarify something I said earlier, about

submitting things in writing. We don't need philosophical argument in writing. (Laughter)

: (Laugher)

CHAIRMAN : What we need is specific language suggestions that, that you might have and I, I think we, I think we've heard the philosophical arguments.

: (Inaudible, background conversation)

CHAIRMAN : Certainly we have. Thank you--

MITHOFF : Thank you.

CHAIRMAN : --Mr. Mithoff. David Thomason. David Thomason's not here? Texas Association of Homes and Services for the Aging in Austin. Is this his stat--

ELLIS : (I guess that's, he's givin' writ--he's giving written testimony, (Governor).

CHAIRMAN : --(written), written statement okay. Charles Bailey.

BAILEY : Governor Ratliff, Senators, my name is Charles Bailey. I'm general counsel for the Texas Hospital Association here in Austin. And I'm here in support of Article 10 in House Bill 4. I wanna begin by thanking, particularly you, Senator Ratliff, you have showed a lot of, I think, commitment, patience and perseverance. We've had a long day of testimony, a long day yesterday, I'll try to keep my comments brief. I do have a few issues I would like to raise for the Committee. I know there will be some rebuttal tomor--or Tuesday with Mr. Hall and Mr. Jacks. Mr. Hall's, though, I think a little bit outnumbered in the last few minutes. We've had several TTLA representatives speaking on the bill and if I could, I'd like to respond to, some of the things that have been mentioned as well emphasizing our support for this legislation. There's been a lot of discussion about the data and certainly that is important. There's a lot of, I think disagreement about, how good the TDI data is, how much severity is up, how much is frequency up, and health care liability claims. Earlier this afternoon you heard testimony from a, a hospital actuary, Mr. McWhorter, who talked about hospital claims data. The one thing I'd like to emphasize is that most hospitals, as was also testified to earlier, self insure their risk. The cost of liability insurance has increased significantly over the last number of years, and as a result, most of 'em are going to self retained amounts. As consequence, most of these hospitals, because they're not regulated, they're basically absorbing the risk themselves, do not report their claims data to the Texas Department of Insurance. So the suggestion that, at least, as hospitals are concerned, that severity is (sic), been up only moderately 5.9 or 6 percent over the last decade, I think, is incorrect. The data, and I won't belabor th--the information that was presented earlier, but, I think, the data clearly shows, at least as hospitals are concerned, severity is up significantly, and that is a big cost driver in hospital services.

DUNCAN : Man I ask you a question on that, Senator, (Mr. Chairman)?

CHAIRMAN : (Senator) Duncan.

DUNCAN : In the rollback provisions in the bill, where the Commissioner has to look at the history and, I think, (file that on) for a long period of time, does it require the self insured retention groups to--

BAILEY : As I understand the--

DUNCAN : --report claims data?

BAILEY : --as I understand Article 10A, it does not require risk retention groups to the report data.

DUNCAN : Okay.

BAILEY : And the rollback provision would not apply to, I believe, surplus lines as well as risk retention groups.

DUNCAN : So, I know when we've done that, I think we did, did it in some bills require surplus lines and others to report, I guess we could do that and get more claims history. I'm just--

BAILEY : (Yes, Sir.)

DUNCAN : --thinking (that) well, I just, I didn't know if it was in the bill or not.

BAILEY : There, there's only one small hospital insurer, the Texas Hospital Insurance Exchange. It does report data to the Department of Insurance. That company, however, primarily insures public hospitals, which are, as you know, are subject to Tort Claims Act.

DUNCAN : I, I remember what it is, in the, in the nursing home, in 1839 we did, we required the, the surplus lines to report the data.

BAILEY : If I might, I'd like to address, some of the comments were made by Ms. Sweeney concerning definitions and the application of law, and certainly these are important issues. The point was made that there isn't substantial expansion of a definition of health care providers. You have assistant living. You have hospital systems. You have the directors and officers of a corporate entity all included within the definition, and this was purposeful. She is correct. There was, I think, an intent to make sure that we cover potential defendants. In most health care liability cases, the hospital is sued, the hospital system is sued, some cases the officers or directors of the hospital might be sued. If the hospital system is not included within the definition of health care provider or the director, or manager, (or) officer of a health care system is, is not included within the definition of health care provider, you have the potential that the lawsuit can also allege recovery against the system, against the officers, the directors, affect what we're creating is an exception to cap. It'd be possible to get whatever that cap amount is the Legislature decides to recover against the hospital, the hospital system, and also against the managers and directors of that, that corporate entity. That's a policy decision you need to make, but I think from the standpoint of, of writing a bill, we felt like it was important to cover those potential defendants in a lawsuit. Mention was also made about the definition of claimant being very restrictive, and I would say that it was true. It was, in my review the legislation it was intended to be restrictive. What we're trying to deal with is a, is a tough issue, we're

trying to balance the needs to provide adequate recovery to claimants by the same time, somehow putting a, a limitation on the increases we're seeing in--in liability insurance cost. Whether we set the, the cap at five hundred thousand or we, whether we allow multiple defendants to be sued, those are all certainly judgments that, you, will need to be made, that will ne--need to be (nade) (sic). But I think, certainly the testimony today has shown, that if we don't have a low enough cap we're not gonna get sufficient re--relief in the liability insurance premiums. If you allow additional claimants or diter--additional causes of actions or additional defendants to come under separate caps then the benefits of the reforms certainly are reduced. Ms. Sweeney, also mentioned the definition of emergency care. She mentioned it was very overly broad. I'm, I'm a little confused with that. That is the same definition that's used in the Health and Safety Code as it relates to hospitals. It's the same definus--nish--definition we use in the Insurance Code, as well as the federal law, the EMTALA statute. It talks about the responsibilities of hospitals and doctors to respond to, to evaluate and treat emergency medical conditions. There was no intent to try to create a problem in the statute. We basically put into law what is the existing definitions of emergency medical conditions.

DUNCAN : Could, could I ask you a question on that though?

BAILEY : Yes, Sir.

DUNCAN : You don't intend for that to apply to like (code-blues) (sic) or (doctor-reds) (sic), or those kind of things, situations to where, what you're really talking about are people that come in off the street in a trauma situation. You're not trying to apply that to like those types of routine emergencies that apply during a hospitalization?

BAILEY : That certainly was the intent, Senator Duncan. If we to, to tighten the language to make sure that we're talking about the emergency department, I think that was certainly where the problem is, and certainly (the) definition ties to those other provisions, the bill (sic) that deal with emergency care. As several witnesses have testified, over the last couple days, we have a very significant problem in the emergency department. We're losing neurosurgeons, also, all over the state. Many hospitals are having great difficulty getting physicians to provide on-call coverage to the emergency department. The purpose of the, setting a higher standard for emergency care is really an effort to somehow encourage physicians. Now, I, we're not sure that's gonna be enough of a (sic) incentive to get more doctors to be willing to serve in emergency rooms, but it's--it's one of, I can think, several measures in this legislation, including the limitations on damages and other provisions that hopefully will--will keep doctors in Texas, and willing to, to deal with emergency care. We certainly all need access to emergency services. The question of periodic payments, I think, was also mentioned. This particular provision, in large part, is, is patterned after the California statute. We've talked a lot about, over the last couple days, about how MICRA has worked. Certainly, the periodic payment provisions of, of MICRA have worked and helped contribute to inc--

reduced liability cost in, in that state. We think this is an important provision. We certainly support it. There was mention about, that the award would somehow be reduced to present value. What I think the provision intended to say, and I believe does say, is that for purposes of determining whether or not a periodic payments plan should be established, the judge needs to determine what is the present value at that time. He's not reducing the entire award to present value, but merely saying, if you did reduce it, would it be above a hundred thousand or not, to determine whether or not the threshold has been tripped, and you can, you can request periodic payments. The issue of, I think, medical benefits and whether or not that should terminate at some point, I think that's a key part of this provision. In situations where the recipient of the periodic payments does not live as long as the projected life span of that person, that does create a windfall. I think it was suggested that that's, that's inappropriate. There's, there's no windfall there. But it appears that would be the case. And I think that's one of the, the main reasons for this provisions (sic), because it will help reduce the payout in judgments. Finally, I, I want to talk briefly about the amendments to Chapter 84, the Civil Practice and Remedies Code, th--the Charitable Immunity Law. This particular law, as you know, has been on the books for a number of years, and there's, there has been a specific exclusion that, that hospitals, unlike other health care providers, would not have any limitation on liability, they provide charity services. This amendment is very straight forward, and it, and Mr. Mithoff, is correct, it is a total cap on damages. I think we have a problem in the state with charity care. We, as most of you know, Texas leads the nation or is near the top, as far as, the number of uninsured. Hospitals in the state are, are burdened heavily by the charity care burden. This is an effort, and it's certainly like a lot of the other provisions in this legislation. It's, it's, it's a balancing of th--the competing interest here. And--and to certain extent, this provision, we would hope, would encourage hospitals to provide charity care. Some hospital I think would, would prefer to reduce that burden. This will, at least, provide some liability protection to those facilities if they provide those services. We think it's an important provision, certainly like the cap on noneconomic damages. This is a tough policy decision for the Legislature. We would urge you to carefully consider it. Again, we think it would help provide some, some legal protection to hospitals and other providers. It's a reasonable provision and, with that I'll stop and, and answer any questions.

CHAIRMAN : The charity care, I was trying to find where it said that the, the hospital, there's no expectation of compensation. That would even include Medicaid or any kind of, any kind of compensation. If the hospital (dudn't) (sic) expect any compensation, is that right?

BAILEY : That's my understanding, yes, Sir.

CHAIRMAN : Thank you, Mr. Bailey.

BAILEY : Thank you.

CHAIRMAN : Darrell Keith.

KEITH : Governor. Senators. I know the hour is late,

pardon my (clears throat) I realize the hour is late and I passed yesterday to follow the TTLA folks. So I will try to make my remarks targeted and hope it would not over stay my welcome and, Governor, if I, if I am just shut me off. I, my name is Darrel Keith. I practice law in Fort Worth with my daughter and two associates. I am a medical malpractice and professional liability lawyer, been practicing law since 1970 over 72 years. I like to think that I'm coming to this Committee and to the Legislature as an advocate for patient rights, which I've spent my entire life, do unabashedly and (unapologisedly) (sic), but also as a strong advocate for fair and balanced legal reform. I'm here testifying for myself. Although, I am a member of the Texas Trial Lawyers, I'm here speaking for myself. I believe we have a great opportunity at this time to address the sweeping changes that are proposed in Article 4590i, as well as other laws affecting medical malpractice and related health care liability claims. I would like to think that I can bring to this Committee, (clears throat) so sorry for my voice, a bit of unique blend of 32 years of experience in this field, but also a strong historical background with 4590i. I was very involved with 4590i when it was in the, in its infant, well, in its embryotic stages in 1977 and, before that in 1975, then the Legislature dealt with the, the medical malpractice insurance crisis for the first time. My law partner at the time was Bill Meier, who was, who was in the Senate--

CHAIRMAN : Is there a doctor in the house.
: (Laughter)
: (Coughing)
: (Inaudible, background conversation)
: (Laughter)

CHAIRMAN : (Coughing, clearing throat) I'm sorry. Go ahead.

KEITH : Okay, Governor?

ELLIS : (Inaudible) lock on him but I don't wanna get sued.

: (Laughter)

DUNCAN : They'd all be witnesses (inaudible, not speaking into the microphone).

KEITH : Are you okay, Governor?

CHAIRMAN : Yeah. I don't need the emergency room.
: (Laughter)

KEITH : As I was saying, I, and I hope evoking the name of Senator Meier didn't bring on the attack--

CHAIRMAN : No.

KEITH : --(Governor). As I was saying it was my privilege to practice with Senator Meier, when he was in the Senate. I was very involved with 4590i, have lived with it, written on it, li--dealt with it, practiced it, had appellate issues along with Jim Perdue, did the post submission Amicus Brief in the Lucas case, and in the (Rose) case, and here I am, in, in two, 27 years later addressing the same issue again. I think it's extremely important as,

as the Governor, pointed out earlier, that since this is a medical malpractice bill we apply the two medical principles of the hippocratic standard of hi--of, to approach it, does it, does it help, but first to do no harm, does it do harm and the great saying by Dr. Osler that the secret of patient care is caring for the patient, and does this legislation take care of the patient. I think that it certainly takes care of the, of the insurance industry and the health care industry, but I think the, the big debate is, is it fair to patients, and to patient rights to access to justice. Are we sacrificing too much access, in the name of access to health care for patient rights and access to justice, and I think, it is a very, imbi--I would like to be here arguing for a bill, a strong, positive, fair, balanced, medical malpractice reform bill, that would take care of everyone in a fair and balanced way. This bill does not. This bill does harm. This bill does harm and does not care for patients, and harms a patient's access to care. I think that it's very important for this Committee to understand, appreci--historically, some, some salient features, 4590i started out in 1975 as Article 5.82 of the Insurance Code, because they couldn't, they couldn't make a decision. They had a study commission, and they studied it, and as the Governor knows, and perhaps other Senators, in '77, the study commission, with Dean Keaton chairing it, told a committee, just like this one, that they did not have adequate data to show a causal of relationship between the skyrocketing medical malpractice insurance premiums, at that time, just as they are today, and the tort law system, the medical liability system. But because, Senator Duncan, is, to paraphrase your words earlier, because there was such a strong, indeed, huge momentum toward having a cap, in politics, and the momentum toward having a cap, the perception that the legal system was causing the rates to go up, then 4590i, 1101, the five hundred thousand dollar cap was passed, but this was, this was not California, this was Texas. And at that time, it wasn't two-fifty that was considered and rejected by the Legislature, while California two years earlier had done a two-fifty, no COLA, per claimant clat--cap, Texas considered and rejected that, five hundred thousand dollars indexed with inflation and per defendant. In eight--in, in '87, Lucas came down, struck tha--struck it down as unconstitutional. In non-death cases in an '80--and in '93 then Rose upheld it in death actions. Now you are being faced for the first time since 1975 and '77 to determine, is a cap necessary. There was inadequate data in '77 and in the findings of fact of 4590i, the Legislature sets out that it was an experimental statute. The Legislature recognized that they didn't have the adequate data. They were gonna see if it would work, with regard to solving the, the medical malpractice insurance crisis at that time. We are now sitting here with a lot of interesting data, you know, som--some fuzzy and some voodoo economics. The other thing I want to get across to y'all, Senators and Governor, and this is so important, is to appreciate the, the, the economics of MICRA. I've set (sic) through these hearings for two and a half days, and I've been hearing, MICRA works, MICRA works, MICRA works. Well, obviously MICRA works, because it puts a tremendous da--da--depressive effect on the damage cap, and makes litigating major cla--cases except catastrophic injuries with large economic claims, almost impossible in

that state, except on a, just a big volume basis by lawyers that just settle them very cheaply. Obviously, MICRA works financially, but whether it works in a fair and balanced way, is yet another question. MICRA was passed at a time, in the '70s, and I was in the '70s trying malpractice cases where four and five hundred thousand dollar verdicts were the top of the line. Those were, and some of those people thought we're runaway juries. I did not win in Tarrant County, I won the first million dollar medical malpractice verdict in Tarrant County, was, that didn't happen until 1980. I won the first figure over ten million dollars in Tarrant County and in the state, I believe, and that wasn't until 1989 and in 1990. So, during the period of MICRA's formation, and Proposition 103, whatever effect it had or didn't have, when all of that was going on, the jury verdicts that MICRA and 4590i, the Texas Legislature were facing in the '70s, were dealing with a cap with verdicts that were not much more than the cap. That's why Texas put the five hundred, the Legislature plus the, plus the COLA and the per defendant. Today the two hundred--pardon me, the two hundred and fifty thousand dollar cap in MICRA in 1975, is in today's dollars worth seven hundred thousand under the, under the COLA formula. Our cap, five hundred thousand dollar cap, is now worth 1.4 million dollars in a death action. So, when you are, when you are considering this legislation, the proposed cap, I ask you, first of all, remember that this is the first time that the Legislature has had an opportunity to examine, whether the crisis really is being caused by the litigation system, or if it, and--and if it is, is that the major factor or is it the other factors, the need for health system reform, due to the horrendous number of medical errors, which cause people to go to hire lawyers who investigate their cases that result in lawsuits. It is my perception, I don't have any hard data, but looking at, from my experience in the field, and trying to stay abreast of what's going on, and looking at all the data that's been thrown at this Committee in the last two and a half days, and I haven't had the benefit of looking at all of the hard copy that's been given, that, that there, there are clate--categories of lawyers in this state, there are the experienced medical malpractice lawyers that know how to carefully evaluate cases and take meritorious cases and reject frivolous or weak or nonmeritorious or questionable cases. My law firm, traditionally, and we keep statistics traditionally. We, we select between 2 and 5 never more than 10 percent of the cases per year, rejecting in the range of 90 to 98 percent of cases we look at. The good lawyers do that. The inexperienced, there may be personal injury lawyers that are experienced in personal injury, but not experienced in malpractice claims that take the cases, and they, they don't investigate 'em, they know how (sic), they file 'em and perhaps those are a significant, that may make up a bunch of those, so called, frivolous or weak claims that, that, that the proponents of h--i--of House Bill 4 are talking about. Then there's the inexperienced lawyers--

DUNCAN : Can I ask, can I--

KEITH : --who don't know what they're doing.

DUNCAN : --can I interrupt you on that (inaudible, not speaking into the microphone).

KEITH : Yes, Senator.

DUNCAN : I wanna speed this up, but I just--I thought in '95, when we did the reforms, we did the 1301 and all that, now, that's really what we were trying to address.

KEITH : Yes.

DUNCAN : Was to try to get the, the, the claims that really don't have merit, that haven't been evaluated properly out of the system by requiring some financial insurance up front. How--why did that fail?

KEITH : I'm sorry. I'm a little hard of hearing.

DUNCAN : Why did that fail?

KEITH : I'm not sure that it's failed entirely. I think that, I think that it certainly has a very strong effect with my firm and all the good lawyers that I, the experienced malpractice lawyers, it has a strong effect. We in, after we do the initial phase if we don't, if, if we have to shut down and non-suit some defendants, we do it. Okay. And I know that, that it's, it is having an effect. Where, where perhaps it's failing is that, lawyers are able to get experts, you know, flaky experts, phony experts, who'll sign a report--

: (Uh-huh.)

KEITH : --and, and I don't know how you gauge or quantitate this problem, but apparently there are, I know of at least one judge in Tarrant County that, that really doesn't impo--you know, doesn't follow the strict requirements of 1301 and a very flimsy report will get by. I mean that's my explanation, I think that, the answer is to make fo--make the 1301 standards strong enough so that it will work. And a Mis--Jim Perdue, Jr. previously spoke to that. With regard to, with regard to the, back to the cap situation, all I'm, I'm suggesting, I don't think we need caps. I don't think they're justified. I don't think the case has been made. We don't have the data. We, we haven't done the study. The, the, we haven't audited these companies. The TMLT recent consolidated report, that I saw, they, they combine, you can't, you can't separate out what, what their, their loss, losses are from their, from their defense cost. We don't know really what's going on with their investments. I mean, you've heard a lot of data about, their going up, their going down. I don't think that, that, that we have a rational basis for putting caps on damages. But, if the, if it is the sense of the Senate and this Committee to, to approach and have a cap structure, then alternatively, although I don't think they're, they're justified, then I'm, I'm pleading with this Committee, please look at the history and realize that, that MICRA was worth seven hundred thousand dollars, in today's dollars, if you're even gonna start there, and you--and look at the model of our own cap, which is now 1.4 million, as well as the, the other factors in term of, of the need for exceptions. Including, but not limited to, gross negligence, malice, willful, re--and intentional misconduct. I've had a number of cases in which there has been in--(verbiage lost due to changing of the tape)--

END OF TAPE

(Senator Ratliff in the Chair)

: --(inaudible) of the cap. I don't think that's good public policy and I don't think that's what, you know, what this Committee should do. I don't think what--that's what the Legislature should do. Keep in mind that over sev--from '75 to the present time, as we've gone through all these stages, the verdicts, the verdicts have gone from, in the four--four to five hundred thousand range, in the '70s, up to the two million dollar range today. It took a long time to get there. And so, if you're gonna consider a cap, do it in the current environment. Don't go back 27 years and u--and use what I think, I'm gonna borrow from, you know, Reagan, the Reagan years of voodoo economics that, of MICRA, and take a 27-year-old statute and apply that cap in today's environment when our cap is 1.4 million and working well in death cases.

CHAIRMAN : Darrell, (inaudible, not speaking into the microphone).

: I would just, I would just, you're, you're givin' me the, the high sign. Thank you, Senator, Governor. I would just say lastly, with regard to the expert reports, and I will, I will get some, some information and some proposed language. The, the, the stay of discovery is, is really draconian. It is, it is a summary judgment without due process. We're not gonna have adequate discovery to get the information, the data, the pr--policies, procedures, contracts, all the documents we're gonna need to determine all the potential parties and to develop a case to get adequate reports, not just against the doctors, but hospitals, health care entities, all these other folks that are being added, and we're gonna have to come up with reports. The discovery that is allowed doesn't co--i--it's too limited, and without any depositions. My suggestion, real fast, is if, if you want to, to look at trying to, to approach, either, either take it all out and allow discovery to go on as is, or if you wanna put some limits in it, I'll be glad to give some suggestions in writing, but let the trial court sit down and figure out what, what discovery is really needed for the report. And he could, and, and can put, then they let the trial judge determine what limits are needed, documentary discovery, deposition discovery, time limits on that sort of thing, so that the plaintiff can then get their reports. And then at that point, that will, that will allow the plaintiff then to separate the wheat from the chef, cut loose any nonessential defendants, and then they can go forward with the full blown unlimited, or, or reasonable discovery under the rules. Thank you, and I, sorry if I overstayed my welcome.

CHAIRMAN : (That's all right) (inaudible, not speaking into the microphone).

: Thank you, Governor, very much.

CHAIRMAN : Thank you. Dick (sic) Trabulsi.

TRABULSI : Thank you, Governor, Members. Richard Trabulsi, Texans for Lawsuit Reform, in favor of Article 10 of HB 4. Just a few thoughts. Governor Ratliff, you, you posed a couple of times during this hearing, the dilemma of why impose noneconomic damages, caps on noneconomic in just

(Senator Staples in the Chair)

SWEENEY : --so we would suggest that in addition to the scheduling sequence, that a limited number of depositions, five would, would be adequate, be permitted, either at the 202 stage, but preferably during the discovery phase before the 1301 report is filed, because at the 202 stage, you're still building in a hearing, you're still requiring that folks go to the court, and although we believe that those should be left as they are for those cases where they're necessary, it's not necessary to do presuit discovery in every case, so, but we would suggest that it be taken out of the bill and just, it's already subject to court discretion, and judges already look very carefully at whether or not to allow 202 depositions. This hamstrings 'em and says you just can't do 'em in med mal cases unless the very limited instances that are permitted here. So, those changes are important. The other thing and I don't know if the Chair is aware of this, but in, in moving all of this over, the sections on the form discovery are carried over here and I don't know if, if y'all have been made aware of this, but those don't actually exist. The Legislature, in an attempt to, again, get to this same place, decreed that a k--that a task force be created to write form discovery, plaintiff and defense lawyers, and that the Supreme Court appoint that task force, and we were appointed, I was on it. W--there were six of us. We met a bunch. We wrote a bunch of form discovery. It was largely agreed to and then the agreement started to kinda fall apart, but it was sent to the Supreme Court years ago and has been there ever since. So, it's never been promulgated and I get calls from out-of-state lawyers from time to time that have won a malpractice case in Texas and they say, you know, can I get a copy of this form discovery that's in y'alls statute, (and I) it, you know, it just (dudn't) (sic) exist. So, that's not available as a tool to us, currently.

RATLIFF : We need to pena--we need to put a penalty in there if the Supreme Court (dudn't) (sic) do it.

SWEENEY : I think that'd be gr--(laughter).

: (Laughter)

SWEENEY : If, if you'd like. I, and we don't know. It was sent and, and we thought we'd get more input back and, and it just stopped, so, it's not there. If you'll, if you'll look on Page 63, or, or I'll just tell you. On Page 63, what y'all have done with qualifications of expert witnesses and suits against health care providers, this is non-doctors, you've provided that an expert can qualify only if they're in the same field. And what that does is, artificially and probably more than you want to, restrict the ability of the right experts to be called. For instance, if an obstetric nurse is negligent and causes harm, this would prevent an obstetrician from testifying against her. I don't think that should, is or should be the Committee's intent. The fix to that simply is to, and we've provided language, to say in the same field, or having knowledge of, or being conversant in the same procedures. So that when you have specialities that overlap, they can talk about each other, and certainly, we don't want to say that

an obstetrician, by way of example, isn't qualified as an expert to say if an obstetric nurse did something wrong in, in a case. So, we've, we've sent you that language. On Page 64, you pick up, under C1, that in determining qualification, the court shall consider if someone is certified by a Texas licensing agency and we, we do this over and over again. If, if somebody wants to bring the expert from Harvard or from John's Hopkins or from Yale to testify, they ought not to be precluded from doing so by the fact that they're not licensed in Texas. And this is a shall. In, in other iterations of this, it's been an either or, but it, it really, in our judgment, and we've proposed language, should say, at Line 14, is certified by a Texas or other state licensing agency, or by a Texas licensing agency, or licensing agency of another state.

RATLIFF : A--th--the words are a national professional certifying agency dudn't cover that.

SWEENEY : Well, when you talk about an actual Texas licensing agency, I think you run into trying to get somebody who is licensed in Texas, and then you can look at national board certification, but you've got Texas, you've got licenses in other states that are not necessarily, you know, if you've got somebody who is licensed in Oklahoma but doesn't have a national licensure, that, we seem to be excluding folks that we probably don't mean to exclude. And then, just a couple of more on that discovery section, on Page 57, under Letters D and E. This is the dentist and the podiatrist exception and what has been written here is, this is talking about causation now, so, forgetting who the experts are on negligence, if you want to prove that a dentist, through malpractice, has proximately caused harm, you must do so through a dentist. And, in many s--senses, as a matter of law, a dentist really can't do that. For example, many mouth cancers, d--dentists routinely do a test in your, look in your mouth to see if you have massive sores, humps, bumps or lumps that look like they may cancerous and it's part of dental care to do that. It's negligent not to do it. If a dentist didn't do it and you had a lump in your mouth, it was a lymphoma and your cancer spread and you died, the dentist, your dental expert that you would call to say he should've identified the lump is not qualified to say, and as a result, the lymphoma spread and the cancer became incurable. An oncologist would have to do that. I mean, as a matter of law, a dentist isn't qualified to say those things, so this, the, and the fix for that, for Section D is on Line 18 after the word a dentist, add or physician who is otherwise qualified.

RATLIFF : But wouldn't the dentist be able to s--testify as to whether another dentist should have recognized the condition and, and referred it.

SWEENEY : Yes, Sir. That's the negligence component, but this is the causation paragraph.

RATLIFF : Oh, okay.

SWEENEY : Yes, on negligence, you would want a dentist or someone qualified, you know, an orthodontist or what have you, but on causation, you've got to be able to fold in a physician. The next--

RATLIFF : All right.

SWEENEY : --paragraph is the same for a podiatrist. I think almost as a matter of law in Texas, a podiatrist is not qualified to testify about medical causation. You know, if a podiatrist misses a foot cancer, or causes a, an orthopedic injury, you're going to need a, a, an MD to testify about causation. And so, again, on Line 24 of the same fix, is a podiatrist or a physician who is otherwise qualified. Because, otherwise, you're tellin' the plaintiff that to prove their case they have to do it in a way that is legally as a matter of law, not competent proof to being a podiatrist to testify about causation in a malpractice case. So those are the elements of the discovery on 1301 Section. I wanna focus on a couple of other items. On, on Page 32, under the definition section and moving through some of the definitions, Definition Number 1 is of a, is for affiliates and affiliates is an extraordinarily broad definition under this term that it is difficult to tell who it does cover, but it certainly probably covers HMOs. It seems that it does because HMOs certainly directly or indirectly control care that is given. And so, to put an HMO under a two hundred and fifty thousand dollar cap when they deny care, I think this definition is overbroad. We can't tell who it was designed to pull in, but certainly it pulls in a lot of folks that it wasn't meant to. The second definition there of claimant, I touched on a minute ago, b--but to give you an example of the problem that you run into with the definition of claimant. What we've done here is we've, an--an--and it was done in connection with the damages, to restrict damages that are available, but if you look on Page 38, I'll tell you what it does, 38 is the notice section where when you send a notice letter, you're supposed to, if asked, send over your medical records. That's phrased in terms of the claimants medical records. Now, there's nothing in existing law, and I don't think it's the Committee's intention that if my husband is malpracticed on, I'm one of the claimants in that case, that I should have to send over my medical records, certainly not my psychiatric records, which are privileged. And maybe I should use something other than me in that example, but, so I think we ru--(laughter) I think we run into a problem with the definition of claimant there, an--and I suspect, and I, I don't have this in a word search program where I can pull that up, but I think we need to make sure that that is changed, and that in other places in the statute where it ma--it may come up, that also it is changed.

RATLIFF : If we leave claimant defined as it is, the, probably on 38 it would be the injured parties medical records or some such there, right?

SWEENEY : It, yeah, it would have to be the patient's medical records or th--the patient involved in the claim or words to that effect. The other problem that you have with claimant, the way it's written, Mr. Chairman, is, relates to the issue that was created in a case called Utts, U-T-T-S, and what that provides is that if some plaintiff's settle their case and other plaintiff's don't, let's say you've got two families, two sets of kids. One family settles and the other doesn't, the remaining family has a credit against their

recovery from that, if any benefit can be shown to have (passed). And if you already have a two hundred and fifty thousand dollar cap, and you already have at least a hundred thousand dollars in expenses, and you already have a limit on your recovery, and everybody now has to share it, and then, in addition to that, you've got to take a credit on that limited recovery, if other plaintiffs have settled. You're reducing some claimants to zero as a matter of practice. And so, I think that the, in, in broadening the definition of claimant this way, that you run into that unintended consequence as well. That claimants are not always allied and do not always have an identity of interest. On Page 33, the definition of emergency services providers, the witness who testified a little while ago brought to your attention a case from San Antonio and, and gave y'all some language about emergency services providers, the EMS folks. What, that case held that they, as she said, were not licensed, that they are s--they have a certificate instead. It allows them good Sam (sic) protection, protection under the good Samaritan statute, which is a, basically they're immune unless they're willful or wanton. And so, we'd be very interested in which way the Committee is going on that, because right now, they're health care providers, they have been added here under health care providers, which gives them the damages caps and other protections of 4590i or its new successor, versus her comment was that she also wanted to be sure they had the good Samaritan willful and wanton standard, and so you would then have somebody who, one, was never in the statute before, two, was added to the statute by your definition, three, therefore it gets caps, four, also gets a willful and wanton good Sam and I, I--

RATLIFF : I didn't think the good Sam could apply to somebody who, who was performing that emergency service as a, as a, part of their job, or--

SWEENEY : The Trevino case held that it did apply to them.

RATLIFF : (Is that right?)

SWEENEY : Yes, Sir.

RATLIFF : Because they were not licensed, but certified.

SWEENEY : 'Cause they were certified.

RATLIFF : Okay.

SWEENEY : Health care provider, the definition at the bottom of 33, hugely increases who health care providers are. You're adding hospital systems, podiatrists, pharmacists, chiropractors, and we have not heard about any of those entities loading up on buses and heading out of the state 'cause they can't insurance. There are plenty of chiropractors in Texas and why they are suddenly being afforded this heightened protection, is not something that anyone has come before this Committee to ask for or to justify ditto, pharmacists, podiatrists, and hospital systems are the largest corporations virtually in this country, or among the largest and including them as ho--as health care providers and putting them under the cap is, we would suggest that that be taken out. If you look down at Line 24, independent contractors is added. And the example that was given was if you've got someone whose job it is to fill

the oxygen tanks and deliver 'em to the hospital and they fill the oxygen tank with helium and the helium tank with oxygen and a patient dies, that contractor, who is not even a health care provider, is just someone whose wheeling the tank in, fillin' it at their plant wherever it is, is protected by this. They're not health care liability provi--I mean, health care providers. They're not providing, they're not licensed in any way, they're not certified health care providers and it's at Line 24 on Page 34, and we would suggest that that be taken out as well. And then on Page 35, the beginning of the definition is at the bottom of 34, health care liability claim. Y'all have added two words that are going to make a monumental difference and that is health care is, health care provided arising out of or related to, and it's the words related to. There are a host of cases as to what is and is not health care and c--injury arising out of health care is one thing, but related to is almost anything. If I am walking into the hospital and I'm hit by a car and I'm, it's related to my health care because I'm going in to have my appendix out, arguably, that comes under this. But even worse, and David Bragg touched on this, there are a series of cases involving hospitals and nursing homes, allowing known, dangerous criminals in their premises. These folks rape patients, they murder patients, they assault patients, they attack patients. Those folks are not there, the patients are not there for anything other than treatment and it is an easy argument to make that their assault, rape or murder is related to their treatment under this extraordinarily broad language. There are a host of cases that point out that rape is not health care and that we are not protecting it. I believe that this bill, because of that related-to language, does do that, and we--

RATLIFF : Where--

SWEENEY : --suggest--

RATLIFF : --where were you (for the)--

SWEENEY : --the first two words on Line 2 of Page 35. It's Section 12, health care liability claim under the definitions.

RATLIFF : Okay, all right. I found it.

SWEENEY : So that is a, an--and then also, as you, if you, if you tie it all together, if you say, you know, related to and you go on down to safety, certainly allowing folks to be murdered on your premises is related to their safety. So, the, the, the addition of those words is very problematic and we would ask that it be deleted. At the bottom of Page 36--

RATLIFF : Y--

SWEENEY : --yes, yes.

RATLIFF : --I'm sorry, Ms. Sweeney--

SWEENEY : Yes, Sir.

RATLIFF : --you really believe that the statement aroused--arising out of or related to treatment could somehow be construed to mean rapists.

SWEENEY : It's already been argued and is already a subject of appellate opinions without related to. And, when you get on down to related to safety, I think, certainly allowing a rapist to run around your hospital and

attack your patients relates to their safety.

RATLIFF : Okay.

SWEENEY : 'Cause it's, it's related to treatment, etcetera, medical care, health care, or safety, which proximately results in injury to or death of. So--

RATLIFF : Never cease--

SWEENEY : --yes, I do.

RATLIFF : --never ceased to be amazed at the way (torts) might interpret this. Go 'head.

SWEENEY : Well, they've, they've held it's not. I mean, they've held rape is not health care and is not protected under 4590i or murder. But if you, if you add this language related to safety while in the hospital, that's where, if the argument's already been made without it, it's certainly gonna be made louder and stronger with it.

RATLIFF : Okay.

SWEENEY : One other (definitional) (sic) thing, if you look on Page 53, and this is under the minimum liability, it's just a quick, it's Item E1 on Line 11, talks about insurance for residents and it says physicians participating in a residency program and we would ask that be changed to in training, because an awful lot of physicians could be argued to be participating, which would include people training, teaching, helping, monitoring, proctoring, and a--this is meant, we believe, to include just the residents so we would ask that the word on Line 11, participating, be changed to in training. The area of emergency care is one other area that is important. There's been some shifting of language since the last iteration of the bill on this, but there is a, an--an added clause here that says that being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration. If you flip that with the language on the next page, having to do with whether or not somebody is en--t--ta--the language is very inconsistent between B1 and D, which says that the person who would ordinarily be entitled to receive a salary, a fee, or other remuneration is not entitled to good Sam. And you come over here to this page and it says, whether or not they're legally entitled doesn't determine whether or not they're legally entitled. And, I, we would suggest that Lines 13 through 16 on Page 47 be deleted. They really don't make sense. They seem to, seem to say that a physician, when an outcome, health care provider, when an outcome is bad, can decide, ex post facto, I don't think I'll send a bill for that one. That didn't turn out too well, which I don't think, I think is the opposite of what the Committee's tryin' to do. And so we would suggest deletion of those Lines on 13 through 16 for that reason. Additionally, Mr. Chairman, with regard to emergency physicians, on Page 49, the bill provides in those cases where emergency care is given for a clear and convincing evident standard as to those physicians only. And the justification for this always has been that emergency physicians are faced with a host of problems that don't happen in a nice, quiet

office visit. They see people they've never seen before who have been shot, stabbed, or are unconscious, who can't give a clear history, who are in active labor at the last stages, and that they therefore ought to have a different standard. The Committee has already addressed that in the next section downward provides that the jury shall be instructed to consider those things and has a long list of factors to consider. And to do both of those, to provide one, there's going to be this instruction and two, on top of that, for this unique class of physicians, we're gonna require a clear and convincing standard when we don't require that of anybody else. We would suggest is, excessive one, and two, under existing law, is not necessary because existing law already has the jury being instructed. You're instructed that reasonable prudence is governed by what a reasonably prudent physician would do under the same or similar circumstances. So, you're already telling the jury under existing law to consider same or similar circumstances. That means, did they have a history? Did they have a preexisting physician-patient relationship? What were the circumstances of the emergency? So, that's already existing law that they are told that by the court in the jury charge and it's part of the standard of care, same or similar circumstances. And here you're, you're adding that entire instruction plus, in addition to that, you're adding for only these physicians clear and convincing evidence, taking them out of a negligent standard and, and we would ask that that be deleted as redundant and excessive protection that is over and above what is already provided by law. (Pause) One last area is the statute of limitations which is found starting on Page 50 where y'all have added the statute of repose. There are a series of cases dealing with the constitutionality of the statute of limitations and there are three areas and we've provided language, four areas, we've provided language to you on this where the court has found an open courts violation when a statute is imposed before the claimant could make a claim. Those are fraudulent concealment. If a physician has a duty to reveal a harm and doesn't and tells 'em either you're hurt, there's nothing wrong, or what have you, then the physician ought not to be able to lay behind that fraud, which you have to prove. But if you do, in fact, prove it, then the courts have, have found a constitutional reason, bear a constitutional problem with the statute. Mental incompetence, and we've provided specific language that tracks the constitutional exception, but if the mental incompetence of the patient is continuous from the time of the negligence to the time that the claim is brought, then constitutionally that extends the statute. And the other is in areas where the injury is undiscoverable, those are the cases that, where somebody leaves a sponge in, takes out an organ and doesn't tell you, and, I had one client who couldn't figure out why she couldn't get pregnant, it was 'cause they took her ovaries out and didn't tell her, and when she did find out, she was upset. And, but that's not something that you can discover on your own, and so undiscoverability and we've provided language that tracks that as well. Is, so those are the areas where the statute, in order to meet constitutional muster should include those exceptions. We appreciate the issue of the long tail with minors and the difficulty of obtaining coverage for that and

understand that's the reason for the statute of repose. But those issues are still there.

RATLIFF : Okay.

SWEENEY : We'd be happy to sit down and work on the 1301 language with anyone that you direct us to sit down with and to see if we can work out the scheduling issue that I think will solve a lot of, of those concerns.

RATLIFF : Okay. Questions of Ms. Sweeney? I guess you know who you need to work it out with, unless you all (want) me to work it out?

SWEENEY : We'd be happy to do it, Mr. Chairman.

RATLIFF : (Laughter) Okay.

SWEENEY : Thank you.

RATLIFF : Thank you, Ms. Sweeney. Scott Agthe, is that right?

: (Pause)

AGTHE : My name is Scott Agthe, compliment you on the pronunciation.

RATLIFF : Phonetic.

AGTHE : I am a board-certified labor and employment attorney with the Brown McCarroll firm and I'm here on behalf of a committee that advises the Texas Association of Business on nonsubscriber issues. And I'm hoping that this late in the day, that the fact that I probably have something that you haven't heard about will perk things up a little for you, but I'll also try to be brief, but nonsubscribers, as most of you probably know are employers who have rejected workers' compensation insurance coverage which is an option under the Texas system. And there is a problem that would be useful, I think, for your Committee to consider, and it has to do with the rules of statutory construction, similar to something you heard a few speakers ago. The, as you probably know, one of the penalties, so to speak, for being a nonsubscriber is that you, under the statute you, of course, are open to negligence lawsuits. And so what I'm talking about really is a subspecies of tort claims, which primarily what I'm talking about is a, the Chapter 33 proportionate responsibility section and whether it would apply to this species of tort claims, tort claims brought by workers against employers. And the Texas Supreme Court looked at this issue a couple of years ago and through using the rules of statutory construction, issued a very restrained decision, and, and comparing, sort of went through the history of the Workers' Comp (sic) Act and the history of the concepts of comparative negligence, the Supreme Court said, well, the Legislature, it just hasn't been specific enough in either the comparative negligent statute or proportionate responsibility statute, or in the Texas Labor Code and the Workers' Comp Act, for us to, to tell exactly whether in 1973, comparative negligence was, in fact, intended to cover all tort claims, which, by the way, is what that statute has said, currently says now, defines the scope in, in Chapter 33 as, as all tort claims and then lists some exceptions and it doesn't mention common law negligence claims that are brought by employees against employers. The only exception that's

TEXAS SENATE STAFF SERVICES
EV:mms/294/SAHB4051303T1/120303
SENATE STATE AFFAIRS COMMITTEE
EXCERPT: HOUSE BILL 4
MAY 13, 2003
TAPE 1

(Senator Ratliff in the Chair)

(Tape begins with meeting in progress)

CHAIRMAN : --the Secretary will, the Clerk call roll.
CLERK : Ratliff.
CHAIRMAN : Here.
CLERK : Staples.
STAPLES : Here.
CLERK : Armbrister.
ARMBRISTER : Here.
CLERK : Duncan.
DUNCAN : Yeah.
: (Laughter)
CLERK : Ellis.
ELLIS : Here.
CLERK : Fraser.
FRASER : Here.
CLERK : Harris.
HARRIS : Here.
CLERK : Madla. Nelson.
NELSON : Here.
CHAIRMAN : Quorum is present. Members, I hope all of you received a, a revised version of the Committee Substitute that the, I intend to send up this morning, and I will ask Vice-Chairman to recognize me on House Bill 4.

(Senator Staples in the Chair)

CHAIRMAN : The Chair recognizes the real Chair, Senator Ratliff.
RATLIFF : Members, let me run down a--a--at least the, the parts that I believe are a significant departure in the, in the revised version of this Committee Substitute. By the way, let, Mr. Chairman, let me send up Committee Substitute for House Bill 4 at this time.
CHAIRMAN : Committee Substitute House Bill 4 is now before the Senate State Affairs Committee.
RATLIFF : Let me run down the, the major changes that, that were made between this draft, and the earlier draft that, that you all heard testimony on. With regard to Article 1, class actions, it, it provides that the, the Supreme Court is authorized to adopt rules to govern class actions. It provides that there will be an interlocutory appeal to certification rulings. It adds language providing that if an award for attorney's fees is available the rules adopted must provide that the trial court shall use the lodestar method to

calculate the amount of attorney's fees. It provides that the--

HARRIS : Mr. Chairman, is your mike on?

RATLIFF : Yeah, it is, but I'll, I'll try harder.

: (Laughter)

RATLIFF : Provides that the trial court may increase or decrease the fee awar--award calculated by using the lone sta--lodestar method by not--no more than four times based on specified factors. That the court must hear and rule on plea, on pleas to the jurisdiction, and that replaces the earlier version, which had exhaustion of administrative remedies. Article 2, on settlement, it removes the provision simply requiring the Supreme Court to adopt rules, and it actually sets the two-way offer of settlement in the statute, and then, and then provides that the Supreme Court will adopt further rules to implement. Article 3, venue and forum non conveniens replaces the provision requiring the Supreme Court to adopt rules for complex litigation with language authorizing the Supreme Court to consider rules relating to the transfer of related cases for consolidated or coordinated pretrial proceedings. It adds provision requiring each plaintiff in an action in which there is more than one plaintiff to independently establish proper venue. It also allows an interlocutory appeal to be taken on the trial court's determination that the plaintiff did or did not indepen--independently establish proper venue. It amends Article 3, by adding language to the probate code to clarify that the proper venue for an action by or against a personal representative for personal injury death or property damage is under 15007 of the Civil Practice and Remedies Code, and not under the Probate Code. Under Article 4 pro--proportionate responsibility, it adds (inaudible, overlapping conversation).

HARRIS : Mr. Chairman, on three, you basically adopted the federal rules is that correct?

RATLIFF : On--

HARRIS : Venue.

RATLIFF : --on venue?

HARRIS : And forum non conveniens.

RATLIFF : I'm told that it is a, it--it is only a slight departure from the federal rules--

HARRIS : Yeah.

RATLIFF : --yes. Thank you. Under Article 4, proportionate responsibility adds a provision, cla--allowing a claimant to join a person who has been designated as a responsible third party, and who otherwise would be barred by limitations if the claimant joins that par--person no later than 60 days after that person has been designated as a responsible third party. I have as--by the way, I have asked Senator Duncan on, on the two provisions at least, because they were, very honestly, procedural questions that were getting to deep for me, I've asked him to, to look at and to propose some amendments if he thought they were appropriate. On Article 4, if a defendant alleges that an unknown person committed a criminal act which caused the

injury that is the cause of the suit, the court shall grant leave to designate the unknown person as the responsible third party. If, one, the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal. Two, that the defendant has stated all identifying characteristics of the unknown person, and three, the allegations satisfies (sic) the pleading requirements of the Texas Rules of Civil Procedure. It adds a new section which requires the Supreme Court to amend Rule 194.2 of the Texas Rules of Civil Procedure to include discol--disclosures of the name, address and telephone number of any persons who may be designated as responsible third parties. It clarifies the Civil Practice, Section 33.014 of Civil Practice Remedies Clo--Code (sic), the election of credit for settlements and adds language providing if a claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant by a percentage equal to each settling persons responsibility. Under product liability, it adds language providing that the statute of repose does not apply to products covered by the General Aviation Revitalization Act of 1994. It adds language providing that with respect to any new component system or other part which replaced another component system or part, or which was added to the product, and which has alleged to have caused death, injury or damage, the applicable limitations period begins on the date of the completion of the replacement or addition. It adds language to the medi--medicinal warnings section to clarify that it applies to pharmaceutical products which have been prescribed by a licensed physician. And, this is another section that I've asked Senator Duncan to look at the procedural language on. It adds language to the medicinal sec--warning section, to direct that the section does not apply to a product which has been designated by the FDA as generally regarded as safe, or which is marketed as an over-the-counter product. And it amends the subsequent reme--remedial measures section by adding that evidence of ownership, control, feasibility or precautionary measures or s--or safer alternative design, if controverted, or impeachment shall be admissible in a products liability case. It requires the Supreme Court to revise and adopt ru--changes to Rules 40--407(a) to conform to this section. It replaces language in the governmental standard section, by providing that federal standards shall be construed as minimum standards unless the specific federal standards expressly state otherwise. And it separates the, the governmental standards section from the medicinal warning section as, so they do not both apply to medicinal warning. Under Article 6, interest, well, this was in--included in the earlier version which, which says that all interests will be the Federal Reserve Bank of New York's prime rate. On appeal bonds, it clarifies that nothing in Article 7 presents a trial court from enjoining the judgement debtor from dissipating or transferring assets to avoid satisfaction of the judgement. No changes in Article 8 or 9. Under health care, which obviously all of you have been following, it provides a two hundred and fifty thousand dollar cap, a--and by the way, this language, Members, I've had a lot of language

submitted to me over the last few weeks. This language is, was submitted by Senator Harris, and frankly, I thought it was the best, the best of all the compromises that I saw, provides a two hundred and fifty thousand dollar cap on noneconomic dan--damages for a physchis--physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply. It replaces the language regarding unanimous jury verdicts for health care provider other than a physician or registered nurse, with a provision which calls for a five hundred thousand dollar cap on noneconomic damages for health care institutions. It amends the definition of health care provider, to include definition of health care institution. The health care institution includes an ambulatory surgical center, an assisted living facility, an emergency medical services provider, a home and community support services agency, a hospice, a hospital, a hospital system, an intermediate care facility for the mentally retarded, a nursing home, or an end-stage renal disease facility. It adds legislative findings to Article 10, extends the time period that a claimant has to serve expert reports on each party from 90 days to 150 days. It extends the period for the defense production of documents to 45 days. It adds language allowing parties by written agreement to extend the deadline for serving expert reports, and it clarifies that the wrongful death cap applies to health care liability claims only. Article 11, claims against employees or volunteers of a governmental unit, it deletes language providing that a municipal hospital management contractor and any employee of the contractor, or while performing services under the contract for the benefit of hospital employees of a municipality. Article 12, th--there were no changes. Article 13, it provides definitions for claimant and defendant. It amends the felonious conduct exemption to the punitive damages cap so that it would not apply to medicinal malpractice cases involving children, the elderly or disabled. It amends the definition of gross negligence, and it clarifies that exemplary damages may be awarded only if the jury was unanimous in regard to finding the liability for, in the amount of exemplary damages. Articles 14, 15 and 16, there were no s--and 17, 18, 19, there were, and 20 there were no changes. Article 21, the, the, it adds a severability clause. It amends Article 21 to provide that except as provided in Articles 15, 17 and 20, this act applies only to an action filed on or after the effective date of this act, and a cause of action filed before the effective date of this act is governed by the law in effect immediately before the change in law was made. Members, I know that there are some of you that, that have amendments, two of you at least, amendments that I've asked you to look at for me, but I would be glad to answer any question.

CHAIRMAN : Senator Duncan.

DUNCAN : Senator Ratliff, I just wanna commend you for really taking a deep and hard look at this issue as it came over from the House. I know that, why you're an engineer and not a lawyer, I think you probably could pass the bar examination--

: (Laughter)

but we're close to those.

ELLIS : I, you know, I, Governor, I hope you appreciate I, I was defending your fine bill this morning, and you know, I'm being pulled to a meetin' up at the Lieutenant Governor's office. So much is goin' on, and I was for your bill this morning, and I just want you to know I'll still be for you this evening, but I'm not all that sure we'll be for your bill. So, I just wanna--

: (Laughter)

ELLIS : --for the record, here, 'cause if some of this stuff is gettin' on it, well, I'm gettin' 'em at the last minute, and have no earthly idea. I just would hope, Governor, although I won't be here, I don't want somebody to look at it and denote my absence as part of a unanimous vote, when some of this stuff may unanimously get a bunch of us run out of here on a rail.

CHAIRMAN : Okay.

ELLIS : If we keep throwin' it in here, and I, I just wanna say that for, for the, for the record. I'll come back for the vote on, on your, on what was a fine bill.

HARRIS : Well, Senator Ellis, that's why I threw this out, is (inaudible, overlapping conversation).

ELLIS : Yeah, and there just may be some others, 'cause I've got this meetin' at, at, at, at 3:00 that the, you know, you used to pull me out of this room for (meetin's) (sic) up there. You know, so--

HARRIS : Yeah.

ELLIS : --I, I need to go up there to the principal's office.

: (Laughter)

CHAIRMAN : Well, be as kind as you were with me.

ELLIS : It was a lot easier with you.

: (Laughter)

CHAIRMAN : Committee Amendment Number 17 is withdrawn temporarily. And the c--Chair lays out Committee Amendment Number 18, recognizes Senator Harris.

: (Inaudible, background conversation)

HARRIS : Which one is that?

: This one is the (inaudible, not speaking into the microphone).

HARRIS : All right, Mr. Chairman, Governor, this amendment, basically, what it does it puts the teeth back into the expert report requirements by shortening the time period within which an expert report must be presented, limiting ex--expert report, extensions limiting deposition, encouraging cases to be reviewed by saying speciality experts prior to suit should reduce the numbers. The suits filed requiring cases to be reviewed by or, or very early in the litigation, should significantly reduce the litigation costs, and worries for the 85 percent of the claims that will ultimately be dismissed for lack of sufficient evidence. The Amendment 1 restores (the) provision in HB4 that limits the clement--claimant to one precinct deposition and restrictions, restricts

the depositions. (A fact) (sic), Amendment 2, an expert report must be ready 90 days after a claim is filed. Amendment 3 deletes language that the defendant must serve an objection on the expert report within 21 days needed because the defendant cannot always know whether the report is sufficient within 21 days. Number 4 needed to clean up, Amendment 2, also the current language encourages a claimant to deny receipt of notice, and thus, creates a loophole to permit the court to extend the time for the expert report. Five, an amendment, this amendment (leaks) a provision that gives the court unlimited discretion to extend the time deadlines for the expert report. The court currently has unlimited discretion and this is one reason why the current system does not work. Six, the clean--the cleanup based upon the adjudication of five, seven current bill language substantially extends the scope of written discovery. This really kinda goes back to the discussion that Duncan and I had this morning concerning discovering, and that is why, Mr. Governor, I'd leave this to the discretion of the Committee.

ELLIS : Senator, Governor.

CHAIRMAN : Senator Ellis.

ELLIS : So, you're sayin' that you would leave this one to the discretion, vote on it on the Floor.

CHAIRMAN : I'm waiting for--

ELLIS : (I didn't know what you want.)

CHAIRMAN : --instructions from--

DUNCAN : Can I--

HARRIS : --the Chair.

DUNCAN : --can I ask a question about--

HARRIS : Sure.

DUNCAN : --the amendment. Does this return this pretty much to the House bill version?

HARRIS : Yes.

DUNCAN : Wouldn't it be a good idea to maybe take this issue to conference and work on it, or I'm just tryin' to figure out where.

HARRIS : I think that that is an excellent idea. Why don't I kinda just trash that one, where that way it does go to conference.

ELLIS : He's such a warm and fuzzy guy.

: (Laughter)

CHAIRMAN : Let me tell you, Se--Senator Harris, this whole section has been bounced around. We had 180 days, we had 90 days, we had 10 days--

HARRIS : One fifty, 150 days with a--

CHAIRMAN : --45 days, we had some people advocating for five depositions, some pe--some people advocating for none. I probably heard every idea in, in the book, and, and I finally (lit) (sic) with what's in this bill. If you--

HARRIS : Governor--

CHAIRMAN : --if you would go to conference on it, I, I think that--it might be a good solution.

HARRIS : --Governor, I just said I'd, stuck it in the trash.

CHAIRMAN : Okay.

HARRIS : But I did tell the people that I would lay it out. I've laid it out.

CHAIRMAN : All right, Senator. Well, an--and I'll look at it again before we go to the Floor, and if there's anything in it that I think, that we might need to talk about, I'll, I will, we'll do that.

HARRIS : Okay.

CHAIRMAN : Okay, Committee Amendment Number 18 is withdrawn temporarily. Chair lays out Committee Amendment Number 19, recognizes Senator Harris.

HARRIS : Members, this amendment simply clarifies the date on which the post-judgment interest rate will be comput--computed by substituting the word judgment for the word computation. More or less once it has reached the judgment form, then at that point the court can clearly compute the interest rate where it can go with the other verbiage you could get to a question there of the offsets and, and also post-judgment rulings by the court. And this makes it to where the in--to where the post-judgment interest is after final judgment.

CHAIRMAN : Senator, I certainly don't have any problem with this. I, I guess the question is since we have sent--since this bill provides that the interest rate will be on the, the prime rate established by the Federal Reserve, you tell me procedurally, if it's the date of the judgment, when the judge is drawing the judgment, will he know what that is on the date of the judgment. You see what I'm saying.

HARRIS : Yes, Sir, he will 'cause all he has to do is insert it.

CHAIRMAN : On that date?

HARRIS : On that day.

CHAIRMAN : Okay.

HARRIS : And that way, there's clarity.

CHAIRMAN : That's fine. I, I was under the impression that, that it would be hard for him to know, on that date, what the, what the interest rate was because he'd be drawin' it ahead of time and then just issuing it on (inaudible, overlapping conversation).

HARRIS : No, 'cause if I was the judge, I'd have that left blank and then I'd have my clerk check to see what the prime--

CHAIRMAN : (Sure.)

HARRIS : --is as of that date and insert that interest rate.

CHAIRMAN : Anybody, questions for, on Committee Amendment Number 19? Senator Harris moves--

FRASER : Senator.

simply what it does is, is it just reverses that opinion and states that the migration of an air contaminant onto your property is not a trespass. It doesn't affect other potential causes of action that might arise with that. It just does not treat this as a trespass.

CHAIRMAN : Questions of Senator Duncan? Is there objection to the adoption of Amendment Number 6(a)? Chair hears none. (Gavel) The amendment is adopted.

NELSON : Mr. Chairman?

CHAIRMAN : Senator Nelson.

NELSON : We left Committee Amendment Number 11 pending, and I'm still working on language that will alleviate some of the concerns that Committee Members raised, but I, I, that was the emergency room physicians--

: Yeah.

NELSON : --and I'm still very concerned about that. So, I just kinda wanna leave it on the table, but I may be bringing an amendment to the Floor.

CHAIRMAN : On the Floor, fine.

NELSON : Thank you.

CHAIRMAN : Fine. Anything else to come--

MADLA : Mr. Chairman?

CHAIRMAN : --Senator Madla.

MADLA : Yes, I had Committee Amendment Number 10 and I had pulled that amendment down, Senator Duncan I think had some concerns with it, since then we have visited, and I think he's comfortable with the amendment now. Basically, what it does, on Page 61, where it deals with cases that involve emergency medical care, it only makes reference to physicians, it doesn't make reference to other health care providers, such as nurse practitioners that may be working either in an emer--in an emer--emergency room setting, or somewhere in the hospital.

CHAIRMAN : Okay. Questions of Senator Madla on, on Committee Amendment Number 10? Is there objection to adoption of the amendment? Chair hears none, (gavel), amendment's adopted.

MADLA : Thank you, Mr. Chairman, Members.

: (Inaudible, background conversation)

CHAIRMAN : Just for the record we will state that the following amendments were withdrawn, Number 6, 7, 11, 13, 17 18, 19, 21 and 24 through 34. Is that right? Any other amendments? Anything further before we vote on the bill? Senator Staples if you will Chair it.

(Senator Staples in the Chair)

CHAIRMAN : Senator Ratliff moves that the amendments be rolled into a new Committee Substitute, and that the Committee Substitute be