

HB4 AND PRODUCTS LIABILITY ACTIONS

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GENERAL OVERVIEW OF HB4

HB 4 is composed of 23 Articles

6 articles affect most civil lawsuits

- Article 2 Settlement Offers*
- Article 3 Venue / Forum Non Conveniens*
- Article 4 Proportionate Responsibility and Designation of Responsible Third Parties*
- Article 6 Interest*
- Article 7 Appeal Bonds*
- Article 13 Damages*

13 articles address specific types of civil lawsuits

- Article 1 Class Actions
- Article 5 Products Liability*
- Article 8 Seat Belts*
- Article 10 Health Care
- Article 11 Claims Against Employees or Volunteers of a Governmental Unit
- Article 15 School Employees
- Article 16 Admissibility of Certain Evidence in Civil Action
- Article 17 Successor Corporate Liability – Asbestos Related Litigation*
- Article 18 Charitable Immunity and Liability
- Article 19 Liability of Volunteer Fire Departments and Volunteer Fire Fighters
- Article 20 Design Professionals
- Article 21 Liability in Suits for Trespass
- Article 22 Community Benefits and Charity Care

3 articles are left blank (Articles 9, 12, 14)

1 article addresses effective dates of the articles (Article 23)

(Note: Italic type indicates topics which will be discussed in this program)

I. ARTICLES RELATED TO PRODUCTS LIABILITY LAWSUITS

Article 5 concerns products liability suits. Articles 8 and 17 may also effect products liability claims and are addressed in this section.

A. ARTICLE 5: PRODUCTS LIABILITY (CPRC § 16.012(a)(2))

“Products liability action” means any action against a manufacturer or seller for recovery of damages for harm allegedly caused by a defective product, whether the relief sought is recovery of damages or any other legal or equitable relief including: injury, damage or loss of real property, personal injury, wrongful death, economic loss, or injunctive, declaratory or other equitable relief.

1. Statute of Repose (CPRC § 16.012(b))

a. All products liability actions against a manufacturer or seller of a product must be commenced before the end of 15 years after the date of sale of the product by the defendant. Previously, the 15 year statute of repose only applied to a manufacturer or seller of manufacturing equipment. “Manufacturing equipment” means equipment and machinery used in the manufacturing, processing, or fabrication of tangible personal property but does not include agricultural equipment or machinery.

b. Exceptions to the 15 year statute of repose:

i. Expressly Warranted

Manufacturer expressly warrants product for longer than 15 years. Suit must be commenced before the end of the number of years warranted.

ii. Latent Defect

Exposure occurred before the end of the 15 years, the exposure caused the disease, but the symptoms did not manifest themselves until after the end of the 15 years.

2. Admissibility of remedial measures (TRE 407)

a. TRE 407 now mirrors its federal counterpart, FRE 407.

b. Evidence of subsequent remedial measures to prove a defect in a product, a defect in a product’s design, or a need for a warning or instruction is prohibited in all products liability cases, even strict liability cases.

- c. Under the old rule, evidence of subsequent remedial measures was generally not admissible to prove negligence or culpable conduct, but the rule allowed evidence of subsequent remedial measures in products liability cases based in strict liability.

3. Liability of non-manufacturing sellers (CPRC § 82.003) The language is broad enough to cover negligence and strict liability claims. Texas legislators seemed to have taken note of the problems other states have had with their own non-manufacturing seller liability statutes (sometimes called "sealed container defenses") and attempted to craft the language of 82.003 to avoid problems.

- a. A non-manufacturing seller is exempt from liability unless the claimant can prove that the seller:

- i. Participated in the design of the product;
- ii. Altered or modified the product, and the alteration resulted in claimant's harm;
- iii. Installed the product or had it installed, and the installation resulted in claimant's harm;
- iv. Exercised substantial control over the content of a warning or instruction accompanying the product that was inadequate, and the inadequate warning resulted in claimant's harm;
- v. Made an express factual representation that was incorrect, the claimant relied upon the representation, and if the aspect had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm;
- vi. Actually knew of a defect to the product at the time the seller supplied the product, and the defect resulted in claimant's harm; **OR**
- vii. Is subject to the jurisdiction of the court but the manufacturer is not subject to the court's jurisdiction or the manufacturer is insolvent.

- b. Potential Problems:

- i. Actual knowledge: This provision has caused problems in other jurisdictions.
 - 1. Testing or Inspecting of Product by Seller. In Kansas, a court found that even where a seller does not believe there is a defect and can establish as a matter of law that it did not have actual knowledge of a defect, the seller can still be liable when the seller inspected and tested a

machine. The inspection and testing alone created sufficient evidence that the seller "could have discovered the defect during the inspection and testing." *Stillie v. AM Int'l, Inc.*, 850 F. Supp. 960, 963 (D. Kan. 1994); See Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 Baylor L. Rev. 103, 1082-1092 (2003). Such inspection if communicated to the claimant could also be considered a representation, leading to an additional ground for seller liability.

2. Imputed knowledge: Courts in other states have found that knowledge of a product's characteristics can be imputed to knowledge of a defect related to known characteristics, such as the difference in size of child's mattress and bed frame which could lead to asphyxiation. However, the Texas requirement for "actual knowledge," which is similar to the North Dakota statute, should be more helpful to defendants. See *Paracelsus Healthcare Corp. v. Philips Elecs. N. Am.*, No. A3-00-171, 2000 U.S. Dist. LEXIS 20607, at 9 (D.N.D. May 7, 2000) (recognizing distinction between knowledge of a product's characteristics and knowledge of a defect, thus precluding liability). See Sachs, *supra*.
 3. Knowledge of similar accidents: Another problematic aspect of the seller's knowledge might arise if a similar accident or problem occurred regarding the same product. If the seller was aware of similar problems, a court might find that the seller had actual knowledge of a defect relating to such an accident.
 - ii. Installation or alteration: An obvious problem for sellers is the installation or alteration provisions because many products (bicycles, gas grills or customized products, for example) are shipped to sellers and require sellers do some minor assembly. The language in the Texas statute is tighter than in other states and should allow liability only if the installation itself caused the harm.
 - iii. Insolvency provision: Finally, the insolvency provision creates problems for sellers. Even though a manufacturer is insolvent, there may still be sufficient insurance policies to cover the claim, but a non-manufacturing seller could still be liable.
- c. Products liability actions for the distribution and sale of motor vehicles are exempted from this section. (Chapter 2301, Occupations Code)

4. **Pharmaceutical Products (CPRC § 82.007)** HB4 provides some protection from liability for failure to warn claims to manufacturers, distributors, or prescribers of pharmaceutical products through the use of a rebuttable presumption.

- a. Presumption: Manufacturers, distributors or prescribers of pharmaceutical products are presumed to have given an adequate warning if
 - i. it is an FDA approved drug and the warning was approved by the FDA, or
 - ii. it is not an approved FDA drug, but the warning was stated in monographs developed by the FDA.
- b. Rebut the presumption through evidence that:
 - i. The defendant withheld or misrepresented material information to the FDA;
 - ii. The defendant continued to sell the product after the FDA ordered its removal from the market or withdrew its approval of the product;
 - iii. The defendant recommended, promoted, or advertised the product for something other than what the FDA approved, i.e., an off-label use, the product was used as recommended, promoted or advertised and the use resulted in injury; **OR**
 - iv. The defendant prescribed the product for an off-label use, the product was used as prescribed, and the injury was caused by the use.
- c. Plaintiffs must prove specific wrongful conduct. Strict liability developed because plaintiffs were believed to be at a disadvantage when compared to manufacturers in terms of resources and access to information as well as experts, and thus faced difficulty proving wrongful defendant conduct.

5. **Compliance with Government Standards (CPRC § 82.008)**

Provides a product manufacturer or seller some protection from liability through the use of a rebuttable presumption.

- a. Presumption:

The manufacturer or seller is presumed to have acted appropriately and thus not liable in a suit based on a product's formulation, labeling or design if:

 - i. At the time the product was manufactured, its labeling, design, or formula was in compliance with federal safety standards or regulations; **OR**
 - ii. The product was subject to federal licensing or marketing approval and the product complied with federal requirements.

- b. Rebutting the Presumption:
 - i. Establish that the government standards were inadequate to protect the public from unreasonable risk of harm; **OR**
 - ii. Establish that the manufacturer withheld or misrepresented material information that was relevant to the government's or agency's determination of the adequacy of the safety standards or regulations at issue.
- c. Manufacturing Defects Exempt. This section does not apply to claims of manufacturing defects even though the manufacturer complied with all quality control and manufacturing practices mandated by the government.

B. ARTICLE 17: LIMITATION OF LIABILITY RELATING TO MERGERS OR CONSOLIDATIONS (ASBESTOS CLAIMS) (CPRC § 149)

- 1. The cumulative successor asbestos-related liabilities of a corporation are limited to the fair market value of the total gross assets of the acquired company determined at the time of the merger or consolidation.
- 2. Applies only to mergers prior to May 13, 1968.
- 3. Does not limit the successor corporation's liability for its own wrongdoing, only for the acts of the acquired company based upon asbestos-related liability.
- 4. Does not apply to a successor that, after merger or consolidation, continued the business of mining, manufacturing, distributing, selling, removing or installing asbestos products.

C. ARTICLE 8: EVIDENCE RELATING TO SEATBELTS

- 1. Repealed Transportation Code §§ 545.412(d), and 545.413(g), which made use or non-use of seat belts inadmissible in civil actions.
- 2. Allows the jury or fact-finder to know whether a plaintiff was wearing a seat belt at the time of an accident for the purpose of allocating fault and determining the cause of damages.

II. ARTICLE 23: EFFECTIVE DATES

- A. **July 1, 2003:** Articles 4 (Proportionate responsibility), 5 (Products Liability), and 8 (Evidence relating to seat belts) applies to actions filed on or after July 1, 2003. Actions filed before July 1, 2003 are governed by the law in effect prior to adoption of Articles 4, 5, and 8.

B. January 1, 2004: Articles 1 (Class actions) and 2 (Settlement offers) apply to actions filed on or after January 1, 2004.

C. September 1, 2003: Effective date of all other articles.

1. Article 6 (Post-judgment interest rate) is applicable to all judgments entered or signed after September 1, 2003.
2. Article 17 (Successor Corp. Liability – Asbestos Related Litigation) applies to any trial or retrial occurring on or after September 1, 2003.

III. ARTICLES APPLICABLE TO PRODUCTS LIABILITY CLAIMS AND OTHER CIVIL SUITS

HB4 covered a lot of additional issues including Settlement Offers (Article 2), Venue and Forum Non Conveniens (Article 3), Proportionate Responsibility and Responsible Third Parties (Article 4), Interest (Article 6), Appeal Bonds (Article 7) and Damages (Article 13). The following is a brief explanation of these bills.

A. ARTICLE 2: EFFECT OF SETTLEMENT OFFER ON RECOVERING LITIGATION COSTS (TRCP 167; CPRC Chapter 42)

This article was enacted to provide incentives for parties to make and accept reasonable settlement offers early in lawsuits by shifting litigation-related costs.

1. Shifting Litigation Costs

An offering party's litigation costs can be shifted if a settlement offer is made and rejected and judgment rendered is significantly less favorable to the rejecting party. (CPRC § 42.004(a))

- a. Judgment is significantly less favorable if:
 - i. The plaintiff (claimant) rejects a settlement offer and the jury awards less than 80% of the offer.
 - ii. The defendant rejects a counteroffer and the plaintiff recovers more than 120% of the offer. However, if costs shift against the plaintiff, the plaintiff still recovers at least 50% of the economic damages.

b. Example

Defendant makes a declaration and offers \$200,000 which plaintiff rejects,

$$200,000 \times 80\% = \$160,000$$

If the judgment is for \$159,000 then the plaintiff must pay defendant's litigation costs.

BUT, if plaintiff counters with a demand for \$300,000 which defendant rejects,

$$300,000 \times 120\% = \$360,000$$

If the judgment is for \$363,000 then the defendant pays plaintiff's litigation costs.

- c. **Litigation costs**
 - i. Includes court costs, reasonable fees for two testifying experts and reasonable attorney fees.
 - ii. Limited to
 - 1. sum of non-economic, exemplary or additional damages plus
 - 2. one half of the economic damages minus
 - 3. statutory or contractual liens.

2. Application of Settlement Offers

- a. Monetary claims only. Applies to settlements of a claim for monetary damages, including a counterclaim, cross claim, or third party claim. An offer must not include non-monetary claims and other claims to which this rule does not apply such as class actions, shareholder derivative suits, actions against the State, actions under the Family Code, etc. (TRCP 167.2(d)); (CPRC § 42.002)
- b. Defendant must invoke: Rule only applies when a defendant files a declaration invoking this rule. (CPRC § 42.002(c))
 - i. For purposes of this rule, defendant means a party against whom a claim for monetary damages is made, including a counter-defendant, cross-defendant, or third-party defendant. (TRCP 167.2)
 - ii. The declaration must be filed no later than 45 days before the case is set for trial on the merits. (TRCP 167.2)

3. Requirements for a Settlement Offer

- a. In writing;
- b. State that it is made under TRCP Rule 167 and CPRC Chapter 42;
- c. Identify the parties making the offer and the parties to whom the offer is made;
- d. State the terms by which all monetary claims – including any attorney fees, interest, and costs – may be settled;
- e. State a deadline for acceptance – cannot be any sooner than 14 days after offer is served; and
- f. Served on all parties to whom the offer is made.

4. Acceptance Requirements for a Settlement Offer

- a. If an offer has not been withdrawn it can be accepted only by written notice served on the offeror by the deadline stated in the offer.
- b. Offer can be withdrawn before it is accepted.

B. ARTICLE 3 – VENUE & FORUM NON CONVENIENS

1. Venue (CPRC § 15.003)

- a. Good for one, NOT good for all.
- b. Each plaintiff must prove proper venue or case transferred or dismissed unless the plaintiff can prove:
 - i. Joinder of that plaintiff or intervention in the suit by the plaintiff is proper under Texas Rules of Civil Procedure;
 - ii. Maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit;
 - iii. There is an essential need to have that plaintiff's claims tried in the county in which the suit is pending; **AND**
 - iv. The county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought.
- c. Proper venue for actions by or against a personal representative for personal injury, death or property damage is determined by CPRC 15.007.
- d. Interlocutory appeal may be taken and the trial on the merits is stayed pending the appeal.

2. Forum Non Conveniens (CPRC § 71.051)

- a. Trial court no longer has discretion to exercise jurisdiction when factors indicate an inconvenient forum.
- b. If a court, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this state, the court SHALL decline to exercise jurisdiction and shall stay or dismiss the claim or action. This mirrors the federal rules regarding Forum Non Conveniens. The court may consider whether:
 - i. An alternative forum exists;
 - ii. An alternative forum provides an adequate remedy;
 - iii. Maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
 - iv. The alternative forum can exercise jurisdiction over all the defendants;
 - v. The balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum; **AND**
 - vi. The stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

3. Exception regarding act or omission in Texas removed

Deleted exception allowing cases to remain in Texas if an act or omission upon which the cause of action is based occurred in Texas, even if all other factors weighed heavily in support of dismissal.

C. ARTICLE 4: PROPORTIONATE RESPONSIBILITY AND DESIGNATION OF RESPONSIBLE PARTIES

1. Proportionate Responsibility

- a. Now applicable to DTPA actions and toxic tort actions. (CPRC 33.002(a)(2))
- b. No joint and several liability except:
 - i. Where the defendant is found greater than 50% responsible;
OR
 - ii. The defendant acted with another person to engage in certain criminal conduct which caused the claimant's damages. (CPRC 33.013(a), (b))
- c. Eliminates the sliding scale reduction in all cases, and the dollar for dollar credit in all cases except health care claims. (CPRC § 33.012)
 - i. Defendants may be more apt to introduce evidence unfavorable to a settling party to increase the percentage of liability assigned to the settling party.
 - ii. However, Plaintiffs may benefit from a Defendant's reluctance to malign companies and people with whom they have an ongoing relationship.

2. Responsible third parties now designated by defendants

- a. Ensures that named defendants will be responsible only for the portion of fault attributable to them by allowing the jury to consider the conduct of **all** potentially responsible persons when allocating fault for a plaintiff's injury.
- b. A defendant may now designate a responsible third party, as opposed to joining a responsible third party. (CPRC § 33.004)
- c. Designated party is not a party to the case. No service of process is necessary; however, evidence may be introduced showing that the responsible party caused damages or harm.
- d. Third Party Designation Requirements:
 - i. Motion must be filed 60 days before trial, unless good cause can be shown.
 - ii. A claimant may join a designated third party, even if such joinder would otherwise be barred by limitations. Claimant's motion must be filed within 60 days of defendant's designation.

- iii. The court shall grant leave to designate the third party unless another party files an objection within 15 days establishes that the defendant did not plead sufficient facts concerning the alleged responsibility of the 3rd party to satisfy the pleading requirement.
- iv. By granting a motion for leave to designate a responsible third party, the person named is designated automatically unless another party objects.
- v. Assuming Plaintiff has not joined the designated third party, questions may arise regarding discovery of sufficient facts to support the submission of proportionate responsibility to the jury.
- e. Entities or persons that can be named as a Responsible Third Party broadened. For example, defendant can designate
 - i. plaintiff's employer (even one with worker's compensation insurance),
 - ii. bankrupt entities,
 - iii. parties outside of the court's jurisdiction, and
 - iv. unknown "Jane Doe" or "John Doe" can be designated as responsible third parties if defendant alleges he or she is responsible for criminal acts that caused plaintiff's loss. (CPRC § 33.004(f) – (l))
- f. TRCP 194.2(l) has been amended to require disclosure of any person who may be designated as a responsible third party. This amendment applies in all cases filed on or after July 1, 2003, in which a request under Rule 194.1 is made after May 1, 2004.

D. ARTICLE 6: INTEREST

- 1. Post-Judgment Interest Rates** (Tex. Fin. Code § 304.003(c))
 - a. The post-judgment interest rate is now based on the Prime Rate as published by the Federal Reserve Bank of New York, instead of the treasury bill, on the date of computation.
 - b. The floor is 5% and the ceiling is 15%, instead of 10% and 20%.
- 2. Pre-judgment interest rate also changed in non-contract civil cases.** The pre-judgment interest rate for wrongful death, personal injury or property damage cases equals the post-judgment interest rate. (Tex. Fin. Code § 304.103); *See (Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998))*
- 3. Pre-Judgment interest prohibited on future damages.**

- E. ARTICLE 7: APPEAL BONDS.** Modifies rules regarding appeal bonds so the cost of the bond alone will not make the appeal of a judgment prohibitive.

1. **New bond calculations for money judgments** (TRAP 24.2(a)(1))
 - a. Amount of bond must equal the sum of compensatory damages only, which excludes punitive damages, interest for the estimated duration of appeal, and costs, but must not exceed the lesser of:
 - i. 50% of judgment debtor's current net worth; **OR**
 - ii. \$25 million.
 - b. Bond, deposit or security no longer required to be equal to the amount of the judgment plus interest for the estimated duration of the appeal, and costs.
2. **Further discounting of Appeal Bonds** (TRAP 24.2(b))
 - a. Court is required to lower amount of bond if it is likely that the amount will cause the judgment debtor substantial economic harm.
 - b. Court no longer has to consider whether lowering the amount will substantially impair the judgment creditor's ability to recover as prior law mandated.
3. **Bond decision is subject to appellate review.**
4. **Preventing the judgment debtor from transferring assets** (TRAP 24.3(d))

The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance or dissipation of assets in the normal course of business.

F. **ARTICLE 13: DAMAGES**

1. **HB4 did not impose a general damages cap in civil litigation.**
 - a. Only limited "non-economic" damages in civil cases based on medical malpractice.
 - b. However, Section 66 of Article III of the Texas Constitution allows Legislators to enact damage caps, not only in personal injury cases but to potentially any type of civil case in which monetary damages may be awarded.
2. **Definitions** (CPRC § 41.001)
 - a. Malice (amended): a specific intent by the defendant to cause substantial injury **OR HARM**.
 - b. Compensatory damages (new): economic and non-economic damages
 - c. Non-economic damages (new): damages awarded for compensating the claimant for physical pain and suffering, mental or emotional pain, loss of consortium, disfigurement, physical

impairment, loss of companionship, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses other than exemplary damages.

- d. Exemplary damages (amended): any damages awarded as a penalty or by way of punishment but not for compensatory purposes.

3. Evidence of taxes in awarding damages (CPRC § 18.091)

- a. Evidence to prove the loss of earnings, earning capacity, contribution, or inheritance must be presented in the form of a net loss after taxes.
- b. The court shall instruct the jury as to whether any recovery for compensatory damages sought is subject to federal or state income taxes.

4. Medical Expenses (CPRC § 41.015):

Recovery of medical or health care expenses is limited to the amount actually paid or incurred on behalf of claimant.

5. Exemplary Damages (CPRC § 41.003)

- a. Claimant required to prove by clear and convincing evidence that damages resulted from:
 - i. fraud;
 - ii. malice; **OR**
 - iii. gross negligence.
- b. Jury determinations regarding liability; **AND** amount of exemplary damages must be unanimous.
- c. Jury must be instructed that in order to award exemplary damages the answer to the question regarding the amount of exemplary damages must be unanimous.
- d. Exemplary damages may no longer be awarded if only nominal damages are recovered even if malice is shown. (CPRC § 41.004)