



Oklahoma  
State  
Senate

# Legislative Brief

August 2004

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## Tort Reform – House Bill 2661 (Adair/Hobson)

### Issue Background

Reform of the civil justice system is a nationwide issue affecting the medical, insurance and legal systems, proponents of which view such reform as a way to prevent frivolous lawsuits, lower medical malpractice rates of physicians and lower medical costs of consumers. Tort reform came to the forefront of the legislative agenda when, in 2003, the state's largest medical malpractice insurer requested a more than 80% premium increase in order to maintain adequate reserves to cover claims. Physicians have asserted that such an increase will cause an undue burden and force some doctors to discontinue practices in specialty areas or relocate out of state.

### Summary of Actions

After both houses of the legislature passed a version of a tort reform bill, HB 2661, legislative leadership appointed a special conference committee to hear witness testimony and craft a final version of the bill. The Joint Committee on Lawsuit Reform consisted of 10 Senators and 14 House members, and was co-chaired by Senator Mike Morgan and Representative Jari Askins. During four public hearings, the Joint Committee on Lawsuit Reform received testimony from over 40 witnesses related to caps on noneconomic damages, frivolous lawsuits, medical malpractice and insurance reform, product liability and class action reform. Witnesses, who testified under oath, included victims of medical malpractice, physicians, medical students, attorneys, royalty and land owners and representatives of various public action groups. Court reporters prepared transcripts of each of these public meetings, and witnesses or others who did not testify at a hearing were given the opportunity to submit written testimony. Upon conclusion of the public hearings, the committee conducted numerous further meetings to discuss and vote on the inclusion of individual proposals in the final bill draft.

House Bill 2661 passed in the House on May 27, and passed in the Senate and was signed by the Governor on May 28. The following is a section-by-section outline of HB 2661:

#### **SECTION 1: ATTORNEY FEES IN CLASS ACTIONS NEW LAW**

- Requires court to conduct an evidentiary hearing to determine fair and reasonable fees for attorneys in class actions.

#### **SECTION 2: VENUE FOR MEDICAL LIABILITY ACTIONS NEW LAW**

- Provides venue for medical liability actions brought under the Affordable Access to Health Care Act (county where cause of action arose; county where any defendant resides; or county where corporation defendant has its principal office or place of business or any county where corporation codefendant may be sued).
- Requires court to transfer or dismiss case upon finding lack of venue.
- States exception to dismissal of case by requiring court to transfer rather than dismiss case upon finding lack of venue if dismissal would operate as dismissal with prejudice.

### **SECTION 3: EXCEPTION LANGUAGE AMENDATORY**

- Exception language for new Section 5.

### **SECTION 4: EXCEPTION LANGUAGE AND ASSESSING ATTORNEY FEES AMENDATORY**

- Exception language for new Section 5.
- Authorizes court to assess costs and attorney fees against plaintiff incurred by the defendant for any action dismissed after a jury is empanelled and then subsequently refiled.
- Limits costs and fees to those incurred in the previous action by the defendant subsequent to the jury being empanelled.

### **SECTION 5: DISMISSAL OF ACTIONS NEW LAW**

- Limits dismissal of medical liability actions without a court order.
- Requires filing of certain dismissal in court where action is pending.
- Authorizes court to award reasonable costs against a party upon a finding by the court that the party has acted in bad faith, vexatiously, wantonly or in an oppressive manner in dismissing case.
- Authorizes court to condition refile of case upon payment of costs.

### **SECTION 6: CURRENT PREJUDGMENT AND POSTJUDGMENT INTEREST AMENDATORY**

- Limits current calculations for postjudgment and prejudgment interest to judgments rendered on or after January 1, 2000 but before January 1, 2005.
- Applies current calculations until January 1, 2005 for postjudgment interest to judgments rendered prior to January 1, 2000 and remaining unpaid.

### **SECTION 7: INTEREST NEW LAW**

- Sets forth procedures for computing postjudgment and prejudgment interest.

- Applies calculation provisions for interest to actions filed in the district court on or after January 1, 2005.
- Applies method for computing postjudgment interest to all judgments remaining unpaid prior to January 1, 2005. (Effective 2005)

#### **SECTION 8: PRODUCT LIABILITY ACTIONS NEW LAW**

- Requires manufacturers to indemnify sellers against loss in a product liability action.
- Provides exceptions for manufacturer indemnification.
- Requires seller eligible of indemnification to provide notice to manufacturer of a product alleged defective in a petition.
- States exception for notice by seller.
- Entitles seller to certain expenses incurred to enforce right to indemnification.

#### **SECTION 9: APPEAL BONDS AMENDATORY**

- Authorizes court to lower amount of appeals bond for judgment debtor on a showing that debtor is likely to suffer substantial economic harm.
- Requires court to balance likelihood of substantial economic harm and the ability of judgment creditor to collect the judgment if affirmed on appeal.
- States exception to court's authority to lower amount of appeals bond.
- Requires court to enter order prohibiting debtor from dissipating or transferring assets upon lowering of bond.
- Prohibits court from entering order that interferes with judgment debtor's use of assets in normal course of business.

#### **SECTION 10: FRIVOLOUS LAWSUITS AND SANCTIONS AMENDATORY**

- Requires court to award certain sanctions against a party for improper or frivolous representations to the court for any action not arising out of contract.

#### **SECTION 11: PERMISSIVE JOINDER OF PARTIES AMENDATORY**

- Requires court to consider whether forum is fair and convenient for all parties when joining parties or ordering separate trials.

#### **SECTION 12: MISJOINDER AND NONJOINDER OF PARTIES AMENDATORY**

- Requires court to consider whether forum is fair and convenient for all parties when adding or dropping parties.

#### **SECTION 13: ABUSIVE DISCOVERY**

**AMENDATORY**

- Adds harassment and undue delay to grounds for issuing a protective order for persons from whom discovery is sought.

**SECTION 14: ABUSIVE DISCOVERY****NEW LAW**

- Authorizes court to issue protective orders against abusive discovery upon a motion by a person or party from whom discovery is sought.
- Requires movant to provide to court, along with motion for protective order, certification showing good faith effort to resolve dispute without court action.
- Authorizes court to award expenses of motion.

**SECTION 15: JUDICIAL PANEL ON MULTIDISTRICT LITIGATION****NEW LAW**

- Authorizes the Supreme Court to create a Judicial Panel on Multidistrict Litigation.
- Authorizes Panel to consolidate or stay certain cases after determining that the transfer or stay will be for the convenience of the party and witnesses and promote just and efficient conduct of actions.
- Requires Supreme Court to promulgate rules.

**SECTION 16: BUSINESS COURT****AMENDATORY**

- Adds business docket for business court divisions of the court

**SECTION 17: BUSINESS COURT****NEW LAW**

- States finding for need for business court.
- Authorizes the Supreme Court to create a business court division within certain judicial districts.
- Requires Supreme Court to promulgate rules for establishment and jurisdiction of business court divisions.

**SECTION 18: JOINT AND SEVERAL LIABILITY****NEW LAW**

- Limits joint tortfeasors in civil actions based on fault and not arising out of contract to amount of damages allocated to that tortfeasor.
- States exception to several liability by making liability for damages joint and several if:
  1. Responsibility attributed to defendant is greater than 50%; or
  2. Any joint tortfeasors acted with willful and wanton conduct or with reckless disregard and the conduct is the proximate cause of the injury.

- Prohibits application of provisions in this section to actions brought by state or political subdivision, or action where no comparative negligence is found to be attributed to plaintiff.
- Applies section provisions to cases accruing on or after 11/1/04.

*(Several liability means liability separate and distinct from liability of another to the extent that an independent action may be brought without joinder of others.)*

#### **SECTION 19: GOVERNMENTAL TORT CLAIMS ACT AMENDATORY**

- Modifies definition of employees by adding volunteer, full-time, or part-time firefighters.

#### **SECTION 20: EXPANDING AFFORDABLE ACCESS TO HEALTH CARE ACT AMENDATORY**

- Conforms Language.
- Adds Section 22 [I'm Sorry provisions], 23 [noneconomic damage cap provisions], and 24 [qualifying expert testimony] to the Affordable Access to Health Care Act.

#### **SECTION 21: NONECONOMIC DAMAGE CAP AMENDATORY**

- Extends sunset provision from July 1, 2008 to November 1, 2010, for noneconomic damage limit of \$300,000 enacted in 2003 for obstetric and emergency care cases.

#### **SECTION 22: NONECONOMIC DAMAGE CAP NEW LAW**

- Extends noneconomic damage cap to any medical liability action not provided for in Section 21 provided the defendant has made an offer of judgment and the verdict awarded plaintiff is less than 1 ½ times the amount of the final offer.
- Requires annual adjustment of damage cap based upon any positive increase in CPI (Consumer Price Index).
- Prohibits adjustment for any year in which there is a decline in CPI.
- Defines term—"noneconomic damages". (As used in this section, "noneconomic damages" means only mental pain and suffering, inconvenience, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation; provided, however, noneconomic damages do not include exemplary damages, as provided for in Section 9.1 of Title 23 of the Oklahoma Statutes).
- Excepts application of noneconomic damage cap if nine or more jurors find:
  - By clear and convincing evidence defendant committed negligence, or
  - By a preponderance of the evidence defendant was willful or wanton.
- Requires court to submit to jury an additional form of verdict under certain circumstances.
- Excepts wrongful death actions from damage cap provisions.

- Applies damage cap provisions to actions accruing on or after 11/01/04.
- Sunsets this section on 11/01/10

**SECTION 23: “I’M SORRY”—INADMISSABLE  
NEW LAW**

- Makes “I’m sorry” gestures inadmissible as evidence of an admission of liability or admission against interest.
- Defines terms—“relative” and “representative”.

**SECTION 24: QUALIFYING EXPERT WITNESSES IN MEDICAL LIABILITY ACTIONS  
NEW LAW**

- Requires court to consider specified criteria in determining whether expert is qualified to testify on whether health care provider departed from accepted standards of health.
- Requires court to state on record any reason for admitting testimony if the court departs from the criteria.
- Specifies criteria.

**SECTION 25: LANDOWNER’S LIMITATION OF LIABILITY—OUTDOOR RECREATIONAL  
PURPOSES  
AMENDATORY**

- Modifies and adds definitions.
- Limits liability of landowners when providing public with land for outdoor recreational use.

**SECTION 26-32: OKLAHOMA LIMITATION OF LIABILITY FOR FARMING AND RANCHING  
LAND ACT  
AMENDATORY**

- Creates “Oklahoma Limitation of Liability for Farming and Ranching Land Act”.
- States purpose of act.
- Limits liability to owners of farming and ranching land who do not charge more than \$10 per acre per year for such land used for recreational purposes.
- Modifies definitions.
- States exceptions to limited liability.
- Construes provisions.
- Prohibits maintaining an action or recovering damages from a landowner in contravention of a written release of liability or waiver to sue for certain injuries.
- States exception to limiting liability pursuant to a written release.

**SECTION 33: LIMITATION OF LIABILITY OF LANDOWNERS, LESSEES, OR OCCUPANTS OF  
REAL PROPERTY  
NEW LAW**

- Limits liability of landowners, lessees, or occupants of real property.

**SECTION 34: VOLUNTEER MEDICAL PROFESSIONAL SERVICES IMMUNITY ACT  
NEW LAW**

- Provides immunity from liability in a civil action for volunteer medical professionals under certain circumstances.
- Defines terms-“volunteer medical professional” and “referred volunteer medical professional”.

**SECTION 35-53: REGISTRATION OF OUT-OF-STATE ATTORNEYS ACT  
NEW LAW**

- Creates the “Registration of Out-of-State Attorneys Act”.
- Specifies proceedings and actions to which the Act does and does not apply.
- Requires revocation of privilege to practice for certain attorneys who fail to comply with Act within certain time period.
- Authorizes out-of-state attorneys to file application to appear as counsel in certain actions or proceedings provided specified conditions are met.
- Requires out-of-state attorneys to register with Oklahoma Bar Association and Oklahoma Tax Commission and obtain approval of court, arbitrator, mediator, or hearing officer before appearing in an action or proceeding.
- Sets forth procedure for out-of-state attorneys to register with Oklahoma Bar Association and Oklahoma Tax Commission.
- States out-of-state attorneys’ obligations to Oklahoma Tax Commission.
- Sets forth procedure for filing a motion to associate.
- Prohibits out-of-state lawyers from appearing in any proceeding subject to these provisions until the motion to associate has been granted.
- Deems out-of-state attorneys admitted in the event of change of venue or appeal once a motion to associate has been granted.
- Authorizes court having jurisdiction over transferred or appealed cause to revoke attorney’s authority to appear.
- States duties of Oklahoma counsel of record on or before the anniversary date of the filing of the application with the Oklahoma Bar Association and out-of-state counsel no later than 30 days after the original application anniversary date.
- Requires suspension of out-of-state attorneys for failure to comply with certain requirements and authorizes reinstatement upon compliance.
- Authorizes waiver of fees for applicants providing certain pro bono services.
- Requires Oklahoma Bar Association to prepare annual report relating to out-of-state attorney registration.
- Applies Oklahoma laws and standards of conduct to out-of-state- attorneys.
- States responsibilities of Oklahoma attorney of record.

**SECTION 54: DIRECT DEPOSIT OF TAXES AND FINES  
AMENDATORY**

- Adds fees required to be reported and disbursed by Insurance Commissioner.

**SECTION 55-57: SURPLUS AND RESERVE MORATORIUM****SECTION 55 – NEW LAW, NONCODIFIED****SECTION 56-57 - AMENDATORY**

- States legislative findings concerning threatened loss of insurers currently issuing medical malpractice policies.
- Provides moratorium until January 1, 2006 on the applicability of laws of this state that require certain reserves for insurers domiciled in this state that are issuing policies of medical professional liability insurance to physicians, allied health care professionals and health care institutions.
- Requires notice by eligible insurers to Commissioner if electing to utilize moratorium.
- Requires certain notice on premiums issued during moratorium period.
- Excepts eligible insurers from maintaining certain surplus under certain circumstances.
- Prohibits Insurance Commissioner from enforcing any recapitalization plan against an eligible insurer.

**SECTION 58-66: OKLAHOMA MEDICAL PROFESSIONAL LIABILITY TRUSTS ACT****NEW LAW**

- Creates the “Oklahoma Medical Professional Liability Trusts Act”.
- Defines terms—“allied health care professional”; “association”; “commissioner”; “department”; “health care institutions”; “medical professional liability claim”; “physician”; “insureds”; and “trust”.
- Authorizes an association to create a trust to self-insure physicians, allied health care professionals or health care institutions against medical professional liability claims.
- Requires compliance with certain conditions when creating a trust.
- Authorizes trust to make certain purchases and insure certain entities.
- Excepts certain trusts from reserve and surplus requirements.
- Authorizes certain entity to convert to trust and provides conversion procedure.
- Requires a medical professional liability trust to file certain items with the Insurance Commissioner within certain time period.
- Requires trust to pay certain tax.
- Sets tax rate.
- States penalty for failure to pay tax.
- Requires Commissioner to report and disburse collected taxes, fees and penalties.
- Sets forth required provisions of trust instrument.
- States reserve and surplus requirements.
- Prohibits contributions into or benefits from any insolvency guaranty fund by trust.
- Provides duties of Insurance Commissioner including but not limited to reviewing and evaluating consumer satisfaction and investment activities of trust, and analyzing, studying and comparing certain costs.
- Requires trusts to provide Commissioner with policy changes, rate changes and changes to trust within certain time period prior to implementation.

**SECTION 67 AND 68 : RECODIFICATION PROVISIONS**



**SECTION 69: EFFECTIVE DATE**

- July 1, 2004—Sections 54-66.

**SECTION 70: EFFECTIVE DATE**

- November 1, 2004-Sections 1-53 and Sections 67 and 68

**SECTION 71: EMERGENCY CLAUSE****Contact For More Information:**

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