

Bill Summary

MEASURE: Conference Committee Substitute for HB 1603

AUTHOR: Representative Sullivan

SUBJECT: Tort Reform

Please note page references are to the Conference Committee Substitute version of this bill only.

Section 1 (page 6): Titles the act the “Comprehensive Lawsuit Reform Act of 2009.”

Section 2 (page 6): Creates a new law addressing expert testimony in civil action for professional negligence. Where a party is required to use a “qualified expert,” the plaintiff shall attach to the petition an affidavit attesting to the fact that the plaintiff has consulted with an expert and obtained a written opinion that clearly shows that the plaintiff’s claim is meritorious. The language in this section allows a court to grant an extension of time to the plaintiff, not to exceed 90 days from the date the petition is filed to file an affidavit.

If a plaintiff – without good cause shown – does not comply with the above paragraph, the court shall, upon motion of the defendant dismiss the action.

Upon written request of any defendant in a civil action for professional negligence, the plaintiff shall, within 10 business days after receipt of such a request, provide the adverse party with a copy of the written opinion of the expert and an authorization from the party for the release of all medical records related to the plaintiff for a period of five years prior to the incident that is at issue. If the plaintiff fails to provide the opinion and the release, the court shall, upon motion of the defendant and unless good cause is shown for such failure, dismiss the action.

Sections 3(pages 10 to 11): If the court wishes to move the claim or action to another venue it may do so in the interest of justice and for the convenience of the parties. This forum may be in state or out of state.

The section also sets out what the court shall consider in determining whether to grant a motion to stay or dismiss an action pursuant to this section.

Section 4 (page 11): Allows a plaintiff to claim an indigency exemption from providing an affidavit of merit in civil actions for professional negligence. Requires the Oklahoma Supreme Court to establish qualification rules for determination of indigency for those claims.

Section 5 (page 12-13): Clean up language of a statutory reference

Section 6 (page 13-15): Amends statute regarding when an action may be dismissed by the plaintiff. It may be dismissed without court a order before pretrial. After the pretrial hearing, it may only be dismissed by agreement of the parties or by the court. In either case, unless otherwise state in the notice of dismissal, the dismissal will be without prejudice.

Except as provided, an action will not be dismissed at the plaintiff's request except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaims can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

A defendant may move for dismissal of any action or claim if the plaintiff does not comply with these rules or any court order.

The provisions of this section apply to the dismissal of any counterclaim, cross-claim or third-party claim. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Section 7 (page 15 to 23): Amends language regarding pre-judgment interest stating that beginning November 1, 2009 "...if a verdict for damages by reason of personal injuries or injury to personal rights including, but not limited to, injury resulting from bodily restraint, personal insult, defamation, invasion of privacy, injury to personal relations, or detriment due to an act or omission of another is accepted by the trial court, the court in rendering judgment shall add interest on the verdict from the date which is 24 months after the suit resulting in the judgment was commenced to the earlier of the date the verdict is accepted by the trial court as expressly stated in the judgment, or the date the judgment is filed with the court clerk.

No prejudgment interest shall begin to accrue until 24 months after the suit resulting in the judgment was commenced.

The prejudgment interest is calculated by changing it from the prime rate plus two percent, to the average U.S. Treasury Bill rate of the preceding calendar year.

Section 8 (page 23 to 30): Caps appeals bonds at no more than \$25 million.

Allows a court to require a bond be posted equal to the full amount of security required if the court finds “by a preponderance of the evidence” that the appellant is intentionally dissipating or diverting assets for the purpose of avoiding payment of the judgment.

Appeal bonds shall not be required for appeals from punitive damages.”

Section 9 (page 30 to): Amends existing language by adding that an aggrieved party may appeal an order to the Supreme Court when an order: “denies a motion in a class action asserting lack of jurisdiction because an agency of this state has exclusive or primary jurisdiction of the action or part of the action, or asserting that a party has failed to exhaust administrative remedies, but only if the class is subsequently certified and only as part of the appeal of the order certifying the class action.”

Section 10 (page 33 to 36): New law that spells out how a recovery is split when Medicaid is involved in a medical liability action.

Section 11 (page 36 to 60): Amends the section on time limit for service of process after the filing of the petition and states that the action shall be deemed dismissed as to that defendant not timely served, without prejudice.

Section 12 (page 60 to 63): Amends language as it relates to claims for relief by striking \$10,000 and replacing the language with “the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28, U.S. Code.

Section 13 (page 63 to 66): Amends statutes by increasing the amount set in the language from \$10,000 to the amount “required for diversity jurisdiction pursuant to Section 1332 of Title 28, U.S. Code,” in instances where special damages are claimed.

If the amount of damages sought to be recovered by the plaintiff is less than the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code, the defendant may file, for purposes of establishing diversity jurisdiction only, a Motion to Clarify Damages prior to the pretrial order to require the plaintiff to show by a preponderance of the evidence that the amount of damages, if awarded, will not exceed the amount required for diversity. If the court finds that any damages awarded are more likely than not to exceed the amount of damages required for diversity jurisdiction, the plaintiff shall amend his or her pleadings in conformance with paragraph 2 of subsection A of Section 2008 of this title.

Section 14 (page 66 to 70): Redefines “frivolous” by simply defining it as an action/pleading was “in bad faith or without any rational argument based in law or fact to support the position of the litigant or to change existing law.

Section 15 (page 70 to 71): Adds amended definition of frivolous (above)

Section 16 (page 71 to 83): Amends law regarding class actions.

An order entered on or after November 1, 2009, that certifies a class action shall define the class and the class claims, issues or defenses, and shall appoint class counsel.

A court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall clearly and concisely state in plain, easily understood language the following:

- The nature of the action
- The definition of the class certified
- The class claims, issues or defenses,
- That a class member may enter an appearance through an attorney if the member so desires,
- That the court will exclude him from the class if he so requests by a specified date,
- That the judgment, whether favorable or not, will include all members who do not request exclusion, and
- That any member who does not request exclusion may, if he desires, enter an appearance through his counsel

Class membership shall be limited only to individuals who are: residents of Oklahoma and non-residents of Oklahoma who own property in the state where the property is relevant to the class action.

Spells out how claims, issues, or defenses of a certified class may be settled, voluntarily dismissed or compromised with court's approval.

Sets out how the court may award reasonable attorney fees in a certified class action. Allows for a class member to object the motion for such fees; requires the court to hold an evidentiary hearing to determine a "fair and reasonable" fee for class counsel; requires the court to act in a fiduciary capacity on behalf of the class in making such determination; allows the court to appoint an independent attorney to represent the class in the manner of awarding attorney fees; and sets out what the court shall consider in determining what a "fair and reasonable" fee is.

Also sets out that, "If any portion of the benefits recovered for the class...are in the form of coupons, discounts on future goods or services, or other similar types of noncash common benefits, the attorney fees awarded in the class action shall be in cash and noncash amounts in the same proportion as the recovery for the class."

Section 17 (page 83 to 85): New law that spells out the conditions under which a claimant or defendant can move for summary judgment.

Section 18 (page 85): Amends existing law on qualified expert witnesses by allowing a qualified expert witness to testify on scientific, technical, or other specialized knowledge if: the testimony is based upon sufficient facts or data; the testimony is the product of

reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.

Section 19 (page 85 to 86): Adds amendatory language stating that “facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

Section 20 (page 86 to 100): Amends statute by providing guidelines for initial disclosures and discovery

Section 21 (page 101): Adds amendatory language stating that “breach of the obligation of good faith imposed by this section shall not give rise to a separate tort cause of action.”

Section 22 (page 101): New law stating that no later than December 1, 2009, the Supreme Court of this state shall establish qualification rules for determination of indigency for a plaintiff claiming an exemption from providing an affidavit of merit in a civil action for professional negligence pursuant to Section 2 of this act.

Section 23 (page 101 to 102): Amends language related to joint and several liability by stating that this section of the bill shall not apply to actions brought by or on behalf of the state.

Section 24 (page 102 to 109): New law stating that In any civil action arising from a claimed bodily injury, the amount of compensation which the trier of fact may award a plaintiff for economic loss shall not be subject to any limitation.

Places a cap of \$400,000 on noneconomic damages in any civil action arising from claimed bodily injury. The cap does not apply in claims resulting from professional negligence against a judge, if the injured person/plaintiff suffers permanent and substantial physical abnormality or disfigurement, loss of a limb, etc. or if he or she can no longer independently care for themselves. The cap does not apply if the defendant’s acts were reckless, negligent, fraudulent or with malice.

In the trial of a civil action arising from claimed bodily injury, if the verdict is for the plaintiff, the court, in a nonjury trial, shall make findings of fact, and the jury, in a trial by jury, shall return a general verdict accompanied by answers to interrogatories, including the total compensatory damages recoverable by the plaintiff, the portion of the total compensatory damages representing both the plaintiff’s economic loss and noneconomic loss.

In any civil action to recover damages arising from claimed bodily injury, after the trier of fact makes the findings required, the court shall enter judgment in favor of the plaintiff for both noneconomic and economic damages in the amount determined

In any civil action arising from claimed bodily injury which is tried to a jury, the jury shall not be instructed with respect to the limit on noneconomic damages set forth, nor

shall counsel for any party nor any witness inform the jury or potential jurors of such limitations.

This section of the bill shall not apply to actions brought under The Governmental Tort Claims Act or actions for wrongful death

Upon the establishment of a Health Care Indemnity Fund, any damages awarded that exceed the \$400,000 cap shall be paid by such fund. The provisions of this section shall not apply to any action that accrues before the date of enactment of the Health Care Indemnity Fund provided, such fund shall include professional liability insurance coverage requirements in an amount of no less than One Million Dollars (\$1,000,000.00) for physicians, and shall maintain availability of Twenty Million Dollars (\$20,000,000.00) annually. It is the intent of the Legislature that the state purchase reinsurance of up to Twenty Million Dollars (\$20,000,000.00) to cover judgments through such fund.

Section 25 (page 109 to 111): Creates the Health Care Indemnity Fund Task Force spelled out in the above section.

Section 26 (page 111 to 114): Amends existing law to state that failure to secure a child is admissible as evidence in a civil action case unless the plaintiff is a child under the age of 16.

Section 27 (page 114): Amends language to reflect changes made in Section 26.

Section 28 (page 114 to 119): Amends language regarding civil actions involving a patient claiming injuries as a result of negligence by a health care professional by making it such that factual statements presented during the peer review process regarding the patient's health care shall *not* be subject to discovery

Section 29 (page 119 to 122): Clean up language

Section 30 (122 to 123): Clean-up language that clarifies that the term "emergency management worker" shall not include "any volunteer health practitioner subject to the provisions of the Uniform Emergency Volunteer Health Practitioners Act.

Sections 31 to 41 (pages 124 to 137): Creates the "Uniform Emergency Volunteer Health Practitioners Act. This Act empowers the State Department of Health when an emergency is in effect to limit, restrict, or otherwise regulate the duration of practice by volunteer health practitioners, the area in which they may practice, and the types of practitioners who may practice.

The Act provides guidelines on qualifying as a volunteer health practitioner, and states that once registered (and an emergency is in effect), he/she may practice in this state as authorized, as if he/she was licensed in this state. A volunteer health practitioner shall adhere to the scope of practice for similarly licensed practitioners.

This Act does not affect credentialing or privileging standards of a health facility and does not preclude a health facility from waiving or modifying those standards while an emergency declaration is in effect.

Section 42 (page 137 to 139): Amends language having to do with volunteer protection by deleting the following language in the definition of volunteer: “where the person does not offer that type of service, care, assistance, advice or other benefit for sale to the public,” and replacing it “provided, being legally entitled to receive compensation for the service or undertaking performed shall not preclude a person from being considered a volunteer.”

The immunity from civil liability provided for by this section shall extend only to the actions taken by a person rendering the service, care, assistance, advice, or other benefit as a volunteer, where such actions are agreed upon in advance by all involved persons to be provided on a volunteer basis. This section shall not be construed to confer any immunity to any person for actions taken by the volunteer prior to or after the rendering of the service, care, assistance, advice, or other benefit as a volunteer.

Section 43 to 46(pages 139 to 143) New law creating the Common Sense Consumption Act, which states that you cannot sue a manufacturer, packer, distributor, etc. for weight gain, obesity or diseases associated with such conditions. The exception to this is when violations of marketing, misbranding, etc. have occurred.

Section 47 (pages 143 to 147): Amends the Oklahoma Livestock Activities Liability Limitation Act to include agritourism activities involving livestock.

Sections 48 to 51(page 147 to 149): Exempts gun manufacturers, distributors and sellers who “lawfully” manufacture, distribute or sell firearms from liability for “any injury suffered.” Does not exempt such firearms from product liability actions if appropriate.

Section 52 (page 149 to 150) New law dealing with product liability. In a product liability action, a manufacturer or seller shall not be liable if the product is inherently unsafe and known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.

The claim that a product is inherently unsafe shall be an affirmative defense and shall be pled in accordance with the requirements of the Oklahoma Pleading Code. In order for the defense to apply, all of the following shall be shown:

- The product was a common consumer product intended for personal consumption;
- The product’s utility outweighs the risk created by its use;
- The risk posed by the product was one known by the ordinary consumer who consumes the product with the ordinary knowledge common to the community;
- The product was properly prepared and reached the consumer without substantial change in its condition; and
- Adequate warning of the risk posed by the product was given by the manufacturer or seller.

The term “product liability action” does not include an action based on manufacturing defect or breach of warranty.

Section 53 (page 150): New law. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.:

Sections 54-65 (page 150 to 179)

Creates new law that shall apply to all asbestos and silica claims filed on or after November 1, 2009. Aspects of the law include legislative findings, a detailed definition of qualified physician, elements of proof for an asbestos or silica claim, required information for a new claim, and prima facie evidence for nonmalignant asbestos, asbestos-related cancers, silicosis, silica-related lung cancer and silica-related claims.

Sections 66-73 (page 179 to 187): New law creating the “Innocent Successor Asbestos-Related Liability Fairness Act” which protects successor companies who have purchased companies with an earlier asbestos exposure.

The cumulative successor asbestos-related liabilities of an innocent corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The corporation does not have any responsibility for successor asbestos-related liabilities in excess of this limitation. In the event of the merger, then the fair market value is based on value prior to that merger.

Section 74 (page 187 to 189): Spells out who can and cannot preside at a termination hearing of a teacher.

Section 75 to 83 (pages 188 to 192): School Protection Act

Section 84: (pages 192 to 199): Amendatory language stating that any student in grades six through twelve found to have assaulted, attempted to cause physical bodily injury, or acted in a manner that could reasonably cause bodily injury to a school employee or a person volunteering for a school shall be suspended for the remainder of the current semester and the next consecutive semester, to be determined by the board of education pursuant to the provisions of this section. The term of the suspension may be modified by the district superintendent on a case-by-case basis.

Section 85 (page 199 to 204): Amends existing law to state that a state or political subdivision shall not be liable if a loss or claim results from the use of necessary and reasonable force by a school district employee to control and discipline a student during the time the student is in attendance or in transit to and from the school, or any other function authorized by the school district; or actions taken in good faith by a school

district employee for the out-of-school suspension of a student pursuant to applicable Oklahoma Statutes.

Section 86 (page 204): Repeals language requiring the court to conduct an “evidentiary hearing” to determine “fair and reasonable fee for class counsel.”

Section 87. (page 204)::Repeals sections dealing with medical liability

Section 88(page 205): -Repeals licensing and appointment of health personnel.

Section 89(page 205): - Repeals severability clause.

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