

## **BILL ANALYSIS**

C.S.H.B. 4249  
By: Leibowitz  
Judiciary & Civil Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Under current law relating to expert reports in health care liability claims, doctors can essentially get immunity by successfully evading service of an expert report. Additionally, some defendants, in both health care and other cases, designate health care providers as responsible third parties. Such a designation pressures a plaintiff to add the health care providers as additional defendants. There is also currently no deterrent to a defendant filing an interlocutory appeal of an order denying a challenge to an adequate expert report. Some defense attorneys are abusing the system by filing interlocutory appeals in every case. Current law, as interpreted by the courts, also requires a claimant to disclose the action of the defendant upon which the claim is based before discovering exactly what the defendant did.

C.S.H.B. 4249 changes the deadline for a claimant to serve an expert report on a party from 120 days after the petition was filed to 120 days after the answer was filed. The bill requires an objection to the sufficiency of an expert report to clearly state the specific elements of the report that are alleged to be deficient. The bill establishes that an expert report served by a health care liability claimant does not limit a party to allegations or opinions expressed in the report.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 4249 amends the Civil Practice and Remedies Code to provide that a claimant in a health care liability claim is required, not later than the 120th day after the date each defendant's original answer is filed, to serve on that party or the party's attorney one or more expert reports, with the curriculum vitae of each expert listed in the report, rather than requiring the claimant to serve such report on each party not later than the 120th day after the date the original petition was filed. The bill changes the date by which each defendant physician or health care provider whose conduct is implicated in a report is required to file and serve any objection to the sufficiency of the report from not later than the 21st day after the date the report was served to not later than the later of the 21st day after the date the report is served or the 21st day after the defendant's answer is filed. The bill requires an objection to the sufficiency of an expert report to clearly state the specific elements of the report that are alleged to be deficient. The bill requires an objection that is conclusory or that fails to state the specific elements of the report that are alleged to be deficient to be overruled, and establishes that any deficiency in the report is considered waived.

C.S.H.B. 4249 establishes that an expert report served by a health care liability claimant does not limit a party to allegations or opinions expressed in the report, subject to certain waiver provisions.

C.S.H.B. 4249 authorizes a claimant, notwithstanding provisions staying discovery in a health

care liability claim until a claimant has served the required expert reports and curricula vitae, to proceed with discovery if the citation has been served on the defendant but the defendant has not answered in a timely manner or if the claimant has made a reasonable effort to serve the expert report on the defendant in the manner provided by the Texas Rules of Civil Procedure but service has failed.

### **EFFECTIVE DATE**

On passage, or, if the act does not receive the necessary vote, the act takes effect September 1, 2009.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 4249 requires a claimant in a health care liability claim, not later than the 120th day after the date each defendant's original answer is filed, to serve on that party or the party's attorney one or more expert reports, with the curriculum vitae of each expert listed in the report, whereas the original requires the claimant to serve such report on each party not later than the 120th day after the date the original answer was filed.

C.S.H.B. 4249 removes a provision included in the original requiring a party asserting a health care liability claim by joining a physician or health care provider as a defendant, third-party defendant, cross-defendant, counter-defendant or designating a physician or health care provider as a responsible third party in any pending health care liability claim to serve on each party or the party's attorney the expert reports and curriculum vitae not later than the 120th day after the date a physician or health care provider against whom a health care liability is joined as a party or designated as a responsible third party. The substitute removes language in the original authorizing the date for serving the report to be shortened by written agreement of the parties, and also authorizing the date to be shortened or extended by order of the court. The substitute differs from the original by requiring each defendant physician or health care provider whose conduct is implicated in a report to file and serve any objection to the sufficiency, rather than the adequacy as in the original, of the report by a certain date. The substitute differs from the original by providing for alternative dates for the filing and serving of the objections, whereas the original provides a set date. The substitute removes a provision in the original establishing that service shall be presumed accomplished if done by U.S. Mail, electronic mail, hand delivery, or any method of service provided by the Texas Rules of Civil Procedure.

C.S.H.B. 4249 differs from the original by requiring an objection to the sufficiency of an expert report to clearly state the specific elements of the report that are alleged to be deficient, whereas the original requires objections to and motions challenging the adequacy of an expert report to be clear, specific, and tailored to the specific report to which they are directed and to specify how the expert report is claimed to be inadequate. The substitute differs from the original by requiring an objection that is conclusory or that fails to state the specific elements of the report that are alleged to be deficient to be overruled, and establishes that any deficiency in the report is considered waived, whereas the original establishes that objections found to be conclusory, non-specific, or not tailored to the specific report being challenged are waived.

C.S.H.B. 4249 removes a provision included in the original requiring a court, if a physician or health care provider appeals a denial of a motion challenging the adequacy of the report and if the denial is not reversed, to enter an order that awards the claimant reasonable attorney's fees and costs of court related to the challenge and appeal. The substitute removes a provision included in the original establishing that nothing in provisions relating to expert reports served by a claimant in a health care liability claim shall be construed to limit the claim to the opinions contained in the expert report in any subsequent pleadings, proceedings, or trial. The substitute differs from the original by establishing that an expert report served by a health care liability claimant does not limit a party to allegations or opinions expressed in the report, whereas the original prohibits an expert report served by a claimant in a health care liability claim from being

construed to limit the claimant's proof or pleading in the case.

C.S.H.B. 4249 removes language in the original redefining "claim," "defendant," and "expert report."

C.S.H.B. 4249 removes language included in the original clarifying that nothing in provisions staying discovery in a health care liability claim until a claimant has served the required expert reports and curricula vitae precludes the claimant from deposing one or more defendants prior to serving the 120 day report. The substitute removes provisions included in the original adding the acquisition by the claimant of information related to the patient's health care through pre-suit depositions allowed under the Texas Rules of Civil Procedure and on showing of good cause, oral depositions to obtain factual data in support of claims set forth in the claimant's pleadings on file with the court as exceptions to the staying of discovery in a health care liability claim until a claimant has served the required expert reports and curricula vitae. The substitute removes language included in the original clarifying that the prohibition against a claimant taking more than two depositions before the expert report is served applies to oral and videotaped depositions taken pursuant to the Texas Rules of Civil Procedure. The substitute removes a provision included in the original authorizing a court to allow additional oral and videotaped depositions under the Texas Rules of Civil Procedure of any party or witness on a showing by a claimant that additional information is needed for the completion of an expert report that cannot otherwise practicably be obtained in a timely manner under these provisions.

C.S.H.B. 4249 adds provisions not in the original authorizing a claimant, notwithstanding provisions staying discovery in a health care liability claim until a claimant has served the required expert reports and curricula vitae, to proceed with discovery if the citation has been served on the defendant but the defendant has not answered in a timely manner or if the claimant has made a reasonable effort to serve the expert report on the defendant in the manner provided by the Texas Rules of Civil Procedure but service has failed.