

**2007 TEXAS LEGISLATIVE UPDATE:  
BILLS AFFECTING THE CIVIL JUSTICE SYSTEM  
IN THE 80<sup>TH</sup> SESSION**

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**CHAPTER 1**



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This year, David E. Chamberlain was honored as The Outstanding Defense Bar Leader in the nation by DRI, the largest association of defense lawyers in the country (Fred Sievert Award). He recently served as President of the Texas Association of Defense Counsel (2005) and has been named Texas Super Lawyer for three straight years in Texas Monthly Magazine (2005, 2006, 2007) (limited to 5% of Texas attorneys). He is the senior partner in the Austin civil trial firm of Chamberlain♦McHaney and is A.V. rated by Martindale-Hubbell. He was recently elected to the Board of Directors of the Austin Bar Association (2007-2009) and has been named the Course Director of the 2007 Texas Advanced Personal Injury Law Course, sponsored by the State Bar of Texas. He is a Sustaining Life Fellow of the Texas Bar Foundation.



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## 2007 TEXAS LEGISLATURE UPDATE: BILLS AFFECTING THE CIVIL JUSTICE SYSTEM IN THE 80<sup>TH</sup> SESSION

### I. INTRODUCTION

There is good news and there is bad news. The bad news is that the 80<sup>th</sup> Legislature did not pass a lot of bills affecting the Texas Civil Justice System. The good news is that the 80<sup>th</sup> Legislature did not pass a lot of bills affecting the Texas Civil Justice System.

Overall, 6,741 bills were filed, with just over 1,450 being passed and sent to the governor. Among the bills filed, there were bills of interest affecting the courts, the practice of law, the conduct of jury trials, arbitration, indemnity contracts, consolidated insurance programs, automobile insurance, damages, civil practices and procedures, causes of action and damages.

While the 80<sup>th</sup> did not match the 78<sup>th</sup> (2003 session) in terms of its impact upon the civil justice system (read HB 4 and Prop 12), it had its points of interest nonetheless. It started with a speaker's race and ended with a speaker's race. In between, the Lege passed a record \$152 billion budget, overturned Governor Perry's executive order requiring young women to be vaccinated for HPV, passed a resolution naming the salamander as our state amphibian (later vetoed by Governor Perry), suspended temporarily (sort of) new state toll road agreements involving foreign contractors, refused to sell the state lottery, battled over voter identification, passed water legislation and clean air programs, failed to pass electric utility regulation, restored CHIP eligibility to thousands of children, and left alone the top 10% rule for admission to state universities.

Despite a major push by tort reformers (turned court reformers), the Lege did not pass an ambitious court reorganization plan. It did not pass anti-indemnity or consolidated insurance program legislation. It did not pass bills affecting the conduct of jury trials, arbitration, collaborative law, judicial selection or qualifications.

It did re-write the "paid or incurred" statute<sup>1</sup> and passed a number of other measures that, for the most part, improved or tweaked the civil justice system. It even found time to protect oysters from lawsuits. And of course, it increased fees, both on lawyers and on clients seeking access to the courthouse.

### II. SCOPE

This paper covers bills affecting the civil justice system that passed as well as bills that did not pass.

We include a discussion of bills that did not pass because they may portend a trend in legislative thinking. Some bills are considered over the course of several legislative sessions before they ultimately pass. A slight change in the composition of the membership or the leadership of either chamber can mean a change in priorities and a change in a bill's prospects for eventual passage.

### III. DISCLAIMER

In addition to a brief discussion of the contents of a bill, we sometimes also summarize the principal perspectives of the proponents and opponents of the bill. Any opinions expressed in this paper are not necessarily the opinions of the State Bar of Texas or the authors. As a mandatory bar, the State Bar of Texas cannot take a position on many bills. Having said that, it is our opinion that individual lawyers can and should take an active role in protecting, preserving and improving the Texas civil justice system.

### IV. CIVIL PRACTICE AND REMEDIES

#### SB 7 (Hinojosa) Defibrillators

This bill provides for the availability of automatic external defibrillators at schools and school district events. This bill also provides that it does not create or waive any liability.

The bill passed both chambers, has been signed by the Governor, and is effective immediately.

#### HB 323 (Hamilton) Seat Belts on School Buses

An amendment to this bill, which requires school district to install seat belts on school buses if funds are available, was added to immunize school districts from liability if the buses did not have seat belts. The final version of the bill provides for voluntary donations of bus seat belts to school districts and, if so equipped, mandates instruction as to their use.

The amendment was ultimately stripped and the final version of the bill passed and has been signed by the Governor.

#### CSHB 3281 (King) "Paid or Incurred"

As part of House Bill 4, the major tort reform legislation of the 2003 session, the legislature passed a diminutive statute that provided "...recovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." Despite the statute's brevity, it has caused large-scale disagreement among lawyers, judges, and commentators as to its meaning and impact. Moreover, some have contended that the statute prohibits the recovery of future medical or healthcare expenses.

<sup>1</sup> Later vetoed by the Governor. See footnote 2.

This session, the legislature passed an amendment that simply states that the statute “only applies to healthcare liability claims under Chapter 74” and “[t]his section does not apply to a claim for future medical or healthcare expenses.”

According to the report of the House Civil Practices Committee, the bill would amend the statute to clarify that it only applies in healthcare liability claims and that the statute does not apply to a claim for future medical or healthcare expenses.

This bill enjoyed broad support in both houses including support from many conservative members. But the bill also had its opponents. These critics argued that this bill awards nonexistent damages for medical costs that were not actually charged and will never be paid. They further contend that insurance providers will be required to reimburse claimants at the highest “rack rate” for medical care rather than the negotiated lower rates.

This bill passed both houses but has been vetoed by the Governor.<sup>2</sup> Tort reformers such as the Texas Civil Justice League, Texas Association of Business,

and Citizens Against Lawsuit Abuse led the campaign for the veto.

### **SB 378 (Wentworth, et al) Castle Doctrine or “Make My Day” Bill:**

This bill changes the presumption in the Penal Code and the Civil Practice and Remedies Code so that the use of force is presumed justified against unlawful intruders into homes, vehicles, or places of business or employment. There is no longer any “duty” to retreat. The bill as originally filed contained a “loser pays” provision, allowing the prevailing party in a resulting civil action to recover fees and costs. The “loser pays” provision was removed and SB 378 passed both chambers.

This bill has been signed by the Governor and it becomes law on September 1, 2007.

### **HB 414 (Eissler) Texas Medical Board**

This bill would have allowed certain “administrative” violations to be removed from a physician’s medical board records after five years. The bill died in committee without a hearing.

### **CSSB 468 (Ellis) Emergency Room Physicians**

Critics of the 2003 tort reform package (HB 4) have been particularly critical of the statutory standard of care as applied to emergency room physicians. They say HB 4 requires proof that the ER doctor intended to harm the patient which, in their opinion, essentially amounts to a criminal standard.

Proponents of CSSB 468 say it would restore the ordinary negligence standard with regard to the conduct of emergency physicians, holding them to the same standard applicable to other doctors. Proponents also argue that low income Texans who rely on emergency rooms as primary healthcare facilities are particularly burdened by the HB 4 standard.

This bill was reported favorably out of the Senate State Affairs Committee, but never reached the floor for a vote.

### **HB 497 (Madden) Disputes Arising Under Commercial Construction Contracts**

This 17 page bill would provide that parties to a commercial contract may create a “Dispute Board” that would be staffed from one to three arbitrators. The parties would select these dispute board members within 15 days of entering into the construction contract. These board members go to work immediately on the work site with the object of preventing disputes between owner and contractors before they occur and then decide disputes they don’t prevent. This board would be statutorily empowered to decide when and how much work they do. According to the specific mandates of this bill, they would be paid for that work as well as for time spent

<sup>2</sup>The following is Governor Perry’s veto message:

**TO THE MEMBERS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE EIGHTIETH TEXAS LEGISLATURE, REGULAR SESSION:**

Pursuant to Article IV, Sections 14 and 15 of the Texas Constitution, I, Rick Perry, Governor of Texas, do hereby disapprove and veto House Bill No. 3281 of the 80th Texas Legislature, Regular Session, due to the following objections:

House Bill No. 3281 would reverse Texas’ sweeping lawsuit reforms passed in 2003 that reasonably limited the amount of medical bills a plaintiff could recover to the amount actually paid or incurred by the individual or their insurer.

This bill would permit an individual in a personal injury lawsuit (other than a medical malpractice claim) to recover more money for medical expenses than actually was or will be paid. This would be done by allowing a person to submit bills that are higher than those actually paid to health care providers. For example, if this bill became law, an individual who was billed \$20,000 by a hospital, but whose insurance company negotiated the bill down to an actual amount paid of \$12,000, could still submit the original \$20,000 bill to the jury as if their insurance company actually paid that amount. This would deceive the jury as to the true amount of actual medical damages.

Our civil justice system holds a defendant accountable for economic damages caused, including medical bills. A person should not be allowed to recover, and a defendant should not be required to pay, an inflated amount of actual medical costs. If a defendant has caused damage in addition to medical expenses, those damages should be addressed and recovered under the rules of our civil justice system, rather than inflating medical bills to cover them.

Proponents of this bill argue it would reverse the “collateral source” rule, which prevents defendants from introducing evidence that an insurance company, rather than the individual, paid all or a portion of the medical bills. This is not true. Nothing in Section 41.0105 allows a defendant to introduce this evidence or hinders an individual’s ability to recover the amount of the medical bills paid by their insurance company.

The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant’s actions. It should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid.

The bill contains a second provision, which correctly restates that Texas’ tort reform law does not prevent a person in a lawsuit from recovering damages for future medical bills caused by their injury. On its own, this provision would have been acceptable.

reading contracts, weekly progress reports, plans, specifications, change orders, minutes of progress meetings and generally hanging around the construction site monitoring construction activities (looking for potential disputes). They are to be provided with offices and clerical support. They would be budgeted and “must” be paid as a capital expense of the project. They would enjoy judicial immunity and could not be called to testify at any proceeding or trial. Their written decisions, however, are admissible in evidence in any subsequent arbitration or court case.

Strongly supported by the lobby for mediators and arbitrators, this bill surprised many when it passed out of the House and was then reported favorably out of the Senate State Affairs Committee. It did not reach a vote on the Senate floor.

### **HB 511 (Farabee) Employer Liability for Employee’s Concealed Handgun**

This bill would prohibit employers from prohibiting employees from packing heat in a locked vehicle in the employer’s unsecured parking lot or garage. The bill further provides that the employer is not liable in a civil action for damages resulting from an occurrence involving the possession of a concealed handgun by an employee licensed to carry the weapon under law.

The bill did not emerge from the House Law Enforcement Committee.

(See also HB 220, 992 & 1037; SB 534, which did not pass.)

### **SB 763 (Duncan) Medical Records Affidavits**

Currently, parties in a personal injury lawsuit must file copies of medical records affidavits and a patient’s medical records with the clerk of the court and the opposing party. In cases with large amounts of records, this becomes a time consuming and expensive task. In addition, the patient’s private medical information becomes open to the public when filed with the court.

S.B. 763 requires parties offering the affidavit to serve only the opposing party with copies of the affidavit and medical records. Additionally, this bill protects the privacy of medical records.

This bill passed both houses and it has been signed by the Governor.

### **HB 811 & 813 (Dutton) Tort Claims & Governmental Immunity**

These bills would have clarified the waiver of sovereign immunity for activities involving a motor vehicle and discovery procedures in a tort claims suit. HB 811 was substituted to remove the “condition or use” of property prerequisite under the Texas Tort Claims Act.

The substituted bill died in the House Committee on Civil Practices.

### **CSHB 823 (Ritter) Limited Liability for Certain Services Provided During an Emergency:**

As a result of the hurricanes last year, architects and engineers claimed to be hindered in the amount of volunteer work they could perform because of the onerous risk of liability. CSHB 823 provides that licensed architects and engineers are not civilly liable due to fault in the performance of services during a government declared disaster if: (1) the services are provided without compensation or the expectation of compensation; and (2) if the fault does not involve gross negligence or intentional misconduct.

HB 823 passed both chambers and has been signed by the Governor. It is effective immediately.

### **SB 942 (Carona) Collaborative Law**

This bill, which has been filed in previous sessions, would allow the parties to sign a collaborative law agreement and employ a single lawyer to advise them and mediate their dispute over an extended period of time. As one critic put it, “collaborative law is mediation on steroids.”

Opponents say this bill would wrest control of the case from the trial judge. For a period of two years, the court would be prohibited from setting the case for trial or rendering a scheduling or other orders. Critics also pointed out that this bill would create another expensive and unnecessary step in litigation and create a significant difference in state and federal procedural law. This bill was lobbied hard by mediator groups. They say collaborative law works well in family law matters and should be extended to all civil litigation.

SB 942 died in the Senate State Affairs Committee.

### **CSSB 966 (Ellis/Duncan) HB 2249 (Van Arsdale) Journalist’s Privilege**

CSSB 966 and HB 2249 would have enacted a qualified privilege purportedly providing a balancing test for compelling a journalist to disclose confidential and non-confidential information and sources for use in court proceedings. Before compelling a journalist to reveal such information and sources, the party seeking the information in a civil case would have to prove by clear and convincing evidence that (1) all reasonable efforts had been exhausted to obtain the information from an alternative source; (2) the request does not require the production of a large volume of unpublished material; (3) that timely notice had been given; (4) nondisclosure would be contrary to the public interest; (5) the request is not being used to obtain nonessential information; and (6) the information or identity of the source is essential to the

maintenance of a claim or defense. In a criminal case; this qualified privilege could not be used to shield an eyewitness observation of a crime or if this information is reasonably needed to stop or prevent reasonably certain death or substantial bodily harm.

Proponents of the bill argued that this privilege is necessary to protect the free flow of information and to encourage whistleblowers to come forward to the media to discuss matters of public concern without fear of retribution. Opponents characterized it as a cumbersome and time-consuming roadblock to obtaining information critical to some cases.

The Senate version passed by a wide margin, but was killed in the House by a point of order.

These bills will be refilled next session.

### **HB 1038 (Ritter) Texas Residential Construction Commission**

This bill provides the Texas Residential Construction Commission (TRCC) with more disciplinary powers, including additional penalties and the ability to discipline builders who do not register or who repeatedly fail to make an offer to repair and/or reasonably perform on an accepted offer to repair. Moreover, the homeowner may disregard the state sponsored inspection and dispute resolution process and go directly to court or arbitration if the builder is not registered with the TRCC. A builder may not enforce a contract if the builder is not registered with the TRCC. The bill adds new contract disclosure requirements and requires a minimum of three inspections for new homes (foundation pre-pour, framing and mechanical prior to being covered, and final inspection).

The bill passed both houses and has been signed by the Governor. It is effective September 1, 2007.

### **HB 1053 (Van Arsdale) Exemplary Damages**

This bill would require the court to order any award of exemplary damages in a bench or jury trial awarded to a claimant who is a non-citizen to be turned over to the state comptroller for deposit in the general revenue fund. The bill defines a “noncitizen” as a person who is not a “citizen or natural of the United States.” The bill further provides that the provisions of this statute may not be made known to the jury. The bill makes no mention as to whether attorneys fees may be collected out of the award of exemplary damages.

HB 1053 died in the House Civil Practices Committee. It had no Senate companion.

### **CSSB 1167 (Duncan) Arbitration**

According to the Senate State Affairs Committee report, appeals are only authorized to be taken from final orders or judgments unless a statute permits an interlocutory challenge. A statute currently permits an

interlocutory appeal of a lower court’s denial of a petition to order arbitration in cases subject to the Texas Arbitration Act. However, there is no such statutory exception in cases subject to the Federal Arbitration Act, and the Texas Supreme Court has held that review in these cases is required to be made by writ of mandamus. As a result, there are two different procedures for seeking review under the two arbitration acts, leading to duplicative actions that may be unnecessarily expensive and cumbersome.

C.S.S.B. 1167 would have created a statutory exception to the general procedural rule to authorize interlocutory appeal of a court’s petition denial in cases subject to the Federal Arbitration Act.

This bill passed the Senate, but did not make it out of the House.

### **HB 1170 (Flynn) Limited Liability for Liquefied Petroleum System Installers:**

This bill provides limited liability for licensed installers of LP Gas systems if the installer was not negligent and did not supply a defective product that was a producing cause of harm.

The bill passed both chambers and has been signed by the Governor.

### **HB 1183 (Otto) Limited Liability for Landowners who Allow Radio Controlled Aircraft to Fly Over their Land**

This bill amends Chapter 75 of the Civil Practice and Remedies Code to add radio controlled airplanes to the list of recreational activities for which liability is limited under the chapter. The bill excludes injuries which occur outside the boundaries of the property used for recreational purposes.

HB 1183 passed both chambers and has been signed by the Governor.

### **SB 1300 (Wentworth) Jury Trial Procedures**

This Senate bill was reported favorably from the Jurisprudence Committee, but did not make it out of the Senate. It had no House companion.

The bill would have changed certain procedures in the conduct of jury trials. According to the Senate committee report, change is needed in order to assist jurors in competently fulfilling their duty to determine the credibility of the evidence.

This bill would:

- Require the trial judge to instruct jurors immediately after they are impaneled and sworn that they may discuss the evidence among themselves in the jury room during recesses when all jurors are present (unless good cause is shown to prohibit or limit such discussions during recesses).

- Require the trial judge to instruct jurors that they may take notes.
- Authorize the court at the request of either party to allow counsel to make interim summations after opening statements and before closing arguments.
- Require that the name of an excused prospective juror (or a prospective juror not selected) be immediately returned to the jury wheel.

Although the bill did not pass, it had substantial support. However, even many of these supporters felt that these changes should be made by the Texas Supreme Court (pursuant to its rule making authority) instead of the legislature.

### **CSSB 1309 (Wentworth) Qui Tam (See Also HB 2690 & 3550 (Haggerty); HB 2925 (Keffer)**

This bill tracks the Federal False Claims Act and, according to the Senate Jurisprudence Committee Report, would give the Texas Attorney General civil remedies against wrongdoers who knowingly defraud the state. This bill also would have provided incentives and anti-retaliation protection to encourage private persons to assist the state by exposing fraud the state might otherwise not learn about.

A private person, if successful in a state Qui Tam action, could recover at least 15 percent but not more than 25 percent of the proceeds recovered, depending on the extent to which the person substantially contributed to the prosecution of the action. Reasonable attorneys fees, expenses and costs could also be recovered.

Some business and tort reform groups opposed the bill, arguing that it “allowed private bounty hunter plaintiffs to file lawsuits for false claims in the name of the State of Texas and reversed civil justice reform measures passed in the last three legislative sessions.” See [www.TCJL.com](http://www.TCJL.com).

The bill passed the Senate unanimously, and was reported favorably from the House Civil Practices Committee, but it died at the end of the session without a vote on the House floor.

### **SB 1348 (Patrick) Peace Officers & High Speed Chases**

As proposed, this bill would have provided cities and counties protection from liability for injuries and damages resulting from a peace officer’s pursuit of a person evading arrest if the officer’s action was not consciously indifferent to the safety of others.

This bill handily passed the Senate, but did not get a hearing in the House.

### **HB 1519 (Smith) Solicitation by Chiropractors and Telemarketers**

This bill would have expanded the definition of barratry in the penal code to prohibit contact by a chiropractor and telemarketing firms with accident victims by telephone or in person within 31 days of an accident.

HB 1519 passed both chambers, but was vetoed by the Governor. In his veto message, the Governor said his veto was warranted because attorneys were not included as a profession prohibited from making this contact.

### **HB 1560 (Callegari) For Premises Owned, Operated or Maintained by a Governmental Unit for Paintball Activities**

This bill amends Chapter 75 of the Civil Practice and Remedies Code to add paintball activities to the list of recreational activities for which the liability of a governmental unit is limited.

The bill passed both chambers and has been signed by the Governor. It is effective immediately.

### **HB 1572 (Woolley) Law Enforcement Privilege & Civil Discovery**

This bill amends the Civil Practices and Remedies Code and provides that the investigation materials of a non-party law enforcement agency is privileged from discovery in a civil action unless the court, after an in camera inspection, determines the discovery is relevant and there is a specific need for the discovery.

The bill passed both chambers and has been signed by the Governor.

### **HB 1602 (Van Arsdale) Jones Act Venue – Dredging Companies**

This bill provides that venue of lawsuits brought under the Jones Act in Texas courts must be brought in the county where the incident causing the alleged injury occurred or in the county of the defendant’s principal place of business.

The House Committee report states that passage of this bill was necessary to close a “loophole” that allows cases brought under the Federal Jones Act to be filed in the county of the plaintiff’s residence. According to the committee’s analysis, this “loophole” has caused an explosion of lawsuits in Texas against dredging companies and that these lawsuits were threatening to make dredging in Texas so expensive that projects along the Texas gulf coast were at “serious risk.”

The bill passed both houses and has been signed by the Governor. It became effective immediately.

**HB 1663 (Eiland) & SB 791 (Williams) Oysters**

This bill declares oysters an “inherently unsafe product.” It passed both houses and has been signed by the Governor.

This bill was not proposed by detractors of oysters. To the contrary, it was proposed and lobbied by the gulf coast oyster industry. According to the report of the Senate State Affairs Committee, recent litigation and the threat of future litigation against private business over liability associated with the business of oyster production and subsequent sale for human consumption has produced the need for statutory protection. Without legislation, there is no explicit protection for people in the oyster industry from lawsuits which are brought on behalf of plaintiffs who get sick or die as a result of eating oysters. Oysters are known to cause severe reactions in people with certain conditions; for example, *Vibrio Vulnificus*, a bacteria commonly found in oysters, is very dangerous to individuals with liver disease.

By defining oysters as an “inherently unsafe product,” the processor and seller of oysters are not liable for any injury pursuant to section 82.004 of the Texas Civil Practices and Remedies Code. Thus, oysters have joined the statutory ranks of “sugar, castor oil, alcohol, tobacco and butter,” as products that have earned or have been given a bad name but that enjoy protection nonetheless.

**CSSB 1782 (West) Arbitration (See also HB 3885 (Gattis)).**

This bill passed the Senate by a wide margin, but died in the House Calendars Committee.

This bill would have amended the Texas Arbitration Act in several respects including:

- Prohibit an order compelling arbitration from violating rights protected by the United States and Texas Constitutions. Provide the right of appeal from an order compelling arbitration based on constitutional violations.
- Provide basic qualifications for arbitrators.
- Prohibit a court from appointing an unqualified arbitrator.
- Authorize a trial court to vacate, modify or correct an award as if the award were a judgment entered by a court without a jury.
- Require an appellate court reviewing a judgment entered on an award to apply the same standard of review as if the judgment were entered by a court sitting without a jury.
- Require arbitrators to disclose certain information about the arbitration proceeding and award to the Office of Court

Administration unless otherwise limited by the parties.

- These amendments would have applied only to arbitrations that are not governed by the Federal Arbitration Act or to a residential construction arbitration governed by Chapter 437 of the Texas Property Code.

As frustration with arbitration continues to grow, we should expect this bill to be filed again next session.

**HB 2117 (Parker) Limited Liability Volunteer First Responders**

This bill provides liability limitations for volunteer first responders under the emergency care section of Chapter 74 of the Civil Practice and Remedies Code (unless the responder has been willfully or wantonly negligent).

The bill passed both chambers and has been signed by the Governor.

**HB 3029 (Frost) Dram Shop**

This bill would have clarified the proportionate responsibility scheme in dram shop cases in order to address the Texas Supreme Court’s opinion in *Duenez*. The bill would have provided that the provider of alcoholic beverages against whom damages are awarded is jointly and severally liable (along with the drunk patron) for all damages awarded in the action. The bill had exceptions for restaurants and retail outlets that served alcohol.

The bill was voted favorably out of the House Civil Practices Committee, but died in House Calendars.

**V. LAWYERS AND THE PRACTICE OF LAW****SB 105 (West) University of North Texas School of Law in Dallas**

This bill, creating a new law school in Dallas as part of the UNT system, was attached as an amendment to H.B. 3057, which authorizes governmental entities to exercise the right of eminent domain to cure urban blight. The bill passed the Senate. A point of order in the House on May 26, 2007 killed the bill.

Proponents argued this new law school is needed because the Dallas-Fort Worth area is the fifth most populous area in the country, but does not have a public, affordable law school. They also argued that Dallas currently imports 30 percent of its attorneys from out-of-state law schools. The opponents of this bill argued, well...you know.

This bill will be re-filed next session.

**SB 168 (Ellis) \$65 Fee to Fund Legal Services for the Poor**

This bill continues the \$65 annual fee imposed on lawyers to fund legal services for the poor. Under current law, authorization of the fee would have ended on September 1, 2007. The bill passed both houses and has been signed by the governor. It becomes effective immediately.

The bill's author, Senator Rodney Ellis, stated in committee that the "implementation of this fee has not led to a reduction in the number of attorneys doing pro bono legal work as some have feared."

**CSSB 496 (Duncan) Indigent Representation**

Current law restricts the use of Fund 540, the judicial and court training fund, to the training of judges and attorneys. C.S.S.B. 496 allows Fund 540 to be used to train attorneys, judges, law enforcement officers, law students and other participants in cases of indigent representation.

The bill passed both houses and has been signed by the Governor, with an effective date of September 1, 2007.

**HB 1237 (Farabee) Lawyer Privacy**

This bill passed both houses and has been signed by the Governor. It becomes effective on September 1, 2007.

The State Bar, as an administrative agency of the judicial branch, requires licensed attorneys to provide personal information including home addresses and phone numbers, birth dates and social security numbers. The State Bar regularly receives requests from third parties for this personal information about lawyers.

HB 1237 clarifies current law to provide that a licensed attorney may choose to restrict public access to the attorney's home address and phone number, email address, social security number and date of birth by notifying the State Bar on a form to be provided by the State Bar.

**HB 1331 (Flores) Publication of Bar Exam Results**

Currently, the Texas Board of Law Examiners posts on its website the test results and full name of candidates who take the bar exam. This bill, which passed the House but died in the Senate, would have prohibited the display in any manner accessible to be public.

**HB 3928 (Keffer) Taxation on Law Firms**

This bill provides that limited liability partnerships are subject to the state's margin tax, closing a so-called loophole for some law, accounting and other service firms.

According to the report of the House Ways and Means Committee, this bill will make it clear that a "taxable entity" includes a limited liability partnership and that a "taxable entity" does not include a general partnership the direct ownership of which is entirely composed of natural persons and the liability of which is not limited under a statute of this state or another state.

The bill passed both houses and has been signed by the Governor.

**CSHB 3928 (Keffer) Tax Deductions for Pro Bono Cases**

CSHB 3928 allows law firms subject to the state's new margin tax to deduct up to \$500 per pro bono case they handle. This bill was supported by the State Bar of Texas.

The bill passed both houses and has been signed by the Governor.

**VI. COURTS AND THE JUDICIARY****HJR 89 (Gattis) Judicial Qualifications**

This resolution would propose a constitutional amendment to require the chief justice and justices of the Texas Supreme Court to be board certified (by the Texas Board of Legal Specialization) in at least one practice area other than criminal law in order to be eligible to serve on the court. District and other appellate judges would be required to be board certified in at least one practice area in order to be eligible.

Proponents of the resolution argued that this board certification requirement would upgrade the quality of the judiciary. Opponents argued that the remaining pool of eligible candidates would be extremely shallow inasmuch as only ten percent of Texas lawyers are board certified in any area of law, and many if not most of those eligible lawyers would not run for a bench.

The resolution never escaped the House Judiciary Committee.

**SB 179 (Wentworth) Court Reporters Transcripts**

In a bold move that caught the attention of the court reporters' lobby, Senator Wentworth in this bill proposed that the law be made clear that a court reporter's shorthand notes and official transcripts are the property of the court, and not the court reporter, and that the clerk of the court set and collect fees for transcripts. The bill provides that the court would compensate the court reporter a "reasonable amount" for transcribing notes.

Needless to say, SB 179 did not emerge from the Jurisprudence Committee despite the fact that Senator Wentworth is chairman of the committee.

**SB 749 (Janek) Judicial Compensation/ Resources in Asbestos/Silica Litigation**

This bill, which passed both houses and has been signed by the Governor, authorizes additional pay for the presiding judge of asbestos or silica multi-district litigation and authorizes the presiding judge to appoint up to four staff members to address the additional workload.

This bill also authorizes the state's MDL panel, at the request of the MDL pre-trial court, to issue writs of mandamus to require trial courts to set trial dates in asbestos and silica cases.

**SB 806 (Duncan) & HB 1908 (Crowover) Merit Selection of Judges**

These bills, which would provide for the appointment and retention election of judges (instead of the current general election of judges) failed to pass out of either house. In fact, both companion bills died in their respective committees without hearings.

Both the Republican and Democratic parties opposed these bills. Texans for Lawsuit Reform and the Texas Civil Justice League supported these bills.

**CSSB 1182 (Watson) Court Fees**

This bill increases filing fees in the Texas Supreme Court and Courts of Appeals by \$50.00. The Senate Jurisprudence Committee report states the additional funds are necessary to defray the costs and expenses in the operation of the supreme court. The fees are to be deposited in a dedicated fund for the court.

Proponents of the bill said the supreme court needs the money. Critics of this bill argue that this is yet another toll booth on the courthouse and that the legislature is not discharging its duty to adequately fund the judicial branch out of the general fund.

The bill passed both houses and has been signed by the Governor.

**CSSB 1204 (Duncan) Court Reorganization**

Without any doubt whatsoever, the biggest and most controversial bill affecting the civil justice system this session was the "Court Re-Org" bill. Pushed hard by Texans for Lawsuit Reform, who labeled the current court system as antiquated and dysfunctional, this bill met resistance from many lawyers, judges and even the NAACP. To say the bill met resistance is somewhat of an understatement. In a poll conducted by the Austin Bar Association in April, 2007, over 96% of the respondents flatly opposed it. Corpus Christi, Amarillo and other local bar associations passed resolutions against it. The State Bar formed an ad hoc "working group" to study it. After the bill underwent several significant revisions, many people who opposed the bill early on, jumped on board. But not enough to save it. The bill passed

the Senate by a big margin, but died on the House floor on a point of order sustained at the eleventh hour.

The bill mutated over time. Initially, it contained an article that would empower a statewide panel on complex cases to transfer a "complex case" away from a local trial judge and re-assign it to a hand picked judge with special expertise in the subject matter of this case. As should have been expected, this article was met with widespread and forceful opposition. Eventually this article was dropped and was replaced by an article allowing a local trial judge to apply for help with a complex case.

The final version of this bill provided that, upon application, a statewide judicial panel could provide additional resources to a trial court to handle a complex case, including briefing attorneys, additional staff, computers and equipment. Further, at the sole option of the sitting trial judge, a visiting judge could be appointed to try the case. All of these resources were to be funded by the state without charge to the county or the parties to the suit. This significant change made this bill more palatable to many, but not all.

The bill also would have abolished justice of the peace courts and increased the jurisdiction of small claims courts to \$10,000.00. County courts were given the option to convert to district courts or remain county courts with maximum jurisdictional limits of \$250,000.00. Versions of the bill also gave the supreme court discretionary jurisdiction to pick any case it wanted to review.

Although the bill died, it is expected to resurface next session.

**HB 2766 (Eiland) Location for Court Proceedings in an Emergency**

This bill allows the presiding administrative judge to designate an alternate location for judicial proceedings during and after a disaster in certain coastal counties.

The bill passed both chambers and has been signed by the Governor. It is effective immediately.

**CSHB 3199 (Hartnett) Judicial Compensation Commission**

This bill adds a new chapter to the Government Code establishing a Judicial Compensation Commission. This commission, composed of nine members appointed by the Governor with the advice and consent of the Senate, is charged with making recommendations to the legislature regarding salaries for district and higher level courts. This bill provides for the qualifications of commission members and sets forth the factors to be considered by the commission in preparing reports. The members would not be paid but would be reimbursed for expenses.

The bill passed both houses and has been signed by the Governor.

### **CSHB 3413 (Gattis) Juries**

This bill would have increased the jury fee to \$60 in civil cases and would have created a dedicated jury assembly and administration fund to be administered by the comptroller.

The bill would have also removed a misdemeanor theft conviction as a basis for disqualifying a person from jury service [according to the committee report: “A concern in this regard is a desire to restore the qualification of hot check convicts.”]

This bill would have also changed several existing exemptions from jury service, including:

- Repeal exemptions for prior jury service within two years in counties over a 200,000 population without certain plans and in counties of at least 250,000 who have served within 3 years.
- Exemption for parent with young child: Child’s age raised from 10 to 12 years.
- The exemption for high school students is amended to limit the exemption to dates when school is in session.

This bill was reported favorably out of the House Judiciary Committee, but died in House Calendars.

## **VII. INSURANCE**

### **HB 26 (Corte) Automobile Insurance**

HB 26 would have provided that an intoxicated driver who is injured in an automobile accident may not recover non-economic or exemplary damages in a civil action for bodily injury, death or damage to property (if convicted of driving while intoxicated). The bill contained a limited exception for wrongful death actions and there was another exception if the driver of the other vehicle is drunk as well. This bill also provided that auto insurance companies must notify their insureds of this statute.

This bill died in the House Civil Practices Committee.

### **CSSB 346 (Duncan) HB 2262 (Eiland) Anti-Indemnity**

Although these bills did not pass this session, they are likely to be filed again next session. If passed these bills would render unenforceable indemnity and additional insured provisions in construction contracts.

According to the report of the Senate State Affairs Committee, construction project owners

frequently require general contractors to assume liability for the owner’s negligence, and those contractors require any subcontractors under them to do the same. Therefore, in the case of an accident for which the owner is responsible, a general contractor is responsible for any damages incurred, including the defense costs of the owner, and a subcontractor will be responsible for the same due to the general contractor’s negligence. Most construction contracts also require a contractor or subcontractor to purchase an “additional insured” endorsement to its insurance policy, which effectively requires an insurance company to provide coverage for the other entities involved in the contract. Many construction contracts also make the subcontractor liable for a breach of contract and warranty by the general contractor or make the subcontractor responsible for any fines or penalties assessed by a governmental entity directly against an indemnitee. This essentially makes subcontractors the “insurers” of the entire project, placing the subcontracting company and its insurance carrier at risk for the negligent acts of those entities above them.

If passed, these bills would have made each party liable for damages caused by its own negligence and would have prohibited the transference of liability by contract or other means.

The opponents of these bills, principally comprised of tort reform groups and general contractors, argued that these bills would eliminate the ability of property owners to contractually manage risk and they would subject property owners to a substantial increase in litigation costs. These groups also argued that these bills would provide a disincentive for safety on a construction site.

While CSSB 346 passed the Senate by a fairly wide margin, HB 2262, its companion, died in the House Civil Practices Committee.

There remains discontent about what has been termed the “oppression of contractual indemnity provisions,” so we should expect the issue to surface again during the next session.

### **CSSB 354 (Carona) and HB 2014 (Smithee) Consolidated Insurance Programs**

If passed, these bills would have provided a regulatory framework for the use of consolidated insurance programs on single or multiple large construction projects.

According to the Senate State Affairs Committee Report, consolidated insurance programs are insurance programs in which a principal, usually an owner or general contractor, provides insurance coverages that are bundled into one insurance program for a single construction project or multiple construction projects.

The policy typically provides coverage for each entity on the project, from the general contractor to the subcontractors and their employees for general liability, workers' compensation, and builder's risk. When coverage on a construction project is provided through a program, the principal anticipates saving money through selling contracts in volume, and the general contractors and subcontractors are expected or required to lower their bids for the project to reflect the insurance costs they would have included in their bids. The experience of many contractors and subcontractors has been mixed. In some cases, coverage may not provide the same extent of coverage that the contractor or subcontractor normally carries; the amount of coverage may not match the scope of the job; and gaps in coverage may exist.

These bills are lengthy, often contradictory, and not easy to understand. Many critics suspected these bills were a vehicle for expansion of "statutory employer" which would expand employer immunity and workers compensation exclusivity to the owner and every contractor on the worksite. This argument may have merit inasmuch as the bills are vague in some important respects and rule making authority was expressly granted to the Commissioner of Insurance.

Even some business and tort reform groups opposed these bills pointing out they created a new cause of action for damages caused by a violation of the Act. These critics also believed these bills would increase the cost of providing consolidated insurance programs.

#### **SB 502 (Averitt) Raising Auto Minimum Limits**

SB 502 sets new automobile liability insurance limits at 25/50/25, increasing to 30/60/25 in 2011. This bill passed both chambers and has been signed by the Governor. Although the bill is effective as of September 1, 2007, a policy issued or renewed before January 1, 2008 is governed by old law.

#### **SB 561 (Carona) Subrogation Rights of Political Subdivisions**

This bill provides specific subrogation rights in third party actions for political subdivisions who provide health insurance benefits to their injured employees. This bill abolishes the "made-whole doctrine" for these type of subrogation actions as enunciated in *Texas Association of School Boards v. Ward*. This bill also allows the attorney for the injured party to recover a contingent fee out of the subrogated interest if the political subdivision is not represented by its own attorney.

This bill passed both houses, has been signed by the Governor, and is effective immediately.

#### **CSHB 1070 (Laubenberg) Lower Insurance Requirements for Certain Amusement Rides**

This bill provides lower liability insurance requirements for certain amusement rides that operate in a manner similar to a train. The committee report states kiddie rides ought to get a lower insurance premium since, unlike big scary rides, they pose minimum risk.

The bill passed both chambers and has been signed by the Governor.

#### **SB 1272 (Van de Putte) Direct Action Against Insurer**

This bill would have allowed an insurance company to be added as a party to a third party lawsuit. The bill died in the State Affairs Committee.

#### **CSHB 2013 (Smithee) UM/UIM Coverage: Attorneys fees**

This bill would have prohibited insurers from requiring a court ruling to establish liability or damages in uninsured/underinsured motorist claims. Further, uninsured/underinsured motorist insurers would be required to pay the legal fees of insureds who prevail in court. This bill would have effectively overturned the Texas Supreme Court's December 22, 2006 decision in *Brainard v. Trinity Universal Insurance Co.*, 2006 WL 3751572 (Tex. 2006).

According to the committee report, the *Brainard* decision is "harmful" to the interests of Texas policyholders and fosters unnecessary litigation. Insurance companies opposed this bill and lobbied to preserve the ruling in *Brainard*.

This bill was reported favorably out of the House Insurance Committee, but it died in House Calendars. It had no Senate companion.

#### **HB 3026 (Corte) Mandatory Liability Insurance for Alcoholic Beverage Providers**

This billing would have required the holder of an alcoholic beverage permits to have minimum limits of liability insurance in the amount of \$100,000 per person and \$300,000 per occurrence and maintain a certificate of insurance with the TABC.

The bill died in the House Licensing Committee without a hearing.

### **VIII. HOW TO TAKE AN ACTIVE ROLE IN THE TEXAS CIVIL JUSTICE SYSTEM**

While the State Bar of Texas cannot take a position on many issues that affect the Texas civil justice system, there are other bar associations in Texas that can and do. The Texas Association of Defense Counsel is an association of personal injury defense, civil trial and commercial litigation attorneys that takes an active role in legislative matters insofar as civil justice issues are concerned. Likewise, the

Texas Trial Lawyers Association, an association of personal injury plaintiff's attorneys and civil trial lawyers, also takes an active role in legislative issues. Both organizations employ legislative consultants and both have political action committees. Moreover, both associations have effective amicus curiae committees that file briefs in appellate cases that impact the civil justice system.

Depending on the nature of one's practice, a lawyer can join one of these associations and become an integral part or even a leader in protecting and improving the civil justice system in Texas.

Obviously, TADC and TTLA often disagree on legislation affecting the civil justice system, and that's as it should be. However, the authors believe (as former presidents of our respective associations) that both TADC and TTLA strive to preserve, protect and promote the health and vitality of the civil justice system from our own unique perspectives. We agree that all we want is a level playing field with no wind. We invite you to join one of us in achieving that common goal.