

**2003 LEGISLATIVE UPDATE:
SELECTED ISSUES FOR CIVIL APPEALS**

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2003 LEGISLATIVE UPDATE: SELECTED ISSUES FOR CIVIL APPEALS

In its regular session the 78th Legislature confronted a record deficit, a change in leadership in both houses, and a quorum busting walkout to Oklahoma. Even so, it passed over 1400 pieces of legislation, many of which will affect civil litigation.¹ The most significant changes are found in House Bill 4 (“HB4”).² Most of these changes involve proceedings in the trial court as opposed to appeals, and they are dealt with in Part Two of this paper. The changes that apply to appellate practice are addressed in Part One.

Effective dates: In general, HB4 and other legislation will apply only to suits filed on or after September 1, 2003. *See* HB4 § 23.02, p.130.³ Where the effective date is different, the date will be noted.

PART ONE: APPELLATE CHANGES

House Bill 4 changed appellate practice in two significant ways. First, the legislature rewrote and substantially broadened the provisions pertaining to conflict jurisdiction of the Supreme Court. Those will be dealt with in part I below. Second, the legislature made it easier for some judgment debtors to post supersedeas bonds. These changes are addressed in part II.⁴ Additionally, the legislature made important changes in the law governing interlocutory appeals, *infra* part III, prejudgment and post-judgment interest, *infra* part IV, appeals of class actions, *infra* part V, and obtaining stays of foreign judgments, *infra* part VI. Finally, the legislature began the process of judicial redistricting for the courts of appeals, *infra* part VII.

I. CONFLICT JURISDICTION REDEFINED (HB4, §§ 1.02-1.05, PP.2-6)

In HB4 the legislature significantly redefined and expanded the scope of the Texas Supreme Court’s conflict jurisdiction. These changes are found in Article 1 of HB4, which is entitled “Class Actions.”

¹ *See* <http://www.capitol.state.tx.us/tlo/reports/daily/78R/daily.htm>.

² Act of June 2, 2003, 78 Leg., R.S., ch. 204, 2003 Tex. Gen. Laws. *See generally*, Scott Rothenberg, *HB4: A User-friendly Guide*, 66 TEX. B.J. 702 (Sept.2003) (brief analysis of HB4).

³ Copies of HB4 and other bills are available at http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm, “78th Regular Session – 2003.”

⁴ The changes involving supersedeas bonds are also the subject of the presentation on “Advanced Supersedeas,” which is scheduled in this seminar for Thursday afternoon.

The apparent intent of these provisions was to make it easier to obtain review of class action certification decisions by interlocutory appeal to the Texas Supreme Court. But these provisions are not limited to class actions. Rather, the legislature expanded the Supreme Court’s conflict jurisdiction over all interlocutory appeals, and indeed, over all appeals generally.

A. Interlocutory appeals

In general, the Texas Supreme Court does not have jurisdiction over interlocutory appeals. Under subsection (a) of the court’s jurisdictional statute, the judgment of a court of appeals in an interlocutory appeal is “conclusive on the law and facts.” TEX. GOV’T CODE § 22.225(a).⁵ There are, however, exceptions to this general rule. *See Id.* § 22.225(b) & (c).

Under one of these exceptions--the so-called “conflict” jurisdiction--the Supreme Court can hear an interlocutory appeal when “one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court.” *Id.* § 22.225(c) (emphasis added). For many years the Supreme Court has narrowly limited the scope of conflict jurisdiction as follows:

For the Supreme Court to have jurisdiction on the ground of conflict, it must appear that the rulings in the two cases are so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other. Or, in other words, the decision must be based practically upon the same state of facts, and announce antagonistic conclusions. An apparent inconsistency in the principles announced, or on the application of recognized principles, is not sufficient.

Christy v. Williams, 156 Tex. 555, 298 S.W.2d 565, 567 (1957) (emphasis added, citations and quotation marks omitted).⁶

This is a strict standard, and the court rarely hears cases on the ground of conflict jurisdiction.⁷ Indeed, it

⁵ *Cf.* TEX. GOV’T CODE § 22.001(a)(6) (emphasis added) (Supreme court has jurisdiction over appeal of final judgment when the error is of “importance to the jurisprudence of the state” . . . but excluding those cases in which the jurisdiction of the court of appeals is made final by the statute.”) (emphasis added).

⁶ quoted in *Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex.1995). *See generally* *Coastal Corp. v. Garza*, 979 S.W.2d 318 (Tex.1998).

has heard only a dozen or so cases on this basis in the last decade,⁸ and it has gone to great lengths to avoid finding the needed conflict.⁹ More recently, however, the Supreme Court appears to have relaxed this standard in order to hear interlocutory appeals of certification decisions in class actions.¹⁰

Now, in HB4, the Legislature has broadened the scope of conflict jurisdiction. As noted above, the concept of conflict jurisdiction is ultimately premised on statutory language which gives the Supreme Court jurisdiction when “one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court.” TEX. GOV’T CODE § 22.225(c) (emphasis added). In HB4 the legislature has now defined “holds differently,” as follows:

For purposes of Subsection (c) one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove

⁷ *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 350 (Tex.2001) (Hecht, J., dissenting from denial of motion for rehearing of petition for review) (“more rare than a blue moon”).

⁸ See, Pamela S. Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, in STATE BAR OF TEX. PROF. DEV. PROGRAM, 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE, pp.17-18. (2003) (citing cases).

⁹ See generally, *Id.*; *Montes v. City of Houston*, 66 S.W.3d 267, (Tex.2001) (Hecht, J., concurring in denial of motion for rehearing of petition for review) (“To one of its oldest and most beneficent functions—resolving conflicts of law among the courts of appeals—this Court has an inexplicably mulish aversion, preferring instead the resulting confusion in the law, the unfairness to litigants in having the law dependent on what court they happen to be in, and the waste of time and money, public and private, in pointless litigation over issues that could readily be resolved.”).

¹⁰ See *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 431 (Tex.2000) (“Conflict jurisdiction does not require that two cases be identical either on the facts underlying the causes of action nor on the procedural facts.”); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex.2003) (“[O]utspoken disagreement is not necessary to invoke our conflicts jurisdiction.”); *Union Pacific Resources Group, Inc. v. Hankins*, 2003 WL 21512615, at *3, 46 Tex. Sup. Ct. J. 973 (Tex.2003) (“[T]he court of appeals ignored applicable substantive law crucial to understanding the claims and defenses in this case.”). See also *Bland Independent School Dist. v. Blue*, 34 S.W.3d 547, 553 (Tex.2000) (“If a rule of decision in one case would require a different result were it applied in another case, the conflict between the two cases is sufficient to invoke our jurisdiction over and interlocutory appeal.”).

unnecessary uncertainty in the law and unfairness to the litigants.

TEX.GOV’T CODE § 22.225(e) (as amended) (emphasis added). See HB4 §1.02, p.4. Thus, beginning September 1, 2003, the court must decide whether it has conflict jurisdiction based on this statutory language. Earlier decisions defining conflict jurisdiction will no longer control.

B. Appeals from final judgments

The jurisdiction of the Supreme Court over final judgments is set forth in Section 22.001 of the Government Code. Under this provision, the court has jurisdiction over the following categories of cases:

- (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
- (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
- (3) a case involving the construction or validity of a statute necessary to a determination of the case;
- (4) a case involving state revenue;
- (5) a case in which the railroad commission is a party; and
- (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEX. GOV’T CODE § 22.001(a) (emphasis added).

Subdivision 6 is the most commonly used basis for supreme court jurisdiction. By contrast, conflict jurisdiction, in subdivision 2, is almost never invoked in appeals from final judgments. This is because its language is identical to the language of Section 22.225(c), and as noted above, the court has narrowly construed that language to limit its conflict jurisdiction.

Now, the legislature has changed the definition of conflict jurisdiction in Section 22.001 as well. Under HB4, Section 22.001 has been amended to add the following provision:

- (e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove

unnecessary uncertainty in the law and unfairness to litigants.

TEX. GOV'T CODE §22.001(e) (as amended) (emphasis added). See HB4 § 1.04, p.6. This language is identical to the language of new Section 22.225, discussed above. Henceforth, this same statutory language will govern "conflict jurisdiction" in appeals from both interlocutory orders and final judgments.

C. Toward a new standard

Under the language of these two new jurisdictional provisions the court will have conflict jurisdiction when the decision before it is (i) "inconsistent" with a decision of another court of appeals and when the inconsistency "should be clarified to remove [ii] unnecessary uncertainty in the law and [iii] unfairness to litigants."

This language appears to be quite broad. The section speaks of "inconsistency," "unnecessary uncertainty," and "unfairness." But these terms provide little guidance as a new standard. Under prior law an "apparent inconsistency" was "not sufficient." *Christy*, 298 S.W.2d at 567. Now, however, "inconsistency" is the standard. The second requirement--the need to clarify "unnecessary uncertainty in the law"--is not helpful. Any material "uncertainty" obviously needs to be "clarified," and it is difficult to imagine what a "necessary" uncertainty in the law might be. Finally, there will always be "unfairness to the litigants in having the law dependent on what court they happen to be in."¹¹

In fashioning a new standard for conflict jurisdiction, the Texas Supreme court may turn to the law of other jurisdictions which have developed their own "conflict" standards. Thus, when the United States Supreme Court decides to grant a petition for writ of certiorari, a primary factor is whether a decision of one court is "in conflict with a decision of another." Supreme Court Rule 10 (a).¹² Similarly, several states

have their own versions of conflict jurisdiction,¹³ as does the Texas Court of Criminal Appeals.¹⁴

Finally, in applying the former standard, the court has promulgated a number of rules that further restrict the scope of conflict jurisdiction. Thus, the conflicting cases can not come from the same court of appeals. *Collins v. Ison-Newsome*, 73 S.W.3d 178, 181-182 (Tex.2001) (Jefferson, J., concurring). Moreover, the subject case must conflict with a prior decision, not a subsequent one. *Id.* at 183-184. Finally, the prior case has to be published; unpublished decisions would not trigger conflict jurisdiction. *Id.* Nothing in the new statute will necessarily change any of this, but these rules will become less important since a "conflict" will be so much easier to establish under the new standard.

II. SUPERSEDEAS BONDS (HB4 §§ 7.02-7.03, PP. 39-40)

The law governing supersedeas bonds is set forth in Chapter 52 of the Civil Practice and Remedies Code and Rule 24, TEX.R.APP.P.¹⁵ Now in HB4, the legislature has effectively rewritten Chapter 52 to make it easier for a judgment debtor to post a supersedeas bond. Sections 52.002, 52.003, and 52.004 have been replaced with a new Section 52.006. See HB4 §§ 7.02-7.03, pp.39-40. The supreme court has also amended Rule 24, TEX. R. APP. P., to conform to these changes.¹⁶ **Effective date:** These changes apply to any case where the final judgment is signed on or after September 1, 2003. See HB4 §7.04(b), p. 41.¹⁷

A. Amount of bond

Prior to House Bill 4, the amount of the spersedead bond had to equal "at least the amount of the judgment, interest for the estimated duration of the appeal, and costs." Rule 24.2(a) (repealed) (emphasis added). Under the newly enacted Section 52.006(a), the amount of security that must be posted must equal "the amount of compensatory damages" plus "interest

¹³ See generally, Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLORIDA L. REV. 21, 53-58 (January 1993).

¹⁴ See Rule 66.3 (a) TEX. R. APP. P. ("whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue.").

¹⁵ See generally *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604 (Tex.1996) (per curium).

¹⁶ See Supreme Court Misc. Docket No. 03-9145, pp.4-6 (August 29, 2003).

¹⁷ See also *Id.* at p.1 ¶ 1.b.

¹¹ *Montes*, 66 S.W.3d at 267 (Hecht, J. concurring).

¹² Charles G. Cole, *Petitioning for Certiorari in the Big Case*, 12 NO. 3 LITIGATION 33, 33-35 (Spring 1986); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983).

for the estimated duration of the appeal” and “costs awarded in the judgment.” TEX. CIV. PRAC. & REM. CODE § 52.006(a) (as amended). *See also* Rule 24.2(a)(1) (as amended). Obviously, any portion of the judgment that represents exemplary damages will not have to be superseded. Arguably, the same will be true for attorneys fees and prejudgment interest.

B. Caps

Under the new Section 52.006(b), this supersedes bond cannot exceed the lesser of:

1. 50 percent of the judgment debtor’s net worth; or
2. \$25 million.

TEX. CIV. PRAC. & REM. CODE § 52.006(b) (as amended).¹⁸ *See also* Rule 24.2(a) (1). Thus, a party who suffers a \$100 million judgment will not have to post more than a \$25 million bond. Also, a party with a net worth of \$1 million will not have to post a bond larger than \$500,000. Arguably, a party with zero net worth will not have to post any bond.

C. Reduction

Under prior law, the amount of the supersedeas bond may be lowered only on a showing of “irreparable harm to the judgment debtor.” TEX. CIV. PRAC. & REM. CODE § 52.002(1) (repealed).¹⁹ Moreover, there had to be a showing that the lesser security will not “substantially decrease the degree to which a judgment creditor’s recovery under the judgment would be secured after the exhaustion of any appellate remedies.” *Id.* § 52.002 (2) (repealed).

But under the new Section 52.006(c), the court must lower the amount of the bond if the debtor shows “substantial economic harm.” *Id.* § 52.006(c) (as amended). Moreover, the former requirement that the reduction “not substantially impair the judgment creditor’s ability to recover” has been repealed.

D. No exclusion for personal injury and death cases

Finally, Section 52.002 did not allow reduction of “a judgment rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by a liability insurance, or a workers compensation claim.” *Id.* § 52.002 (repealed). With the repeal of Section 52.002, these exceptions no longer apply.

¹⁸ *See* HB4, § 7.02, p.40

¹⁹ *See also* Rule 24.2 (b) (repealed).

III. INTERLOCUTORY APPEALS

A. New ground for interlocutory appeal.

As a part of its reform of medical malpractice law in HB4, the legislature enacted Section 74.351 of the Civil Practices and Remedies Code. *See* HB4 § 10.01, pp.70-75. This requires a plaintiff in a healthcare liability claim to serve an expert report on the defendant no later than 120 days after the date the suit is filed. TEX. CIV. PRAC. & REM. CODE § 74.351(a). If the plaintiff fails to do this, the trial court is required, on motion of the defendant, to dismiss the plaintiff’s claim with prejudice and award attorney’s fees. *Id.* § 74.351(b). *See* HB4 § 10.01, pp.70-71.²⁰ Also, in HB4, the trial court order granting or denying of such relief can be the subject of an interlocutory appeal. *See* HB4 § 1.03, p.5 (adding TEX. CIV. PRAC. & REM. CODE § 51.014(a) (9) & (10)).

B. Grounds for venue appeals expanded (HB4, § 3.03, pp.14-16)

In HB4, the legislature has rewritten the venue provisions found in Section 15.003 of the Civil Practice and Remedies Code to reverse the result of *American Home Products Corp. v. Clark*, 38 S.W.3d 92 (Tex.2000). Section § 15.003 was enacted as part of the 1995 tort reform legislation.²¹ It provided that “each plaintiff must, independently of any other plaintiff, establish proper venue.” TEX. CIV. PRAC. & REM. CODE § 15.003 (a). Any person who could not independently establish proper venue could still maintain venue through “joinder or intervention.” *Id.* The statute contained a four part test for “joinder on intervention,” but that test was almost impossible to satisfy because it required proof of “an essential need to have the person’s claim tried in the county in which suit is pending.” *Id.* § 15.003(a)(3).²²

Subdivision (c) of the statute provided for interlocutory appeal, as follows:

Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing

²⁰ *Cf.* TEX. REV. CIV. STAT. art. 4590i §§ 13.01 & 14.01 (repealed).

²¹ *See generally Electronic Data Systems Corp. v. Pioneer Electronics (USA), Inc.*, 68 S.W.3d 254, 256-257 (Tex.App.—Fort Worth 2002, pet dism’d by agr.) (summarizing legislative changes); *Clark*, 38 S.W.3d at 100-101 (Owen, J., dissenting) (same).

²² *See Surgitek, Bristol-Myers Corp. v. Able*, 997 S.W. 2d 598, 604 (Tex.1999). *See generally Smith v. Adair*, 96 S.W.3d 700, 707 (Tex.App.—Texarkana, 2003) (“We have found only one post-*Surgitek* case in Texas in which an essential need was found to exist.”).

intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal . . . under the procedures established for interlocutory appeals.

Id. 15.003 (c). The courts of appeals agreed that this provision allowed an interlocutory appeal when a party was seeking to establish venue by “joinder or intervention.” But they split on the question of whether an interlocutory appeal would be available when a party was able to “independently establish proper venue.”²³ In *American Home Products v. Clark*, a majority of the Supreme Court held that an interlocutory appeal would not be available if the trial court had concluded that a party had “independently establish[ed] proper venue.” 38 S.W.3d at 95-96.²⁴

In HB4, the legislature has sided with the *Clark* dissenters and expressly provided that, in a suit in which there are multiple plaintiffs, an interlocutory appeal is available of the trial court’s determination that “a plaintiff did or did not establish proper venue” or that a plaintiff did or did not establish venue by joinder or intervention. HB4 § 3.03, p.15 (amending TEX. CIV. PRAC. & REM. CODE § 15.003(b)).

The legislature has also expressly provided that the interlocutory “appeal may be taken by a party affected by the trial court’s determination.” HB4 § 3.03, p.15 (amending TEX. CIV. PRAC. & REM. CODE § 15.003 (c)). *Cf. Ramirez v. Collier, Shannon, Scott, PLLC.*, 2003 WL 1889258 (Tex.App.—Houston 1st Dist. 2003, no pet h.).

C. Automatic stay pending interlocutory appeal (HB4 § 1.03 ¶ 5)

An interlocutory appeal stays commencement of trial pending resolution of the appeal, except when the appeal is taken from an order granting or refusing a

request for a temporary injunction. TEX. CIV. PRAC. & REM. CODE § 51.014(b) (emphasis added). Under HB4 the automatic stay is expanded to stop all proceedings in the trial court pending resolution of the appeal, but only as to these kinds of interlocutory appeals. These are an interlocutory appeal of (i) a certification order (ii) a motion for summary judgment based on a plea of immunity or (iii) an order granting or denying a plea to the jurisdiction. HB4 § 1.03, p.5 (amending TEX. CIV. PRAC. & REM. CODE § 51.014 (b)). **Effective date:** These changes apply to any appeal where the notice of appeal is filed on or after September 1, 2003. *See* HB4 § 1.05 (b), p.6.

Prior to HB4, an automatic stay did not result from an interlocutory appeal of a venue determination under Section 15.003 of the Civil Practices and Remedies Code. But now under HB4, an interlocutory appeal of a venue determination made under § 15.003 “has the effect of staying the commencement of trial in the trial court pending resolution of the appeal.” TEX. CIV. PRAC. & REM. CODE § 15.003 (d) (as amended). **Effective date:** This change applies to any suit filed on or after September 1, 2003.

IV. INTEREST ON JUDGMENTS (HB4 ART. 6, P. 38)

In HB4, the Legislature amended Chapter 304 of the Finance Code to change the rate for post-judgment interest. It has also limited the circumstances under which pre-judgment interest can be awarded. **Effective date:** These provisions apply to judgments signed on or after September 1, 2003. *See* HB4 § 6.04, p.38.

A. Post-judgment rate

Under prior law, the annual rate for post-judgment interest equaled the auction rate for treasury bills. TEX. FIN. CODE § 304.003(c) (1) (repealed). Under HB4, the rate will equal the prime rate published by the Federal Reserve Bank of New York. *See* HB4 § 6.01, p.38.

B. Limits on post-judgment Rate

Under prior law, the annual rate for post judgment interest would not exceed 20% or be less than 10% per annum. TEX. FIN. CODE § 304.003(c) (repealed). Under HB4, it may not exceed 15% or be less than 5% per annum. *See* HB4 § 6.01, p.38.

C. Future damages

Under HB4, pre-judgment interest may not be assessed on an award of future damages. *See* HB4 § 6.02, p.38 (adding TEX. FIN. CODE § 304.1045).

²³ Compare *American Home Products Corp. v. Adams*, 22 S.W.3d 121, 124 (Tex.App.—Fort Worth, 2000, pet. dismissed by agr.); *Bristol-Myers Squibb Co. v. Goldston*, 983 S.W.2d 369, 374 (Tex.App.—Fort Worth, 1998 pet dismissed by agr.); *Surgitek Inc. v. Adam*, 955 S.W.2d 884, 887 (Tex.App.—Corpus Christi, 1997, pet dismissed by agr.); with *Dayco Products, Inc. v. Ebrahim*, 10 S.W.3d 80, 83-84 (Tex.App.—Tyler, 1989, no pet); *Blalock Prescription Center v. Lopez-Guerra*, 986 S.W.2d 658, 666 (Tex.App.—Corpus Christi, no pet); *Masonite Corp. v. Garcia*, 951 S.W.2d 812 (Tex.App.—San Antonio, 1997, orig proceeding), *mand. granted sub nom In re Masonite*, 997 S.W.2d 194 (Tex.1999).

²⁴ *Accord Electronic Data Systems Corp. Inc.*, 68 S.W.3d at 258.

V. APPEALS OF CLASS ACTIONS

A. Interlocutory appeals of certification orders

An interlocutory appeal is available to the court of appeals from an order that “certifies or refuses to certify a class in a suit.” TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). By decision, the Supreme Court has enlarged the scope of issues that may be decided as part of an interlocutory appeal of such a “certification” decision.²⁵ But under current law, review by the Texas Supreme Court is available only under very limited circumstances. *See supra* part I.²⁶

Now, however, the Legislature has amended the jurisdictional statute to expressly give the supreme court jurisdiction over interlocutory appeals of certification orders. *See* HB4 § 1.02, p.2 (amending TEX. GOV’T CODE § 22.225(d)). **Effective date:** This new provision applies to any case in which the petition for review is filed on or after September 1, 2003. *See* HB4 § 1.05 (a), p.6.

B. Appeal of pleas to the jurisdiction in class actions where a state agency has primary or exclusive jurisdiction

Some disputes between private litigants can be brought before a state agency.²⁷ A state agency can have both “exclusive” and “primary” jurisdiction over such a claim. “[P]rimary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional.” *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex.2002).

An agency has exclusive jurisdiction when the Legislature gives the agency alone the authority to make the initial determination in a dispute. *Cash America International Inc. v. Bennet*, 35 S.W.3d 12, 18 (Tex.2000). “[I]f an agency has exclusive jurisdiction,

a party must exhaust all administrative remedies before seeking judicial review of the agency’s actions. Until then, the trial court lacks subject matter jurisdiction and must dismiss the claims within the agency’s exclusive jurisdiction.” *Subaru*, 84 S.W.3d at 221 (citations omitted).²⁸

“Primary jurisdiction is an administrative law doctrine that arises when a court and agency have concurrent original jurisdiction over a dispute.” *Cash America*, 35 S.W.3d at 18. In such a case, a trial court must abate the if “the claims enforcement requires the resolution of issues that are ‘within the special competence of an administrative agency.’ ” *Id.*²⁹

If a plea to the jurisdiction is sustained and that ruling finally disposes of a case, then it can be appealed as part of the final judgment. But if the plea to the jurisdiction is denied, no interlocutory appeal is available (unless the plea is raised by a state agency or political subdivision).³⁰

HB4 deals with class actions that can be brought before a state agency. If a plea to the jurisdiction is filed by any party to such a proceeding, the court must hear the plea to the jurisdiction before it decides whether to certify,³¹ and its decision can be appealed as part of the interlocutory appeal of the certification order.³²

Effective date: This provision will apply in any case where the notice of appeal is filed on or after September 1, 2003. HB4 § 1.05(b), p.6.

VI. STAYS OF FOREIGN JUDGMENTS (HB4 § 7.01, P.39)

In HB4, the Legislature has amended Chapter 35 of the Civil Practice and Remedies Code to make it easier to stay enforcement of a foreign judgments. **Effective date.** This change will apply to any foreign judgment filed in Texas on or after September 1, 2003. *See* HB4 § 7.04(a), p. 41.

²⁵ *See De los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493, 495 (Tex.1996) (Interlocutory order is appealable when it alters the fundamental nature of a class.); *McAllen Medical Center v. Cortez*, 66 S.W.3d 227, 231 (Tex.2001) (Certification of a settlement-only class is appealable.); *Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235, 238 (Tex.2001) (Decertification order is subject to an interlocutory appeal.). *But see Bally Total Fitness Corp v. Jackson*, 53 S.W.3d 352, 358 (Tex.2001) (Order refusing to decertify class is not subject to interlocutory appeal.).

²⁶ *See also* TEX. REV. CIV. STAT. art. 4413(36) § 6.06(g) (giving supreme court jurisdiction over certification orders involving a licensee under the Motor Vehicle Commission Code).

²⁷ *See e.g. Winnebago Industries, Inc. v. Reneaux*, 990 S.W.2d 292 (Tex.App.—Austin 1998, pet. denied) (Suit against auto dealer under the Texas Lemon Law may be brought before the Texas Motor Vehicle Commission.).

²⁸ citing *Cash America*, 35 S.W.3d at 15.

²⁹ quoting *Southwestern Bell Tel Co. v. Public Utility Com’n*, 735 S.W.2d 663, 669 n.3 (Tex.App.—Austin 1987, no writ.).

³⁰ *See* TEX. CIV. PRAC. & REM. CODE § 51.014(A)(8) (Interlocutory appeal available from an order that “grants or denies a plea to the jurisdiction by a governmental unit.”) (emphasis added).

³¹ *See* HB4 § 1.01 (adding § 26.051 (a)).

³² HB4, p. 2 (adding § 26.051 (b)).

In 1985, Texas adopted the Uniform Enforcement of Foreign Judgments Act.³³ This allows a creditor holding a judgment from a court of another state, or a federal court, to enforce the judgment in Texas without filing a new suit. Under Chapter 35 of the Civil Practice and Remedies Code, the judgment creditor merely files a copy of the foreign judgment with the clerk of any court having jurisdiction and gives notice of the filing to the judgment debtor. TEX. CIV. PRAC. & REM. CODE §§35.003-35.006. Once this is done the clerk must “treat the foreign judgment in the same manner as a judgment of the court in which the judgment is filed.” *Id.* § 35.003(b).

Section 35.006 of the Civil Practice and Remedies Code provides a procedure for staying enforcement of the foreign judgment. Under subsection (b), the judgment debtor can obtain a stay by posting a supersedeas bond or other security under Texas law. TEX. CIV. PRAC. & REM. CODE § 35.006(b). The debtor can also obtain a stay under subsection (a), which involves actions in a foreign state. *Id.* § 35.006(a). Subsection (a) was amended by HB4.

Under the prior version of subsection (a), the trial court was required to stay enforcement of a foreign judgment if the judgment debtor (i) showed one of the following:

- that an appeal from the foreign judgment is pending or will be taken; or
- that a stay of execution has been granted,

and (ii) proved “that the judgment debtor has furnished the security for the satisfaction of the judgment required by the [foreign] state.” TEX. CIV. PRAC. & REM. CODE § 35.006(a).

Under the amendment to subsection (a), the judgment debtor now must (i) show one of the following:

- that an appeal from the foreign judgment is pending or will be taken;
- that the time for taking an appeal has not expired;
- that a stay of execution has been granted, has been requested, or will be requested.

and (ii) prove that “he has furnished or will furnish the security for the satisfaction of the judgment.” HB4 § 7.02, p.39; TEX. CIV. PRAC. & REM. CODE § 35.006(b) (as amended) (legislative changes underlined).

³³ See generally, Acts 1985, 69th Leg., ch. 959, § 1.

VII. JUDICIAL REDISTRICTING FOR COURTS OF APPEALS (HB 988, HB 2261, 3306)

On December 17, 2002, the Supreme Court proposed a plan to redistrict the courts of appeals. See TEX. GOV'T CODE § 74.022. The court had two primary goals: (1) “to equalize the burden on each justice so that the transfer of cases between courts of appeals should, at least as a matter of routine, be unnecessary”;³⁴ and (2) to eliminate overlapping Court of Appeals districts “so that “[n]o county should be in more than one appellate district.”³⁵ Because the plan will alter the constituencies for electing court of appeals justices, it faces substantial political difficulties. Even so, a modest beginning was made. Two measures were passed by the 78th Legislature.

First, in Brazos County, where appeals now go to three appellate districts (1st, 10th, and 14th), appeals will go only to the 10th District (Waco). See HB 988. But 21 counties remain in overlapping districts, mostly in East Texas.

Second, five West Texas counties (Ector, Gaines, Glasscock, Martin and Midland) are moving from the Eighth District (El Paso) to the Eleventh District (Eastland). See HB2261 § 1; HB3306 § 4.

PART TWO: TRIAL COURT CHANGES

In HB4, the Legislature enacted several provisions that were similar in nature to the tort reform legislation of 1987 and 1995. Thus, it made it more difficult for litigants to recover exemplary damages, and it placed new restrictions on the operation of the collateral source rule where medical expenses are involved. See *infra*, part XI. It also made drastic changes in the area of medical malpractice, products liability, asbestos and proportionate responsibility, which are outside the scope of this paper.³⁶

But in HB4 and other laws, the legislature went beyond the usual tort reform agenda and made changes that apply to all civil litigation. Texas will now have an offer of settlement procedure, similar to the federal offer of judgment rule, *infra*, part IX, and a multidistrict litigation procedure similar to the federal MDL procedure *infra*, part X. The Legislature also created new protections for architects, engineers, homebuilders, public employees, and other specific kinds of litigants, *infra*, parts XV-XVII; and it acted to clarify the types of attorney’s fees that may be awarded

³⁴ Supreme Court Misc. Docket No. 02-9232 ¶ (5) (Dec. 17, 2002), p.2.

³⁵ *Id.* ¶ (1), p.1.

³⁶ For proportionate responsibility see, Kirk P. Watson, *Lawyers Still Trying to Do Math: Proportionate Responsibility, Including the New HB4*, STATE BAR OF TEXAS, 26TH ADVANCED CIVIL TRIAL COURSE (2003).

in class actions, *infra*, part XIV. Finally, in HB3306 the procedure for objecting to visiting judges was changed once again, *infra*, part XIII.

HB4 also took a new approach to rule making. In several areas the Legislature promulgated broad provisions and directed the Texas Supreme Court to “fill in the details” by enacting rules. In response, the Supreme Court has now made important rule changes involving multidistrict litigation panels, supersedeas bonds, and Rule 407(a), TEX. R. EVID.³⁷ Moreover, the Supreme Court Advisory Committee (“SCAC”) has drafted rules involving offer of settlement and class actions and has sent those recommendations to the Court. Those recommended rule changes, along with transcripts of the committee deliberations can be found at the SCAC website.³⁸

Finally, an attached appendix contains a wider survey of legislative changes in the civil justice system.

VIII. EVIDENCE

A. Evidence related to proportionate responsibility

As noted above, the legislature has amended Chapter 33 of the Civil Practice and Remedies Code to provide that a party can be held jointly and severally liable if he engages in certain criminal acts. *See* HB4 § 4.06, pp.26-28 (amending TEX. CIV. PRAC. & REM. CODE § 33.013(b) & (e)). It also provided that the jury may not be told that any of the listed conduct constitutes a violation of the penal code. *See* HB4 § 4.07, p.28 (adding TEX. CIV. PRAC. & REM. CODE § 33.013(f)).

B. Amendment of Rule 407(a)

In HB4 the legislature has directed the Texas Supreme Court to amend Rule 407(a) of the Texas Rules of Evidence, to conform to federal Rule 407. *See* HB4 § 5.03, pp.37-38. Pursuant to the legislature’s direction, the supreme court has now amended Rule 407 to apply to all cases filed on or after July 1, 2003.³⁹

C. Expert reports in medical liability litigation

In HB4 the legislature has recodified the provision requiring service of expert reports in connection with filing of medical liability suits.⁴⁰

D. Seat belts (HB4 § 8.01, p.41)

In HB4 the Legislature has repealed the statute making evidence of failure to use seat belts and child restraint inadmissible. *See* HB4 § 8.01 (repealing TEX. TRANSP. CODE § 545.412(d) & (g)).

E. Tax consequences of lost earnings (HB4 § 13.09)

HB4 § 13.09 adds Section 18.091 to the Civil Practice and Remedies Code, which provides that evidence of lost earnings and lost earning capacity must be presented in the form of net loss after taxes and requires the jury to be told whether the damages are subject to income taxes. *See* HB4, pp.106-107.

F. Nursing home penalties (HB4 §§ 16.01-16.03, pp.111-114)

Currently, evidence regarding a nursing home’s violation of health department regulations and the accession of monetary penalty is admissible. HB 4 makes such evidence inadmissible except as to violations that relate to “the particular incident and the particular individual whose personal injury is the basis of the claim” or a finding of substantially similar conduct within the previous one year. HB4, pp.111-114.

G. Crime stoppers program (HB § 13.06)

HB1036 amends Section 41.008 of the Government Code to allow for production of evidence of a communication between a person submitting a report of a criminal act to the Crime Stoppers Advisory Counsel or a Crime Stoppers organization and the person who accepted the report, in a civil case, on motion by the plaintiff alleging that the denial of access abrogates any part of a cognizable common law action under certain circumstances.

IX. OFFERS OF SETTLEMENT (HB4, ART. 2, PP. 6-11)

Article 2 of HB4 adds a new Chapter 42 to the Civil Practice and Remedies Code. In these provisions, the Legislature has promulgated a new procedure that can make a party liable for his opponents’ attorneys fees and expert witness costs. Under this “offer of settlement” procedure, payment of these fees will be required if a settlement offer is rejected and if the judgment is “significantly less favorable” to the rejecting party than the rejected offer. **Effective date:** These provisions will apply to any suit filed on or after January 1, 2004.

The new Texas procedure is similar to the “offer of judgment” procedure in the federal rules, which has

³⁷ *See* Supreme Court Misc. Docket No. 03-9145.

³⁸ *See* <http://www.jw.com/scac>, “publications,” “House bill 4.”

³⁹ *See* Supreme Court Misc. Docket No. 03-9145 ¶ 1 (c).

⁴⁰ *See* HB4 § 10.01 (recodifying TEX. REV. CIV. STAT. art. 4590i § 13.01 as TEX. CIV. PRAC. & REM. CODE §

74.351 and recodifying TEX. REV. CIV. STAT. art. 4590i § 14.01 as TEX. CIV. PRAC. & REM. CODE § 74.402.)

been adopted in almost 30 states.⁴¹ The federal rule allows shifting of “costs incurred after the making of the offer.” Rule 68, FED.R.CIV.P. (emphasis added). But under the new Texas procedure, the stakes will be higher than mere “costs.”

The Legislature has also directed the Texas Supreme Court to “promulgate rules implementing this chapter.” TEX. CIV. PRAC. & REM. CODE § 42.005(a). In response, the SCAC has drafted a new Rule 167, TEX. R. CIV. P., and sent it to the Texas Supreme Court for consideration. Citations to the draft rule should not be relied on, since its provisions may change.

A. Scope

The offer of settlement procedure applies only to claims for monetary relief. TEX. CIV. PRAC. & REM. CODE § 42.002(a).⁴² If a plaintiff seeks both monetary and non-monetary relief in the same suit, the procedure is available, but only as to the monetary claims.⁴³ Also, the amendment expressly excludes class actions, shareholder derivative suits, suits by or against governmental units, suits under the Family Code, suits to collect workers compensation benefits, and suits in justice court. *Id.* § 42.002(b).

B. The declaration

The offer of judgment procedure cannot be used until “a defendant files a declaration that the settlement procedure allowed by [Chapter 42] is available in the action.” TEX. CIV. PRAC. & REM. CODE § 42.002 (c) (emphasis added).⁴⁴ But once such a “declaration” is filed, both plaintiff and defendant can make offers of settlement. If there is more than one defendant, the procedure is available, but only as to the claims against a defendant who files a declaration. *Id.* Finally, under the draft rule, the declaration must be filed no later than 45 days before the date the case is set for a conventional trial. Rule 167.2(c).

⁴¹ See Solimine & Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 OHIO STATE J. DISPUTE RESOLUTION 51, 64 (1997). Similar provisions are also found in the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE § 17.5052, and the Texas Residential Construction Liability Act, TEX. PROP. CODE § 27.004(f) & (g).

⁴² This avoids the difficult problem of calculating the value of non-monetary relief. See, e.g., *Marek v. Chesny*, 473 U.S. 1, 32-33 n. 48 (1985) (Brennan, J., dissenting) (“Of course, the difficulties in assessing the ‘value’ of nonpecuniary relief are inherent in Rule 68’s operation.”).

⁴³ Cf. Rule 167.3(a) (The written offer “must offer to settle all monetary claims.”).

⁴⁴ Cf. Rule 167.4(a)(1) (“The offer must be made after a declaration is timely filed by a defendant.”).

C. Informal settlement negotiations

The fact that a declaration has been filed does not prevent other settlement negotiations from taking place. TEX. CIV. PRAC. & REM. CODE § 42.002 (d). But these informal negotiations can not trigger rights under the offer of judgment procedure. *Id.* § 42.002(e).

D. The offer

The settlement offer must be in writing, state that it is made under Chapter 42, state the terms of settlement, and state a deadline by which the offer must be accepted. TEX. CIV. PRAC. & REM. CODE § 42.003(1)-(4). Under the draft rule, this acceptance deadline must be at least 14 days after the offer is served. Rule 167.3(a)(6). Also, the offer must be served on all parties to whom it is made, but it should not be filed with the court. Rule 167.3(a)(7).⁴⁵

Under the draft rule the offer must cover all monetary claims between the defendant and the claimant and state whether it includes or excludes costs or interest accrued up to date of the offer. Rule 167.3(a)(3). Thus, if a defendant files a counterclaim, an offer under the rule must cover both plaintiff’s claims against that defendant and the counterclaim.

The offer must state that payment will take place within thirty days after acceptance (or court approval, if required). Rule 167.3 (a)(5). Moreover, separate offers must be made to each defendant, except in cases of vicarious liability. Rule 167.3 (a)(4).

E. Acceptance, rejection, and withdrawal

A settlement offer made under Chapter 42 can only be accepted in writing. Rule 167.8. If it is not accepted by the deadline, or if there is no response, the offer is deemed to be rejected. Rule 167.9. The offer can be withdrawn at any time before acceptance. Rule 167.7.

F. Time limits

In a level 1 discovery case, an offer cannot be made until thirty days after both offeror and offeree have appeared in the case.⁴⁶ In a level 2 and 3 case, the waiting period is ninety days. Rule 167.4(a)(1)(A).⁴⁷

⁴⁵ Cf. Rule 167.3(a)(7) (The offer can be filed once it “is accepted or in connection with a motion to recover litigation costs under this Rule.”).

⁴⁶ See generally Rules 190.1-190.4, TEX. R. CIV. P. (discovery control plans).

⁴⁷ In contrast, under Federal Rule 68, an offer may be made after the complaint is filed. “This arguably leads to gamesmanship and does not allow for an honest evaluation of the value of the case before an offer must be responded to.” Elaine Carlson, *Offer of Judgment*, TEXAS TORT REFORM 2003: LEGISLATIVE CHANGES (2003), p.17. Under

In all cases, the offer must be made no later than thirty days before trial, except that an offer made in response to a prior offer can be made no later than seven days after that prior offer. Rule 167.4(a)(1)(B).

G. How “litigation costs” are shifted

The core provision of Chapter 42 reads as follows:

If a settlement offer is made [under Chapter 42] and rejected and the judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.

TEX. CIV. PRAC. & REM. CODE § 42.004(a) (emphasis added). A judgment is “significantly less favorable” than the rejected offer if:

- (1) the rejecting party is a claimant and the award will be less than 80% of the rejected offer; or
- (2) the rejecting party is a defendant and the award will be more than 120% of the rejected offer.

Id. § 42.004(b) (emphasis added). For example, if a defendant offers to settle for \$100,000 and the plaintiff rejects the offer, the defendant is entitled to receive litigation costs if the plaintiff recovers less than \$80,000. Similarly, if a plaintiff offers to settle for \$100,000, and the defendant rejects the offer, then the plaintiff is entitled to receive litigation costs if the plaintiff recovers more than \$120,000.

H. Litigation costs

As previously noted, if the judgment is “significantly less favorable” than the rejected offer, then “the offering party shall recover ‘litigation costs’ from the offering party.” *Id.* § 42.004(a). “Litigation costs” are defined as “money actually spent and obligations actually incurred that are directly related to the case.” *Id.* § 42.001(5). They include “court costs,” “reasonable fees for not more than two testifying expert witnesses,” and “reasonable attorney fees.” *Id.*

I. Caps on litigation costs

“Litigation costs” are capped in three ways. First, the amount recovered can include only “those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer.” *Id.* § 42.004(c) (emphasis added). Obviously, an early offer can result in more litigation costs being paid.

Second, the “award of litigation costs” may not exceed the total of the following damages awarded to plaintiff:

- 50% of economic damages;
- 100% of non-economic damages; and
- 100% of exemplary or additional damages.

Id. § 42.003(d).⁴⁸ A defendant can never obtain a net recovery against the plaintiff on a single claim. Thus, if plaintiff takes nothing, then defendant cannot recover any litigation costs. *See* Rule 167.11(g).

Third, if a party is entitled to recover attorney’s fees and costs under another law, he cannot recover more than the attorney’s fees and litigation costs recoverable under that other law. TEX. CIV. PRAC. & REM. CODE § 42.004(e) & (f).

X. MULTIDISTRICT TRANSFERS (HB4, § 3.02, PP. 12-14)

Under current law, Rule 11 of the Rules of Judicial Administration allows the presiding judge in an administrative region to assign a judge “to conduct all pretrial proceedings and decide all pretrial matters” in a case. TEX. R. JUD. ADMIN 11.3(a). The assigned judge is called the “pretrial judge.” *Id.* 11.2(c). Rule 11 currently is used to allow a single judge to hear all pretrial matters in a number of related cases within the same administrative region.⁴⁹

In Article 3 of House Bill 4, the Legislature has promulgated a new procedure to allow the transfer of cases so that a single court can hear pretrial proceedings in related cases statewide. The Legislature has expressly given the Supreme Court rule-making power over such “multidistrict” proceedings, TEX. GOV’T CODE § 74.024(c)(10),⁵⁰ and it has directed the Supreme Court to adopt such rules. *Id.* § 74.163.⁵¹ As directed, the Supreme Court has enacted Rule 13 of the Rules of Judicial Administration “effective in all cases filed on or after September 1, 2003.”⁵²

⁴⁸ After subtracting the amount of statutory contractual liens owed against the judgment. Rule 167.11(d)(2). For definitions of “economic” and “noneconomic” damages see TEX. CIV. PRAC. & REM. CODE § 41.001 (as amended), discussed in part X (A) below.

⁴⁹ Rule 11.3(d) allows the Chief Justice of the Texas Supreme Court to assign a pretrial judge to handle cases in more than one administrative region, but that provision has not been used.

⁵⁰ *See* HB4 § 3.01, p.12.

⁵¹ *See Id.* § 3.02, p.13.

⁵² Supreme Court Misc. Docket Order 03-9145 (August 29, 2003).

the proposed Texas Rule there will be time for at least some limited initial discovery.

A. The MDL panel

The Legislature has created the “judicial panel on multi-district litigation” consisting of five “active court of appeals justices or administrative judges.” TEX. GOV’T CODE § 74.161.⁵³ The Legislature has expressly given this panel the power to “transfer civil actions involving one or more common questions of fact.” *Id.* § 74.162.

B. The motion to transfer

A party to a suit may move to transfer his own case, together with any number of “related cases,” to a “pretrial court.” TEX. R. JUD. ADMIN 13.3(a). The motion must contain an appendix listing all “related cases for which transfer is sought” and identify the attorneys in those cases. Rule 13.3(a)(4).

The motion “must conform to the requirements of Rule 9.4 of the Rules of Appellate Procedure,” TEX. R. JUD. ADMIN. Rule 13.2(b)(3), and the MDL panel will accept all facts stated in the motion as true, unless another party contradicts them. Rule 13.3(j). Any party in any related case has twenty days to file a response, and any party may file a reply within ten days of a response. Rule 13.3(d).

C. Filing

The motion to transfer, the response, and the reply must be filed with the clerk of the MDL panel, and a copy must be sent to each panel member. Rule 13.3(h). A party may file evidence with the MDL panel clerk only with leave of the panel. Rule 13.3(j). The panel may also order that evidence be filed. *Id.*

D. Stay

Filing of the motion does not suspend proceedings in the trial court, but the trial court or the MDL panel may “stay all or part of any trial court proceeding until a ruling by the MDL panel.” Rule 13.4.

E. The decision to transfer

The MDL panel may transfer cases based on the following factors:

- the cases involve one or more common questions of fact;
- the transfer will “be for the convenience of the parties and witnesses;” and
- the transfer will “promote the just and efficient conduct of the actions.”

TEX. GOV’T CODE § 74.162.⁵⁴ “The concurrence of three panel members is necessary to any action by the panel.” *Id.* § 74.161(b).⁵⁵ The order of transfer may refer to specific cases, or it may be generic as to type of case.

The MDL panel will designate a court to which all related cases will be transferred (the “pretrial court”). *See* Rule 13.2(e). It may also assign “any active judge, or any former or retired district or appellate judge who is approved by the chief justice of the Supreme Court.” Rule 13.6(a). When a particular judge is assigned, he has “exclusive jurisdiction over each related case transferred.” *Id.*

F. The transfer

After the transfer order is signed, “a notice of the transfer with a copy of the MDL transfer order will be filed with the trial court and the pretrial court.” Rule 13.5(a). The notice must list all parties who have appeared and their attorneys, and it must also list the parties who have not yet appeared in the transferred suits. *Id.* Unless the MDL panel orders otherwise, “the party moving for transfer must pay the cost of opening new files in the pretrial court (including filing fees and other reasonable costs.)” Rule 13.5(d). Once the notice of transfer is filed, the trial court may take no further action in the case “except for good cause” stated in the order in which such action is taken and after conferring with the pretrial court.” Rule 13.5(b).

G. Tag along cases

As noted above, the transfer order may simply describe a certain kind of case. If a case filed later meets the description set forth in the transfer order (so called “tag along cases”), a party seeking transfer can file a notice of the transfer order with the court in the tag along case, and the case will be automatically transferred. Rule 13.5(e).

Any party to the transferred cases may file a motion to remand the tag along case within thirty days after the service of the notice. Rule 13.5(e). The

⁵³ *See Id.* p.12. On July 1, 2003, Chief Justice Thomas R. Phillip appointed five judges to this panel, as follows:

- Chief Justice Scott Brister, 14th Court of Appeals, Houston
- Justice Errlinda Castillo, 13th Court of Appeals, Corpus Christi and Edinburg
- Justice Mack Kidd, 3d Court of Appeals, Austin
- Justice Douglas S. Lang, 5th District Court of Appeals, Dallas
- Judge David Peebles, presiding judge, 4th Administrative Region, San Antonio

Supreme Court Misc. Docket No. 03-9096.

⁵⁴ *See also* Rule 13.3(e).

⁵⁵ *See Id.*

pretrial court's order on that motion may be appealed to the MDL panel by a motion for rehearing. *Id.*

H. Proceedings in the pretrial court

The pretrial court “has the authority to decide, in place of the trial court, all pretrial matters in all related cases transferred to the court.” Rule 13.6(b). The pretrial court is directed, “at the earliest practical date,” to “conduct a hearing and enter a case management order.” Rule 13.6(c).

The pretrial court can set aside or modify any ruling made by the trial court before transfer, so long as the trial court still has plenary power over such pretrial ruling. Rule 13.6(b). It can also enter orders relating to jurisdiction, joinder, venue, discovery, preparation for trial (such as motions to strike expert witnesses, preadmission of any exhibits, and motions in limine), and mediation. *Id.* It can hear and decide dispositive motions such as summary or default judgments, but it may not try the case on the merits. *Id.*; TEX. GOV'T CODE § 74.162.

I. Remand

The pretrial court can remand any transferred case, or any “separable triable portions” thereof, back to the trial court. Rule 13.7(b). It may set cases for trial in the trial court after conferring with the judge of the trial court. Rule 13.6(d).

When a case is remanded, the trial court will have only limited authority to revisit rulings of the pretrial court. *See* Rules 13.7 & 13.8.

J. Review

An order of the MDL panel may be reviewed only by the Supreme Court in an original proceeding. Rule 13.9(a). Any appeal from a decision of the pretrial court will go to the court of appeals that normally reviews rulings of the pretrial court. Rule 13.8(b). Similarly, trial court orders will be reviewed by the court of appeals that normally reviews rulings of the trial court. *Id.*

XI. DAMAGES (HB4 ART. 13, PP. 100-107)

A. Rewrite of Chapter 41

Currently, Chapter 41 of the Civil Practices and Remedies Code deals solely with exemplary damages. In Article 13 of HB4, the Legislature has rewritten Chapter 41 to deal with damages in general. It has also amended the definitions of “economic damages” and “exemplary damages,” TEX. CIV. PRAC. & REM. CODE § 41.001(4)-(5), and promulgated new definitions of “compensatory damages,” “future damages,” “future loss of earnings,” “noneconomic damages,” and “periodic payments.” *Id.* § 41.001(8)-(10), (12) & (13). Finally, it has taken the definition of “gross negligence” out from under the definition of

“malice” and again called it “gross negligence.” *Id.* § 41.001(11).

B. Exemplary damages

The Legislature has also provided that exemplary damages may not be awarded unless the verdict awarding exemplary damages is unanimous as to liability for and amount of exemplary damages. *Id.* § 41.003(d).⁵⁶ Moreover, the jury must be instructed that its verdict must be unanimous as to the amount of exemplary damages. *Id.* § 41.003(e).

C. Separate finding on economic damages

In HB4, the Legislature now requires the judge or jury to make a separate finding on economic damages in all cases, not just those involving exemplary damages. *Id.* § 41.008.

D. Limit on collateral source rule

The collateral source rule bars a tortfeasor from offsetting his liability by “insurance benefits independently procured by the injured party.”⁵⁷ Under this rule, an award for reasonable medical or hospital expenses cannot be reduced if the injured party received proceeds of medical insurance, disability insurance, or other forms of protection which he has purchased⁵⁸ including Medicare⁵⁹ and social security.⁶⁰ It also applies “[w]here medical services are provided gratuitously”⁶¹ by relatives⁶² or by government programs⁶³ including Medicaid.⁶⁴

⁵⁶ *See* HB4 § 13.04, p.103.

⁵⁷ *Graco, Inc. v. CRC, Inc.*, 47 S.W.3d 742, 744 (Tex.App.—Dallas 2001, pet.denied) (citing *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex.1980)); *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 (Tex.1999).

⁵⁸ *See generally, Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 582 (Tex.App.—Houston [1st Dist.] 1992, no writ).

⁵⁹ *See Texarkana Memorial Hospital v. Murdock*, 903 S.W.2d 868 (Tex.App.—Texarkana 1995), *rev'd on other grounds*, 946 S.W.2d 836 (Tex.1997) (Recovery for medical expenses allocated between Medicare and plaintiff.); *Wong v. Graham*, No. 03-00440-CV, slip op. at 10 (Tex.App.—Austin, Feb. 15, 2001, no pet.) (not designated for publication) (Collateral source rule barred reducing medical expenses to allow for Medicare reduction.). *See also Berg v. United States*, 806 F.2d 978, 985-986 (10th Cir.1986) (applying Colorado law); *Manko v. United States*, 830 F.2d 831, 837-838 (8th Cir.1987) (applying Missouri law).

⁶⁰ *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 688 (Tex.App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex.1987).

⁶¹ *Oil Country Haulers, Inc. v. Griffin*, 668 S.W.2d 903, 904 (Tex.App.—Houston [14th Dist.] 1984, no writ).

In Article 13 of House Bill 4, the Legislature has added Section 41.0105 to the Civil Practice and Remedies Code. The new provision is titled “Evidence Relating to Amount of Economic Damages,” but the section does not deal with evidence. Rather, it limits recovery of damages, as follows:

[R]ecovery of medical or healthcare expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

TEX. CIV. PRAC. & REM. CODE § 41.0105 (emphasis added).⁶⁵

XII. FORUM NON CONVENIENS (HB4, § 3.04, PP. 16-17)

The doctrine of forum non conveniens for personal injury and wrongful death actions is codified in Section 71.051 of the Civil Practice and Remedies Code. Under the prior provision, in a case where the plaintiff is a legal resident of the United States but not of Texas, a trial court could stay or dismiss a suit under the doctrine of forum non conveniens only if the party seeking such relief establishes by a preponderance of the evidence that there is (i) an alternate forum with (ii) an adequate remedy that can (iii) exercise jurisdiction over all defendants. TEX. CIV. PRAC. & REM. CODE § 71.051(b). The party also had to show (iv) that maintaining the action in Texas would “work a substantial injustice.” *Id.*

HB4 has amended this section so that the movant no longer needs to establish these factors by preponderance of the evidence. Rather, the trial court “may consider” these factors in deciding to stay or

⁶² *Houston General Insurance Co. v. Hamilton*, 634 S.W.2d 18, 20 (Tex.App.—Beaumont 1982, writ dismissed w.o.j.).

⁶³ *Hall v. Birchfield*, 718 S.W.2d 313, 338 (Tex.App.—Texarkana 1986)(Plaintiff could recover “for cost of services which are provided by the State free of charge”), *rev’d on other grounds*, 747 S.W.2d 361 (Tex.1987); *Arvin v. Patterson*, 427 S.W.2d 643, 644 (Tex.Civ. App.—Waco 1968, writ refused n.r.e.) (Plaintiff could recover for value of medical services provided free of charge at Naval hospital).

⁶⁴ *Martinez v. Vela*, 2000 WL 12968, at * 3 (Tex.App.—Austin 2000, no pet.) (not designated for publication). *See also Cates v. Wilson*, 361 S.E.2d 734, 737-738 (N.C.Sup.Ct.1987); *Bennett v. Haley*, 208 S.E.2d 302, 310-311 (Ga.App.1974). *See generally*, RESTATEMENT (SECOND) OF TORTS § 902A cmt. c(4) (“Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.”).

⁶⁵ *See* HB4 § 13.08, p.106.

dismiss the claim. TEX. CIV. PRAC. & REM. CODE § 71.051 (as amended).

XIII. ASSIGNED JUDGES (HB3306)

Chapter 74 of the Government Code allows the presiding judge of an administrative region to assign judges “to hold court when necessary to dispose of accumulated business in the [judicial administrative] region.” TEX. GOV’T CODE § 74.052. *See also Id.* § 74.056.

Assigned judges--commonly called “visiting judges”--play an important role in keeping court dockets from becoming clogged. But they have long been a source of controversy. This controversy arises from “the perceived abuse of the assignment system, in particular the use of judges who had been recently rejected by the electorate.” *Mitchell Energy Corp. v. Ashworth*, 953 S.W.2d 436, 440 (Tex.1997). This concern is reflected in the history of Section 74.053,⁶⁶ which has been amended no less than five times.⁶⁷ In HB3306, the 78th Legislature has amended Section 74.053 once again, and those changes are addressed below.

But there may be fewer controversies over assigned judges in the future. The budget adopted by the 78th Legislature slashes funds available to pay assigned judges by over 70%. Additionally, HB3306 now requires judges to have 96 months of active service before serving as an assigned judge, instead of 48 months under the current statute.⁶⁸

A. The legislative scheme

A party may object to the assignment of a judge under Chapter 74. If the objection is timely, the assigned judge “shall not hear the case.” TEX. GOV’T CODE § 75.053(b). The objecting party does not have to give a reason for the objection. *In re Perritt*, 992 S.W.2d 444, 446 (Tex.1999). The assigned judge is automatically disqualified from hearing the case. *Id.* His “removal from the case is mandatory and may be enforced by mandamus.” *Id.* Any action taken by the judge after such an objection is void.⁶⁹

⁶⁶ *State ex rel. Holmes v. Lanford*, 837 S.W.2d 705, 709 (Tex.App.—Houston [14th Dist.] 1992, orig. proceeding).

⁶⁷ *See generally Mitchell Energy*, 953 S.W.2d at 438-439; *Texas Employment Com’n v. Alvarez*, 915 S.W.2d 161, 165-166 (Tex. App.—Corpus Christi 1996, orig. proceeding); *Garcia v. Employers of Wausau*, 856 S.W.2d 507, 509 n.2, (Tex.App.—Houston [1st Dist.] 1993, writ denied).

⁶⁸ *See* HB3306 § 12, p.8 (amending TEX. GOV’T CODE § 75.055 (c)(1)).

⁶⁹ *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996); *O.C.S., Inc. v. PI Energy Corp.*, 24 S.W.3d 548, 554

B. New categories for judges

The availability of an objection depends on the status of the assigned judge. Under current law assigned judges come in three categories, as follows.

- “A ‘regular’ judge is one who is a current office holder from another court.”
- “A ‘retired’ judge is one who . . . is . . . receiving an annuity under the Judicial Retirement System.”
- “A ‘former judge’ is any other judge who qualifies for assignment.”

Mitchell Energy, 943 S.W.2d at 439.⁷⁰ Now, under the amendment to Chapter 74, assigned judges will come in four categories as follows:

- (4) “Active judge” means a person who is a current judicial officeholder.
- (5) “Former judge” means a person who has served as an active judge . . . but who is not a retired judge.
- (6) “Retired judge” means:
 - (A) a retiree; or
 - (B) a person who served as an active judge for at least 96 months . . . and has retired under the Texas County and District Retirement System.
- (7) “Senior judge” means a retiree who has elected to be a judicial officeholder under Section 75.001.

TEX. GOV’T CODE § 74.041(4)-(7) (as amended).⁷¹ Moreover, the order of assignment must state whether the assigned judge is an active, former, retired, or senior judge. *Id.* § 74.053(a)(1), (as amended).

C. New limits on objections

Section 75.053 limits the number of objections that a party may make to an assigned judge. Formerly, those provisions read as follows:

- (b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only

entitled to one objection under this section for that case . . .

. . .

- (d) a former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

TEX. GOV’T CODE § 74.053 (repealed) (emphasis added). Each party was limited to one unqualified objection to the assignment of any judge assigned pursuant to Chapter 74. But if the assignment involved a former judge who was not retired, there was no limit on the number of objections.⁷²

The 78th Legislature has now changed subdivision (d) to read as follows:

- (d) ~~A former~~ An assigned judge or justice who was is not a retired judge defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice may not sit in a case if either party objects to the judge or justice.

Id. § 74.053 (as amended) (legislative changes shown). Under these new provisions, each party is limited to one objection to the assignment of a retired judge or a senior judge or a former judge. But if the assigned judge was defeated in his last election there is no limit on the number of objections.

D. No objection to active judges

Under prior law, a party could make one objection to a “regular” judge, that is, a judge who currently held the bench in another court.⁷³ Now, however, the Legislature has changed this rule by adding the following subsection:

⁷² *Flores*, 932 S.W.2d at 501; *Mitchell*, 943 S.W.2d at 437; *Alvarez*, 915 S.W.2d at 164; *Lanford*, 837 S.W.2d at 709.

⁷³ See generally *O.C.S., Inc.*, 24 S.W.3d at 553-554. But the right to object “only applies to judges assigned under Chapter 74.” *Perritt*, 992 S.W.2d at 446. Thus, no objection is available if a sitting judge is assigned outside Chapter 74. *Id.* (“This right to an unqualified objection, however, only applies to judges assigned under Chapter 74.”). See *Id.* at 447 n.4 (No objection available to judge assigned under TEX. R. JUD. ADMIN. 11); *Lanford*, 837 S.W.2d at 710 (Objection not available to “a regular judge who is sitting on the bench with the consent of the regular presiding judge.”); *In re Flores*, 53 S.W.3d 428, 431 (Tex.App.--San Antonio 2001, orig. proceeding) (Objection available if presiding judge of judicial administrative district hears case.). Cf. *In re City of Wharton*, 966 S.W.2d 855, 857 (Tex.App.--Houston [14th Dist.] 1998, orig. proceeding).

(Tex.App.--Houston [1st Dist.] 2000, no pet.); *Garcia*, 856 S.W.2d at 509.

⁷⁰ citing TEX. GOV’T CODE § 74.054(a) (1) & (a) 5), (b), (c) (1) & (e).

⁷¹ See HB3306 § 9, p.5.

(e) An active judge assigned under this chapter is not subject to an objection.

Id. § 74.053 (as amended) (legislative changes underlined).

E. New definition of parties

Under former Section § 74.053, “each party” had one objection “for that case.” Thus, if there are two defendants, they could each exercise one objection for a total of two objections.⁷⁴ But the Legislature has now changed this by adding the following provision.

(g) in this section “party” includes multiple parties aligned in a case as determined by the presiding judge.

TEX. GOV’T CODE § 74.053 (as amended) (legislative changes underlined).

F. New time limits

The presiding judge must give notice of the assignment to the attorneys if it “is reasonable and practicable and if time permits.” TEX. GOV’T CODE § 74.053(a). Any objection to an assigned judge must be “timely.” *Id.* § 75.053 (b). That is, it “must be filed before the first hearing commences . . . over which the assigned judge is to preside.” *Id.* § 74.053 (c). “An objection under Section 74.053 is timely if it is made at any time before the assigned judge, sitting on the bench and in open court, calls the case to hearing or to trial.” *Garcia*, 856 S.W.2d at 509. Moreover, the objection must be in writing,⁷⁵ although a handwritten objection is sufficient.⁷⁶

Under HB 3306, the objection must now be filed by the earlier of the following:

- [1] not later than the seventh day after the date the party receives actual notice of the assignment or
- [2] before the date the first hearing . . . commences.

TEX. GOV’T CODE § 74.053 (c) (as amended) (bracketed numerals added).⁷⁷ This language is problematic in two ways. First, there will be a fact question as to when a party received actual notice, and

⁷⁴ See *O.C.S., Inc.*, 24 S.W.2d at 552.

⁷⁵ *Morris v. Short*, 902 S.W.2d 566, 569 (Tex.App.—Houston [1st Dist.] 1995, writ denied).

⁷⁶ See *O.C.S., Inc.*, 24 S.W.2d at 550 & n.2.

⁷⁷ See HB 3306, p.6.

this could require the taking of evidence.⁷⁸ Second, the objection must be filed “before the date” of the first hearing.” *Id.* (emphasis added). Thus, if the first hearing occurs on a Wednesday, the objection is arguably due on Tuesday.⁷⁹

Under prior law, there was no express provision for extending the time for making objections. However, under HB3306 the presiding judge (not the assigned judge) may extend the time for filing an objection “on written motion by a party who demonstrates good cause.” TEX. GOV’T CODE §74.053(c).

XIV. CLASS ACTIONS (HB4 ART. 1, PP. 1-6)

In Article 1 of HB4, the legislature has added Chapter 26 to the Civil Practice and Remedies Code. These provisions direct the Supreme Court (1) to limit the award of attorney’s fees in class actions and (2) to adopt a rule regarding class actions in general. See *infra*, parts 1 and 2. The Legislature has also added provisions governing interlocutory appeals of class actions. See *infra*, part 3.

A. Mandatory rules limiting attorney’s fees

In the new Section 26.003 of the Civil Practice and Remedies Code, the legislature has promulgated two “mandatory guidelines” for rules involving attorney’s fees in class actions. HB4 § 1.01, pp.1-2. The first requires courts to use a “Lodestar” method in calculating attorney’s fees. See *infra*, part 1. The second involves class actions where plaintiffs recover non-cash benefits. See *infra*, part 2.

1. Lodestar method

Attorney’s fees in a class action may be awarded from the “common fund” recovered for all class members.⁸⁰ The legislature has not changed the “common fund” doctrine in HB4, but it has limited the amount of attorney’s fees that can be paid from the common fund.

⁷⁸ Cf. Rule 306 a.5, TEX. R. CIV. P. (A party may extend time for filing notice of appeal by proving lack of notice in trial court.). See *O’Quin v. Hall*, 77 S.W.3d 438, 445-448 (Tex.App.—Corpus Christi 2002, no pet.); *In re Ray*, 967 S.W.2d 951, 952-955 (Tex.App.—Dallas 1998, no writ); *Gonzales v. Sanchez*, 927 S.W.2d 218, 220-221 (Tex.App.—El Paso 1996, no writ).

⁷⁹ *But cf. Soxa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (construing Rule 63, TEX.R.CIV.P.).

⁸⁰ *City of Dallas v. Arnett*, 762 S.W.2d 942, 953-955 (Tex.App.—Dallas 1988, writ denied); *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 647 (Tex.App.—Waco 1993, no writ). See generally, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957-958 (Tex.1996).

When attorney's fees are paid from a common fund there are two ways to calculate them: the percentage method and the Lodestar method. In HB4, the Supreme Court is directed to adopt a rule requiring trial courts "to use the Lodestar method" in calculating "attorneys fees to be awarded to class counsel." TEX. CIV. PRAC. & REM. CODE § 26.003(a), (as amended). See HB4 § 1.01, p.1.

Under the Lodestar method, the number of hours worked times an hourly rate is viewed as "the Lodestar of the court's fee determination." *Lindy Brothers Builders Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir.1973). The result of this calculation is called the "Lodestar figure." The trial court may then apply a "multiplier" to raise or lower the Lodestar figure.⁸¹

In HB4 the legislature has given the Supreme Court some discretion in promulgating the required rule. Specifically, the rule can allow the trial court to "increase or decrease the fee award calculated by using the Lodestar method by no more than four times based on specified factors." TEX. CIV. PRAC. & REM. CODE § 26.003(a) (as amended) (emphasis added).

2. Non-cash benefits

The legislature has also directed the Supreme Court to adopt a rule providing that "in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other non-cash common benefits, the attorney's fees" must also "be in cash and non-cash amounts in the same proportion as the recovery for the class." TEX. CIV. PRAC. & REM. CODE § 26.003(b).⁸²

B. Additional discretion regarding rule making power

The legislature also has directed the Supreme Court to "adopt rules to provide for the fair and efficient resolution of class actions." *Id.* § 26.001(a) (as amended). A number of additional proposals to further alter the current class action rule are presently pending before the SCAC. These proposals come from two sources.

First, Rule 42, TEX. R. CIV. P., which governs class actions, is patterned after Rule 23, FED. R. CIV.

⁸¹ See, e.g., *Borg-Warner Protective Services Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex.App.—Corpus Christi 1997, no pet.); *Guity v. C.C.I. Enterprise, Co.*, 54 S.W.2d 526, 528-529 (Tex.App.—Houston [1st Dist.] 2001, no pet.); *Dillard Department Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex.App.—El Paso 2002, pet. denied); *Haggar Apparel Co. v. Leal*, 100 S.W.3d 303, 315-317 (Tex.App.—Corpus Christi 2002, no pet.).

⁸² Cf. *Bloyed*, 916 S.W.2d at 956-957 (upholding settlement, awarding coupons to class members).

P.⁸³ Extensive amendments to the federal rule are scheduled to take effect on December 1, 2003.⁸⁴ These amendments involve changes in the certification and notice procedure, as well as the procedure for appointing class counsel and determining their attorney's fees. Some of those changes are likely find their way into the Texas rule.

Second, the Supreme Court received a report from a task force on civil litigation improvements, chaired by Joe Jamail of Houston, that proposed a number of possible changes to class action practice including requiring class members to opt in, instead of opting out, as under current law.⁸⁵

XV. CONSTRUCTION CLAIMS

A. Design professionals (HB4 art. 20, pp. 124-126)

In article 20 of HB4, the legislature has promulgated Chapter 150 of the Civil Practice and Remedies Code, which places procedural hurdles in the way of a plaintiff suing a registered architect or licensed professional engineer for professional negligence. Any original petition or complaint alleging professional negligence by such a "design professional" must be accompanied by

an affidavit of a third-party registered architect or licensed professional engineer . . . , [which] shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim.

TEX. CIV. PRAC. & REM. CODE § 150.002(a).⁸⁶ This affidavit is not required if the suit is filed within 10 days of the expiration of limitations [and plaintiff affirmatively states none could be prepared], so long as the affidavit is filed within 30 days of filing. *Id.* §150.002(b). And the defendant does not have to file an answer until 30 days after the an affidavit is filed. *Id.* § 150.002(c).

Most importantly, the failure to file the affidavit "may result in dismissal with prejudice." *Id.* § 150.002(d). Compare *Id.* § 74.351.⁸⁷

⁸³ See source notes to Rule 42, TEX. R. CIV. P.

⁸⁴ Available at <http://www.uscourts.gov/rules/newrules6.html>.

⁸⁵ The Jamail Committee proposal is available at <http://www.jw.com/scac>, "Publications," "House bill 4."

⁸⁶ See HB4, p.125.

⁸⁷ See HB4, pp. 70-74.

B. Home builders (HB 730)

In House Bill 730, the legislature has amended the Property Code to make it more difficult to recover for construction defects in a home. To accomplish this, it has amended Chapter 27 of the Property Code (the Residential Construction Liability Act)⁸⁸ and added a new Title 16 to the Property Code.⁸⁹

In these provisions, the legislature has codified the law of warranty with regard to residential construction. It has also created a new “state sponsored inspection and dispute resolution process”⁹⁰ that must be followed before suit can be filed. Finally it has created a new state agency, the Texas Residential Construction Commission and given it authority (i) to define the extent of residential home warranties and (ii) to administer the “inspection and dispute resolution process.”⁹¹

1. Scope

These amendments apply to any “dispute between a builder and a homeowner if: . . . the dispute arises out of alleged construction defect. . . .” TEX. PROP. CODE § 426.001 (as amended). The term “builder” is broadly defined, and arguably can include almost anyone who builds, renovates, or repairs a residence. *Id.* § 401.003 (as amended). But claims against licensed tradesmen are excluded. *Id.* § 401.003(c) (as amended).

These provisions control over any other provision of the law, including the Deceptive Trade Practices Act. But they do not apply to (1) suits under Section 27.01 of the Business and Commerce Code or (2) claims arising from “a builder’s wrongful abandonment of an improvement project before completion” or (3) claims arising from a violation of the trust fund provisions of the property code. TEX. PROP. CODE § 426.001 & 426.002 (as amended). Neither do they cover claims solely for personal injury, survivorship, or wrongful death or damage to goods. *Id.* § 426.001(a)(1) (as amended).⁹² The Residential Construction and Liability Act will still apply to claims not covered by the new legislation. *Id.* § 27.004 (as amended).⁹³

⁸⁸ See HB730 art. 2, pp.49-65

⁸⁹ See *Id.* art. 1, pp.1-49

⁹⁰ See *Id.*, p.26.

⁹¹ See *Id.*, pp.6-15.

⁹² See *Id.*, p.26

⁹³ See *Id.*, p.57

2. Warranties

Under common law, Texas courts have long recognized the homebuilder makes an implied warranty of good and workmanlike construction and an implied warranty of habitability, but that those warranties may be disclaimed. See generally, *Centex Homes v. Buecher*, 95 S.W.3d 266, 270-275 (Tex. 2002). Now, in HB730, the legislature has directed the newly created Texas Residential Construction Commission to “adopt limited statutory warranties and building and performance standards for residential construction.” TEX. PROP. CODE § 430.001(a) (as amended).⁹⁴ These warranties must conform generally to standardized national codes. *Id.* § 430.001(c) (as amended). These warranties “supersede all implied warranties.” *Id.* § 430.006 (as amended). The warranties may not be waived by contract. *Id.* § 430.007 (as amended). Moreover, breach of these limited statutory warranties do not, by themselves, “constitute a violation of the Deceptive Trade Practices-Consumer Protection Act.” *Id.* § 430.011(c) (as amended).

The legislature has set the warranty periods as follows:

- (1) one year for workmanship and materials;
- (2) two years for plumbing, electrical, heating, and air-conditioning delivery systems; and
- (3) ten years for major structural components of the home.

Id. § 430.001(b) (as amended). The legislation also codified and limited the warranty of habitability. *Id.* § 430.002 (as amended).

3. The inspection and dispute resolution process

a. Prerequisite to suit

A homeowner must comply with the new subtitle before initiating an action for damages or other relief arising from an alleged construction defect. *Id.* § 426.005 (as amended). If the requirements of the new legislation are not satisfied, the court is directed to dismiss any suit. *Id.* § 27.004(d) (as amended). Moreover, if a verified motion to dismiss is filed and not controverted, the suit is automatically dismissed without court order. *Id.* § 27.004(d) (as amended).

b. The notice

At least thirty days before the request is submitted, the homeowner must notify the builder in writing of each defect in the home. *Id.* § 428.001(c) (as amended). The builder then must be given a

⁹⁴ See *Id.*, p.37

reasonable opportunity to inspect the home. *Id.* The builder also has the right to inspect the home at any time before conclusion of the “inspection and dispute resolution process.” *Id.* § 428.002 (as amended).

c. The request for inspection

To initiate the process “the homeowner or the builder” must submit a request. This request must describe:

- (a) each alleged construction defect in reasonable detail, *Id.* § 428.001 (as amended);
- (b) the amount of any “known out-of-pocket expenses and engineering or consulting fees incurred by the homeowner” in connection with the defect, *Id.*;
- (c) evidence that depicts the nature and cause of each defect and the nature and extent of repairs necessary to remedy it including expert reports, photographs, and videotapes, if discoverable, *Id.*;
- (d) state the name of the person who had inspected the home on behalf of the requestor. *Id.* If any such person’s name is not submitted, he may not be designated as an expert in the dispute resolution process or any action arising from the defect. Nor may materials used by such individual be offered into evidence. *Id.* §426.007 (as amended).

d. Time limit

Any request for inspection and dispute resolution must be submitted “on or before the second anniversary of the date of discovery of [the alleged defect] but not later than the thirtieth day after the date the applicable warranty period expires.” *Id.* §426.006 (as amended).

e. The inspection

Within 15 days of the request, the commission must appoint a third-party inspector “from the applicable lists of third-party inspectors maintained by the commission.” *Id.* § 428.003 (as amended). If the dispute involves a structural matter, the inspector must be an approved engineer. *Id.* § 428.004 (b) (as amended). To be eligible for appointment, an inspector may not receive more than ten percent of his gross income from expert witness fees. *Id.* § 427.001 (e) (as amended). The homeowner has a right to strike the inspector and take the next one on the list. *Id.* § 428.003 (b) (as amended).

Within 15 days, the inspector must make a recommendation. *Id.* § 428.004 (a) (as amended). The inspector’s recommendation must address the defects and “designate a method or manner of repair if any.” *Id.* § 428.004 (c) (as amended). The inspector may

not call for payment of monetary consideration. *Id.* § 428.004 (d) (as amended).

f. The appeal

The homeowner or builder may appeal the inspector’s recommendation to a panel of three inspectors who shall review his recommendation. The panel can approve, reject, remand, or modify the recommendation and issue a ruling and written findings. *Id.* § 429.001(c)(2) (as amended).

g. The suit

After the written findings and ruling are issued, the homeowner may sue the builder for breach of the limited statutory warranties adopted by the commission. The homeowner may recover only the damages provided by the Residential Construction and Liability Act. *Id.* § 430.011(b) (as amended).

The ruling by the third party inspector or the panel of state inspectors on “the existence of the construction defect or its appropriate repair . . . shall constitute a rebuttable presumption of the existence or nonexistence of a construction defect or the reasonable manner of repair of the construction defect.” *Id.* § 426.008(a) (as amended). The presumption can be overcome by a showing “by a preponderance of the evidence that the recommendation or ruling is inconsistent with the applicable warranty and building and performance standards.” *Id.*

h. Arbitration

A court is allowed to vacate an award in a residential construction arbitration “upon showing of manifest disregard for Texas law.” *Id.* §438.001 (as amended).

XVI. PUBLIC EMPLOYEES

A. All government employees (HB4, § 11.05, pp. 98-99)

In Section 11.05 of HB4, the Legislature has amended the Texas Tort Claims Act by rewriting Section 101.106 of the Civil Practice and Remedies Code. *See* HB4, pp. 98-99. The effect has been described as transforming this section in to a blanket immunity for all governmental employees.

Formerly, Section 101.106 merely barred an action against a governmental employee if the plaintiff has obtained a judgment or settled with the governmental employer. The amended section now provides that the filing of suit against a governmental employer discharges the employee, and vice versa. TEX. CIV. PRAC. & REM. CODE § 101.106(a) & (b) (as amended). It also provides that a settlement of a claim arising under this chapter shall “immediately and forever” bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter. *Id.* §

101.106(c) (as amended). Similarly, a judgment against a government employee bars all claims against the governmental unit. *Id.* 101.106(d) (as amended).

B. Public school employees (HB4 art. 15, pp. 107-110)

In Article 15 of HB4, the legislature has expanded the immunity of professional school employees by amending Chapter 22 of the Education Code. Formerly, Section 22.051 gave immunity to any professional school employee engaged in an activity “that involves the exercise of judgment or discretion.” TEX. EDUC. CODE § 22.051(a) (as amended). There are three exceptions: (1) use of excessive force in discipline of a student, *Id.*; (2) negligence resulting in bodily injury to students, *Id.*; and (3) “operation, use or maintenance of any motor vehicle.” *Id.* § 22.051(b) (as amended).

HB4 expands the class of “professional school employees” to include principals, teachers, substitute and student teachers, counselors, nurses, school bus drivers, and school board members. *Id.* § 22.051 (as amended). It also adds the immunities available under the federal Paul D. Coverdell Teacher Protection Act of 2001. *See* TEX. EDUC. CODE § 22.0511(c) (as amended).

The new provision also requires 90 days written notice of such claims, *Id.* § 22.0513(a) (as amended), and requires the claimant to have exhausted administrative remedies before filing suit. *Id.* § 22.0514 (as amended). The provision allows for ADR, *Id.* § 22.0516 (as amended), and provides that the employee shall recover attorney’s fees if they are found to be immune. *Id.* § 22.0517 (as amended).

XVII. OTHER IMMUNITIES AND RESTRICTIONS

A. In-home service or residential delivery (HB705)

HB705 adds Chapter 145 to the Civil Practice and Remedies Code to provide for a rebuttable presumption of no negligence in an action against an in-home service company or residential delivery company arising out of a criminal act or omission of an officer or employee of the company as to whom the company is required to obtain a criminal history record.⁹⁵ The presumption applies if the company obtained the information and the information shows that the officer or employee had not been convicted of certain criminal actions for the preceding 20 years (felonies) or the preceding 10 years (misdemeanors).

B. Public road contractors (HB1699)

HB1699 amends Chapter 97 of the Civil Practice and Remedies Code to provide that a contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable for personal injury, property damage, or death arising from performance of the construction or repair if the contractor is in compliance with the contract documents “material to the defect that caused the injury.” TEX. CIV. PRAC. & REM. CODE § 97.002 (as amended).

C. Trespass (HB4 §21.01, p. 126)

Section 75.006 of the Civil Practice and Remedies Code contains limits on the duties of the owners of agricultural land and land used for recreational purposes. Under HB4, a section is added providing that an “owner, lessee, or occupant of real property” is liable for trespass “as the result of migration or transport of any air containment . . . other than odor, only upon a showing of actual and substantial damages.” TEX. CIV. PRAC. & REM. CODE § 75.002(h) (as amended).

D. Volunteer firefighters (HB4 art 19, pp. 122-124)

Article 19 of HB4 adds a new immunity for volunteer firefighters by adding section 78.101 to the Civil Practices and Remedies Code. This provision places limits on liability of a volunteer fire department and its employees that are the same as the limits of a county and its employees.

E. Crime Stoppers programs (HB1036)

HB1036 amends Section 414.013 of the Government Code to provide immunity from civil liability to a person who communicates to the counsel or Crime Stoppers organization or a report of criminal activity that leads to the arrest of, the filing of charges against, or the conviction of a person, unless the communication was intentionally, willfully, or wantonly negligent or done with conscious indifference or reckless disregard for the safety of others.⁹⁶

XVIII. MISCELLANEOUS

A. Ad litem appointments (HB1815)

In HB1815, the Legislature has completely rewritten subchapters A, B, and C of Chapter 107 of the Family Code, which deal with guardians ad litem and attorneys ad litem.

⁹⁵ Background checks of certain employees are mandated pursuant to TEX. CIV. PRAC. & REM. CODE § 145.002 (as amended).

⁹⁶ *Cf. In re Hinterlong*, 109 S.W.3d 611 (Tex.App.—Fort Worth 2003, orig. proceeding).

B. Contempt (HB346)

HB346 amends section 21.002 of the Government Code to limit the amount of time a person may be confined for criminal contempt charges to 18 months, including three or more periods of confinement arising from the same matter, and to the lesser of 18 months from the confinement to the date the person applies for the court order that was the basis of the contempt finding. **Effective date:** This provision took effect on June 20, 2003.

C. Pro hac vice (HB462)

A non-resident attorney requesting permission to appear pro hac vice must pay a \$250 fee to the Board of Legal Examiners for deposit into the basic civil legal services account of the judicial fund for each case in which the attorney is requesting to participate. TEX. GOV'T CODE § 82.0361(b) (as amended).

D. Referral fee for judges (SB532).

A judge commits a class B misdemeanor if he solicits or accepts a gift or referral fee in exchange for referring legal business to an attorney or law firm. But the bill does not cover a constitutional county judge, statutory county court judges authorized to practice law or a justice of the peace or municipal court where the legal business involves a matter that will not come before the judge. It is an affirmative defense that the referral involves legal business that the judge was engaged in but unable to complete before taking office or that the solicitation occurred prior to the oath of office. Any judge or attorney who obtains information regarding such misconduct must file a complaint with the Commission on Judicial Conduct.

The task of reviewing 6,072 legislative proposals, including the 1,384 that eventually became law, is not an easy one. Fortunately, the Texas Judicial Council and the Office of Court Administration track bills during the legislative session and compile a timely report of the past session's activity.

The basis for this paper is the Texas Judicial Report, prepared by the Office of Court Administration (Alicia Key, Administrative Director) and the Texas Judicial Council (Elizabeth Kilgo, Director) and their staffs and the staffs of affiliated judicial agencies. I have edited their work, deleting sections likely of little interest to civil practitioners, and added commentary regarding general trends seen in reviewing categories of legislation. Additionally, I have underlined bill descriptions discussed in subject summaries or which appear to require changes to common forms. Any errors are mine alone.

Appellate Courts

The Legislature made two significant changes to intermediate appellate court operations in 2003. First, Brazos County was removed from the jurisdiction of the First and Fourteenth Courts of Appeals and is now only in the Waco Court of Appeals.

Second, five West Texas counties, most notably Midland County, were removed from the El Paso Court of Appeals region and placed in the Eastland Court of Appeals. As a result, the third major change, the shifting of a judge's position from the El Paso Court of Appeals to the Beaumont Court of Appeals, also occurred. After 2005, El Paso will have a three-judge court and Beaumont will have a four-judge court.

The bills describing these changes are set out below.

HB 988 – Effective 9/1/03

Amends Section 22.201, Government Code, to remove Brazos County from the jurisdiction of the First and Fourteenth Courts of Appeals such that Brazos County remains only within the jurisdiction of the Tenth Court of Appeals.

HB 2261 – Effective 9/1/03

Amends Section 22.201, Government Code, to move Ector, Gaines, Glasscock, Martin and Midland counties from the jurisdiction of the Eighth Court of Appeals to the Eleventh Court of Appeals. Amends Section 22.216 to provide that when a vacancy occurs or a term expires, the Eighth Court of Appeals consists of a chief justice and two, rather than three, justices. Provides that effective January 1, 2005, the Ninth Court of Appeals consists of a chief justice and three, rather than two, justices.

SB 375 – Effective 05/12/03

Amends Section 22.210, Government Code, to provide that the Ninth Court of Appeals may transact business in the

City of Beaumont or the county seat of any county in the district.

Associate Judges, Masters and Magistrates

The demands on judicial resources have created a number of staffing challenges for courts. The most common methods of solving these issues is referral of certain matters to associate judges or masters, as opposed to the creation of new courts. The 2003 legislative session reaffirmed the integral part associate judges and masters play in the judicial system.

There were two major trends in legislative enactments in this area. First, several bills (HB 321, 823, and 883) clarify the binding and final nature of certain actions taken by associate judges or masters and clearly state the effect of these decision on a practitioner's appellate timetable. Second, a number of bills have specifically enlarged the ability of an associate judge to preside over jury trials or other actions traditionally presided over by district or county court judges.

HB 821 – Effective 9/1/03

Amends Section 201.011, Family Code, to allow an associate judge to provide by facsimile transmission, the required notice to the parties regarding the associate judge's report. Creates a rebuttable presumption that the notification is received on the date stated on the confirmation page produced by the facsimile machine.

HB 823 – Effective 9/1/03

Amends Chapter 201, Subchapter B, Family Code, to change the designation of "master" to "associate judge". Conforms the "Time to Disposition" for Title IV-D cases with the current federal requirements such that 75 percent of the cases must be completed within six months and 90 percent of the cases must be completed within one year from the time of successful service. Amends Subchapter C to provides that if an appeal to the referring court is not filed or is waived, a recommendation of the associate judge for child protection cases becomes an order of the referring court by operation of law. Provides that an associate judge for child protective cases may not engage in the private practice of law.

HB 883 – Effective 9/1/03

Amends Chapter 201, Subchapter A, Family Code, to grant to an associate judge the power to render and sign a final order agreed to in writing as to both form and substance by all parties or a final default order. Provides that the date an agreed order or a default order is signed by an associate judge is the controlling date for the purpose of an appeal to or a request for other relief relating to the order from a court of appeals or the Supreme Court.

HB 935 – Effective 5/15/03

Amends Chapter 54, Government Code, to allow the Commissioners Court of Comal County to authorize the judges of the district and statutory county courts by unanimous vote to appoint one or more part-time or full-

time magistrates. Sets forth the qualifications, compensation, judicial immunity, termination, jurisdiction, powers, and responsibilities of the magistrates.

HB 1539 – Effective 9/1/03

Amends Chapter 54, Government Code, to change the designation of “master” to “associate judge” in the statutory probate courts. Allows the associate judge of a statutory probate court, if no party objects, to preside over a jury trial.

HB 3304 – Effective 9/1/03

Amends Chapter 54, Government Code, by adding subchapter V to allow the judge of the 229th District Court in Duval County, with the approval of the commissioners court, to appoint a full-time or part-time associate judge. Sets forth the qualifications, compensation, powers, and immunity of the associate judge.

HB 3384 – Effective 9/1/03

Amends Subchapter F, Government Code, to change the designation of “master” to “associate judge” and to authorize the appointment of one or more associate judges in certain Dallas County district courts for any civil matter. Sets forth the qualifications, compensation, and judicial immunity of associate judges and allows associate judges to conduct a trial on the merits on the consent of the parties and the referring court.

SB 358 - Effective 9/1/03

Amends Chapter 54, Government Code, by adding Subchapter V to allow the constitutional county court judge in a county with a population of two million or more to appoint magistrates to hear truancy cases. Requires the judge to adopt, modify, or reject the magistrate’s recommendations not later than the third working day after receipt of the recommendations. Sets forth the qualifications, compensation, and powers of the magistrates.

SB 922 – Effective 9/1/03

Amends Section 54.651, Government Code, to allow for the appointment of a magistrate in Tarrant County with the approval of at least two-thirds, rather than the unanimous consent, of all the criminal judges in the county. Amends Sections 54.656 and 54.658 of the Code to authorize a magistrate to accept a plea of guilty from a defendant charged with a misdemeanor or felony and to select a jury. Prohibits a magistrate from presiding over a trial on the merits.

SB 1465 – Effective 9/1/03

Amends Chapter 54, Government Code, by adding Subchapter X to provide that upon the approval of the majority, the district court judges in Harris County that give preference to criminal cases may appoint the number of magistrates set and approved by the commissioners court for the performance of the duties associated with drug courts and with acceptance and sentencing on agreed plea bargains. Sets forth the qualifications, compensation, applicable proceedings, and powers. Provides that the supervising judges may modify, correct, reject, reverse, or

recommit any action taken by the magistrate, otherwise, the action becomes the decree of that court.

SB 1794 – Effective 9/1/03

Amends Sections 54.971 and 54.974, Government Code, to provide that the judges of the county courts at law that give preference to criminal cases in Travis County must, with the consent and approval of the commissioners court, jointly and unanimously appoint magistrates that will assist the county courts at law. Grants the same judicial immunity as a county court at law judge to the magistrates. Amends 54.976 of the Code to include among the proceedings that may be referred to a magistrate a motion to increase or decrease a bond, a motion to revoke community supervision or proceed to adjudication, and an issue of competency with or without a jury. Provides that a judge may refer to a magistrate any proceeding involving an application for a protective order.

Civil Law

The biggest change of the last legislative session for the Texas Civil practitioner is clearly HB 4 and its associated proposed constitutional amendment, HJR 3 (Proposition 12). In one hundred thirty-two pages and twenty-two sections, HB 4 redefines the civil litigation landscape in Texas. Practitioners in products liability or medical malpractice cases will recognize sweeping procedural changes in their areas of the law. Additionally, the wide spectrum of these changes will also require a number of procedural rules changes that will have to be adopted this fall and winter.

Additionally, limitations on liability on a wide range of activities by public or private actors were also found in a number of other bills passed during the 2003 regular session.

HB 4/HJR 3 – Effective Date: See Bill Remarks

Provides for comprehensive tort reform of Texas’ civil court system.

- Adds Chapter 26, Civil Practices and Remedies Code, to require the Supreme Court to promulgate rules by December 31, 2003 that provide for the fair and efficient resolution of class actions. Specifies that the rules must provide that the trial court use a lodestar method to calculate the amount of attorney’s fees to be awarded to class counsel and that if any portion of the benefits recovered for a class are in the form of coupons or other noncash common benefits, the attorney’s fees awarded in the action must be in that same proportion of cash and noncash amounts.
- Provides that in class actions involving the jurisdiction of a state agency, a trial court must, before hearing or deciding a motion to certify a class action, hear and rule in writing on all pending pleas to the jurisdiction asserting that a state agency has exclusive or primary jurisdiction or

- that a party has failed to exhaust administrative remedies.
- Provides that an appeal is available if a plea to the jurisdiction is denied and a class is subsequently certified.
 - Amends Sections 22.001 and 22.225, Government Code, to clarify conflict jurisdiction such that one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.
 - Amends Sections 15.003 and 51.014, Civil Practices and Remedies Code, to clarify the right to seek an interlocutory appeal and the availability of a stay while seeking such relief.
 - Adds Chapter 42 to the Code to create an offer of settlement provision that provides for the payment of the other party's litigation costs for failure to accept a settlement offer that is more than 120% larger than the verdict (usually applies to the plaintiff) or that was less than 80% of the verdict (usually applies to the defendant).
 - Provides that the settlement provision applies to a wide range of cases involving monetary damages, but does not apply to class actions, actions by or against a governmental unit, family code cases, worker's compensation cases or cases arising in justice courts.
 - Amends 74.024, Government Code to authorize the transfer of related cases for consolidated or coordinated pretrial proceedings.
 - Creates a judicial panel on multidistrict litigation consisting of five members, either active court of appeals justices or administrative judges, to transfer civil actions involving one or more common questions of fact pending in the same or different courts to any district court for consolidated or coordinated pretrial proceedings, including summary judgment or other dispositive motions, but not a trial on the merits, if the transfer will be convenient for the parties and witnesses and will promote the just and efficient conduct of the actions.
 - Amends 15.003, Civil Practice and Remedies Code, to require each plaintiff in a suit in which there is more than one plaintiff, to independently establish proper venue or face dismissal.
 - Amends Chapter 33 of the Code to authorize a defendant to seek to designate, rather than join, a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party.
 - Amends Chapter 82 of the Code to provide that in a products liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product's formula, labeling, or design complied with mandatory safety standards or regulations

adopted and promulgated by the federal government or a federal agency that were applicable at the time of manufacture and that governed the product risk that allegedly caused harm.

- Prohibits prejudgment interest from being assessed or recovered on an award of future damages.
- Amends Chapter 74, Civil Practices and Remedies Code, to make significant changes to the method of pleading, the conduct of discovery, the receipt of expert testimony, and the limitations on liability in medical liability cases.
- Amends Chapter 52 of the Code to provide that an appeal bond must not exceed the lesser of 50% of the judgment debtor's net worth or \$25 million.
- Amends Chapter 41 of the Code to provide that exemplary damages may be awarded only if the jury was unanimous in finding liability for and the amount of exemplary damages.
- ***HJR 3 (Proposition 12):*** *Requires the submission to the voters of a constitutional amendment authorizing the legislature to determine limits for noneconomic damages in medical or health care liability claims and other actions.]*

HB 346 – Effective 6/20/03

Amends Section 21.002, Government Code, to limit the amount of time that a person may be confined for civil contempt charges to the lesser of 18 months or the period from the confinement to the date the person complies with the court order that was the basis of a finding of contempt.

[See also, Criminal Procedure]

HB 705 – Effective 9/1/03

Amends Title 6, Civil Practice and Remedies Code, by adding Chapter 145 to create a rebuttable presumption of no negligence in an action against an in-home service company or residential delivery company that arises out of a criminal act or omission of an officer or employee of the company as to whom the company is required to obtain criminal history record information, if the company obtained the information and the information showed that the employee had not been convicted of certain felonies for the past 20 years and had not been convicted of certain misdemeanors for the past 10 years.

HB 1036 – Effective 9/1/03

Amends Section 414.008, Government Code, to allow evidence of a communication between a person submitting a report of a criminal act to the Crime Stoppers Advisory Council or a crime stoppers organization and the person accepting the report to be produced in a civil case upon a motion by a plaintiff who alleges that denial of access to the records concerning the report of criminal activity abrogates any part of a cognizable common law cause of action under certain circumstances. Amends Section 414.013 of the Code to provide immunity from civil liability to a person who communicates to the council or a crime stoppers organization a report of criminal activity that leads to the arrest of, the filing of charges against, or the conviction of a person unless the communication was intentionally,

willfully, or wantonly negligent or done with conscious indifference or reckless disregard for the safety of others.

HB 1666 – Effective 9/1/03

Amends Section 141.002, Civil Practice and Remedies Code, to allow a statutory probate court, in addition to a statutory county court or a district court, in the county of the payee to approve a transfer of payment rights under a structured settlement.

HB 1699 – Effective 9/1/03

Amends Chapter 97, Civil Practice and Remedies Code, by adding Section 97.002 to provide that a contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if at the time of the injury, damage, or death, the contractor was in compliance with contract documents material to the condition or defect that was the proximate cause of the injury, damage, or death.

HB 3248 – Effective 9/1/03

Amends Section 75.002, Civil Practice and Remedies Code, to limit the liability of the state and a county, in addition to a municipality, regarding certain recreational activities taking place on premises owned, operated, or maintained by the state or county.

HB 3439 – Effective 9/1/03

Amends Title 4, Civil Practice and Remedies Code, by adding Chapter 91 to grant immunity from liability to a health care practitioner who, without compensation or expectation of compensation, conducts a physical examination or medical screening of a patient for the purpose of certifying the patient's eligibility to participate in a school-sponsored extracurricular or sporting activity under certain conditions.

SB 313 – Effective 5/28/03

Amends Title 2C, Civil Practices and Remedies Code, by adding Chapter 40 to prohibit the collection of civil damages against certain nonprofit institutions, including nursing homes and assisted living facilities, from an endowment or restricted fund or the income derived from the corpus of the fund or account, that is otherwise exempt from federal taxation, used to fund care provided by the institution, affiliated with certain nonprofit religious organizations, or derived from donations or grants from third parties who temporarily or permanently restrict the use of the funds at the time the donation is made.

SB 319 - Effective 9/1/03

Amends Section 71.001 of the Civil Practices and Remedies Code and Section 1.07 of the Penal Code to provide for a civil cause of action and criminal sanctions for the death or injury of an unborn child at every stage of gestation from fertilization until birth.

SB 430 – Effective 4/24/03

Amends Section 30.003, Civil Practice and Remedies Code, to provide that a member or member-elect of the legislature

must be hired at least 30 days prior to the trial date, rather than 10, in order to receive an automatic legislative continuance. Regarding criminal cases, the member or member-elect must have been employed at least 15 days before the trial date to receive an automatic continuance.

SB 504 – Effective 9/1/03

Amends Chapter 55, Property Code, to provide that in a county with a population of 575,000 or less, an emergency medical services provider has a lien not to exceed \$1,000 on a cause of action or claim of an individual who receives emergency services for injuries caused by an accident attributable to the negligence of another person.

SB 513 – Effective 9/1/03

Amends Chapter 79, Civil Practice and Remedies Code, by adding Section 79.003 to provide that except for reckless, intentional, wilful or wanton misconduct, a person is immune from civil liability for an act or omission that was made regarding care, assistance, or advice with respect to a man-made or natural disaster that endangers or threatens to endanger individuals, property, or the environment and that was provided at the request of an authorized representative of a local, state, or federal agency, unless the person does so for or in expectation of compensation.

SB 930– Effective 9/1/03

Amends Chapter 22, Education Code, to cap the liability of a school professional at \$100,000 for acts within the scope of the professional's duties. Requires the exhaustion of district level remedies and a 90-day notice of a claim prior to filing suit. Allows a court to refer a cases to alternative dispute resolution and provides for the recovery of attorney's fees and court costs.

SB 995 – Effective 9/1/03

Amends Section 9.102, Business & Commerce Code, to redefine "agricultural lien" by deleting the exemption for a security interest and "health care insurance receivable" to include services to be provided. Amends Section 9.039 of the Code to include a sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance among the list of interests that are perfected upon attachment. Amends Section 9.515 of the Code to provide that a record of a mortgage that is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut remains effective until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

SB 1017 – 9/1/03

Amends Section 89.004, Local Government Code, to create a method for presenting contract claims made against counties. Provides that notice of the claim must be delivered to the county within 30 days of the suit being filed or the suit is subject to dismissal. Specifies the appropriate damages that may be awarded.

SB 1212 – Effective 9/1/03

Amends Section 17.47, Business & Commerce Code, to provide that the trier of fact may award a civil penalty to be

paid to the state in an amount that is not more than \$20,000, rather than \$2,000 per violation, and to provide for an additional amount not to exceed \$250,000, rather than \$100,000, for an act to deprive money or property from a consumer who is 65 years of age or older. Specifies certain factors to be considered when determining the amount of the penalty. Specifies that the consumer protection division acting in the name of the state does not establish an attorney-client relationship with another person, including the victim. Amends Chapter 17 by adding Section 17.501 to provide that a consumer filing a class action must send to the consumer protection division a copy of the notice and the petition not later than the earlier of the 30th day after the date the petition is filed or the 10th day before the date of a hearing regarding any class certification or proposed settlement. Requires the court to abate the cause of action for 60 days upon discovery that the notice was not provided. Provides that the court, on a showing of good cause, may allow the consumer protection division to intervene in an action to which this section applies.

SB 1527 – Effective 9/1/03

Amends Section 5.065, Property Code, to provide that a purchaser in default under an executory contract for the conveyance of real property may avoid the enforcement of a remedy of rescission or of forfeiture and acceleration by complying with the terms of the contract on or before the 30th day after the seller's notice.

Costs and Fees

There were twenty-four new or increased court costs or fees imposed during the last legislative session. Only a few will be of much interest to the civil practitioner.

- HB 462 creates a new \$250 fee for an attorney seeking to appear pro hac vice in a case.
- HB 3167 increases the filing fee of a case based on the number of plaintiffs to an action.
- SB 604 and SB 782 give attorneys collecting debt owed to certain governmental units additional tools to aid in the collection of debts, including the ability to collect reasonable collection costs or a 30% collection fee and the ability to collect outstanding debt owed to the county.

HB 462 – Effective 9/1/03

Amends Chapter 82, Government Code, by adding Section 82.0361 to require a nonresident attorney requesting permission to participate in court proceedings in this state to pay a \$250 pro hac vice fee per case to the Board of Law Examiners for deposit into the Basic Civil Legal Services Account of the Judicial Fund.

HB 3167 – Effective 9/1/03

Amends Section 51.317, Government Code, to increase the fee for filing a suit, including an appeal from an inferior court, to \$50 for 10 or less plaintiffs; \$75 for 11 to 25 plaintiffs; \$100 for 26 to 100 plaintiffs; \$125 for 101 to

500 plaintiffs; \$150 for 501 to 1000; and \$200 for more than 1,000 plaintiffs. [Note that due to the delay provision in SB 325 and HB 2424, the increase in the fee will not apply until January 1, 2004.]

SB 325 – Effective 6/20/03

Amends Chapter 51, Government Code, by adding Section 51.607 to require the comptroller to publish a list in the Texas Register by August 1 after the end of each regular session that identifies each new or amended court cost or fee to be collected by a district, county, statutory county, municipal, or justice court in a civil or criminal case.

SB 604 – 9/1/03

Amends Section 113.902, Local Government Code, to provide that counties may collect from a debtor reasonable attorney fees, investigation costs, and court costs incurred to recover any debt owed to the county, excluding delinquent ad valorem tax cases.

SB 782 – Effective 6/18/03

Amends Article 103.0031 of the Code of Criminal Procedure and Section 682.010 of the Transportation Code to allow a commissioners court or governing body of a municipality to contract with a private attorney or public or private vendor to collect debts and accounts receivable in criminal cases and in cases where the accused failed to appear. Authorizes an additional 30% collection fee for each item that is more than 60 days past due after any credits for time-served or community service. Municipalities with a population greater than 1.9 million may authorize the additional collection fee to fund a collection program performed by employees of the governing body. Provides that payments in an amount that is less than the aggregate total to be collected must be reduced proportionately for allocation to the comptroller, the county or municipality, and the private attorney or vendor.

SB 1180 – Effective 6/20/03

Amends the Government Code by adding Chapters 101 and 102 to establish one complete index of all the court costs and fees in civil proceedings, court costs on conviction, and other court-related costs and fees collected in Texas' supreme court, courts of appeals, districts courts, statutory county and probate courts, constitutional county courts, justice courts, and municipal courts.

County Courts

A majority of the changes this last legislative session relating to county courts involved tweaking the jurisdiction of "local" courts. A brief description of the bills is set out below.

HB 338 – Removes the statutory authority for the County Court at Law of Navarro County.

HB 501 – The County Court of Marion County has general criminal jurisdiction.

HB 2498 – Effective 6/20/03

Amends Sections 25.1801 and 25.1802, Government Code, to require the County Court at Law No. 5 of Nueces County to include in the court's jurisdiction and preferences proceedings involving an order regarding a

child for whom the court has appointed a temporary or permanent managing conservator.

HB 3577 – Amends Section 25.1932, Government Code, to provide that the County Court at Law No. 1 of Randall County has concurrent jurisdiction with the district court in felony cases to conduct arraignments, conduct pretrial hearings, and accept guilty pleas. Allows the judge of the county court at law and judges of the district courts, in matters of concurrent jurisdiction, to exchange benches and courtrooms and to transfer cases between their dockets.

HB 3595 – Amends Section 25.0732, Government Code, to allow a criminal court at law judge in El Paso County to transfer cases between and exchange benches with a judge of a statutory county court or district court.

HB 3597 – Repeals Sections 25.1631 and 25.1632, Government Code, to abolish the County Court at Law of Matagorda County. Amends Section 152.1671(a) of the Human Resource Code to remove the county court at law judge from the membership of the juvenile board of Matagorda County.

HB 3605 – Amends Sections 23.1132, Government Code, to provide that the a county court at law in Hood County has concurrent jurisdiction with the district court in contested guardianship matters under Section 606(b) of the Probate Code.

SB 358 - Amends Section 26.045, Government Code, to provide original jurisdiction over truancy cases to a constitutional county court in a county with a population of two million or more.

SB 1225 – Amends Sections 693.002 and 693.005, Health and Safety Code, to allow the justice of the peace, county judge, or a designated physician to authorize the removal of organs from a decedent. Provides that if the autopsy is not performed by a medical examiner and one or more organs may be withheld, the justice of the peace, county judge, or designated physician must be present and may request the biopsy or deny the removal of the anatomical gift. Provides for judicial immunity in a related civil action.

SB 1552 – Amends Chapter 25, Government Code, to provide for a new county court at law in each of the following counties: Collin County (effective 1/1/05); Comal County (effective 9/1/03); Henderson County (effective 12/1/07 or an earlier date determined by the commissioners court); Orange County (effective 9/1/03); Rockwall County (effective 9/1/03); and Parker County (effective 9/1/03). Provides that in Henderson and Orange counties a jury in a county court at law is composed of six members, unless the constitution requires a 12-member jury.

Criminal Law

A wide variety of changes to both Texas criminal law and Texas criminal procedure may be of interest to Texas civil practitioners. Attorneys representing clients in a wide variety of areas may be interested to review changes to the Penal Code or Code of Criminal Procedure that could impact the client. A brief description of the affected bills is below.

HB 11 – Effective 9/1/03

Amends Section 19.03, Penal Code, to include among the offenses constituting capital murder, murder in the course of a terroristic threat. Amends Section 22.07 of the Code to provide that a person commits a third degree felony if the person threatens to commit any offense involving violence to any person or property with the intent to place the public in fear of serious bodily injury or to influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state.

HB 148 – Effective 9/1/03

Amends Section 681.0111, Transportation Code, to create a Class A misdemeanor for the manufacture, sale, or possession of a placard that is deceptively similar to a disabled parking placard. Creates a Class C misdemeanor

for knowingly displaying a deceptive placard while parking in a parking space specifically designated for the disabled.

HB 236 – Effective 9/1/03

Amends Section 43.23, Penal Code, to enhance the penalties for obscenity offenses involving images of children under the age of 18. Amends Section 25.08 of the Code to establish a second-degree felony for the sale or purchase of a child with intent involving a sexual performance by a child. Amends Section 43.25 of the Code to remove the affirmative defense to prosecution for sexual performance of a child, that the defendant reasonably believed the child was 18 years or older. Adds Section 43.27 to the Code to require any business that develops or processes visual materials to report to a local law enforcement agency any material the business determines may be evidence of a criminal offense under this subchapter. Amends Sections 62.01, 62.0101, and 62.021 of the Code to provide for the recognition of the laws of a foreign country.

HB 240 – Effective 9/1/03

Amends Section 28.03, Penal Code, to increase the punishment for criminal mischief to a first-degree felony if the damaged property is livestock and the damage is caused by introducing bovine spongiform encephalopathy, commonly known as ‘mad cow disease’ or other communicable diseases described in the Agriculture Code.

HB 325 – Effective 9/1/03

Amends Section 38.02, Penal Code, to increase the penalty for failure to identify if it is shown that the defendant was a fugitive from justice at the time of the offense. Adds Section 37.171 to the Code to provide that a person commits an a Class A misdemeanor if the person observes the commission of a felony in which serious bodily injury or death may have resulted and fails to report the offense immediately to law enforcement.

HB 420 – Effective 9/1/03

Amends Sections 31.03 and 32.46, Penal Code, to enhance the punishment for theft, misapplication of fiduciary property, and securing the execution of a document by deception when perpetrated against the elderly.

HB 532 – Effective 9/1/03

Amends Chapter 21, Penal Code, by adding Section 21.12 to create a second-degree felony when an employee of a primary or secondary public or private school engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person enrolled at the school.

HB 565 – Effective 9/1/03

Amends Sections 22.01 and 22.02, Penal Code, to enhance the penalty for an assault or aggravated assault committed against a person the actor knows to be a security officer.

HB 616 – Effective 9/1/03

Amends Section 22.07, Penal Code, to enhance the penalty for a terroristic threat to a state jail felony when the actor causes pecuniary loss of \$1,500 or more to the owner of a building, room, place, or conveyance.

HB 1060 – Effective 9/1/03

Amends Section 21.15, Penal Code, to provide that a person who promotes a photograph or visual recording, knowing the character and content of such, that was obtained without the subject's consent and with the intent to arouse or gratify the sexual desire of any person commits a state jail felony.

HB 716 – Effective 9/1/03

Amends Section 22.01, Penal Code, to increase the punishment for certain assaults committed against a person who is performing duties as a sports participant or committed in retaliation for performance by a sports participant from a class C to a class B misdemeanor.

HB 864 – Effective 9/1/03

Amends Section 38.11, Penal Code, to provide that a person commits an offense if the person provides to an inmate of a correctional facility operated by the Texas Department of Criminal Justice, a deadly weapon, a cellular telephone, a cigarette, tobacco product, or money, or possesses a deadly weapon while in a correctional facility. Provides that it is an offense for an inmate of a correctional facility to possess a cellular phone.

HB 1246 – Effective 9/1/03

Amends Sections 22.011 and 22.021, Penal Code, to provide for the offense of a sexual assault or aggravated sexual assault for the penetration of the sexual organ of another person, male or female.

HB 1326 – Effective 9/1/03

Amends Section 545.420, Transportation Code, to enhance the penalty for racing on a highway from a Class B to a Class A misdemeanor when the person was previously convicted of the offense, intoxicated, or in possession of an open container. Enhances the penalty to a state jail felony if the person was convicted of the offense two times previously; to a third-degree felony if the offense results in bodily injury; and to a second-degree felony if an individual suffered serious bodily injury or death. Amends Chapter 521 of the Code to provide for a one-year license suspension and 10 hours of community service.

HB 1592 – Effective 9/1/03

Amends Chapter 165, Occupations Code, by adding Section 165.1535 to create a state jail felony if a licensee under the Health Professions Title of the Occupations Code performs surgery while intoxicated and places the patient at a substantial and unjustifiable risk of harm.

HB 2096 – Effective 9/1/03

Amends Chapter 545, Transportation Code, by adding Section 545.4191 to provide that a person commits a Class B misdemeanor by operating a truck, road tractor, or truck tractor when another person occupies a trailer or semitrailer being drawn by the truck or tractor, with limited exceptions. Amends Title 5, Penal Code, by adding Chapter 20A to provide that a person commits a second-degree felony if the person knowingly traffics another person with the intent that the trafficked person engage in forced labor or conduct that constitutes public indecency. If the person trafficked is younger than 14 years old or the offense results in the death

of the person trafficked, the offense constitutes a first-degree felony.

HB 2138 – Effective 9/1/03

Amends Chapter 35, Business and Commerce Code, by adding Section 35.58 to create a Class B misdemeanor when a person uses a scanning device or re-encoder to access, read, scan, store, or transfer information encoded on the magnetic strip of a payment card without the consent of an authorized user of the payment card and with the intent to harm or defraud another. Amends Article 18.18, Code of Criminal Procedure, to require that upon conviction for such an offense, the court must order that the scanning device or re-encoder be destroyed or forfeited to the state.

HB 2248 – Effective 9/1/03

Amends Section 32.31, Penal Code, to provide that a person commits a state jail felony if the person uses a debit card with the intent to obtain a benefit fraudulently. Amends Section 32.51 of the Code to include in the definition of "identifying information" a financial institution account number.

HB 2892 – Effective 9/1/03

Amends Section 481.126, Health and Safety Code, to include among the offenses constituting a second-degree felony, the act of bartering property that the person knows is derived from or intended to further certain offenses involving the possession of marihuana. Amends Chapter 481 of the Code to provide that at the guilt or innocence phase of the trial of an offense involving the manufacture, delivery, or possession of a controlled substance, if the trier of fact determines beyond a reasonable doubt that the person died or suffered serious bodily injury as a result of injecting, ingesting, inhaling or introducing any amount of the substance manufactured or delivered by the defendant, the punishment for the offense is increased by one degree.

HB 3139 – Effective 9/1/03

Amends Chapter 161, Health and Safety Code, by adding Subchapter R to provide that a person commits a Class C misdemeanor if the person makes a delivery sale of cigarettes to anyone who is under the age of 18, does not fulfill certain age verification requirements, does not fulfill certain shipping requirements, does not register with and report certain sales data to the comptroller, or does not remit any taxes imposed by the state to the comptroller. Provides that upon a second offense, the person commits a Class B misdemeanor, and that a person commits a third-degree felony by knowingly violating this subchapter.

SB 45 – Effective 9/1/03

Amends Chapter 49, Penal Code, by adding Section 49.045 to provide that a person commits a state jail felony if the person is intoxicated while operating a motor vehicle that is occupied by a passenger younger than 15 years of age.

SB 317 – Effective 9/1/03

Amends Section 25.07, Penal Code, to provide that a person violates a protective order or magistrate's order by communicating directly with a protected individual in a

threatening way, communicating a threat through any person to a protected individual or a member of the family or household, or communicating in any manner with the protected individual except through the person's attorney, rather than requiring that the person communicate in all three ways before a violation occurred.

SB 319 - Effective 9/1/03

Amends Section 71.001 of the Civil Practices and Remedies Code and Section 1.07 of the Penal Code to provide for a civil cause of action and criminal sanctions for the death or injury of an unborn child at every stage of gestation from fertilization until birth.

SB 408 – Effective 9/1/03

Amends Section 22.07, Penal Code, to increase the penalty for making terroristic threats against a member of a person's family or household or against a public servant to a Class A misdemeanor from a Class B misdemeanor.

SB 501 – Effective 9/1/03

Amends Section 30.05, Penal Code, to provide that it is a defense to prosecution for criminal trespass that the basis for which entry was forbidden is that entry with a handgun was forbidden and the person was carrying a concealed handgun and the corresponding license issued under Chapter 411, Government Code. Amends Section 46.03 of the Code to provide that a person commits a third-degree felony if the person intentionally, knowingly, or recklessly possesses or goes with a firearm, illegal knife, club, or prohibited weapon under Section 46.05(a) *on the premises of*, rather than *in*, any government court or offices utilized by the court, unless pursuant to written regulations or authorization of the court (e.g., hallways and other common areas located within the building).

SB 729 – Effective 9/1/03

Amends Section 22.11, Penal Code, to provide that an incarcerated individual commits an offense if the person causes another person to contact certain animal, in addition to human, fluids or products with the intent to harass, alarm, or annoy.

SB 825 – Effective 9/1/03

Amends Section 22.011, Penal Code, to provide that an employee of a long-term care facility, including a contract laborer, commits a sexual assault without consent if the actor engages in sexual contact with a person who is a resident of the facility.

SB 837 – Effective 9/1/03

Amends Section 22.021, Penal Code, to provide that a person commits an aggravated sexual assault if the victim is a disabled individual regardless of age.

SB 1060 – Effective 5/20/03

Amends Section 29 of the Securities Act, to provide that a person who renders services as an investment adviser without being registered with the State Securities Board is guilty of a felony and must pay a fine of no more than \$5,000 and/or be imprisoned in a state penitentiary for two to ten years. Amends Section 32 of the Act to allow the

attorney general to seek and the court to grant equitable relief for a victim of fraudulent practices.

SB 1452 – Effective 9/1/03

Amends Chapter 6, Tax Code, by adding Section 6.411 to create a Class C misdemeanor for ex parte communications made between a member of an appraisal review board and the chief appraiser or another employee of the appraisal district regarding the evidence, argument, facts merits, or property involved in a pending hearing.

Criminal Procedure

HB 171 – Effective 9/1/03

Amends Article 55.02, Code of Criminal Procedure, to clarify that district courts have exclusive jurisdiction to grant expunction of criminal records. Requires the defendant's attorney or, if the defendant is not represented by counsel, the state's attorney to prepare the order.

HB 178 – Effective 9/1/03

Amends Article 42.20, Code of Criminal Procedure, to extend civil immunity protections to county attorneys, district judges, district attorneys, and criminal district attorneys for damages arising from an act or omission regarding a community service or work program under this chapter involving an inmate, offender, or releasee if made pursuant to a court order or otherwise performed in an official capacity without indifference for the safety of others.

HB 254 – Effective 9/1/03

Amends Chapter 13, Code of Criminal Procedure, by adding Article 13.28 to authorize the prosecution of fraudulent use or possession of identifying information in any county where the offense was committed or in the county of residence for the person whose identifying information was fraudulently obtained, possessed, transferred, or used.

HB 346 – Effective 6/20/03

Amends Section 21.002, Government Code, to limit the amount of time that a person may be confined for criminal contempt charges to 18 months, including three or more periods of confinement arising from the same matter

HB 1180 – Effective 9/1/03

Amends Articles 42.12 and 499.052, Code of Criminal Procedure, to extend the 90-day maximum sentence for state boot camp participants to 180 days.

HB 1634 – Effective 6/18/03

Amends Article 42.12, Code of Criminal Procedure, to provide that a court retains jurisdiction to hold a hearing regarding a violation of a condition of community supervision and to proceed with an adjudication of guilt, regardless of whether the period of community supervision imposed on the defendant has expired, if before the

expiration, the state attorney files a motion to proceed with the adjudication and a *capias* is issued for the arrest of the defendant. Amends Article 42.12 of the Code by adding Section 24 to provide that for the purposes of such hearings, it is an affirmative defense to revocation for an alleged failure to report or to remain within a specified place that the officer with the power to arrest under the warrant issued by a judge failed to contact the defendant in person at the last known address or last known employment.

HB 1838 – Effective 9/1/03

Amends Section 35.02, Penal Code, to require the court to order a defendant who is convicted of insurance fraud to pay restitution, including court costs and attorney’s fees, to an affected insurer.

HB 2474 – Effective 9/1/03

Amends Articles 18.20 and 18.21, Code of Criminal Procedure, to provide that a peace officer may install and monitor a device to intercept electronic communications if the officer reasonably believes an immediate life-threatening situation exists that requires such interception, reasonably believes there are sufficient grounds to authorize the interception, and obtains oral or written consent from a district judge in the county in which the device will be installed or from a judge or justice of a court of appeals or of a higher court, rather than from a magistrate. The order may include the use of a pen register, ESN reader, trap and trace device. Such consent expires 48 hours after it is granted or at the conclusion of the emergency, whichever occurs first. Authorizes a judge of competent jurisdiction to issue a written order authorizing interception during the 48-hour period and specifies that such order expires after 30 days or at the conclusion of the emergency that initially justified the interception, whichever occurs first.

HB 2795 – 6/18/03

Amends Article 17.033, Code of Criminal Procedure, to provide that in cases where a person is arrested without a warrant and requires a medical evaluation or care prior to being brought before a magistrate, the time limits regarding a release on bond do not apply. Rather, the applicable limits commence at the time, as documented in the records of the hospital, clinic, or other medical facility, that a physician or other medical professional releases the person from the hospital, clinic, or other medical facility.

HB 3306 – Effective 6/18/03

Amends Article 11.071, Code of Criminal Procedure, to require a convicting court to reasonably compensate an appointed attorney, regardless of whether the attorney was appointed by the convicting court or was appointed by the court of criminal appeals under prior law. Provides that the comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals in an amount not to exceed \$25,000. Authorizes counsel to incur expenses for a habeas corpus investigation, including expenses for experts, without the prior approval of the convicting court or the court of criminal appeals.

HB 3377 – Effective 9/1/03

Amends Article 59.05, Code of Criminal Procedure, to provide that if property is seized at a federal checkpoint, the notice of seizure and intended forfeiture may be filed in and the proceeding may be held in the county in which the seizure occurred or in an adjacent county located in the same judicial district if the owner, operator, or agent in charge of the property consents.

SB 176 – Effective 9/1/03

Amends Article 14.03, Code of Criminal Procedure, to provide that a peace officer may arrest, without a warrant, a person who the officer has probable cause to believe has prevented or interfered with an individual’s ability to make an emergency telephone call.

SB 566 – Effective 9/1/03

Amends Article 55.02, Code of Criminal Procedure, to provide that a person may seek a court-ordered expunction of records containing identifying information that was given falsely by another person by filing an application with the district or county attorney. Provides that the application must be verified and include a statement that the person was not the person arrested and did not consent to the false identify. On receipt of an expunction order, the court must enter a final order directing expunction without a hearing on the matter.

District Courts

Like the county courts, all of the changes this last legislative session relating to district courts involved “tweaking” the jurisdiction of “local” courts. A brief description of the bills is set out below.

HB 2234 – Amends Section 53.002, Government Code, to allow the judge of the 411th District Court to appoint a bailiff.

HB 3386 – Amends Section 74.024, Government Code, to allow the supreme court to adopt rules relating to conducting proceedings under Rule 11, Rules of Judicial Administration, by a district court outside the county in which the case is pending.

SB 354 – Amends Chapter 24, Government Code, to provide that the Tarrant County Criminal District Court No. 4 and the 213th, 297th, 371st, 372nd, and 396th district courts have concurrent original jurisdiction over misdemeanor cases with the county criminal courts in Tarrant County.

SB 520 – Amends Section 24.185, Government Code, to remove Upton County from the 83rd Judicial District. Provides that on September 1, 2003 the local administrative district judge must transfer all cases from Upton County pending in the 83rd District Court to the 112th District Court.

SB 979 – Amends Sections 24.451 and 24.123, Government Code, to remove Caldwell County from the 274th Judicial District and to require the local administrative district judge to transfer all cases from Caldwell County pending in the 274th District Court on September 1, 2003 to the 22nd and 207th district courts.

SB 1018 – Amends Sections 53.002 and 53.009, Government Code, to provide that the judge of the 106th District Court may appoint a bailiff to serve the court and may set the salary with the approval of the commissioners court.

SB 1551 – Amends Chapter 25, Government Code, to create the following nine district courts: the 413th Judicial District composed of Johnson County and the 416th Judicial District composed of Collin County (effective 9/1/03); the 417th Judicial District composed of Collin County (effective 9/15/04); the 414th Judicial District composed of McLennan County, the 415th Judicial District composed of Parker County, the 419th Judicial District composed of Travis County, the 420th Judicial District composed of Nacogdoches County, the 421st Judicial District composed of Caldwell County, and the 422nd Judicial District composed of Kaufman County (effective 9/1/05).

SB 1915—Amends Section 24.109, Government Code, to provide that the terms of the 9th District Court in Waller County begin on the first Monday in January and July.

Family Law

Not surprisingly, bills affecting family law made up the bulk of the civil litigation legislation passed. This is no doubt in recognition to the overwhelming percentage of the civil docket that is composed of family law matters. Among the items that may be of interest to all civil practitioners include:

HB 1815, which sets out minimum requirements for appointment as guardian ad litem or attorney ad litem in certain cases involving minors. The bill also sets out guidance for fee payments.

HB 518 which modifies standards for service of publication in family cases.

Matters which are of general interest to all practitioners or that will require changes to standard family law forms are highlighted

HB 162 – Effective 9/1/03

Amends 45.102, Family Code, to require that a petition to change the name of an adult include a legible and complete set of the petitioner's fingerprints on a fingerprint card format acceptable to the Department of Public Safety and the Federal Bureau of Investigation.

HB 227 – Effective 9/1/03

Amends Section 105.006, Family Code, to require that a final court order in a suit for the possession of or access to a child contain an additional notice prominently displayed and directed to Texas peace officers informing them that they may use reasonable efforts to enforce the specified custody terms and that they are immune from claims regarding their good faith acts to enforce the order's provisions. Specifies that a person who presents an invalid order for enforcement commits an offense punishable by confinement in jail for up to two years and a fine up to \$10,000.

HB 233 – Effective 9/1/03

Amends Section 102.003, Family Code, to confer standing in suit requesting the termination of the parent-child relationship or adoption to a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child in a "verified written statement to confer standing." Allows for the filing of an adoption suit prior to the child's birth and prior to the execution of an affidavit voluntarily relinquishing parental rights. Adds Section 102.0035 to the Code to set forth the content and execution requirements for a valid statement.

HB 234 – Effective 9/1/03

Amends Section 154.002, Family Code, to provide that a court may render an original order or modify an existing support order providing that child support past the 18th

birthday of the child be paid only if certain education conditions are met.

HB 297 – Effective 9/1/03

Amends Article 17.292, Code of Criminal Procedure, to provide that a condition imposed by a subsequent protective order under Chapter 85 of the Family Code prevails over an order issued under this Article. Provides that a condition imposed by a subsequent protective order under Chapter 83 of the Family Code takes precedence over a condition imposed by this Article if the court issuing the subsequent order is informed about the order under this Article and makes a finding in the order issued that it supersedes the prior order.

HB 320 – Effective 6/20/03

Amends Section 261.111, Family Code, to provide that the refusal of a parent, guardian, or managing or possessory conservator of a child to administer or consent to the administration of a psychotropic drug to the child, or to consent to any other psychiatric or psychological treatment of the child, does not by itself constitute neglect of the child unless the refusal to consent presents a substantial risk of death, disfigurement, or bodily injury to the child or has resulted in an observable and material impairment to the growth, development, or functioning of the child.

HB 518 – Effective 9/1/03

Amends Section 102.010, Family Code, to provide that in any suit in which service of citation is by publication, a statement of the evidence of service approved and signed by the court must be filed with the papers of the suit as part of the record. Provides that if the court orders that citation by publication be completed by posting the citation at the courthouse door for a specified time, service must be completed on, and the answer date is computed from, the expiration date of the posting period.

HB 529 – Effective 9/1/03

Amends Section 231.006, Family Code, to prohibit any person who is more than six months delinquent in paying child support from receiving student financial assistance paid directly from the comptroller.

HB 674 – Effective 6/20/03

Amends Section 156.410, Family Code, to provide that the fact that the obligor has been called into active military service in any branch of the United States armed forces is a material and substantial change in circumstances for the purposes of a petition for modification of child support if that active military service is for at least 30 days and results in a decrease in the obligor's net resources during the period of service.

HB 729 – Effective 9/1/03

Amends Chapter 160, Family Code, by adding Subchapter I to authorize an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of the child conceived by means of assisted reproduction and that provides that the intended parents become the parents of the child. Provides that a court may validate a gestational agreement under certain

conditions and does so at its discretion. Provides that on the birth of a child to a gestational mother under a validated agreement, the intended parents must file a notice with the court, and upon receiving the notice, the court must render an order that confirms the intended parents are the child's parents, requires the gestational mother to surrender the child, and requires the bureau of vital statistics to issue a birth certificate naming the intended parents as the child's parents. Provides that a gestational agreement that is not validated is not enforceable.

HB 884 – Effective 9/1/03

Repeals Sections 6.404 and 102.0085, Family Code, which required a party to a proceeding in a suit for a dissolution of marriage or a suit affecting the parent-child relationship to include a signed statement regarding awareness of alternative dispute resolution in the party's initial pleading.

HB 885 – Effective 9/1/03

Amends Section 3.403, Family Code, to provide for a new formula to determine the amount owed to a marital estate claiming an economic contribution to property owned by another marital estate. Amends Section 4.102 of the Code to provide that at any time, spouses may partition or exchange community property including future earnings and income arising from the property as the separate property unless the spouses agree in a record that the future earnings and income will be community property after the petition or exchange. Amends Section 4.205 of the Code to allow an heir of the spouse or the personal representative of the estate of that spouse to offer proof in a proceeding regarding the enforcement of agreements to convert property to community property. Amends Section 7.002 of the Code to require the court, in a decree of divorce or annulment, to award a spouse certain real and personal property as separate property.

HB 886 – Effective 9/1/03

Amends Section 157.167, Family Code, to require the court, upon a finding that that the respondent has failed to comply with the terms of an order providing for possession or access to a child, to order the respondent to pay the movant's reasonable attorney's fees and all related court costs in addition to any other remedy.

HB 887 – Effective 9/1/03

Amends Section 106.002, Family Code, to provide that in a suit affecting the parent-child relationship the court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment interest to be paid directly to the attorney.

HB 889 – Effective 9/1/03

Amends Section 154.124, Family Code, to prohibit the enforcement of child support agreements as contracts.

HB 913 – Effective 9/1/03

Amends Section 105.002, Family Code, to provide that in a jury trial the court may not contravene a jury verdict on the issues of the appointment of a sole managing conservator, the appointment of joint managing conservators, the appointment of a possessory conservator, the determination

of which joint managing conservator has the exclusive right to designate the primary residence of the child, the determination of whether to impose a restriction on the geographic area of the child's primary residence, and a determination as to what that geographic area will be. Eliminates the court's option of submitting to a jury the issues of child support, specific terms or conditions of possession of or access to a child, and any right or duty of a conservator other than the issue of the child's primary residence. Addresses issues regarding a child's preference of the person to designate residence, the duty of each conservator of a child to provide information, the designation of a primary physical residence for the child in cases where joint managing conservatorship is ordered, the standard possession order, and the grounds for modification of conservatorship, child support, or possession of and access to a child.

HB 980 – Effective 9/1/03

Amends Section 162.001, Family Code, to clarify that the former stepparent of a child who is at least two years of age may seek adoption of the child.

HB 1364 – Effective 6/2/03

Amends Chapter 32, Family Code, by adding Section 32.202 to provide that a minor may consent to emergency shelter or care to be provided to the minor or the minor's child or children if the minor is at least 16 years of age, resides apart from the minor's parent or guardian, and manages the minor's own financial affairs, regardless of the source of income, or is not married and is pregnant or the parent of a child. Provides that an emergency shelter facility may rely on the minor's written statement consenting to emergency shelter or care.

HB 1391 – Effective 9/1/03

Amends Chapters 6 and 102 of the Family Code by adding Sections 6.410 and 102.0086 to provide that in a county with a population of 3.4 million or more, all pleadings and documents filed with the court in a suit for dissolution of marriage, are confidential and are excepted from Chapter 552, Government Code, except to a party to the suit, until after the date of service of citation or the 31st day after the date the suit was filed. Amends Section 82.010 of the Code to provide that an application for a protective order in such a county is confidential until after the date of service of notice of the application or the date of the hearing on the application, whichever is sooner, and to provide that an application for the issuance of a temporary ex parte order under Chapter 83 is confidential until after the date that the court or law enforcement informs the respondent of the court's order.

HB 1497 – Effective 6/20/03

Amends Section 162.506, Family Code, to provide that notwithstanding that both spouses have joined in a petition for the adoption of an adult as required by Section 162.503 of the Code, a court may grant the adoption of an adult to both spouses or, on the request of the spouses, to only one spouse.

HB 1536 – Effective 9/1/03

Amends Chapter 161, Family Code, by adding Section 161.2061 to allow a court to provide in an order terminating the parent-child relationship that the biological parent who filed an affidavit of voluntary relinquishment of parental rights will have limited post-termination contact with the child on agreement of the biological parent and the Department of Protective and Regulatory Services. Provides that a court may include in such an order terms that allow the biological parent to receive specified information about the child, to provide written communication to the child, and to have limited access to the child. Adds Section 161.2062 to provide that an order terminating the parent-child relationship may not require that a subsequent adoption order include terms regarding limited post-termination contact between the child and a biological parent.

HB 1648 – Effective 9/1/03

Amends Section 102.003, Family Code, to provide that notwithstanding the otherwise applicable 12-month time requirement, a foster parent may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child.

HB 1815 – Effective 9/1/03

Amends Chapter 107, Family Code, to provide definitions for the three roles of amicus ad litem, attorney ad litem, and guardian ad litem and for certain terminology used in the appointments. Describes the corresponding powers and duties, restricts appointments of ad litem in certain cases, and addresses proper fees.

HB 1869 – Effective 9/1/03

Amends Chapter 104, Family Code, by adding Section 104.007 to provide that in a proceeding brought by the Department of Protective and Regulatory Services concerning a child who is alleged in a suit to have been abused or neglected, the court may, with the agreement of the state's and the defendant's counsel, order that the testimony of certain professionals be taken outside the courtroom by videoconference.

HB 1878 – Effective 9/1/03

Amends the Family Code to make technical corrections and clarifications relating to medical support obligations, health insurance coverage, child support enforcement, child support liens, the determination of parentage, certain administrative procedures used by the Texas Title IV-D, the suspension or revocation of an obligor's license, and the child support review process. Amends Section 154.181 of the Code to require a court to render an order for the medical support of a child in a proceeding in which periodic payments of child support are ordered or modified. Amends Sections 160.633 and 231.108 of the Code to provide that a proceeding to adjudicate parentage under this subchapter and corresponding papers and records are open to the public, and deletes the language that would allow a court on the request of a party and for good cause shown, to order the proceedings closed to the public.

HB 1899 – Effective 6/20/03

Amends Chapter 153, Family Code, by adding Subchapter I regarding the prevention of international parental child abduction. Authorizes the court to take specific abduction prevention measures including passport and travel controls and the execution of a bond or security deposit. Sets forth factors to be considered by the court when determining whether to take any of those measures.

HB 1972 – Effective 6/20/03

Amends Chapter 234, Family Code, by adding Section 234.0091 to require the state disbursement unit of the Title IV-D agency to provide to an obligor or obligee on request, a copy of the record of child support payments maintained by the unit. Allows the obligor or obligee to request that the agency investigate an alleged discrepancy between the records maintained by the unit and the obligor or obligee.

HB 2001 – Effective 7/1/03

Amends Sections 154.186 and 154.186, Family Code, to require that in appropriate cases, the Title IV-D agency or the court send to the obligor's employer the National Medical Support Notice for enforcement of the health care coverage provisions in a child support order, and to provide that an employer who receives such a notice must comply with its requirements.

HB 2099 – Effective 9/1/03

Amends Section 153.004, Family Code, to require a court that is determining whether there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent directed against the other parent, a spouse, or a child, to consider whether a protective order was rendered under Chapter 85 of the Code against the parent during the two-year period preceding the suit or during the pendency of the suit.

HB 2126 – Effective 9/1/03

Amends Section 154.241, Family Code, to permit a local registry to accept child support payments made by credit card, debit card, or automatic teller machine card.

HB 2588 – Effective 9/1/03

Amends Section 157.167, Family Code, to provide that if a court finds that the respondent is in contempt for failure to pay child support and that the arrearages amount to \$20,000 or more, the court may not waive the requirement that the respondent pay attorney's fees and costs unless the court also finds that the respondent is involuntarily unemployed or disabled and lacks financial resources to pay the fees and costs.

HB 3087 – Effective 9/1/03

Amends Section 231.002, Family Code, to provide that the Title IV-D agency may provide a release or satisfaction of judgment for all or part of the amount of the arrearages assigned to the Title IV-D agency.

HB 3114 – Effective 9/1/03

Amends Section 8.055, Family Code, to define gross income for the purposes of determining court ordered spousal maintenance.

SB 7 – Effective 9/1/03

Amends Chapter 6, Family Code, by adding Section 6.204 to provide that a civil union or marriage between persons of the same sex is void. Prohibits the state from effectuating a public act, record, or judicial proceeding that creates, recognizes, or validates such a marriage or civil union in this state or any other jurisdiction, and from recognizing a right or claim to any legal protection, benefit or responsibility asserted as a result of such a marriage or civil union.

SB 92 – Effective 6/20/03

Amends Chapter 92, Property Code, by adding Section 92.015 to provide that a landlord may not prohibit or limit a residential tenant's right to summons emergency assistance regarding family violence nor impose monetary or other penalties. Provides that if a landlord violates this section, a tenant may be entitled to a civil penalty equal to one month's rent, actual damages, court costs, injunctive relief, and reasonable attorney's fees.

SB 146 – Effective 9/1/03

Amends Sections 45.002 and 45.103, Family Code, to require that a petition to change the name of a child or an adult indicate whether the person is subject to sex offender registration requirements. Amends Sections 45.004 and 45.103 to provide that the court may order the name changed if it is in the best interest of the child or petitioner and the public, and if the court has been provided with proof that the appropriate local law enforcement authority has been notified.

SB 151 – Effective 9/1/03

Amends Chapter 162, Family Code, by adding Section 162.023 to provide that an adoption order rendered to a Texas resident by a foreign county must be given full faith and credit by the courts of this state and may be registered in this state, unless the adoption law or process of the foreign county violates fundamental principles of human rights or the laws or public policy of this state.

SB 579 – Effective 9/1/03

Amends Chapter 162, Family Code, by adding Section 162.0065 to provide that the Department of Protective and Regulatory Services is not required to edit documents and related records to an adoption to protect the identity of the birth parents or other persons whose identity is confidential if the information is already known to the adoptive parents or can be easily obtained through other sources, such as the court records.

SB 1489 – Effective 6/20/03

Amends Chapter 264, Family Code, by adding Section 264.114 to require the Texas Department of Protective and Regulatory Services to develop a program to recruit and retain foster parents from faith-based organizations. Provides immunity from liability to faith-based organizations that provide financial or other assistance for damages arising out of the conduct of the parent or a member of the household.

SB 1805 – Effective 9/1/03

Amends the Texas Family Code to conform certain state statutes with federal law and to provide that Chapter 159 of the Code be cited as the Uniform Interstate Family Support Act. Requires that in a Title IV-D case, income withheld for child support be paid to the appropriate state disbursement unit and amends provisions that impact the bases for jurisdiction over a nonresident, the duration of a tribunal's personal jurisdiction, the continuing exclusive jurisdiction of a tribunal to modify or enforce a child support order, the determination of a controlling child support order, the nondisclosure of information in exceptional circumstances, the receipt and disbursement of payments, and the recognition of an order modified in another state.

SB 1807 – Effective 9/1/03

Amends Section 160.204, Family Code, to provide that a man is presumed to be the father of a child if during the first two years of the child's life, he continuously resided in the household of the child and represented to others that the child was his own. Amends Section 160.602 of the Code to provide that a proceeding to adjudicate the parentage of an adult child may only be maintained by the adult child. Amends Section 160.608 of the Code to provide that the court has the authority to deny genetic testing in a proceeding to rescind or challenge an acknowledgement or denial of paternity.

Judicial Compensation and Retirement

Statewide, district judges did not receive a pay increase this session. Their last pay increase was vetoed by the Governor in 2001. Three bills in this area (HB 858, HB 2402, and SB 828) try to remedy this growing concern over judicial salaries and allow commissioners courts in urban areas to pay additional salary supplements to local judges.

HB 820 – Effective 9/1/03

Amends Section 839.101, Government Code, by adding an age requirement of 55 to the Judicial Retirement System Plan Two option that otherwise allowed a member to retire after achieving 20 years of service. Adds an additional eligibility provision to allow a member in Plan Two to retire if such member has served at least two full terms on an appellate court and the sum of the member's age and amount of service credited in the retirement system equals or exceeds the number 70.

HB 858 – Effective 9/1/03

Amends Sections 25.2222 and 25.2223, Government Code, to provide that the judge of a county court at law or a county criminal court in Tarrant County must be paid an annual salary in an amount that is not less than \$1,000 less than the annual salary plus supplements and increases paid to any district judge in the county. Amends Section 32.220 of the Code to allow the commissioners court to budget and pay the annual supplemental salary paid to district judges without restriction. Reenacts the salary differential as provided in Section 659.012 of the Code on 9/1/07

HB 2402 – Effective 9/1/03

Amends Sections 32.043 and 32.227, Government Code, to allow the commissioners court in Collin and Travis counties to budget for and pay the annual supplemental salary paid to district judges without restriction. Reenacts the salary differential as provided in Section 659.012 of the Code on 9/1/07.

HB 2916 – Effective 9/1/03

Amends Chapter 838, Government Code, by adding Section 838.108 to provide that a member of the Judicial Retirement System Plan Two who has at least 120 months of actual service may purchase up to 60 months of equivalent service credit.

HB 3306 – Effective 6/18/03

Provides that certain appropriations made in support of the courts by the legislature to certain individuals and governmental entities may be reduced or eliminated in order to achieve a balanced budget. *(Note that the judiciary was not singled out in this regard as similar legislation was enacted concerning other state appropriations.)*

SB 828 – Effective 9/1/03

Amends Section 32.101, Government Code, to allow the Commissioners Court of Harris County to budget for and pay the annual supplemental salary paid to district judges without restriction. Reenacts the salary differential as provided in Section 659.012 of the Code on 9/1/07.

Judicial Elections

Two bills, HB 296 and SB 757, may have an impact on judicial elections and persons deciding to run for judicial office. Both bills require that a candidate paying a filing fee to run for office must also gather the names of 50 – 250 persons from each court of appeals district, if running for the state's high courts, or from each county in a judicial district, if running from district court in the state's most populous counties.

HB 296 – Effective 9/1/03

Amends Section 172.021, Election Code, to require a candidate for chief justice or justice of the Supreme Court and a candidate for presiding judge or judge of the court of criminal appeals who chooses to pay the filing fee to also accompany the application with a petition containing a minimum of 50 signatures from each court of appeals district.

HB 1606 – Effective 9/1/03

Amends Section 254.036, Election Code, to provide that a candidate may file paper reports with the Texas Ethics Commission if the candidate files an affidavit stating that computer equipment is not used to maintain the political contribution and expenditure records of the candidate and the candidate does not accept contributions or make expenditures that exceed \$20,000 in a calendar year. Provides that the affidavit must include a statement that the

candidate understands that electronic reports are required if the candidate uses computer equipment to maintain the political records or the candidate exceeds \$20,000 in contributions or expenditures in a calendar year.

HB 1695 – Effective 9/1/03

Amends Section 144.006, Election Code, to increase the filings fees for all candidates for nomination in a general primary election such that in counties with a population greater than 850,000, candidates for a court of appeals must pay \$2,500 and candidates for district or statutory county court judge must pay \$2,500. Provides that in all other counties, candidates for the courts of appeals must pay \$1,875 and candidates for district or statutory county court judge must pay \$1,500. Provides that candidates for constitutional county court judge in a county with a population of 200,000 or more must pay \$1,250, otherwise the fee is \$750. Provides that candidates for justice of the peace in a county with a population of 200,000 or more must pay \$1,000, otherwise the fee is \$375.

HB 2158 – Effective 9/1/03

Amends Chapter 253, Election Code, by adding Section 253.1621 to provide that the general primary election and the general election are considered to be a single election for the purpose of the contribution limits set forth in Sections 253.155, 253.157 or 253.160 and the limits on reimbursements prescribed by Section 253.162 if the candidate is unopposed in the primary election or does not have an opponent in the general election whose name is to appear on the ballot. Provides that such candidates may adjust the applicable contribution limits by 25% for officeholder expenditures.

HB 2496 – Effective 9/1/03

Amends Section 41.007, Election Code, to provide that the general primary election date is the first, rather than the second, Tuesday in March in each even-numbered year. Provides that the runoff primary election is the first, rather than the second, Tuesday in April following the general primary election. Authorizes the secretary of state to modify applicable procedures, dates, and deadlines to implement the changes made by this Act.

HB 2682 – Effective 9/1/03

Amends Chapter 22, Government Code, by adding Sections 22.015, 22.112, and 22.216 to create permanent place designations for appellate court judicial officers such that the chief justice or presiding judge holds Place 1 and the corresponding justices or judges on each court hold the places numbered consecutively beginning with Place 2. Requires each of the 16 appellate courts, by majority vote of its members, to adopt rules establishing a seniority system to determine which office and place is held by each justice serving on the court, and to file the names and place numbers of the justices or judges with the secretary of state and the clerk of the court.

SB 757 – Effective 6/20/03

Amends Section 172.021, Election Code, to clarify that judicial candidates are required to file an Application For A Place On The General Primary Ballot accompanied by

either a filing fee or a Petition in Lieu of a Filing Fee signed by the required number of qualified voters. Clarifies that in Harris, Tarrant, Bexar, and Dallas counties judicial candidates who choose to pay the filing fee must also file a separate Petition For Judicial Office on Primary Ballot with at least 250 signatures, while those judicial candidates who chose to file the petition rather than pay the filing fee must obtain an additional 250 signatures on the Petition In Lieu of a Filing Fee.

Judicial Ethics

Both bills relating to judicial ethics place additional restrictions on the outside affairs of judges. SB 532 makes it a misdemeanor for a judge to solicit or accept a gift or referral fee from an attorney for referring legal business to the attorney. SB 1047 regulates the types of case a constitutional county judge may appear in while engaged in the private practice of law.

SB 532 – Effective 9/1/03

- Amends Chapter 33, Government Code, by adding Subchapter C to provide that a judge commits a Class B misdemeanor if the judge solicits or accepts a gift or referral fee in exchange for referring legal business to an attorney or law firm.
- The bill does not prohibit a judge from soliciting funds for appropriate campaign or officeholder expenses, or from accepting a gift as permitted by Canon 4D, Code of Judicial Conduct. “Judge” does not include a constitutional county judge, a statutory county court judge authorized to practice law, nor a justice of the peace or municipal court judge where the legal business involves a matter that will not come before the judge. It is an affirmative defense that the judge referred legal business that the judge was engaged in but unable to complete before taking the oath of office or that the solicitation occurred prior to taking the oath of office. The Commission on Judicial Conduct may issue a sanction or institute formal proceedings regardless of a criminal prosecution or conviction.
- Requires another judge or attorney who obtains information regarding misconduct to file a complaint with the commission within 30 days to avoid discipline.

SB 1047 – Effective 6/20/03

Amends Chapter 171, Local Government Code, by adding Section 171.010 to provide that a county judge or commissioner engaged in the private practice of law has a substantial interest in a business entity if the official enters a court appearance or signs court pleadings in matters related to that entity, and therefore, must comply with this chapter. Further, a judge of a constitutional county court may not enter a court appearance or sign court pleadings as an attorney in any matter before a court over which the judge presides or exercises appellate jurisdiction. Provides that upon compliance with this chapter, a county judge or

commissioner may practice law in the courts located in the county where the judge serves.

Juries

Two major changes to the jury system occurred during the last legislative session. First, both HB 4 and HB 830 changed either the size of a jury panel or the number of jury members needed to agree on a damages verdict. Second, in response to several high profile cases, the legislature banned the broadcast or recording of jury deliberations.

HB 146 – Effective 9/1/03

Amends Chapter 62, Government Code, by adding Section 62.0125 to provide that prospective jurors may not be summoned to appear on the day of a general election for state or county officers.

HB 830 – Effective 1/1/04 upon passage of HJR 44

Amends Article 33.01, Code of Criminal Procedure, to provide that in a trial involving a misdemeanor offense, a district court jury shall consist of six, rather than twelve, qualified jurors. [HJR 44: *Requires the submission to the voters of a constitutional amendment to permit a six-person jury in a district court misdemeanor trial.*]

HB 2188 – Effective 9/1/03

Amends Chapter 62, Government Code, by adding 62.0111 to provide that prospective jurors may appear in response to a summons by contacting the responsible county officer by computer, by calling an automated telephone system, or by appearing before the court in person and may provide certain information regarding qualifications, exemptions, postponement, excuse from jury service, and jury assignments. Requires the responsible county officer to purge the electronic mail address of a prospective juror no later than the 30 days after the payment for service is sent or the date the court releases the person from jury service.

HB 3070 – Effective 9/1/03

Amends Section 61.001, Government Code, to allow a commissioners court to set different daily reimbursements for grand and petit jurors or different petit jurors based on whether a juror serves in a justice, county, or district court or any other reasonable criteria as determined by the commissioners court.

SB 164 – Effective 9/1/03

Adds Article 36.215, Code of Criminal Procedure and Chapter 24, Civil Practice and Remedies Code, to provide that a person may not use any device to produce or make an audio, visual, or audio-visual broadcast, recording, or photograph of criminal or civil jury deliberations.

SB 737 – Effective 9/1/03

Amends Section 62.106, Government Code, to provide an exemption from jury service for a member of the military forces serving on active duty and deployed to a location

away from the person's home station and out of the person's county of residence.

SB 802 – Effective 9/1/03

Amends Article 19.26, Code of Criminal Procedure, to provide that a court must qualify and impanel no more than two alternate grand jurors to serve on the disqualification or unavailability of a juror during the term of the grand jury. Provides that a juror is considered to be unavailable if the juror is unable to fully participate in the duties of the grand jury due to death or a physical or mental illness.

Open Records/Confidentiality

A number of bills passed this session dealt with information privacy and deterrence of identity theft. A number of these changes may affect clients who handle credit card information or require personally identifying information. SB 235 requires that a person accepting a credit or debit card may only print the last four numbers of the card on any receipt. SB 473 allows a consumer to request a "security alert freeze" on consumer credit files held by credit reporting agencies in cases of identity theft. Finally, SB 611 prohibits the display of a person's social security number on a device required to access a good or service.

HB 13 – Effective 9/1/03

Amends Article 15.26, Code of Criminal Procedure, to provide that an arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information. Requires the clerk to make a copy immediately available for public inspection in the clerk's office.

HB 545 – Effective 9/1/03

Amends Chapter 552, Government Code, by adding Section 552.140 to provide that a military veteran's Department of Defense Form DD-214 or other military discharge record recorded on or after September 1, 2003 is confidential for 75 years with specified exceptions

HB 2032 – Effective 9/1/03

Amends Sections 552.137 and 552.352, Government Code, to provide that an e-mail address of a member of the public is confidential, unless it was provided to a governmental body by a person who has or seeks a contractual relationship with the body, was provided in response to a request for bids or proposals, or was provided on letterhead or other public documents. Provides that a person commits an offense by knowingly using the information for an unrelated purpose, permitting inspection of the information, or disclosing the information to an unauthorized person.

HB 2622 – Effective 9/1/03

Amends Chapter 411, Government Code, by adding Section 411.1386 to provide that the clerk of a county having venue over a proceeding for the appointment of a guardian under Chapter 13 of the Probate Code is entitled to obtain from the Texas Department of Public Safety, criminal history

record information that relates to a private professional guardian, each person who represents or plans to represent the interests of the ward as a guardian on behalf of the private professional guardian, or each person employed by the private professional guardian who will have contact with the ward, exercise control over and manage a ward's estate, or perform any duties with respect to the management of the ward's estate. Provides that such information obtained by the clerk is for the exclusive use of the court and may be used only in determining whether to appoint, remove, or continue the appointment of a private professional guardian. Prohibits the clerk from releasing or disclosing the information to any person or agency except on court order or with the consent of the person who is the subject of the information.

SB 84 – Effective 6/20/03

Amends Section 552.221, Government Code, to provide that the prompt production of public information means as soon as possible under the circumstances, within a reasonable time, and without delay.

SB 174 – Effective 9/1/03

Amends Chapter 552, Government Code, by adding Section 552.141 to provide that the social security number of an individual on a marriage license, application, affidavit, or related document is confidential and may not be disclosed by the county clerk to the public.

SB 235 – Effective 9/1/03

Amends Chapter 35, Business and Commerce Code, by adding Section 35.58 to provide that a person who accepts a credit or debit card for the transaction of business may not print more than the last four digits of the account number or the expiration date. Provides that this section is not applicable to a handwritten receipt or an imprint copy of the card. Prohibits a court from certifying a class action under this section, and allows the attorney general to bring a state action to restrain and enjoin violations and to seek a civil penalty of \$500 for each month in which the violation occurs.

SB 473 – Effective 9/1/03

Amends Chapter 20, Business and Commerce Code, to create requirements for a "security alert freeze" to be placed on consumer credit files held by consumer reporting agencies when the consumer has become a victim of identity theft. Permits the attorney general to file a suit against a person for injunctive relief to prevent or restrain a violation of the chapter or to impose a civil penalty of up to \$2,000 for each violation and to recover reasonable expenses, court costs, investigative costs, and attorney's fees. Amends Chapter 35 of the Code by adding Section 35.58 to create confidentiality requirements regarding the disclosure and use of a person's social security number by a person, other than a government or governmental subdivision or agency. Provides that this section is not applicable to the use of a number for internal verification or administrative purposes, to court records, or to the collection use or release of a social security number as required by state or federal law, including Chapter 552, Government Code.

SB 611 - Effective 3/1/05

Amends Chapter 35, Business & Commerce Code, by adding Section 35.58 to prohibit the display of an individual's social security number on any device required to access products or services. Provides for a civil penalty in an amount not to exceed \$500 for each violation, and exempts the collection, use, or release of a social security number for internal verifications or as required by law.

SB 861 – Effective 9/1/03

Amends Section 552.115, Government Code, by changing the date upon which a person's birth record becomes public information from the 50th anniversary of the date of birth to the 75th anniversary of the date of birth. Provides a qualified exception relating to the microfilming agreement entered into between the Genealogical Society of Utah and the Texas State Library and Archives Commission.

SB 1015 – Effective 6/21/03

Amends Chapter 552, Government Code, by adding Section 552.1325 to provide that the name, social security number, address, telephone number, and any identifying information contained in or submitted in preparation of a victim impact statement is confidential and not subject to disclosure under the Public Information Act.

State Agencies

The “law agencies” of state government successfully underwent sunset review and were extended for 12 additional years. Among the major change to the State Bar Act was a new mandatory \$65 fee that will be assessed on all attorneys and that will be evenly split between indigent criminal defense and civil legal assistance.

HB 599 – Effective 9/1/03

Amends Chapter 81, Government Code, to extend the Sunset Provision for the State Bar to September 1, 2015. Addresses the development of a strategic plan, the grievance process, and general agency administration. Requires that newly appointed board members complete a training program prior to voting, deliberating, or being counted as a member in attendance. Requires that with the exception of a sitting judge, state employee, and certain other specified individuals, active members of the bar pay an additional annual legal services fee of \$65.

HB 1075 – Effective 9/1/03

Amends Chapter 411, Government Code, by adding Section 411.1405 to allow state agencies to obtain criminal history information related to a person who is an employee, applicant for employment, contractor, subcontractor, or intern or other volunteer with the agency and has access to information resources or information resources technologies, other than a desktop computer or telephone station. Requires the agency that obtains such criminal history records to keep the records confidential, to destroy the records when the personnel decision has been made, and to adopt, prior to obtaining criminal history record information, policies that provide that evidence of a

criminal conviction does not automatically disqualify an individual from employment.

HB 2359 – Effective 9/1/03

Amends the Government Code and Insurance Code to clarify and align existing law regarding the Employees Retirement System of Texas. Amends Section 1551.359, Insurance Code, to provide that effective June 1, 2003 a person who is aggrieved by a final decision of the retirement system is entitled to judicial review of the decision in a Travis County district court.

HB 3024 – Effective 6/20/03

Amends Chapter 783, Government Code, by adding Section 783.010 to mandate that a state agency that requires reports of local governments must conduct a zero-based review of reporting requirements imposed on the local governments to simplify and eliminate unnecessary, duplicative, or overly burdensome requirements. Provides that such agencies must make legislative recommendations regarding statutory changes to minimize cost, duplication, and paperwork and to maximize the efficient and effective use of public funds. Provides that a state agency cannot require local governments to submit reports not otherwise required by law, rule, or performance measures.

HB 3208 – Effective 6/20/03

Amends Chapter 814, Government Code, by adding Section 814.1051 to provide that a member of the Texas Employee Retirement System who is eligible to retire and receive a service annuity on or after August 31, 2003, is also eligible for a one-time lump-sum payment equal to 25% of the member's total regular salary for the preceding 12-month period. Provides that to receive the lump-sum payment, a member who is eligible to retire on August 31, 2003, must retire on that date, while a member who is eligible to retire between August 31, 2003 and September 1, 2005, must do so in the first month in which the member becomes eligible. Provides that this section expires January 1, 2006.

SB 266 – Effective 9/1/03

Amends Chapter 82, Government Code, to extend the Sunset Provision for the Board of Law Examiners to September 1, 2015. Addresses board member eligibility and general agency administration, and requires that newly appointed board members complete a training program prior to voting, deliberating, or being counted as a member in attendance.

SB 273 – Effective 9/1/03

Amends Chapter 52, Government Code, to extend the Sunset Provision for the Court Reporters Certification Board to September 1, 2015. Addresses board member eligibility and general agency administration, and requires that newly appointed board members complete a training program prior to voting, deliberating, or being counted as a member in attendance. Administratively attaches the board to the Office of Court Administration. Requires the board to develop and recommend to the Supreme Court a code of ethics for the certification of holders.

SB 279 – Effective 9/1/03

Amends Chapter 57, Government Code, to provide that the licensed court interpreter advisory board is an advisory board of the Texas Commission of Licensing and Regulation, rather than the Texas Department of Licensing and Regulation. Provides that the presiding officer of the commission, with the commission's approval, appoints and removes the membership, rather than the governor.

SB 1418 – Effective 6/22/03

Amends Section 71.012, Government Code, to provide that the ex officio members of the Texas Judicial Council include two members of the senate as appointed by the lieutenant governor, rather than the chair of the Senate Jurisprudence Committee and one member of the senate appointed by the lieutenant governor. Amends Section 71.052 of the Code to provide that one of the ex officio members of the Task Force on Indigent Defense must be a member of the senate as appointed by the lieutenant governor, rather than the chair of the Senate Criminal Justice Committee.

Visiting Judges

HB 3306 modifies the requirements that a judge must possess in order to be appointed a visiting judge. The bill also allows sitting district court to serve on an appellate panel. The bill also effects "strikes" a party may exercise against a visiting judge.

HB 3306 – Effective 6/18/03

- Amends Sections 74.003 and 74.055, Government Code, to provide that to be eligible for assignment in a trial or appellate court, a retired justice or judge must have 96 months of active service in a district, statutory probate, statutory county, or appellate court, with at least 48 of those months in an appellate court for appellate court assignments; not have been removed from office; certify under oath to the chief justice of the supreme court to have never been publicly reprimanded or censured by the State Commission on Judicial Conduct; certify that the justice or judge did not resign or retire from office upon notification by the Commission of the commencement of a full investigation prior to the final disposition, or if the justice or judge did resign from office under those circumstances, certify that the justice or judge was not ultimately publicly reprimanded or censured; annually demonstrate the completion of judicial educational requirements for active justices or judges; and certify to the chief justice a willingness not to appear and plead as an attorney in any Texas court for two years.
- Allows an active district court judge to be assigned to a matter in an appellate court. Provides that the 96-month service requirement does not apply to a retired justice of the supreme court.
- Amends Sections 74.053 and 75.551 of the Code to require that an assignment order state whether the judge is an active, former, or senior judge.

- Provides that for purposes of the one-time objection to an assigned judge granted to each party in a civil suit, "party" includes multiple parties aligned in a case.
- Provides that an assigned judge or justice who was defeated in the last election for which the judge or justice was a candidate for judicial office held by the judge may not sit in a case if either party objects. Provides that an active assigned judge is not subject to an objection.
- Amends Section 74.061 of the Code to provide that, effective 9/1/03, an assigned judge who sits for half of a day or less will be compensated for one-half of the amount that would otherwise be paid for a full day of service, and to provide that a judge assigned to a statutory county court is not entitled to compensation paid by the state.

Miscellaneous

HB 15 – Effective 9/1/03

Amends Title 2, Health and Safety Code, by adding Chapter 171 to create a standard of informed consent for abortions. Requires the disclosure of certain information at least 24 hours before the procedure, and sets forth provisions regarding the publication or distribution of certain information relating to the procedure and to other available services and options.

HB 2415 – Effective 6/20/03

Amends Section 304.003, Finance Code, to provide that the postjudgment interest rate is the prime rate as published by the Federal Reserve Bank of New York on the date of computation, five percent a year if the prime rate is less than five percent, or 15 percent a year if the prime rate is more than 15 percent. (Also in HB 4)

HB 2609 – Effective 9/1/03

Amends Title 7, Health and Safety Code, by adding Chapter 616 to authorize the commissioners court of a county to establish a mental health court program for persons who have been arrested for or charged with a misdemeanor and who are suspected to have a mental illness or mental retardation. Defines the programs essential characteristics and provides that such a program may handle all issues arising under Articles 16.22, 17.032, and 46.02, Code of Criminal Procedure, concerning the examination, transfer, release on bond, and competency of those suspected of having a mental illness. Provides for legislative oversight and allows for the possibility that a participant pay the costs of treatment and services.

HB 2676 – Effective 9/1/03

Amends Section 402.003, Government Code, to remove from the attorney general's reporting requirements a statement regarding the number of indictments found by grand juries in the state and the offenses charged, a statement regarding the number of trials, convictions and acquittals for each offense, a statement of the number of dismissals, and a summary of the judgments rendered on

conviction, the nature and amount of penalties imposed, and the amount of fines collected.

HB 2689 – Effective 6/20/03

Amends Section 953.001 to provide for an exception to the practice of law for acts relating to the lease, purchase, sale, or transfer of a mineral or mining interest in real property.

SB 1047 – Effective 6/20/03

Amends Chapter 572, Government Code, by adding Section 572.059 to provide that a state or local officer acting in a legislative capacity is not subject to disciplinary action or a sanction, penalty, disability, or liability for a lawful action the officer takes regarding a legislative measure, nor for a breach of duty in connection with the member's practice of or employment in a licensed or regulated profession or occupation to disclose or obtain a waiver or consent regarding a legislative measure.

SB 1145 – Effective 9/1/03

Amends Chapter 533, Health and Safety Code, to require the Texas Department of Mental Health and Mental Retardation to adopt rules that prioritize funding for the diversion of persons with mental health or mental retardation from incarceration to appropriate health care treatment including individuals who are in contact with criminal justice system and individuals detained in local jails and juvenile detention facilities. Requires local mental health or mental retardation authorities to collaborate with other local resources, including law enforcement and judicial systems in developing a system, training, or a model program and requires prior approval from the Department before implementation.

SB 1564 – Effective 5/28/03

Amends Chapter 292, Local Government Code, by adding Section 292.0025 to provide that the commissioners court of a county that has a population of 18,000 or less may provide an auxiliary court, office building, or jail facility at a location in the county and within five miles of the boundaries of the county seat. The auxiliary court may be used for holding court proceedings and for storing county documents.