

2009 Legislative Preview

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It's that time again. The Texas Legislature is hard at work proposing bills that affect our law practices. The following is a summary of recently proposed bills by the Texas House of Representatives and Senate that, if passed, will have a significant impact on the practice of law in Texas. Attorneys should pay careful attention to these bills and should contact their local senators and representatives to express their approval or dissatisfaction with these proposed laws.

There are a number of notable bills on various topics, including:

Arbitration: Senate Bill 222, amending Texas Civil Practice & Remedies Code Chapter 171, *available at www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00222I.pdf* (last visited Feb. 25, 2009). This is a comprehensive arbitration bill filed by Senator West, and it proposes significant changes to the current enforceability of arbitration contracts, selection of arbitrators, and review of arbitration awards. The introductory portion highlights problems with the arbitration process as it currently stands, citing the unfairness to consumers who are forced to arbitrate their claims to their substantial detriment. First, section 171.001 would be amended to render void and unenforceable certain arbitration agreements, including agreements to arbitrate (1) disputes between employers and employees; (2) disputes between consumers and business organizations or entities providing goods, property, services, money, or credit; (3) disputes between franchisors and franchisees; and (4) disputes arising under statutes intended to protect civil rights or to regulate transactions between parties of unequal bargaining power. Next, the bill attempts to alter the *Prima Paint* rule, which requires arbitrators to determine the validity of an arbitration agreement when the complaining party challenges the validity of other portions of the contract. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967); *Forrest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008) (arguments regarding enforceability of arbitration provision are decided by court, while arguments relating to enforceability of the entire contract go to the arbitrator). Specifically, the bill states that: "Except as otherwise provided by this chapter, the validity or enforceability of an arbitration agreement shall be determined by a court, rather than the arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing the agreement." The senate bill also provides that: (1) absent knowing waiver, a court order compelling arbitration may not violate constitutionally-protected rights; (2) an arbitrator must satisfy objective qualification standards that consider education, training, and experience; (3) an arbitration hearing may not proceed in the absence of notice or waiver of notice; and (4) a party is entitled to obtain a stenographic recording of an arbitration hearing. Perhaps most significantly, the bill proposes that an arbitration award be vacated if it violates public policy or manifestly disregards the law, and that a party may appeal a court judgment or decree granting an application to compel arbitration, which are significant changes to the current law.

Damages in Auto Accident Cases: Senate Bill 42, adding Chapter 92 to the Texas Civil Practice and Remedies Code, *available at www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00042I.pdf* (last visited Feb. 25, 2009). This is a proposal by Representative Corte that would preclude a party from recovering noneconomic or punitive damages arising from an automobile accident if they were operating their vehicle without insurance. [Noneconomic damages are defined in Chapter 41 of the Civil Practice and Remedies code and include "damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages." *See Tex. Civ. Prac. & Rem. Code 41.001(12)* (Vernon 2008)]. The only exceptions are claims in which the person seeking damages was injured by (1) a person who was operating his or her vehicle while intoxicated and was convicted for the offense, or (2) a another person's willful act or omission or gross neglect.

Discovery in Medical Malpractice Cases: Senate Bill 153, amending section 74.351 of the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00153I.pdf (last visited Feb. 25, 2009). Senator Ellis proposes to enlarge the scope of discovery permitted in a medical malpractice case before the claimant's expert report is filed. Currently, only written discovery, depositions on written questions, and discovery from non-parties is permitted. This bill would expand discovery to include oral depositions of the parties.

Discovery Related to Pleas to the Jurisdiction under the Texas Tort Claims Act: House Bill 291, adding section 101.110 to the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00291I.pdf (last visited Feb. 25, 2009). Representative Dutton proposed this bill, which directs the Supreme Court to adopt rules allowing a claimant to conduct discovery related to the merits of a plea to the jurisdiction.

Election of Appellate Judges Altered to Gubernatorial Appointment followed by Non-partisan Retention Election: Senate Bill 782, amending the Texas Government Code and Texas Election Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00782I.pdf (last visited Feb. 25, 2009). This legislation, introduced by Senator Duncan, would transform the current partisan election of all appellate judges (including the Supreme Court and Court of Criminal Appeals) into a non-partisan system, where vacancies are filled by the Governor and confirmed by the Senate. Each appointee will then stand for a "retention election" every 6 years. A justice will be retained if he or she receives a majority vote in favor of retention. Appellate justices' names will be placed at the end of the ballot, and because they are non-partisan, voters will not be able to vote to retain a judge by voting straight ticket. The legislation is accompanied by a proposed constitutional amendment to allow appointments and retention elections.

Eminent Domain: House Bill 4, amending Chapter 2206 of the Texas Government Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00004I.pdf (last visited Feb. 25, 2009). This bill, filed by Representative Orr, makes substantial revisions to the law of eminent domain. Each of the proposed changes seem targeted toward expanding the transparency of the process, including (1) requiring the governmental entity to hold a public meeting and vote on the use of eminent domain prior to initiating an eminent domain proceeding; and (2) requiring the governmental entity to include in its original offer to purchase an estimate of the property value, an estimate of the damage to the property, if any, that will result from the acquisition, and a notice that the property owner has a right to request an appraisal at the governmental entity's expense and information relating to transactions involving surrounding properties.

Governmental Immunity and Liability under the Texas Tort Claims Act:

Easements: House Bill 859, amending Chapter 101 of the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00859I.pdf (last visited Feb. 25, 2009). This is a bill filed by Representative Laubenberg which expands the tort claims act's waiver of immunity to include claims for property damage caused by a governmental entity's use or access to its easement to property other than to property included within the easement.

Negligence: House Bill 933, amending section 101.021 of the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00933I.pdf (last visited Feb. 25, 2009). This bill, offered by Representative Dutton, radically alters the scope of the Tort Claims Act's waiver of immunity and imposition of liability. Currently, a governmental entity is liable for (1) property damage, personal injury, or death caused by the operation or use of motor-driven equipment, or (2) personal injury or death caused by a use or condition of tangible or real property. This bill alters the government's liability for personal injury or death, deleting the requirement that such injury or death be caused by the use or condition of real property. In its place, the bill proposes to hold the government liable for personal injury or death arising from the governmental entity's negligence.

Indemnity Agreements in Construction Contracts: Senate Bill 555, adding Chapter 502 to the Civil Practice and Remedies Code, relating to indemnity agreements within certain construction contracts,

available at www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00555I.pdf (last visited Feb. 25, 2009). Senator Duncan proposes to ban indemnity or insuring agreements in construction contracts if they call for the indemnitor to indemnify the indemnitee for the indemnitee's own negligence. Senator Duncan would also ban contracts that require a party to add another party as an additional insured to the extent that such agreement would exceed the scope of indemnity allowed under the Chapter. Representative Eiland has filed a companion bill, HB 818, in the house. See www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00818I.pdf (last visited Feb. 25, 2009).

Juror Questions and Note-Taking: Senate Bill 445, adding Chapter 25 to the Civil Practice and Remedies Code, relating to submission of questions to witnesses and note-taking by the jury, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00445I.pdf (last visited Feb. 25, 2009). This bill was proposed by Senator Wentworth. It requires the Texas Supreme Court to establish rules governing the submission of jury questions to witnesses and note-taking by jurors. While leaving the use of jury questioning and note-taking to the discretion of the Judge, the bill offers a standardized procedure for their use. Significantly, the bill requires the rules to allow jurors to submit questions to witnesses, and it provides attorneys the right to cross-examine witnesses on their answers to questions. It also provides that a witness may be re-called in order to answer a jury question, imposing a burden on litigants to keep their witnesses, and importantly their expert witnesses, available throughout the entire trial. The Texas Supreme Court Rules Advisory Committee has been working to develop these rules. A proposed draft of the rules was submitted to the Committee at its February 20, 2009 meeting. See www.supreme.courts.state.tx.us/rules/pdf/SCAC_Draft_TRCP265.1.pdf (last visited Feb. 25, 2009) (juror questions); www.supreme.courts.state.tx.us/rules/pdf/SCAC_revised_226a_order.pdf (last visited Feb. 25, 2009) (juror note-taking); www.supreme.courts.state.tx.us/rules/pdf/SCAC_Proposed_TRE606.pdf (last visited Feb. 25, 2009) (juror note-taking). The committee's progress can be monitored at www.supreme.courts.state.tx.us/rules/rules.asp#committee (last visited Feb. 25, 2009) or by contacting Kennon Peterson, the Texas Supreme Court Rules Attorney. Attorneys can also sign up for e-mail updates on the Rules Advisory Committee and the Texas Supreme Court's orders and opinions by e-mailing the Texas Supreme Court's staff attorney for public information, Osler.McCarthy@courts.state.tx.us, and requesting they be added to the e-mail list.

Medical Malpractice: Senate Bill 152, amending section 74.153 of the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00152I.pdf (last visited Feb. 25, 2009). This bill, filed by Senator Ellis, modifies the current ER standard of care. It makes two key changes. The first is to change the "willful and wanton" negligence standard applicable to such claims to "willful or wanton" negligence. Second, it excludes those physicians or entities who regularly practice emergency room medicine from this proposal. Presumably, they would fall back into the general negligence standard of proof applicable to all other physicians.

Property Owners' Liability: House Bill 1288, amending Chapter 95 of the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB01288I.pdf (last visited Feb. 25, 2009). This bill, proposed by Representative Eiland, is an effort to significantly change the liability standard relating to property owners under Chapter 95 of the Civil Practices and Remedies Code. It makes two primary modifications. As a preliminary matter, it limits the scope of the term "improvement to real property" to only those structures "permanently affixed or incorporated into real property." (This could have the impact of removing injuries on oil or gas drilling rigs/sites from the application of Chapter 95.) The second and most significant change, however, is the redefining of a property owner's liability. Under the proposed amendment, the requirement that a property owner have actual knowledge of the defect is expanded to those defects created by an owner of which the owner has actual or *constructive* knowledge. Coupled with this change is a revision to the second component of liability which currently holds the property owner liable only if he failed to adequately warn to liability for a failure to "correct" or "adequately warn." This appears to significantly limit the application of Chapter 95, and even when it will apply, it makes the new liability standard substantially similar to that already imposed under common law.

Protection of Children

Common Nuisance: House Bill 123, amending section 125.0015 of the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00123I.pdf (last visited Feb. 25, 2009). This bill, by Representative Jackson, adds sexually oriented businesses that employ, authorize, or induce children to work to the list of those businesses or activities which constitute a "common nuisance."

Unsafe Children's Products: House Bill 217, amending Chapter 762 of the Texas Health and Safety Code and Chapter 42 of the Texas Human Resources Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00217I.pdf (last visited Feb. 25, 2009). This bill was filed by Representative Menedez and relates to liability for the use of "unsafe children's products" by a child-care facility. The bill sets out a set of presumptions which make a product "unsafe," directs the Texas Department of State Health Services to compile a list of such products, and then sets out a \$1000 per day penalty for each child-care facility which has such unsafe products in use.

Loss of Consortium: House Bill 514, adding Chapter 94 to the Texas Civil Practice and Remedies Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00514I.pdf (last visited Feb. 25, 2009). This bill, offered by Representative Vaught, sets a list of criminal conduct involving injury to a child which will allow a parent to recover loss of consortium.

Texas Supreme Court Voting: Senate Bill 780, adding section 22.0071 to the Texas Government Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00780I.pdf (last visited Feb. 25, 2001). Senator Watson proposed this bill, which would require the Supreme Court to disclose how each member of the court voted on any order relating to a petition of review.

Workers' Compensation: House Bill 520, amending Chapter 406 of the Texas Labor Code, *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB00520I.pdf (last visited Feb. 25, 2001). This bill was filed by Representative Giddings, and it addresses a modification to the workers' compensation statute's a definition of "general contractor." This is a "legislative fix" to the Texas Supreme Court's opinion in *Entergy Gulf States, Inc. v. Summers*, No. 05-0272, 2007 WL 2458027 (Tex. Aug. 31, 2007), in which the court held that because "the Labor Code's definition of 'general contractor' does not prohibit a premises owner who 'undertakes to procure the performance of work or a service' from also being a general contractor," the property owner could invoke the "exclusive remedy" defense. The proposed legislation would redefine "general contractor" to include only those who undertake to procure the performance of work or a service "for the benefit of another," thus eliminating a property owner who procures work or services on his own behalf from the definition of general contractor.