

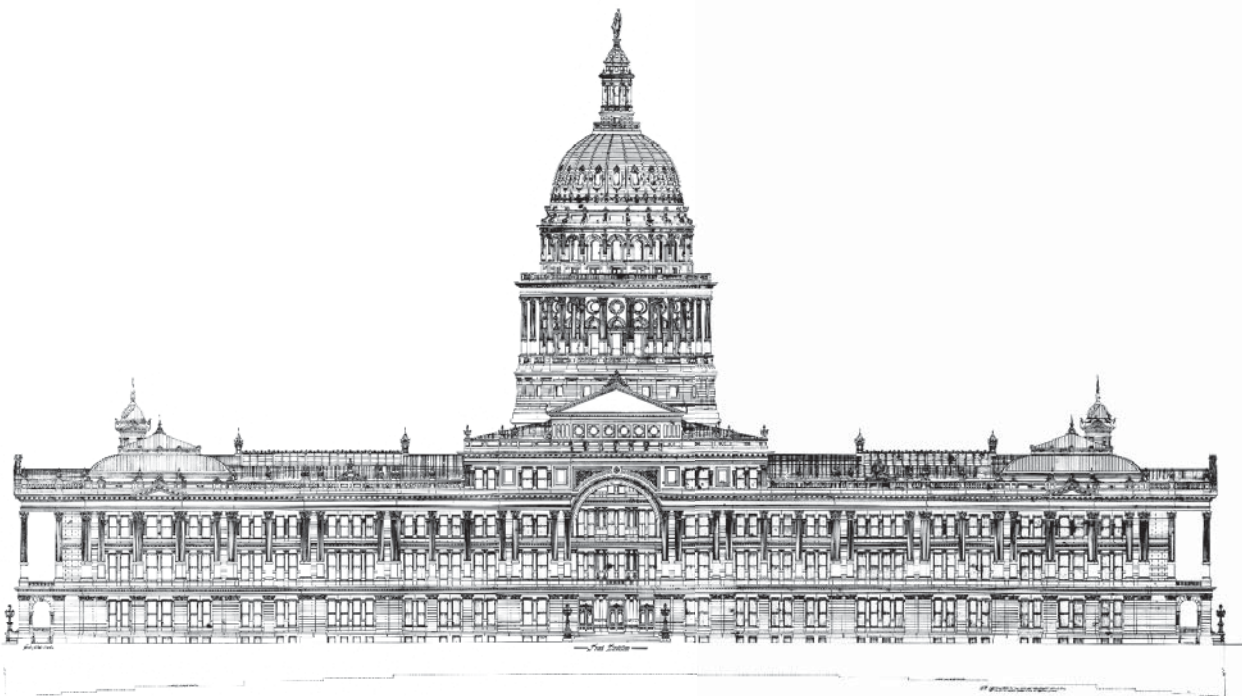


INTERIM REPORT

TO THE

82ND TEXAS LEGISLATURE

House Committee on
JUDICIARY AND CIVIL JURISPRUDENCE
December 2010



**HOUSE COMMITTEE ON JUDICIARY AND CIVIL JURISPRUDENCE
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2010**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
82ND TEXAS LEGISLATURE**

**TODD HUNTER
CHAIRMAN**

**COMMITTEE CLERK
JENNIFER WELCH**



Committee On
Judiciary and Civil Jurisprudence

December 7, 2010

Todd Hunter
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Judiciary and Civil Jurisprudence of the Eighty-first Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-second Legislature.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd Hunter", written over a horizontal line.

Todd Hunter

A handwritten signature in black ink, appearing to read "Bryan Hughes", written over a horizontal line.

Bryan Hughes

A handwritten signature in black ink, appearing to read "Dan Branch", written over a horizontal line.

Dan Branch

A handwritten signature in black ink, appearing to read "Jim Jackson", written over a horizontal line.

Jim Jackson

A handwritten signature in black ink, appearing to read "Tryon D. Lewis", written over a horizontal line.

Tryon D. Lewis

A handwritten signature in black ink, appearing to read "Armando 'Mando' Martinez", written over a horizontal line.

Armando "Mando" Martinez

A handwritten signature in black ink, appearing to read "Roberto R. Alonzo", written over a horizontal line.

Roberto R. Alonzo

A handwritten signature in black ink, appearing to read "Will Hartnett", written over a horizontal line.

Will Hartnett

David Leibowitz

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Jerry Madden

A handwritten signature in black ink, appearing to read "Beverly Woolley", written over a horizontal line.

Beverly Woolley

Bryan Hughes
Vice-Chairman

Members: Roberto R. Alonzo, Dan Branch, Will Hartnett, Jim Jackson, David Leibowitz, Tryon D. Lewis, Jerry Madden, Armando "Mando" Martinez, Beverly Woolley

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INTRODUCTION

At the beginning of the 81st Legislature, the Honorable Joe Straus, Speaker of the Texas House of Representatives, merged two standing committees of the Texas House (Civil Practices and Judicial Affairs) to create the House Committee on Judiciary and Civil Jurisprudence. Previously, the House Committee on Judicial Affairs had legislative jurisdiction over the State of Texas' court systems including the Supreme Court of Texas and the Texas Court of Criminal Appeals. The House Committee on Civil Practices had legislative jurisdiction over all non-criminal legal proceedings, including bills affecting liability in a civil suit, court structures, and the appellate process. The new House Committee on Judiciary and Civil Jurisprudence was given the combined responsibilities of the two previous committees. Additionally, the Judiciary and Civil Jurisprudence committee was given legislative jurisdiction over family law matters such as divorce, child support and domestic violence as well as juvenile, probate and guardianship matters.

Speaker Straus appointed 11 members to the House Committee on Judiciary and Civil Jurisprudence: Todd Hunter, Chair; Bryan Hughes, Vice-Chair; Roberto R. Alonzo; Dan Branch; Will Hartnett; Jim Jackson; David Leibowitz, Tryon Lewis; Jerry Madden, Armando "Mando" Martinez; and Beverly Woolley.

The House Rules adopted by the 81st Legislature as House Resolution 2 on January 28, 2009, give the House Committee on Judiciary and Civil Jurisprudence its jurisdiction. Rule 3, Section 19 reads as follows:

Section 19. Judiciary and Civil Jurisprudence — The committee shall have 11 members, with jurisdiction over all matters pertaining to:

- 1) fines and penalties arising under civil laws;
- 2) civil law, including rights, duties, remedies, and procedures thereunder, and including probate and guardianship matters;
- 3) civil procedure in the courts of Texas;
- 4) administrative law and the adjudication of rights by administrative agencies;
- 5) permission to sue the state;
- 6) civil law as it relates to familial relationships, including rights, duties, remedies, and procedures thereunder;
- 7) uniform state laws;
- 8) creating, changing, or otherwise affecting courts of judicial districts of the state;
- 9) establishing districts for the election of judicial officers;
- 10) the State Commission on Judicial Conduct;
- 11) the Office of the Attorney General, including its organization, powers, functions, and responsibilities;
- 12) courts and court procedures except where jurisdiction is specifically granted to some other standing committee; and
- 13) the following state agencies: the Supreme Court, the Courts of Appeals, the Court of Criminal Appeals, the State Commission on Judicial Conduct, the Office of Court

Administration of the Texas Judicial System, the State Law Library, the Texas Judicial Council, the Guardianship Certification Board, the Office of the Attorney General, the Court Reporters Certification Board, the Board of Law Examiners, the State Bar of Texas, and the State Office of Administrative Hearings.

HOUSE COMMITTEE ON JUDICIARY AND CIVIL JURISPRUDENCE

INTERIM STUDY CHARGES

- CHARGE 1: Study current barratry laws in Texas and make recommendations as to their adequacy in protecting citizens from unscrupulous behavior.
- CHARGE 2: Study and make recommendations regarding the use of arbitration in Texas and the effect such practices have on state jurisprudence.
- CHARGE 3: Review the burden of proof and damage calculation models for certain causes of action to determine appropriate applicability in Texas law.
- CHARGE 4: Study and report on third-party liability issues involving workers' compensation, including the frequency and success rates of third-party litigation, the relationship, if any, between third-party litigation and jobsite safety, the adequacy of compensation and reimbursement to workers, and the economic costs of third-party litigation and equitable and contractual subrogation in construction activities. *Joint Interim Charge with House Committee on Business and Industry*
- CHARGE 5: Study the human and sex trafficking problem in Texas. Make recommendations on best practices in the areas of investigation, prosecution, and tracking of the victims of these crimes. Study whether victims of these crimes are allowed to adequately recover from their attackers in a civil cause of action. *Joint Interim Charge with House Committee on Criminal Jurisprudence*
- CHARGE 6: Review the Texas campaign finance law in judicial races in light of the recent United States Supreme Court decision *Caperton v. Massey*. *Joint Interim Charge with House Committee on Elections*
- CHARGE 7: Monitor the agencies and programs under the committee's jurisdiction.

CHARGE 1

Study current barratry laws in Texas and make recommendations as to their adequacy in protecting citizens from unscrupulous behavior.

SUMMARY OF COMMITTEE ACTION CHARGE 1

Charge 1 - Study current barratry laws in Texas and make recommendations as to their adequacy in protecting citizens from unscrupulous behavior.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence met in a scheduled public hearing on Wednesday, May 26, 2010 at 10:15 A.M. in Room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

William "Bill" Edwards (Self)
Hugh Rice Kelly (Texans for Lawsuit Reform)
Mark Kincaid (Texas Trial Lawyer Association)
Steve Mostyn (Texas Trial Lawyers Association)
Lee Parsley (Texas Civil Justice League)
James Popp (Self)

Summary of Committee Hearing

During the 81st Legislative Session, legislation was filed that sought to codify fee forfeiture as a civil remedy for barratry. The legislation (HB 3915) was filed and had a committee hearing. Subsequently, the Committee was charged with the task of investigating the adequacy of current barratry laws in Texas during the interim. During an interim hearing held on May 26, witnesses from varying sides of the issue voiced their opinions on a civil remedy for barratry. One resource witness provided the Committee with information regarding the problem of barratry in general. In the months following the hearing, some members of the Committee also participated in a working group to discuss the issue and possible solutions further.

During the interim hearing, testimony asserted that barratry is currently a cause of action in common law and the legislation (HB 3915) would have only served to structure the recovery mechanism. Other testimony presented fee forfeiture as a new solution to the problem of prosecuting attorneys for barratry offenses and offered examples of specific cases to describe the inadequacies of the State Bar of Texas' existing complaint process. Furthermore, it was argued that a civil cause of action would allow for depositions which could be an important tool in gathering the information necessary to successfully prosecute a criminal case.

Other witnesses advocated specific reforms to improve and supplement current barratry laws. These reforms included the passage of legislation authorizing private causes of action for violations of the Texas Disciplinary Rules of Professional Conduct as well as the direct and exclusive control of lawyer discipline by the Texas Supreme Court. Barratry was described as a

statewide problem that should be appropriately addressed by a statewide office with both civil and criminal jurisdiction. The creation of a Special Prosecutorial Office within the Office of the Texas Attorney General was also recommended.

Some advocated broadening the barratry bill to make it apply to all types of lawyers. Others recommended focusing the scope of legislation to avoid creating a potential weapon against good lawyers.

Some expressed concern over creating a civil remedy for barratry stating the belief that allowing people who have suffered no harm to collect damages can lead to a troublesome expansion of mental anguish claims. They argued for the enforcement of current barratry laws, under which barratry is a felony, through district attorneys and the State Bar of Texas.

Barratry Working Group

A barratry working group led by Representative Jim Jackson spent time further studying the issue for the committee. A synopsis of the working group's findings is located in **Appendix A**.

CHARGE 2

Study and make recommendations regarding the use of arbitration in Texas and the effect such practices have on state jurisprudence.

SUMMARY OF COMMITTEE ACTION CHARGE 2

Charge 2 - Study and make recommendations regarding the use of arbitration in Texas and the effect such practices have on state jurisprudence.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence met in a scheduled public hearing on Wednesday, January 27, 2010 at 10:00 A.M. in Room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

William Allensworth
Kim Bernard Battaglini (Texas Association of Defense Counsel)
Deeia Beck (Office of Public Insurance Council)
Pamela Bolton (Texas Watch)
John K. Boyce III (State Bar ADR Section)
John Fleming
Mark Kincaid (Texas Trial Lawyers Association)
Steve Mostyn (Texas Trial Lawyers Association)
Robert Parker (Associated Builders and Contractors of Texas and Repcon, Inc.)
Lee Parsley (Texans for Lawsuit Reform)
David Peden (AGC TBB)
Mike Schless

Summary of Committee Hearing

The Committee was charged with studying arbitration laws in Texas. During an interim hearing held on January 27, witnesses from a variety of professions testified on the subject. Following the hearing some members of the Committee also participated in a working group to discuss the issue and possible solutions further.

Several witnesses argued the numerous benefits of arbitration as an alternative form of dispute resolution. They described the process as expert-driven, which is greatly beneficial in complicated disputes, such as homeowner's claims, which profit from an arbitrator's experience with the evidence. In addition, they argued that arbitration is less expensive, more predictable, and more expeditious than trials, which can be lengthy and volatile.

However, other witnesses stressed that the Texas Arbitration Act was not intended to circumvent the right to a jury trial or to compel arbitration. Also, some witnesses advocated for the application of the State Bar of Texas' Fair Practice Guidelines to pre-dispute agreements

between businesses and consumers. They believe these guidelines provide adequate safeguards so that arbitration can also offer consumers fast and fair resolutions of their disputes.

Other witnesses strongly opposed arbitration involving businesses and consumers and indicated several problems that arise from this type of arbitration. It was argued that arbitration can become cost-prohibitive for consumers, especially if the damages are not high enough to cover attorney's fees. Additionally, arbitrators can show bias toward businesses that often require their services, whereas consumers most likely do not offer the same level of patronage. This issue can be addressed by allowing consumers access to information about arbitration service providers. It was also stated that arbitration can also infringe upon certain legal rights, as arbitration clauses often preclude consumers from joining class action lawsuits, assessing attorney's fees and collecting punitive damages. When numerous consumers have small claims against a company that do not outweigh costs incurred during the process, their inability to join a class action suit can prevent the accountability of a business. In addition, arbitration clauses allow the adverse party to decide the method of dispute resolution in advance, while consumers are not as well-advised prior to the dispute.

Witnesses voiced other concerns about the inherently secretive nature of arbitration and the qualifications of arbitrators. The lack of public record does not allow for the creation of precedents for companies to follow which potentially allows for inconsistent decisions in similar cases. Furthermore, it precludes certain safeguards, such as judicial opinion, which is subject to scrutiny. Another issue described is a lack of objective standards by which arbitrators' qualifications can be measured. There is no guarantee that particular arbitrators possess the expertise to make decisions regarding specific areas.

Arbitration Working Group

An arbitration working group led by Rep. Jim Jackson spent time further studying the issue for the committee. A synopsis of the working group's findings is located in **Appendix B**.

CHARGE 3

Review the burden of proof and damage calculation models for certain causes of action to determine appropriate applicability in Texas law.

SUMMARY OF COMMITTEE ACTION CHARGE 3

Charge 3 - Review the burden of proof and damage calculation models for certain causes of action to determine appropriate applicability in Texas law.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence met in a scheduled public hearing on Thursday, March 25, 2010 at 10:15 A.M. in Room E2.010, Texas State Capitol.

Paid or Incurred

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Jay Harvey/Steve Mostyn (Texas Trial Lawyers Association)
Lee Parsley (Texans for Lawsuit Reform)
Mike Hull (Texas Alliance for Patient Access)
George Christian (Texas Civil Justice League)
Pam Bolton (Texas Watch)
Dan Worthington (Texas Association of Defense Council)
Beamen Floyd (Self)
Joe Woods (Self)

Summary of Committee Hearing

During the 81st Legislative Session, companion bills filed in both the House and Senate would have changed the current “Paid or Incurred” provision which passed in 2003 as part of the Omnibus Tort Reform Act. The current provision allows plaintiffs to recover healthcare expenses as economic damages including all out-of-pocket medical expenses paid by the plaintiff, all medical expenses paid by a third party on behalf of the plaintiff, all amounts of a medical provider’s bill that are owed by or on behalf of the plaintiff and all estimated future medical expenses. The proposed change would have allowed plaintiffs to recover the full amount of incurred medical expenses, as opposed to only the expenses actually paid or owed.

During the interim hearing held on March 25, several witnesses contended that the “Paid or Incurred” statute does not prevent the collection of future damages. In addition, they asserted that certain medical providers bill expenses at rates that they do not expect to collect and they allegedly maintain different payment rates for different insurance carriers. Some were strongly opposed to the awarding of “phantom damages” that are not actually paid or owed by anyone and are merely a peculiarity of modern medical billing practices.

Opponents of the current “Paid or Incurred” statute claim it is flawed and inconsistent, erodes the role of juries in our civil justice system and benefits the wrong parties. Some claim that the statute is not uniformly applied in all districts as current interpretations vary. They also assert that allowing statute to determine the value of a service instead of juries erodes the role of juries in our civil justice system.

Others who testified voiced concerns with ensuring that health insurance policyholders are treated fairly. They contended that policyholders should be the only group to benefit from negotiated costs since they pay for insurance in the first place. Furthermore, parties without insurance should not benefit from the negotiated rates established by the injured party’s insurance.

Witnesses also argued for consistent “reasonable costs” of medical services, regardless of the rates negotiated by insurance companies. Some from the insurance sector argued the importance of knowing the “real” value of claims, as that information is necessary in order to make their claimants whole, to maintain their statutory duty to retain solvency, and to have the ability to price products in the marketplace accurately.

Lyme Disease

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Pat Ricks (Texas Lyme Disease Association)
Dr. Robert Kaspar (Dept. of State Health Services)
Dr. Phillip Williamson (Director of Tick Research in UNTHSC, Ft. Worth)
Teresa Jones (Austin area patient, President of Austin Lyme Support Group)
Charles Gordon
Jane Webb
John Quinn (Dallas area patient)
Dr. David Kocurek (Dallas area patient)
Dave Claunch

Summary of Committee Hearing

During the 81st Legislative Session, legislators were approached by constituents about issues involving the quality of care of patients in Texas who have been stricken with Lyme Disease. The committee heard testimony during its interim hearing on March 25 from patients and family members who have been personally affected by Lyme disease or a Lyme-like illness. Resource testimony was also received from medical experts.

Witnesses identified several issues with the diagnosis, reporting, and treatment of Lyme disease and other tick-borne diseases in Texas. Testimony was provided that the current diagnostic tests are designed to determine the presence of only one particular type of bacteria, *Borrelia burgdorferi*, which is transmitted by the Deer Tick. However, the Lone Star Tick,

which carries a similar strain of bacteria, is believed to be responsible for most cases of Lyme disease in this State. Furthermore, there are at least five other tick-borne diseases, which are sometimes all referred to as Lyme disease, but all are the result of different types of bacteria. Unless a patient is tested for the particular strain of bacteria they carry, the test will provide a false negative.

Other witnesses described the difficulty of diagnosing Lyme disease as it can affect any part of the body, may or may not be present with the tell-tale “bull’s-eye” rash, can mimic many other diseases and can be accompanied by a variety symptoms. In addition to these complicating factors, the Center for Disease Control’s (CDC) risk assessment for Lyme disease, which is based on the presence of Deer Ticks, is very low for Texas. As a result, doctors throughout the State are not given information that suggests Lyme disease is a probable cause of symptoms, so other illnesses seem to fit the wide spectrum of symptoms more readily. Witnesses recall a variety of diagnoses including Bipolar Disorder, Influenza, “growing pains,” Fibromyalgia, and Chronic Fatigue Syndrome.

Most of the witnesses claim that they encountered numerous obstacles to receiving treatment for Lyme disease in Texas. The most prominent issues include trouble receiving quick antibiotic treatments for acute Lyme and difficulties with having doctors consider chronic Lyme to be a likely diagnosis. Many have traveled to New England, California, Colorado, or Missouri to find a “Lyme-literate” doctor, who will treat their diseases appropriately. Witnesses also contend that Lyme has become increasingly controversial in the medical community and those willing to treat Lyme with long-term antibiotics allege they have been ostracized or pressured by the Texas Medical Board.

Some witnesses claim the number of Texas cases reported to the Center for Disease Control is at least ten times lower than in reality because many cases do not qualify under the current guidelines and reporting is not enforceable. After gathering enough data from ticks sent in for genetic testing, the University of Texas at Austin and the University of Texas at Denton have collaborated with the University of North Texas Health Science Center to create risk models that accurately represent the number of cases of Lyme. These models do not coincide with the CDC’s risk models for Texas.

Suggestions of areas for the Legislature to address include creating more awareness, supporting better testing, and structuring some protections for doctors. Awareness among the general public and awareness among state agencies will help gain recognition for the problem. Also, it was suggested that support for better testing is necessary as the widely-accepted Western Blot test produces too many false negatives. Also, ideas were suggested that would be helpful in allowing physicians the freedom to diagnose and treat patients as they see fit.

Mesothelioma

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Bryan Blevins (Texas Trial Lawyers Association)
Jeffrey Simon (Texas Trial Lawyers Association)
Scott Brister (Texans for Lawsuit Reform | Texas Civil Justice League)

Kay Andrews (Texans for Lawsuit Reform | Texas Civil Justice League)
Charles Siegal (Texas Trial Lawyers Association)
Gary Elliston (Texans for Lawsuit Reform | Texas Civil Justice League)

Summary of Committee Hearing

During the 81st Legislative Session, House Bill 1811 and its companion Senate Bill 1123 endeavored to establish the *Lohrmann* decision, which requires plaintiffs to prove frequent, proximate, and regular exposure to asbestos-related products, as the standard of causation in claims involving mesothelioma caused by exposure to asbestos fibers. However, the House Committee on Judiciary and Civil Jurisprudence did not report it out of committee after public testimony. The *Borg-Warner* decision frames the current evidentiary standard of causation and requires claimants to prove exposure to a sufficient amount of a particular defendant's asbestos-containing product to cause mesothelioma.

During the interim hearing, witnesses who testified in support of the *Lohrmann* standard expressed concern to the committee that the current burden of proof established by the *Borg-Warner* decision shifts the balance in asbestos-related mesothelioma cases to favor the defendants. They contended that the standard is inherently unfair, as it is nearly impossible for some plaintiffs to accurately quantify their relative exposures to particular brands of asbestos-containing products. These witnesses also asserted that there is no safe threshold for asbestos exposure, as any dose can cause mesothelioma. Furthermore, they cited asbestos exposure as the only established cause of mesothelioma currently; therefore, they claimed anyone who has contracted the disease has a tort.

Supporters of the *Borg-Warner* standard argued that it simply integrates reliable scientific evidence, that it's fair to mesothelioma plaintiffs and it holds asbestos-related mesothelioma cases to the same standards applied in all other toxic tort cases. The current law ensures that those affected by asbestos exposure are compensated in a timely manner and it applies reasonable, scientific evidence standards to hold defendants responsible. Meanwhile, *Borg-Warner* offers innocent defendants an opportunity to extricate themselves from suits in a timely manner. Witnesses stated that the court, which currently handles most of the mesothelioma cases in the state, is efficient and predictable thus providing plaintiffs with legitimate claims in an expeditious path to a resolution.

Some witnesses state that the *Lohrmann* standard was an early effort to address and dismiss baseless cases and it was not introduced as a tool to address the scientific merit of a case or to justify recovery for any plaintiff able to meet its standards. Others also asserted that the criteria of the *Lohrmann* standard are too vague as the definitions of "frequent," "proximate," and "regular" are more subjective than scientific studies. Because of this subjectivity, it was suggested that the *Lohrmann* standard is potentially more difficult to meet than the *Borg-Warner* standard. Some also claim that the limited scope of the proposed exemption for mesothelioma would be unjustified and lead to aggressive and costly lawsuits for defendants due to the lack of an appropriate standard of causation. Other arguments against the *Lohrmann* standard included the contention that not all forms of asbestos are equally carcinogenic, however the *Lohrmann* standard indicates that any level of exposure to any asbestos-related product is enough to recover damages.

CHARGE 4

Study and report on third-party liability issues involving workers' compensation, including the frequency and success rates of third-party litigation, the relationship, if any, between third-party litigation and jobsite safety, the adequacy of compensation and reimbursement to workers, and the economic costs of third-party litigation and equitable and contractual subrogation in construction activities. *Joint Interim Charge with House Committee on Business and Industry.*

SUMMARY OF COMMITTEE ACTION CHARGE 4

Charge 4 - Study and report on third-party liability issues involving workers' compensation, including the frequency and success rates of third-party litigation, the relationship, if any, between third-party litigation and jobsite safety, the adequacy of compensation and reimbursement to workers, and the economic costs of third-party litigation and equitable and contractual subrogation in construction activities.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence met in a scheduled hearing on July 29, 2010 at 10 AM.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Pamela Bolton (Texas Watch)
Rod Bordelon (Texas Department of Insurance, Division of Workers' Compensation)
Michael Cunningham (Texas State Building and Construction Trades Council)
Cathy De Witt (Texas Association of Business)
Mike Hull (Texans for Lawsuit Reform)
Rene Lara (Texas AFL-CIO)
Amy Lee (Texas Department of Insurance, Division of Workers' Compensation)
Craig McDonald (Texans for Public Justice)
Ned Munoz (Texas Association of Builders)
Robert Parker (Repron, Inc., Associated Builders & Contractors of Texas)
Cyrus Reed (Sierra Club, Lone Star Chapter)
Nelson Roach (Texas Trial Lawyers Association)
Michael Sprain (Sprain Law Firm, P.C./John Summers)
John Eddie Williams (Texas Trial Lawyers Association)

Summary of Committee Hearing

Since 1913 Texas businesses have been offering workers' compensation for employees; however Texas is the only state that does not require all employers to carry workers' compensation insurance. Workers' compensation provides a no-fault bargaining system that allows employees injured on the job to be compensated for both medical care and a percentage of lost income due to injury. Employers maintain immunity from lawsuits filed by injured employees as well as from other civil remedies including punitive damages, compensatory damages and loss of wage earning capacity.

In 2007, *John Summers v. Entergy Gulf States* came before the Texas Supreme Court. The Texas Supreme Court opined that due to changes to the definitions of "general contractor"

and “subcontractor” within the Workers’ Compensation Act in 1989, a premises owner is allowed to act as its own general contractor. In doing so, it can provide workers’ compensation to cover all workers on the jobsite. During the 81st Legislative Session, House Bill 1657 sought to redefine the terms “general contractor” and “subcontractor.” The bill was reported out of the House Committee on Business and Industry, passed by the House, and reported out of the Senate Committee on State Affairs. It was placed on the Senate intent calendar; however it did not come to a vote. The House Committee on Business and Industry and the House Committee on Judiciary and Civil Jurisprudence were charged with the task of studying the issue during the interim.

During the committees’ joint interim hearing, supporters of the *Entergy* decision maintained that workers’ compensation allows the injured employee to collect money without costly and time-consuming litigation. While employees forfeit the ability to sue employers for damages, they are compensated whether or not they are injured due to their own negligence. Witnesses stressed the benefit of the no-fault system to laborers as workers’ compensation benefits countless employees injured in this manner. Witnesses also contended that exposing these premises owners to liability, despite the offering of workers’ compensation, will decrease the coverage available to workers. A decrease in coverage would provide fewer injured workers with prompt medical attention, compensation for lost wages and long-term rehabilitative care. They asserted that it is good public policy to encourage premises owners to provide workers’ compensation, so there must be an incentive to do so. Immunity from civil suit provides such an incentive. Also, while injured workers might receive only 70% of their wages, witnesses emphasize the fact that compensation is not taxed.

In response to allegations that the *Entergy* decision encourages lax jobsite safety, one witness stated that most employers maintain high jobsite safety standards, because it is considered a good business practice. Furthermore, he did not believe that immunity from third party liability suits has any bearing on that principle. Others argued that the precedent for premises owners acting as general contractors was established by property owners who acted as their own general contractors for large-scale projects and who provided workers’ compensation for everyone working on the jobsite.

Opponents of the *Entergy* decision maintained that allowing premises owners immunity from suit fails to encourage them to maintain worker safety which is detrimental to the goal of making sites as safe as possible. Furthermore, premises owners often possess the best knowledge of the site and maintain the most control over what occurs whereas contractors and sub-contractors often have no control over the site. Therefore, premises owners are the party most responsible for jobsite safety. Also, the no-fault compensation system prevents accountability because there is no investigation into the causes of an injury or scrutiny of safety requirements. The argument continued that this allows consistent safety violations to be concealed, especially since the no-fault system involves a dispute resolution process that is not public.

CHARGE 5

Study the human and sex trafficking problem in Texas. Make recommendations on best practices in the areas of investigation, prosecution, and tracking of the victims of these crimes. Study whether victims of these crimes are allowed to adequately recover from their attackers in a civil cause of action. *Joint Interim Charge with House Committee on Criminal Jurisprudence*

SUMMARY OF COMMITTEE ACTION CHARGE 5

Charge 5 - Study the human and sex trafficking problem in Texas. Make recommendations on best practices in the areas of investigation, prosecution, and tracking of the victims of these crimes. Study whether victims of these crimes are allowed to adequately recover from their attackers in a civil cause of action.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence and the House Committee on Criminal Jurisprudence met in a scheduled public hearing on Thursday, June 3, 2010 at 10 A.M. in Room E1.030, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Chris Burchell (HT Coalitions of Texas)
Ruben Fuentes (The Austin Police Department)
Billy Sifuentes (The Austin Police Department)
David Boatright (Office of Attorney General)
Rick Cruz (T.A.B.C.)
Mandi Kimball (Children at Risk)
Thon Overstreet (Dallas Police Department)
Susan Reed (Self and Bexar County Criminal District Attorney)

Summary of Committee Hearing

In 2003, the 78th Legislature passed House Bill 2096, a state human trafficking law and a supplement to the federal Trafficking Victims Protection Act of 2000 (TVPA). In 2007, the 80th Legislature passed a variety of legislation to strengthen state laws against human trafficking, encourage prosecution at the state level, increase visibility of the issue through posted informational notices, and launch hotline phone numbers for victims of trafficking. In 2009, the 81st Legislature passed House Bill 4009, which created an assistance program for domestic victims of human trafficking under the Health and Human Services Commission. Additionally, it created the Human Trafficking Task Force and appointed the Attorney General's Office as the task force's coordinator. The House Committee on Judiciary and Civil Jurisprudence and the House Committee on Criminal Jurisprudence were charged with studying the issue of Human Trafficking during the interim.

During the committees' joint hearing on June 3, witnesses from a variety of backgrounds offered testimony on the subject of Human Trafficking. The committees heard from members of Non-Governmental Organizations (NGO) involved with victims' services, prosecutors charged

with pursuing trafficking cases, police officers and trainers that make up the front lines and strive to educate fellow officers about the warning signs of human trafficking. The committees also heard testimony from representatives of the Texas Alcoholic Beverage Commission (TABC) and the Office of the Texas Attorney General.

Several witnesses described the issue of human trafficking as predominantly concerned with commercial sexual exploitation and largely domestic rather than international. They cited runaway children as the most at-risk group as they are forced into prostitution to buy food and other necessities. Often, they are exposed to illicit drugs and many become addicted which further exacerbates the problem.

The variety of issues set forth indicated a desperate need for victims' services, particularly shelters. Numerous witnesses mentioned the lack of shelters for domestic victims as funding is generally reserved for international victims. Without a way out of their current situations, it is almost impossible to stop the cycle of abuse. Many victims are abused at home, are homeless, or get involved with drugs. As a result, many of these children do not have a suitable home to which to return. The juvenile criminal system often becomes the only option available to law enforcement and many lament the position of criminalizing victims in order to provide them with assistance. Even then, juvenile victims "age out" of the system at age 18 and are often left with few options. At this point, the involvement of NGO's is paramount to the successful treatment of victims, as they actively support shelters within their communities and provide an alternative to the juvenile system. A witness from an NGO requested that the Legislature assist them with Safe Harbor efforts which would decrease the burden on the juvenile justice system since victims would receive services through the community.

Witnesses who provide assistance to human trafficking victims described issues with existing law, both criminal and civil. One concern involved charging minors with prostitution. Under Texas law, children are legally incapable of consenting to sex, so the argument follows that children are also incapable of consenting to sex for money. However, there is no age requirement for prostitution under the Texas Penal Code. Witnesses asked that the Legislature consider a statute change that aligns Texas with federal statutes regarding commercial sex acts involving children. Another criminal issue was described when children are labeled as "runaways" and placed in juvenile custody. When children claim they are victims of abuse, they must go through the juvenile justice process before they can be treated as victims. Until the victim is released from the juvenile system, law enforcement officers are not allowed to speak to the child to get information about his or her experiences with trafficking. Witnesses expressed a desire to remedy the situation as quickly as possible by gathering information and placing the child in a more appropriate venue.

On the civil law side, witnesses described an issue with the language of existing statutes. Currently, "pimps" are not included under the definition of "caregiver." Therefore, Child Protective Services is unable to investigate them under civil statutes and potentially unable to remove children from the "home." Witnesses did not suggest language that in any way legitimizes the "pimp" as a caretaker, however other states have passed similar statutes that create a civil penalty and remedy for such cases of abuse.

Witnesses also recommended explicit changes to the state human trafficking law. One witness suggested separating sex trafficking from general labor so children do not have to prove force and coercion in sexual exploitation cases. Other comments underscored the lengthy nature of child exploitation cases by indicating that the current statute of limitations of three years is too short. It was suggested that no statute of limitations can be considered or a limitation to 10 years

be reviewed. Also, some suggested establishing different statutes of limitation for forced labor and sexual exploitation.

Several witnesses stated that local law enforcement officers are often the first to investigate instances of human trafficking. Currently, most officers are not trained to recognize the differences between human trafficking, human smuggling, and other more common crimes. Witnesses emphasized the importance of education. Also, it was noted that the Texas Attorney General's Office is in the process of developing a statewide curriculum to train all levels of law enforcement, including sheriffs' departments and DPS officers, to recognize human trafficking in the field.

Witnesses also recommended an aggressive public information campaign including the formation of a Texas-based human trafficking hotline. The current hotline is based in Washington, D.C., so there is a significant delay in the gathering and dissemination of information to the appropriate authorities.

Human trafficking was described as a multi-billion dollar industry worldwide with strong ties to drug cartels and gangs. It was also indicated that law enforcement is about twenty years behind criminal organizations as far as technology, so funding and agencies that allow them to piece together such complex cases are necessary. The goal is to target the assets of organizations, not just the lower-level workers, in order to make meaningful progress against trafficking.

CHARGE 6

Review the Texas campaign finance law in judicial races in light of the recent United States Supreme Court decision *Caperton v. Massey*. *Joint Interim Charge with House Committee on Elections*

SUMMARY OF COMMITTEE ACTION CHARGE 6

Charge 6 - Review the Texas campaign finance law in judicial races in light of the recent United States Supreme Court decision Caperton v. Massey.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence and the House Committee on Elections met in a scheduled public hearing on Thursday, August 26, 2010 at 10 A.M. in Room E1.030, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Bill Boyce (Self and Justice, 14th Court of Appeals)
Lee Parsley (Texas Civil Justice League)
Rick Strange (Self and Justice, 11th Court of Appeals)

Summary of Committee Hearing

On Thursday, August 26, the House Committee of Judiciary and Civil Jurisprudence and the House Committee on Elections met to review the Texas campaign finance law in judicial races in light of the recent United States Supreme Court decision *Caperton v. Massey* (*Caperton*). *Caperton* ruled that it was unconstitutional for a state supreme court to hear a case involving the financial interests of a major donor to the judge's election campaign. This decision raises questions and concerns for the Texas recusal and campaign finance standards.

Some witnesses asserted that Texas has well established limits on campaign contributions for judges and recusal such as the Judicial Campaign Fairness Act and Texas Rules of Civil Procedure Rules 18A and 18B. It was noted Texas is far ahead of other states in terms of having limits and reporting requirements with the US Supreme Court's decision.

Some argued that language should be added into the Judicial Campaign Fairness Act to allow for the adoption of recusal rules or structures. However, it was advised that language should not to be too specific on what should or shouldn't be automatic grounds for recusal. It was argued that the standard on recusals is somewhat vague and should remain that way because circumstances can change so greatly.

Other witnesses supported changes in the way we select judges in Texas as a response to *Caperton*.

CHARGE 7

Monitor the agencies and programs under the committee's jurisdiction.

SUMMARY OF COMMITTEE ACTION CHARGE 7

Charge 7 - Monitor the agencies and programs under the committee's jurisdiction.

Committee Hearing

The House Committee on Judiciary and Civil Jurisprudence met in a scheduled public hearing on Thursday, February 25, 2010 at 10 A.M. in Room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Michelle Hunter (State Bar of Texas)
Wallace Jefferson (Supreme Court of Texas)
Lawrence Meyers (Texas Court of Criminal Appeals)
Cathleen Parsley (State Office of Administrative Hearings)
Carl Reynolds (Office of Court Administration, Texas Judicial Council)
Alma Trejo (El Paso County Courts – Statutory)
Andrew Weber (Office of the Attorney General)

Summary of Committee Hearing

On February 25 the House Committee on Judiciary and Civil Jurisprudence met for a hearing to monitor the agencies and programs under the Committee's jurisdiction. The Committee has jurisdiction over the Texas Supreme Court, the Texas Courts of Appeals, the Courts of Criminal Appeals, the State Commission on Judicial Conduct, the Office of Court Administration of the Texas Judicial System, the State Law Library, the Texas Judicial Council, the Guardianship Certification Board, the Office of the Texas Attorney General, the Court Reporters Certification Board, the Board of Law Examiners, the State Bar of Texas, and the State Office of Administrative Hearings. During the hearing witnesses provided information about their agencies and programs activities.

APPENDIX A: Barratry Working Group

Barratry statutes in Texas exist to protect accident victims from unwanted solicitation by attorneys, chiropractors and other professionals. Barratry is not often prosecuted.

In the 81st session, the Texas Legislature passed House Bill 148, in an effort to close a loophole in the penal code that addresses contact with accident victims through written communication, but the statute does not cite phone or in-person contact. House Bill 148 was an effort to clean up the statute since telephone and in-person contact are already prohibited under the barratry statute.

The issue at hand for the Barratry working group was to further limit barratry without entirely removing a professional's freedom of commerce. In addition, can a professional be free to seek out new business while giving accident victims and their family a chance to grieve and recover from injuries without unwanted solicitation?

The Working Group suggests for the full committee and House to review that barratry be added under the definitions in the Deceptive Trade Practices Act (DTPA). The DTPA was created in 1973 to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.” The DTPA has been a valuable tool for consumers to pursue civil remedies in lieu of, or in addition to, any other remedies, as DTPA remedies are cumulative to any other remedies being pursued. It also gives jurisdiction to the state Attorney General in addition to local district attorneys. The review of creating a civil offense for barratry by adding barratry to the DTPA may give consumers an additional tool to combat the practice of barratry.

The Working Group also suggests for the full committee and House to review that the law regarding written communication with accident victims be allowed, but to disallow phone or in-person contact without safeguards. This suggestion would allow professionals to make contact with accident victims in the least intrusive way possible. Legal, proper and constructive contact with accident victims and their families will also likely withstand constitutional issues regarding free speech and free commerce.

APPENDIX B: Arbitration Working Group

The Working Group was charged to study and make recommendations regarding the use of arbitration in Texas and the effect such practices have on state jurisprudence. Arbitration in Texas exists as an Alternative Dispute Resolution (ADR) option to resolve conflicts in consumer complaints with the arbitrator or arbitrators making the decision rather than a judge or jury. Arbitration is a method of dispute resolution involving one or more neutral third parties, or arbitrators, who are agreed to by the disputing parties and whose decision is binding. Arbitration can be preferable to more formal court proceedings because, as a general rule, it is faster, cheaper, and can be confidential. Arbitration is a valuable tool that can prevent the costly, protracted experience of going to court.

Many times state arbitration laws must largely follow the guidelines laid out in the Federal Arbitration Act (FAA). Sometimes a state law that disfavors the use of arbitration will be preempted by the FAA. Certain states do, however, have the ability to determine the administrative procedures that arbitration proceedings must follow. The Arbitration Working Group discussed many of these issues, with the goal to ensure that arbitration in Texas is a trusted institution, where the consumers are satisfied that arbitration is a neutral venue where claims will be vetted by impartial arbitrators.

For some consumers, though, there is an inherent bias perceived in the arbitration system. Some perceive certain arbitrators as beholden to entities or groups who represent a large number of cases. Arbitrators must ensure that consumers are receiving an impartial hearing, and must reassure consumers of their impartiality. Arbitrators have a duty to actively show that they are impartial, and should be vigilant in reassuring the public in the integrity of the arbitration process.

Another issue of arbitration that needs review is the actual notice of arbitration. Depending on the contract, consumers may not know or not be made aware that arbitration is mandatory. While it is certainly the responsibility of the consumer to understand what he or she is agreeing to, there is always "fine print" that consumers need to know about. Arbitration clauses fall into this category. Consumers should be made aware of the preconditions of a contract relating to arbitration before entering into a contract.

The ability to vacate arbitration awards under certain circumstances was also discussed in the Working Group. The reason that arbitration is "binding" is to ensure that it is cost effective, simpler and faster than a typical court proceeding. Allowing for vacating of awards and appeals, while potentially giving consumers additional recourse will only prolong and complicate the arbitration process, thereby undermining its efficiency. The Working Group could not reach a consensus on the issue of vacating arbitration awards.

Another issue discussed was arbitrator liability. Creating an avenue of liability against arbitrators would have a chilling effect on the entire arbitration process. It would, essentially, give anyone who is unhappy with the outcome of an arbitration a new way to search for damages. In addition, it deflects a complainant from the original party who the dispute was with, onto one who is presiding over the arbitration hearing per the agreement of both parties in the original dispute. The Working Group could not reach a consensus on the issue of arbitrator liability.

It is ironic that if some of these ideas were implemented, it would lead to additional protracted litigation, when the purpose of arbitration is to avoid protracted litigation. The

purpose of arbitration is largely to avoid the litigation process in order to give parties a more simple and equitable dispute resolution process. But arbitration is not perfect, and much depends on the arbitrators themselves. The arbitration process can be best improved by educating the public on what arbitration is, how it works, how much it will cost and how much time it will take.