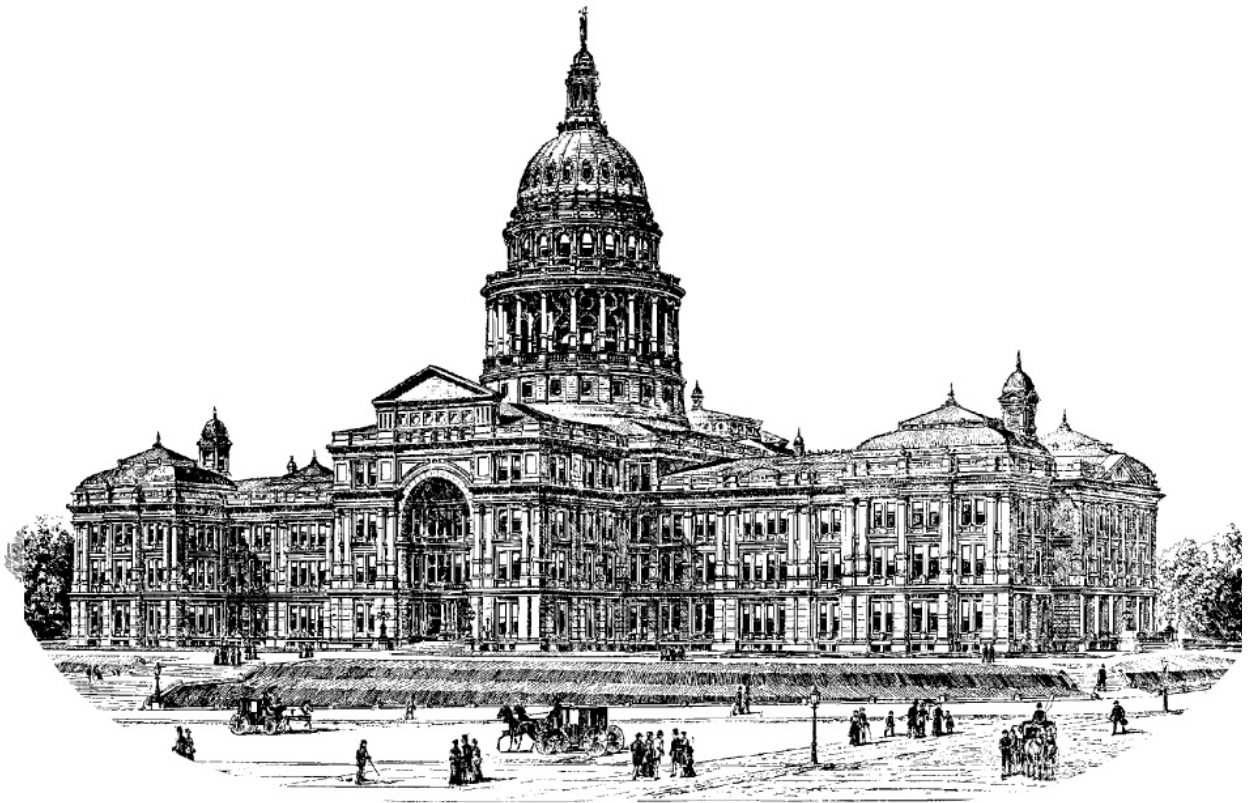




INTERIM REPORT

TO THE 83RD TEXAS LEGISLATURE



HOUSE COMMITTEE ON

JUDICIARY AND CIVIL JURISPRUDENCE

DECEMBER 2012

**HOUSE COMMITTEE ON JUDICIARY & CIVIL JURISPRUDENCE
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2012**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
83RD TEXAS LEGISLATURE**

**JIM JACKSON
CHAIRMAN**

**COMMITTEE CLERK
KARI KING**



Committee On
Judiciary & Civil Jurisprudence

December 3, 2012

Jim Jackson
Chairman

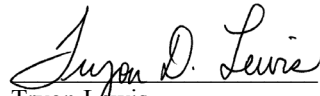
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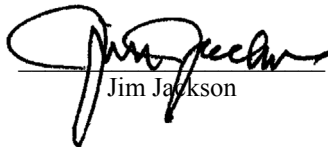
The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

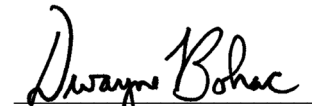
Dear Mr. Speaker and Fellow Members:

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

Respectfully submitted,


Tryon Lewis



Jim Jackson


Dwayne Bohac

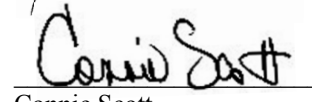
Joaquin Castro


Sarah Davis

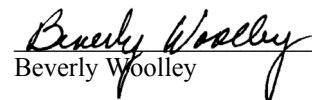
Will Hartnett


Jerry Madden

Richard Peña Raymond


Connie Scott

Senfronia Thompson


Beverly Woolley

Tryon Lewis
Vice-Chairman

Members: Dwayne Bohac, Joaquin Castro, Sarah Davis, Will Hartnett, Jerry Madden,
Richard Peña Raymond, Connie Scott, Senfronia Thompson, Beverly Woolley

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INTRODUCTION

Speaker Joe Straus appointed 11 members to the House Committee on Judiciary and Civil Jurisprudence: Jim Jackson, Chair; Tryon Lewis, Vice-Chair; Dwayne Bohac, Joaquin Castro, Sarah Davis, Will Hartnett, Jerry Madden, Richard Pena Raymond, Connie Scott, Senfronia Thompson, and Beverly Woolley.

The House Rules adopted by the 82nd Legislature as House Resolution 4 on January 24, 2011, give the House Committee on Judiciary and Jurisprudence its jurisdiction. Rule 3, Section 22 reads as follows:

Section 22. 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 & CIVIL JURISPRUDENCE

INTERIM STUDY CHARGES

- CHARGE 1: Study the potential effects on victims of family and domestic violence in the judicial process if courts are allowed to issue agreed protective orders without a finding of violence.
- CHARGE 2: Study and make recommendations regarding the discrepancies in guardianship and child custody statutes. Review potential solutions to the problems surrounding "arbitrary and capricious" findings by trial court judges.
- CHARGE 3: Study the rules of statutory construction and establish a method of determining legislative intent.
- CHARGE 4: Study the degree of transparency in asbestos bankruptcy trusts and how it affects litigation of asbestos exposure claims in Texas courts.
- CHARGE 5: Study the public policy implications of lawsuit lending and its effects on the civil justice system.
- CHARGE 6: Study whether the asbestos and silica multidistrict litigation courts should be allowed to dismiss, without prejudice, claims on the courts' inactive dockets for want of prosecution under certain circumstances.
- CHARGE 7: Study best practices regarding corporate governance. Make recommendations on the confidentiality of communications to ombudsmen in order to provide more protections to complaining parties.
- CHARGE 8: Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature.

CHARGE 1

Study the potential effects on victims of family and domestic violence in the judicial process if courts are allowed to issue agreed protective orders without a finding of violence.

SUMMARY OF COMMITTEE ACTION CHARGE 1

CHARGE 1: Study the potential effects on victims of family and domestic violence in the judicial process if courts are allowed to issue agreed protective orders without a finding of violence.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Thursday, March 15, 2012 at 10:00am 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:

Kathy Kinser (Texas Family Law Foundation)
Jacqueline Pontello (Aid to Victims of Domestic Abuse (AVDA))
Aaron Setliff (Texas Council on Family Violence)

Summary of Committee Hearing

During the 82nd Legislature, the Committee heard a bill¹ that would eliminate the requirement of a finding of family violence in order to receive a protective order. The bill passed out of the Judiciary Committee, and out of the House, but did not pass out of committee in the Senate. The Committee was charged with re-examining this process to see whether change is warranted.

Family Code Section 85.001(a) requires as a prerequisite to issuing an order under that article that the court find family violence occurred.² Petitioners and respondents may agree to a protective order under this article; Article 85.005 provides specific direction as to how this may occur.³ In relevant part, Article 85.005(a) allows the parties to agree in writing to the terms of a protective order.⁴

Proponents of this legislation argue that the finding of family violence is not necessary to receive the protective order, because the finding of "family violence" carries an extremely negative connotation. Many people seeking a protective order do not want to go so far as to claim "family violence." Proponents believe that the majority of those seeking protective orders are women, and these women are hesitant to accuse someone of "family violence;" they only want the protective order.

Opponents of the legislation argue that the Courts already have the ability to grant the

¹ HB 3172, by Naomi Gonzalez.

² The statute also requires a finding that violence is likely to occur in the future. *See* Family Code Section 85.001(a)(2) (Vernon's 2011).

³ Family Code Section 85.005 (Vernon's 2011).

⁴ Section 85.005(a) allows the agreed order as provided by §85.021, which lists several permissive elements including issues of child custody and support and marital property. *See* Family Code §§85.002(a) and 85.021 (Vernon's 2011).

protective order without the finding of family violence, and believe that the proposed legislation will create more problems than solutions. Opponents testified that protective orders are being granted across Texas both with and without findings of family violence. Current law encourages the finding of family violence when a protective order is granted, but does not expressly prohibit a protective order from being granted without the finding.

Protective Order Subcommittee

A Subcommittee led by Chairman Senfronia Thompson spent time further studying the issue for the committee. The Subcommittee's findings are as follows:

Recommendation: The importance and complexity of this issue is such that we recommend further study before proceeding, especially given the clear lack of consensus among attorneys, prosecutors and victim advocates.

Reason: The potential ramifications of revising the statute to allow for the issuance of agreed protective orders without a finding have proven more complicated than at first blush. Having a finding of family violence is a threshold question for a number of other remedies that this Legislature has authorized for victims of family violence. The ramifications of issuing protective orders that do not contain a finding have potentially far-reaching effects on issues ranging from child custody to qualifying for expedited divorce, from gun removal to unemployment compensation.

Important constituencies—district and county attorneys, family lawyers—are split on this issue. The Texas District and County Attorneys Association and the Texas Family Law Foundation have declined to take official positions absent consensus among their members. Some prosecutors and private attorneys fear that the proposed change would water down existing protections. Others, equally well-meaning believe that the lack of consistent access—especially on the part of rural victims—merits a second class of protective orders. Of note is that civil legal-aid attorneys represent a disproportionately high number of abuse victims. That section of the Bar is seemingly unanimous in its opposition, with various legal aid agencies (Texas Advocacy Project, Aid to Victims of Domestic Abuse, TRLA, University of Texas Domestic Violence Clinic) testifying in the 82nd Texas Legislature and being present at the midterm Committee hearings to voice their strong opposition. Shelter programs in Dallas, Houston, Fort Worth and San Antonio have likewise expressed concerns. For those opposed to the proposed changes, the notion of violations being punished by contempt—as opposed to the sanction of arrest—is seen as being of little deterrence.

Committee Recommendations

In concurrence with the sub-committee findings, the Committee believes that further study is necessary to determine whether the proposed legislation is necessary. The Committee is committed to protecting victim's rights, and urges interested parties to work with both victims and prosecutors to insure that all parties are educated with regard to the law, and to the ramifications of their decisions.

CHARGE 2

Study and make recommendations regarding the discrepancies in guardianship and child custody statutes. Review potential solutions to the problems surrounding "arbitrary and capricious" findings by trial court judges.

SUMMARY OF COMMITTEE ACTION CHARGE 2

CHARGE 2: Study and make recommendations regarding the discrepancies in guardianship and child custody statutes. Review potential solutions to the problems surrounding "arbitrary and capricious" findings by trial court judges.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Thursday, March 15, 2012 at 10:00am 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:

Pat Ferchill (Self)
Guy Herman (Self; Statutory Probate Judges of Texas)
Kathy Kinser (Texas Family Law Foundation)
Dorothy Luck (GRADE)
Jamie MacLean (State Bar Real Estate Probate Trust Law Section Guardianship Code Committee)
Latifa Ring (Self; NORTEGA)
Debby Valdez (Self; Myself-Member of GRADE)

Summary of Committee Hearing

The Committee took a particular interest in the discrepancies in guardianship statutes, and heard from a number of advocates who believe that the probate system in Texas, particularly in guardianship disputes, needs a thorough overhaul. The Committee also heard from probate and guardianship practitioners, as well as two Statutory Probate Judges in Texas.

There is anecdotal evidence that guardianship has been abused for purposes of probate. There is no evidence of widespread or systematic abuse, but it is possible that there are specific instances of abuse. Anytime there is an ex parte hearing, there is a greater risk for abuse. Furthermore, it appears that some judges do not show adequate concern and consideration for proposed wards in guardianship disputes.

Guardianship Subcommittee

A Subcommittee led by Chairman Senfronia Thompson spent time further studying the issue for the committee. The Subcommittee's findings are as follows:

1. Currently guardianship court costs (filing fees and ad litem fees) are required by law to be paid out of ward's estate or by the county if the ward is indigent. In other civil cases, including

family law cases, the court may assess fees to ensure they are equitable and just between the parties. There are numerous complaints that contested guardianship attorney ad litem fees are always borne by the ward's estate even when a party is filing a groundless and bad faith contest. This change would allow the court to assess court costs against a contestant acting in bad faith and without just cause.

2. Interim ad litem fees are not statutorily available in guardianship cases, but they are in family law cases. This places a financial burden on attorneys ad litem when cases go on for a lengthy period. On occasion attorneys ad litem are involved in cases that last a long time. Without interim fees, attorneys ad litem may not wish to take cases that last a long time because of the economic impact on their law practice.

3. The statute governing cost should be clear that all parties are subject to the cost deposit provisions in guardianship law even if the party is not ultimately liable for costs. There is a conflict in the appellate courts about whether a court can require a cost deposit of the parties when it is possible that one party will not ultimately be charged costs.

Committee Recommendations

The Committee concurs with the subcommittee findings, and further recommends that the Judicial Council, in conjunction with the State Bar of Texas, create new rules regarding guardianship that show more deference to proposed wards in guardianship disputes, and offer guidance to Statutory Probate Judges to help uniformly apply these new rules. Legal findings and court orders, even if not final, can have far-reaching ramifications for the persons involved in a dispute. Defendants should have every protection possible, and a court ruling should reflect this.

CHARGE 3

Study the rules of statutory construction
and establish a method of determining legislative intent.

SUMMARY OF COMMITTEE ACTION CHARGE 3

CHARGE 3: Study the rules of statutory construction and establish a method of determining legislative intent.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Wednesday, January 18, 2012 at 10:00am 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:

Hugh Brady (Self)
Steve Bresnen (Self)
Lee Parsley (Self; Texans for Lawsuit Reform)
Andrew Weber (Self)

Summary of Committee Hearing

The Speaker of the House charged the Judiciary Committee to "study the rules of statutory construction and establish a method of determining legislative intent." Legislative intent has been defined several different ways, but Section 311 of the Government Code, also known as the "Code Construction Act," instructs courts on how to properly construe statutes.¹

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.

Acts 1985, 69th Leg., ch. 479, Sec. 1, eff. Sept. 1, 1985.

During the 82nd legislative session, there were a record number of requests to have the record of the legislative floor debate reduced to writing, and it seems that the Texas Supreme Court is willing to hear more cases involving statutory construction and legislative intent.

The Texas Supreme Court continues to affirm the longstanding rule that statutory language should be interpreted in accordance with the intent of the Legislature. *LTTS*

¹ Tex. Gov't. Code Ann. § 311.023 (Vernon 2010).

Charter Sch. Inc. v. C2 Constr., Inc., 342 S.W.3d 73, 75 (Tex. 2011). See also *City of De Soto v. White*, 288 S.W.3d 389, 394 (Tex. 2009) ("[O]ur goal in construing a statute is to honor the Legislature's expressed intent."); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) ("[O]rdinarily the truest manifestation of legislative intent is legislative language—the words the Legislature chose.").

Further, "when dealing with issues of policy, this Court has consistently deferred to the judgment of the Legislature, and has not created causes of action where the Legislature did not clearly express a desire to do so." *Ojo v. Farmers Group, Inc.* WL 2112778 Tex. 2011. See also *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 2005) (holding that it is not the court's responsibility to "judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing.").

Chief Justice Jefferson recently wrote an interesting concurring opinion in *Ojo v. Farmers Group, Inc.*, affirming the importance of legislative intent, not only to the judges deciding cases, but to the parties involved and the groups that are interested. ("Legislative history isn't always a villain. It is central to the process by which the Legislature enacts the laws that govern society. Yet a statute's pedigree is not itself law... we first look to the text. When the text is not clear, we explore extrinsic aids, including legislative history"). *Ojo* and Chief Justice Jefferson's concurring opinion affirm the idea that legislative intent should be viewed along with the options that were available and considered, but that other options can also be considered in rendering decisions. ("Even when a statute is not ambiguous on its face, the court can consider other factors to determine the Legislature's intent, including administrative construction of the statute.") *Id.* quoting *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). The Chief goes on to say, "[t]hat we have reached some methodological agreement, even if inconstant, is itself impressive, particularly in light of the difficulties other courts have experienced when attempting to accomplish this same task. Textualism is easy to advocate. The difficulty lies in its implementation." *Ojo v. Farmers Group* 11 WL 2112778 (Tex. 2011).

Another quandary that the Court has had to wrestle with involves construction and implementation by agencies that statutes give authority to. The statute at issue must be ambiguous, and many disputes involve the recodification of statutes by the Texas Legislative Council. The doctrine of legislative acceptance says that "[a] statute of doubtful meaning that has been construed by the proper administrative officers, when re-enacted without any substantial change in verbiage, will ordinarily receive the same construction." *Fleming Foods v. Rylander*, 6 S.W.3d 278, 282 (Tex. 1999), quoting *Sharp v. House of Lloyd, Inc.* 815 S.W.2d 245, 248 (Tex. 1991). The Court has also held that "an agency's construction of a statute may be considered only if it is reasonable and not inconsistent with the statute." See *Tarrant Appraisal District v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). Finally, when interpreting new laws, "general statements of [the] legislature's intent cannot revive repealed statutes or override clear meanings of new, more specific statutes." *Fleming Foods*, 6 S.W.3d 278, 286 (Tex. 1999).² There are other problems with determining

² After the decision was rendered in *Fleming Foods*, the Legislature amended the Tax Code. Therefore, the decision is not consistent with current law.

legislative intent; some older, repealed statutes are difficult to find and research. Further, the Texas Legislative Council is charged with the re-codification of old statutes, and some "non-substantive" changes in codification may inadvertently change words that make the new statute substantively different from the old one. This also adds confusion and uncertainty in determining the legislative intent behind a particular statute.

A hearing was held on January 18, 2012 to discuss the Speaker's interim charge. Several speakers testified on both sides of the issue. Testimony was heard from attorneys who regularly practice in appellate law and from those who are knowledgeable of the rules of the Legislature. Witnesses called attention to past legislative efforts direct courts' attention to nonsubstantive changes, including the bill that Senator Duncan filed in the 81st Legislature. During the 81st Legislature, Senator Robert Duncan filed SB 2038, which passed the Senate and the House but was vetoed by the Governor. Under SB 2038, the codification or revision of a statute would not affect the meaning or effect of the statute if the statute at issue in the case was enacted by the Legislature as a "non-substantive revision" of the statute.

The Committee heard testimony that courts seem inherently suspicious of nonsubstantive revisions because of a suspicion that the legislature may use the term to avoid scrutiny of their work that may actually have the effect of substantively changing the law. The courts also recognize that the Legislature knows how to write laws to prevent nonsubstantive reenactments from disturbing substantive law. *Ex parte Holmes*, 754 S.W.2d 676, 685 (Tex. Crim. App. 1988). A suggestion was made that, when enacting the nonsubstantive codifications, the Legislature could include language to the effect that if a court found that the codification bill substantively changed the meaning of established law, the new law is of no effect and the law as it existed on the effect date of the codification bill is continued.

Fleming Foods and other similar cases were repeatedly mentioned by those testifying. A witness testified that then-Speaker Laney created the Select Committee on Judicial Interpretations of Law in 1999 as a direct response to *Fleming Foods*. The Committee reviewed appellate decisions from 1994-1999 to identify those decisions that: clearly failed to properly implement legislative purposes; found two or more statutes to be in conflict; held a statute to be unconstitutional; expressly found a statute to be ambiguous; or expressly suggested legislative action. One witness recommended that this report should be revived and made regularly to each Legislature in December of even-numbered years or January of odd-numbered years so that Members are regularly kept apprised of the courts' activity in this area. This witness also suggested that the Legislature should consider establishing an independent Revision Commission or Law Reform commission separate from the Legislative Council composed of experts of all political affiliations and outlooks to serve as technical advisers on the state of the law and its application by the courts who undertake a continuous program of legal study that promotes the clarification and harmonization of the law. Another witness testified that giving guidance on what legislative history and circumstances the Legislature would like courts to consider, and providing intent, would help practitioners and courts.

In conclusion, there have been several recent Supreme Court decisions that attempt to discern the legislative intent of specific statutes, and it seems clear that members are interested in finding a way to adequately and accurately determine the legislature's express intent when

introducing and passing a bill. This may be through oral or written testimony in committee hearings, oral arguments by legislators on the House floor, and the introduction of remarks into the record from the House floor. The Texas Government Code has a "Code Construction Act," § 311.023, but there is argument that this statute has done little to assist the appellate courts when attempting to discern the legislative intent of certain statutes.

Committee Recommendations

While members of the committee may individually have a desire for additional legislation to help define Legislative Intent, there was no consensus for such. The Supreme Court's position that it should abide by the plain text where possible and explore extrinsic aids including legislative history only when the text is not clear seems to dictate the Court views its role as one of strict construction. The committee makes no specific recommendations for defining or clarifying "Legislative Intent."

CHARGE 4

Study the degree of transparency in asbestos bankruptcy trusts and how it affects litigation of asbestos exposure claims in Texas courts.

SUMMARY OF COMMITTEE ACTION CHARGE 4

CHARGE 4: Study the degree of transparency in asbestos bankruptcy trusts and how it affects litigation of asbestos exposure claims in Texas courts.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Wednesday, February 8, 2012 at 10:00am 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:

Kay Andrews (Texas Civil Justice League)
Mark Behrens (U.S. Chamber Institute for Legal Reform)
Bryan Blevins (Self; TTLA/Self)
George Christian (Texas Civil Justice League)
Lee Parsley (Texans for Lawsuit Reform)

Summary of Committee Hearing

The Committee met in a public hearing and heard testimony from interested parties on this issue. In order to fully study this charge, Chairman Jackson appointed a subcommittee including Sarah Davis, Jim Jackson, Connie Scott, Richard Raymond, and chaired by Tryon Lewis. The following is the report of that subcommittee.

Establishment of Asbestos Bankruptcy Trusts

Asbestos litigation increased dramatically in Texas and the United States, growing from 300 cases and 21,000 claimants to include 6,000 cases and 600,000 claimants between 1982 and 2003.¹ Facing this growing liability, many companies began declaring bankruptcy. In 1982 the Johns-Manville Corporation declared bankruptcy and established the Manville Personal Injury Settlement Trust in 1988.² Congress enacted 11 U.S.C. § 524(g) in 1994, which codified bankruptcy procedures similar to those used by the Manville Trust. Using this federal statute, approximately 100 companies have declared bankruptcy and 60 independent asbestos bankruptcy trusts have been established.³ Each asbestos bankruptcy trust assumes all of the asbestos-related liabilities of the debtor company, along with a portion of remaining assets, and then operates

¹ House Research Organization, *Bill analysis for Senate Bill 15*, May 2005, at 2.

² Manville Personal Injury Settlement Trust, *History*, <http://www.mantrust.org/history.htm>.

³ United States Government Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, September 2011, at 2-3.

independently of the court system to review and award compensation to eligible claimants.

Processing Individual Claims

Though each trust may establish unique trust distribution procedures (TDPs) in awarding claims and vary in the formulas for determining award amounts, they all generally follow the same pattern established by the Manville Trust. Claimants submit a claim to a trust, opting either to use: (a) expedited review, accepting the standard value for their particular disease according to the payment schedule in the TDP, or (b) individual review, which may justify a higher payment amount resulting from consideration of their individual medical condition or work history. Should the claim be approved and accepted by the claimant at the liquidated value, it enters the payment queue, where the final payment amount will be determined. That liquidated value may be reduced by a pro rata discount, or payment percentage, based on a previous determination that the value of the trust's assets was insufficient to meet all current and future liabilities. This payment percentage serves to allow the trust to compensate all present and possible future claimants as equitably as possible, and may range as widely as from 1% to 100%. That final value is then awarded to the claimant based on position in the queue, and determined by the maximum annual payment (MAP), which may limit the total amount of money the trust can pay to claimants in any single year (delaying payment to the following calendar year), or by the claim ratio, which may set annual percentage limits on the MAP that may be awarded to malignant or severe injuries versus less severe claims.

Proposed Changes to Current Law

Under current state law, defendants found liable in an asbestos-related suit are entitled to a dollar for dollar offset for any amounts the plaintiff may have previously received from settling defendants. Some interested parties have indicated concern that plaintiffs are able to try their cases to a verdict and then later file trust claims. In that way, payments they receive from the bankruptcy trusts are not credited against the judgment amount, which they receive against the trial defendants.

Summary of Committee Testimony

The full committee heard testimony on this interim charge on February 8, 2012. The following paragraphs contain very brief summaries of the testimony presented by witnesses who testified for and against certain proposed changes to existing law. The statements are intended only as a general summary of testimony given and do not represent views or findings adopted by the subcommittee.

Proponents of legislation to require claimants file trust claims before proceeding in trial testified as follows: Texas asbestos MDL claimants are already required to disclose trust payments received in advance of trial and are asked to disclose trusts from which the claimant may reasonably be expected to receive payments in the future. Whether this information is actually disclosed and made available to a defendant is at best uncertain, and the evidence suggests that solvent defendants are unable to obtain credit for all trust payments to which the claimant is entitled and ultimately receives. In some cases, consequently, a claimant may well

recover more than once for the same injury. These proponents support legislation to address this problem by allowing defendants to seek a stay of further proceedings in the litigation until the claimant has filed claims with all bankruptcy trusts from which the claimant may reasonably expect compensation. Additional statutory requirements mandating discovery of claim information and additional material evidence from the bankruptcy trusts might also be considered to facilitate the full and fair disclosure of all relevant information.

Opponents of this change in current law testified as follows: Existing asbestos MDL discovery already requires the information defendants seek here and an authorization for defendants to obtain claim information directly from the trusts. They contend the Texas asbestos MDL court already provides one of the most transparent processes in the country, and the discovery required by the proposed legislation is substantially greater than asbestos defendants, who demand strict confidentiality in the evaluation, processing and settling of asbestos claims, are willing to provide. The Institute for Legal Reform (Chamber of Commerce) proposed similar changes to the Federal Bankruptcy Rules but after extensive investigation, the committee denied ILR's proposal based on the absence of a compelling need. Even a RAND Report funded by asbestos defendants and their insurers states that no problem can be identified in states like Texas where previous tort reform has provided several liability, the allocation of fault to responsible 3rd parties, and set-offs and credits against judgments. As addressed in the hearing, Texas defendants have access to all of these opportunities subject to the Texas Supreme Court's opinion in *BorgWarner v. Flores*.⁴

The subcommittee heard additional testimony from resource witnesses at a public hearing July 11, 2012. That testimony indicated that the number of asbestos cases actually tried in Texas is relatively small. The applicability of the provisions related to the giving of credits for settlement dollars in a trial setting comes into play in only eight to ten asbestos related cases each year in which juries are selected and a trial begins. Excluding Harris County, there were only eight cases that reached a verdict during the three year period from 2008-2011.

⁴ *Borg-Warner Corp. v. Flores*, 232 S.W. 3d 765 (Tex. 2007).

CHARGE 5

Study the public policy implications of lawsuit lending
and its effects on the civil justice system.

SUMMARY OF COMMITTEE ACTION CHARGE 5

CHARGE 5: Study the public policy implications of lawsuit lending and its effects on the civil justice system.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Wednesday, April 18, 2012 at 10:00am in room E2.012, Texas State Capitol.

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

John Beisner (Institute for Legal Reform)
Gary Chodes (Oasis Legal Finance)
Harvey Hirshfeld (American Legal Finance Association)
Lisa Kaufman (Texas Civil Justice League)
Charles Shewmake (BNSF Railway)
Patricia Tillman (Self)

Summary of Committee Hearing

The committee was charged with studying lawsuit lending in Texas. During an interim hearing held on April 18, witnesses from a variety of professions testified on the subject.

The first thing that became apparent is that a distinction must be made between lenders who loan relatively small amounts of money directly to the litigants (consumer lending), and the large financial operations that engage in larger lawsuits (lawsuit finance).

Regarding consumer lending, these are typically small loans made directly to the plaintiff by a company with the expectation of repayment from proceeds of a settlement or judgment. Often times, this loan helps to get a plaintiff through a rough time in their life until a lawsuit can be brought to resolution. While the interest rates that can be charged are not cheap, the consumer lending company has no expectation of repayment other than through the successful settlement of the lawsuit. Because of this non-recourse loan arrangement, a plaintiff is protected from liability and further financial harm.

Testimony moved fluidly between talking about consumer lending and lawsuit finance, and sometimes it was difficult to tell which one members and witnesses were talking about. However, after extensive testimony it appears that most of the concern expressed at the hearing centers on lawsuit finance.

There are several concerns raised about lawsuit finance. The first is that there is no concrete way to determine the extent of the relationship between the lawsuit financier, the attorneys participating in lawsuit finance, and the client. These companies who facilitate lawsuit lending are currently protected from discovery through the attorney/client privilege. Because of this, the opposition cannot determine the extent of the relationship between the litigant, the attorney of record, and the lawsuit finance company.

What is apparent is that, when a lawsuit finance lender funds a lawsuit expecting some sort of return, that the nature of the lawsuit changes completely. The lawsuit finance company has a relationship with the attorney, but not with the plaintiff. Their interests may not coincide with the plaintiff's. The lawsuit finance company's interest is purely financial, and is not subject to the ethical requirements that the attorneys must meet. Although because of the broad protections granted through attorney/client privilege, there is no way to discover what the compensation strategy is.

Secondly, companies that participate in lawsuit finance are typically hedge-fund type companies, and many of them are publicly traded companies. When a company such as this participates and facilitates lawsuits, it begs the question, is the lawsuit the company is investing in considered a security? This third party being part of a lawsuit brings a non-attorney presence to a lawsuit. In fact, having a lawsuit finance company take part in a lawsuit fundamentally changes the lawsuit, because unlike the attorneys representing the litigants, the lawsuit finance company has no responsibility to the litigants.

Committee Recommendations

This committee affirms that "consumer lending" serves a legitimate need in the Texas economy. While the committee believes that reasonable regulations may be appropriate, it makes no specific recommendation regarding the regulation of consumer lending, and believes that no compelling reason to prohibit the practice has been offered.

Regarding "Lawsuit Finance", it is the committee's opinion that companies engaged in lawsuit finance should have to disclose their financial arrangements with attorneys, and their financial interest in lawsuits. There should be limits on this discovery; for instance, attorneys should not be able to determine opposing counsel's legal strategy through discovery. This should still fall under the attorney/client privilege. But, because of the unique circumstances behind these types of cases, there should be exceptions to the attorney/client privilege when these types of investors become involved in a lawsuit. Plaintiffs deserve to know when a third party has an interest in their lawsuit and what that interest is, as does the defendant and opposing counsel.

CHARGE 6

Study whether the asbestos and silica multidistrict litigation courts should be allowed to dismiss, without prejudice, claims on the courts' inactive dockets for want of prosecution under certain circumstances.

SUMMARY OF COMMITTEE ACTION CHARGE 6

CHARGE 6: Study whether the asbestos and silica multidistrict litigation courts should be allowed to dismiss, without prejudice, claims on the courts' inactive dockets for want of prosecution under certain circumstances.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Wednesday, February 8, 2012 at 10:00am 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:

Kay Andrews (Texas Civil Justice League)
Mark Behrens (U.S. Chamber Institute for Legal Reform)
Bryan Blevins (Self; TTLA/Self)
George Christian (Texas Civil Justice League)
Lee Parsley (Texans for Lawsuit Reform)

Summary of Committee Hearing

The Committee met in a public hearing and heard testimony from interested parties on this issue. In order to fully study this charge, Chairman Jackson appointed a subcommittee including Sarah Davis, Jim Jackson, Connie Scott, Richard Raymond, and chaired by Tryon Lewis. The following is the report of that subcommittee.

Establishment of Asbestos Claim Multidistrict Litigation Docket

In response to the asbestos litigation crisis of the 1980s and 1990s, the Texas Legislature passed Senate Bill 15 in 2005, which created Chapter 90 in the Texas Civil Practice and Remedies Code. That legislation imposed a requirement that plaintiffs file a report showing they met certain medical criteria before they could proceed with their action in court. It allowed the Multidistrict Litigation (MDL) Panel to establish MDL proceedings for asbestos claims in Texas. At present, Judge Mark Davidson in Harris County hears all pre-trial motions for new or pending asbestos cases which have been transferred to that docket before transferring them back to the court of origin for trial on the merits. In MDL court cases in which the plaintiff has a diagnosis of malignant mesothelioma or other malignant asbestos-related cancer, the court is directed to expedite the action with a goal of bringing the case to trial within six months from the date of transfer back to the originating court. Chapter 16 of the Civil Practice and Remedies Code was also amended to state that the statute of limitations for asbestos-related injuries is a two-year

period, beginning on the earlier of the date the affected person's death or the date they filed the report, required by Chapter 90, showing they met certain medical criteria.

Summary of Committee Testimony

The full committee heard testimony on this interim charge on February 8, 2012. The following paragraphs contain very brief summaries of the testimony presented by witnesses who testified for and against certain proposed changes to existing law. The statements are intended only as a general summary of testimony given and do not represent views or findings adopted by the subcommittee.

Proponents of legislation to allow the MDL courts to dismiss the inactive claims without prejudice testified as follows: Claimants who may develop an asbestos or silica-related disease that satisfies the medical criteria could be protected by continuing to toll the statute of limitations, allowing claimants to refile their cases when they meet the medical criteria for impairment. They claim this relatively straightforward solution would not disadvantage either side and would address the ethical problems associated with maintaining large backlogs of inactive claims.

Opponents of this change in current law testified as follows: Originally, the proponents of Senate Bill 15 by Janek sought the outright dismissal of pending claims in which the plaintiffs failed to meet statutory standards. After extensive negotiations, the parties agreed to adopt a procedural device, "the inactive docket," that was already in use by several courts in other states. They claim the retroactive dismissal of unimpaired claims would raise the same difficult questions under the "Open Courts" provision of the Texas Constitution today as in 2005. These concerns are reflected in the Texas Supreme Court's opinion in *Robinson vs. Crown Cork*¹ and the 1st Court of Appeals' recent opinion in *Union Carbide v. Synatzske*.² They claim the Legislature made a decision to link the inactive docket, the MDL proceedings and the new statute of limitations such that if any one of 90.007, 90.010, 16.0031 are found invalid then all three fail.

At a public hearing of the subcommittee on July 11th, 2012, members heard testimony from the judge of the MDL court and the executive director of the Office of Court Administration as resource witnesses. According to that testimony, there are approximately 700-1,300 cases pending on the active docket. The number of plaintiffs having cases on the inactive docket is not precisely known, but is estimated between 35,000 to 85,000. Witnesses testified that the inactive docket is essentially a "deep freeze", and that no activity takes place for cases dated from before September 1, 2005, other than an occasional motion to convert a case from the inactive docket to the active docket if warranted by the medical conditions of the plaintiff. Due to the provisions in the statute, the court has very little authority to enter orders with respect to those cases. It is unclear whether the court has power to perform such minor duties as to grant motions to substitute counsel, or allow an attorney to withdraw. The court has granted some voluntary non-suits in settled cases.

¹ *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W. 3d 126 (Tex. 2010).

² *Union Carbide Corp. v. Synatzske*, No. 01-09-01141-CV, 2012 WL 2452044 (Tex.App.--Houston [1st Dist.] June 28, 2012, no pet. h.).

Comments on the Silica MDL Court

The silica MDL court docket is much smaller, but could raise many of the same concerns in the future. At present, there are 669 cases pending before the silica MDL court, of which only seven cases are less than five years old. This total case load represents approximately 7,000 plaintiffs. The majority of the cases are on the inactive docket. As of September 2010, only 22 cases had been transferred to the active docket, and none had yet proceeded to trial.

Recommendations of the Subcommittee

The subcommittee recommends to the Legislature that the judges of the asbestos and silica litigation MDL courts be given authority to exercise their discretion for the entry of orders of dismissal without prejudice in cases in which the plaintiff has died and no estate or survivor has been substituted as plaintiff, after being given reasonable opportunity to do so, within the limitations period for bringing a wrongful death suit; in cases in which the plaintiff has brought an action involving an asbestos or silica claim in another state or jurisdiction during the pendency of the suit in Texas; and in cases in which the plaintiff cannot be contacted or has failed to indicate a desire to continue the litigation, after being given a reasonable opportunity to do so. The particular procedure would be within the discretion of the MDL court.

In addition, the subcommittee understands that the appellate courts have before them cases, such as *Union Carbide v. Synatzske*, which raise questions involving the constitutionality of the application of the statutory standards to inactive docket cases. The decisions from the appellate courts may have an effect on proposed legislation. The subcommittee does not assert any opinion on the merits of those cases, and the Legislature must be mindful of them because of the constitutional questions they raise.

The subcommittee is further of the opinion that legislation granting expanded ability of courts to dismiss certain inactive cases should be so tailored as to minimize cost burdens on the parties and courts and to not impair the access to the courts of litigants who may have meritorious claims.

Committee Recommendations

The committee concurs with the finding of the subcommittee.

CHARGE 7

Study best practices regarding corporate governance.
Make recommendations on the confidentiality of communications to ombudsmen in order to provide more protections to complaining parties.

SUMMARY OF COMMITTEE ACTION CHARGE 7

*CHARGE 7: Study best practices regarding corporate governance.
Make recommendations on the confidentiality of communications to ombudsmen in order to
provide more protections to complaining parties.*

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Wednesday, April 18 at 10:00am in room E2.012, Texas State Capitol.

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

Ralph Hasson (The Ombudsmen Shield Law Coalition)
Charles Howard (Self)
Amos Morale (Marathon Oil Company)

Summary of Committee Hearing

Ombudsman programs provide an avenue for employees to resolve disputes internally, within their own corporation, and give employees a sense of security when discussing possible "whistle-blowing" activities. They also allows corporations to resolve disputes without resorting to costly litigation. During the 80th Legislative Session, Representative Patrick Rose filed House Bill 3578 to protect the confidentiality of communications and records of Ombudsman in programs set up by companies for their employees. H.B. 3578 allowed an ombudsman program to maintain the confidentiality of communications with employees and provided the legal right for ombudsman programs to withhold the identity of the complainant and protect confidential information, even in the face of a subpoena, unless disclosure was necessary to prevent an imminent threat of serious harm. The bill passed the House but was not voted out of the Senate Jurisprudence Committee. The Speaker has charged the Judiciary Committee to study Ombudsman programs and make recommendations as to their usefulness and future in Texas.

The Committee heard testimony from several professional ombudsmen about their profession, and the best practices that will be necessary in order to be certified as an Ombudsman program in Texas. Witnesses testified that ombudsmen are important because they help employees both resolve conflict and surface concerns over misconduct and provide information and guidance necessary for some employees before they are willing to come forward. The Committee heard testimony that, among corporate employees, the fear of retaliation remains extremely powerful and there are limitations of formal channels in the corporate environment for those who do wish to come forward with a complaint or conflict.

The Ombudsman programs advocated by those testifying are designed to ensure anonymity & confidentiality because the ombudsman relationship is considered privileged and therefore should not be subject to subpoena in litigation. Opponents of the creation of a privilege for ombudsmen programs argue that the effect in the real world of legislatively adopting such a privilege would be to channel conflict into a system that is wholly controlled by an agent of the employer and that is then free from any disclosure or effective oversight. Opponents also pointed out that state-created Ombudsman programs differ from private programs because these offices have clear statutory duties and mandates, together with the protection of the law. They are in no way dependent on the good graces of the agencies that they monitor.

Committee Recommendations

The Committee recommends legislation that is designed to protect the confidentiality of communications with the organizational ombudsman. This legislation should ensure that the opportunity to assert the privilege is based on a demonstration that the ombudsman program is structured in keeping with professional best practice standards. The privilege should attach to the ombudsman program, rather than to any party to an issue, and should be designed to provide organizational ombudsman programs with confidentiality protections parallel to those provided under Texas law to confidential communications in alternative dispute resolution procedures. The proposed legislation should also specify as a requirement for an ombudsman program seeking to assert the privilege that the ombudsman program does not have authority to receive notice of claims against the employer. A bill passed by the full House in 2007, HB 3578, provides the model for such legislation.

CHARGE 8

Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature.

SUMMARY OF COMMITTEE ACTION CHARGE 8

CHARGE 8: Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Wednesday, July 11 at 10:00am 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:

Tom Cunningham (Commission on Judicial Conduct)
Don Ford (Guardianship Certification Board)
Michelle Hunter (State Bar of Texas)
Cathleen Parsley (State Office of Administrative Hearings)
John Scott (Office of the Attorney General)
David Slayton (Office of Court Administration)
Tom Walston (State Office of Administrative Hearings)
Seana Willing (State Commission on Judicial Conduct)
Martin Zelinsky (Department of Information Resources)

Summary of Committee Hearing

On July 11, 2012, 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 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.

The Committee opted to hear from the Commission on Judicial Conduct, the Guardianship Certification Board, the State Bar of Texas, the State Office of Administrative Hearings, the Office of the Attorney General, and the Office of Court Administration.

The Committee also heard testimony from the Office of Court Administration and the Department of Information Resources on the state of a uniform electronic filing system in Texas. David Slayton, with the Office of Court Administration, testified that the Texas e-filing program was started in 2002 and now covers 52 counties (more than 75% of the State's population) and processes about 40,000 e-filings monthly. E-filing is mandatory for civil filings in the Supreme Court, several appellate courts and a few district courts.

The two most common complaints about e-filing in Texas are lack of uniformity statewide and the additional cost to litigants. The Office of Court Administration, along with the Department of Information Resources, are working together to eliminate these two main issues and create a uniform system of electronic filing in Texas, which would facilitate easier access to our court system and streamline the document filing process across Texas. Unfortunately, the biggest obstacle to a uniform e-filing system is financial: the Office of Court Administration expects that the configuration and implementation of an e-filing system will cost between \$3.5 and \$4 million. Ongoing support and maintenance is expected to cost between \$3 and \$5 million, depending on volume. Without state funding, the development and implementation costs will be placed directly on litigants and could continue to hamper the use of this effective technology.

Potential Funding Mechanisms

The Office of Court Administration has identified three potential funding mechanisms for a uniform e-filing system in Texas.

The “Toll Road” Model is the current model in Texas. Each e-filing document is charged an additional fee (in addition to the court cost) to recover the cost of the e-filing service. (The current cost to litigants is between \$7 and \$18 per filing). The benefits of this plan are that there are no direct costs to the state, because the vendor recovers their cost through usage. The downside to this plan is that adoption of a uniform system is deterred by the extra cost to the filer, beyond the current cost of filing in person, and that the vendor assumes a large amount of risk to recover costs at some point in the future.

Another possible method of funding is the Court Technology Fee, which would require a fee per case that is filed. Each civil, criminal, and family case filed is charged a small court technology fee. This fee could be appropriated to the Office of Court Administration to support technology projects for the Judicial Branch, including the e-filing project. The benefits of this plan are that there is no direct cost to the state, because the cost is paid by the litigants using the judicial system; and the adoption rate of the e-filing system will increase by equalizing the cost of e-filing versus an in-person, paper filing. A downside to this approach is that it adds a fee to an already complex court fee matrix.

Finally, the Legislature could provide Office of Court Administration with a direct appropriation to pay for the implementation and ongoing operations of the selected vendor’s e-filing system. The benefit of this plan is that there are no additional cost to parties to e-file, and it will increase the adoption rate of electronic filing by equalizing the cost. The downside, of course, is that this plan requires an ongoing biennial appropriation from General Revenue.