

Hurling Toward the Lege: A Preview of the 86th Legislature

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A. Pre-Filed Bills

On November 12, 2018, legislators began filing bills for the 2019 legislative session. As of November 30th, 638 bills have been filed. Of that total, only a handful relate to the civil justice system. Some of the more notable bills are as follows:

1. Attorney's Fees

[HB 370 - Recovery of Attorney's Fees in Civil Cases](#)

- **Summary:** HB 370, filed by [Rep. Briscoe Cain \(R – Baytown\)](#), would amend Chapter 38.001 of the Civil Practice and Remedies Code (CPRC) to provide that a person may recover reasonable attorney's fees "from an individual or a corporation, or other organization...". HB 370 further provides that the term "organization" has the meaning assigned by section 1.002 of the Business Organizations Code, which defines "organization" as "a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign."

Note: Since 2014, Texas courts of appeals have consistently held that a trial court cannot order limited partnerships, limited liability companies, or limited partnerships to pay attorney's fees because section 38.001 of the CPRC does not permit such a recovery. See, e.g., *CBIF Limited Partnership, et al. v. TGI Friday's, Inc., et al.*, No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas April 21, 2017, pet. denied) (mem. op.); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Fleming & Associates, LLP v. Barton*, 425 S.W.3d 560 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). In response to these decisions, legislators filed bills in 2015 and 2017 to expand the scope of the statute to include all business organizations. However, for various reasons, the bills failed to pass.

2. Immunity from Civil Liability

[HB 119 - Liability for Automated Motor Vehicles](#)

- **Summary:** HB 119, filed by [Rep. Ina Minjarez \(D – San Antonio\)](#), would add section 545.457 to the Transportation Code and provide that an automated motor vehicle manufacturer is not liable for damages arising from an accident involving the vehicle if a person other than the manufacturer modified or attempted to modify the vehicle without the manufacturer's consent and the modification or attempted modification: (1) was the direct cause of the accident; or (2) interfered with the normal operation of the vehicle. HB 119 would further provide that immunity from liability does not apply to damages arising from an accident involving an automated motor vehicle caused by a defect that was present at the time of the vehicle's manufacture or first sale.

3. Court Costs

[SB 39 - Consolidation and Allocation of State Court Costs](#)

- **Summary:** SB 39, filed by [Sen. Judith Zaffirini \(D – Laredo\)](#), is an omnibus bill intended to: (1) simplify the civil filing fee and criminal court cost structure; (2) ensure that filing fees and court costs are going to support the judiciary; and (3) ensure that fees being collected for a purpose are actually being used for that intended purpose.

4. Probate Proceedings

[SB 192 - Transfer of Probate Proceedings to County in Which Executor/Administrator of Estate Resides](#)

- **Summary:** SB 192, filed by [Sen. Charles Perry \(R – Lubbock\)](#), would add section 33.1011 to the CPRC to provide that, after the issuance of letters testamentary or administration to the executor or administrator of an estate, the court, on motion of the executor or administrator, may order that the proceeding be transferred to another county in which the executor or administrator resides if no immediate family member of the decedent resides in the same county in which the decedent resided. SB 192 also defines “immediate family member” to be the parent, spouse, child, or sibling of the decedent.

5. Redistricting

[HB 312/HJR 25 - Creation of Texas Redistricting Commission](#)

- **Summary:** HB 312 and HJR 25, filed by [Rep. Donna Howard \(D – Austin\)](#), would create the Texas Redistricting Commission (“TRC”), which would be responsible for adopting redistricting plans for the election of the Texas House of Representatives, the Texas Senate, and members of the United States House of Representatives elected from the state of Texas following each federal census. The TRC also would be responsible for reapportioning judicial districts in the event the Judicial Districts Board failed to reapportion the districts.

6. “Revenge Porn” Statute

Two bills have been filed in response (at least in part) to *Ex Parte: Jordan Bartlett Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. – Tyler May 16, 2018, pet. granted), in which the Twelfth Court of Appeals held that section 21.16(b) of the Texas Penal Code was unconstitutionally overbroad.

[SB 97 - Prosecution of Criminal Offense of Unlawful Disclosure or Promotion of Intimate Visual Material](#)

- **Summary:** SB 97, filed by [Rep. José Menéndez \(D – San Antonio\)](#), would amend section 21.16(b) of the Texas Penal Code (“TPC”) to add language requiring a perpetrator to disclose intimate visual material “with an intent to harm that person” and that the perpetrator “knows or has reason to believe that” the visual material was obtained or created under circumstances in which the person depicted in the visual material had a reasonable expectation that the visual material would remain private.

[HB 98 - Civil and Criminal Liability for Unlawful Disclosure or Promotion of Intimate Visual Material](#)

- **Summary:** HB 98, filed by [Rep. Mary Gonzalez \(D – El Paso\)](#), would amend CPRC section 98B.002 and TPC section 21.16(b) to add intent requirements to both statutes. More specifically, in order to impose civil liability on a defendant, HB 98 would add requirements that (1) the defendant disclose intimate visual material without the consent of the depicted person and “with the intent to harass, annoy, alarm, abuse, torment, or embarrass that person,” and (2) the defendant “know[] or has reason to believe that” the intimate visual material was obtained or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.

In order to impose criminal liability on a perpetrator, HB 98 would amend section 21.16(b) of the TPC to add language requiring a perpetrator to disclose intimate visual material “with an intent to harass, annoy, alarm, abuse, torment, or embarrass that person” and that the perpetrator “know[] or has reason to believe that” the visual material was obtained or created under circumstances in which the person depicted in the visual material had a reasonable expectation that the visual material would remain private.

7. Various Local Ordinance-Related Bills

[SB 86 - Regulation of Raising or Keeping Six or Fewer Chickens](#)

- **Summary:** SB 86, filed by [Sen. Bob Hall \(R – Canton\)](#), would add Section 251.007 to the Agriculture Code and prohibit a political subdivision from imposing a requirement that prohibits an individual from raising or keeping six or fewer chickens in the boundaries of the political subdivision. However, a municipality would be permitted to impose reasonable requirements that do not have the effect of prohibiting the raising or keeping of six or fewer chickens within the boundaries of the municipality, such as: (1) limiting the number of chickens an individual may raise or keep in excess of six; (2) prohibiting the breeding of poultry; (3) prohibiting the raising or keeping of roosters; or (4) establishing a minimum distance that an individual must maintain between a chicken coop and a residential structure.

[SJR 10 - Constitutional Amendment to Restrict Power of Legislature to Mandate Requirements on a County or Municipality](#)

- **Summary:** SJR 10, filed by [Sen. Dawn Buckingham \(R – Lakeway\)](#) and [Sen. Charles Perry \(R – Lubbock\)](#), would propose a constitutional amendment that prohibits the Legislature from enacting any law on or after January 1, 2020 that requires a municipality or county to expend revenue unless the Legislature appropriates or otherwise provides, from a source other than the revenue of the municipality or county, for the payment or reimbursement of the costs incurred by the municipality or county in complying with the requirement.

[HB 234 - Local Regulation of the Sale of Lemonade or Other Beverages by Children](#)

- **Summary:** HB 234, filed by [Rep. Matt Krause \(R – Fort Worth\)](#), would prohibit a municipality, county, or other local public health authority from adopting or enforcing an ordinance, order, or rule that prohibits someone under 18 years of age from temporarily selling lemonade or other nonalcoholic beverages from a stand on private property.

B. Anticipated/Possible Bills

1. Bills that failed to pass in prior sessions

Several civil justice system bills that failed to pass in previous legislative sessions may be resurrected during the 2019 session. Examples of legislation that may be re-filed include the following:

(a) Affidavits Concerning the Cost and Necessity of Services

In 2017, [HB 2301](#) attempted to amend several provisions in section 18.001 of the CPRC. Specifically, the proposed revisions provided that, absent a controverting affidavit, an initial affidavit stating (1) the amount a person charged for a service was reasonable at the time and place that the service was provided, and (2) the service was necessary may be admitted as evidence that the amount charged was reasonable or that the service was necessary. The affidavit would not create a presumption that the amount charged was reasonable or that the service was necessary.

HB 2301 would have also required the party (or the party's attorney) offering the affidavit into evidence to serve a copy of the affidavit on each of the other parties to the case no later than the earlier of: (1) sixty (60) days before the date the trial commences; or (2) the date the offering party must designate any expert witnesses under the Texas Rules of Civil Procedure. Further, the party (or party's attorney) offering the affidavit into evidence must file notice with the court no later than the latest date for serving a copy of the affidavit under 18.001.

Under HB 2301, regardless of the date the party offering the affidavit in evidence serves a copy of the affidavit, a party intending to controvert a claim reflected by the affidavit had to serve a copy of the counter affidavit on each other party or the party's attorney of record by the earlier of: (1) 30 days before the date the trial commences, or (2) the date the party must designate expert witnesses under the Texas Rules of Civil Procedure. The counter affidavit must have: (1) given reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit; (2) been taken before a person authorized to administer oaths; and (3) been made by: (a) the party (or party's attorney) that seeks to offer the counter affidavit if the initial affidavit was made by a person described in the statute; or (b) a person qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

HB 2301 died in committee. Legislation addressing these issues will likely be filed again, especially in light of the Texas Supreme Court's recent decision in *Gunn v. McCoy*, 554 S.W.3d 645 (Tex. 2018), in which the Court held that section 18.001 affidavits executed by subrogation agents for health insurance carriers that pay a plaintiff's medical expenses are proper.

(b) Recovery of Medical/Health Care Expenses as Damages in Civil Actions

In 2017, [HB 2300](#) sought to amend section 41.0105 of the CPRC to provide that the recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant. More specifically, under HB 2300, the amount actually paid or incurred by or on behalf of the claimant for medical or health care expenses incurred for treatment by a physician would have been limited to the amount the treating physician normally would be paid for similar services in a non-litigation context, determined as follows (to the extent applicable):

- if the claimant was covered by health insurance or any other form of health benefits, including workers' compensation, Medicare, or Medicaid, that would pay or reimburse the expenses and the claimant accessed those benefits in obtaining the services, then the amount actually paid or incurred by or on behalf of the claimant is limited to the amount that the payor of the benefits paid or would pay for the services, plus any cost-sharing amount for which the claimant is responsible, up to the allowed amount on which the payor's payment is or would be based; or

- if the claimant did not have health benefits as described above or did not access those benefits in obtaining the services, then the amount actually paid or incurred by or on behalf of the claimant is limited to 125 percent of the Medicare reimbursement rate for the services.

HB 2300 died in committee. However, legislation addressing this issue may be re-filed, especially in light of the Supreme Court's decision in *In re North Cypress Medical Center*, No. 16-0851, 2018 Tex. Lexis 346, 2018 WL 1974376 (Tex. April 27, 2018) in which the Court declined to grant a hospital's request for mandamus relief and left undisturbed a trial court's order requiring a health care facility to produce (1) all insurance company "contracts regarding negotiated or reduced rates for the hospital services provided to plaintiff..."; and (2) documentation of Medicare reimbursement rates for the services provided.

(c) Award of Costs and Attorney's Fees in a Motion to Dismiss Actions that Have No Basis in Law or Fact

Currently, section 30.021 of the CPRC requires a trial court to award costs and attorney's fees to the party who prevails following the filing of a motion to dismiss, but does not require that the party awarded with costs and attorney's fees be the movant. In 2017, the House considered [HB 1038](#), which would have amended section 30.021 to make the award of costs and attorney's fees following the grant or denial of a motion to dismiss filed under the rules adopted by the Supreme Court under section 22.004(g) of Government Code (i.e., TRCP 91a) discretionary instead of mandatory. The original version of the bill also would have required a court to award costs and reasonable and necessary attorney's fees to the prevailing party if the prevailing party was the party that filed the motion to dismiss.

SB 1946, the companion to HB 1038, also would have amended section 30.021 of the Government Code to make the award of costs and attorney's fees following the grant or denial of a motion to dismiss filed under the rules adopted by the Supreme Court under section 22.004(g) of Government Code (i.e., TRCP 91a) discretionary instead of mandatory. Both bills died in committee.

(d) Creation of the Chancery Court and Court of Chancery Appeals

In 2015 and 2017, bills were introduced that sought to create a statewide specialized civil trial court and an appellate court to hear certain business-related litigation cases, such as actions against businesses, accusations of wrongdoing by businesses or their members, disputes between businesses, violations of the Business Organizations Code, Finance Code, and Business & Commerce Code. The proposed "chancery court" did not have jurisdiction over governmental entities (absent the government entity invoking or consenting to jurisdiction), personal injury cases, or cases brought under the Estates Code, Family Code, the DTPA, and Title 9 (Trusts) of the Property Code, unless agreed to by the parties and the court. Some of the other notable components of the bill were:

- The chancery court would be composed of seven (7) judges who are appointed by the governor for staggered six (6) year terms. The judges would be selected from a list of qualified candidates compiled by a bipartisan advisory council (Chancery Court Nominations Advisory Council) and have at least 10 years of experience in complex business law;
- The court clerk would be located in Travis County, but individual judges would be based in the county seat of their respective counties;
- Current venue rules would apply, but cases could be heard in an agreed-upon county or where the court may decide to be more convenient or necessary;
- There would be a removal procedure for cases filed in a district court; and

- The Court of Chancery Appeals, which would handle appeals from the chancery trial court, would be composed of seven (7) justices who are appointed by the governor based on a list of qualified candidates compiled by the advisory council. Justices would serve six (6) year terms and would hear cases in panels of three (3) randomly-selected justices. Appeals from the Chancery CA would go to the Supreme Court.

The chancery court bill filed in 2017 ([HB 2594](#)) was virtually identical to the version of the 2015 bill ([HB 1603](#)) that was voted out of committee, but failed to pass in the House. The 2017 bill was never scheduled for hearing and died in committee.

2. Texas Judicial Council Resolutions

In September, the Texas Judicial Council adopted several [civil justice resolutions](#) that memorialize the Council's legislative priorities for 2019. These resolutions include, but are not limited to, requests for the Legislature do the following:

- Seek to ensure that the judiciary is able to attract the best and brightest minds to promote a fair and experienced judiciary by:
 - considering alternatives to the current method of selection of judges;
 - proposing a constitutional amendment to modify the qualifications to serve as justices/judges; and
 - increasing judicial compensation to an amount sufficient to “attract the most highly qualified individuals in the state, from a diversity of life and professional experiences, to serve in the judiciary without unreasonable economic hardship and with judicial independence unaffected by financial concerns.”
- Examine the structure and jurisdiction of the courts to increase efficiency by:
 - simplifying the trial court structure by establishing consistent jurisdiction among the various trial courts across the state, such as
 - increasing the civil jurisdiction floor for district courts from \$200 to \$10,000;
 - increasing the civil jurisdictional floor of the statutory county courts in Section 25.0003 of the Texas Government Code from \$200 to \$5,000; and
 - for counties with increased justices of the peace qualifications, the Legislature should increase the maximum civil jurisdiction of the justice courts from \$10,000 to \$20,000.
 - Simplifying the courts of appeals' structure and reducing the need for transfer among the courts of appeals.
- Clarify the unauthorized practice of law and barratry statutes to differentiate between providing legal information and legal advice and amend the unauthorized practice of law and barratry statutes to authorize legal assistance software applications that provide legal information.
- Increase funding for civil legal aid services throughout the state.

- Provide adequate funding to:
 - Support core services to the judicial branch, as outlined in the legislative appropriations requests for the state-funded courts and judicial branch agencies;
 - Provide sufficient judicial education to the over 3,300 judges of this state;
 - Retain and recruit knowledgeable and dedicated employees through targeted salary increases at the courts and judicial branch agencies;
 - Protect Texas children by creating new child protection courts for growing CPS caseloads;
 - Fund an expansion of the Guardianship Compliance Project to prevent fraud and abuse committed against the elderly and incapacitated; and
 - Ensure access to justice is available to individuals seeking justice through continued funding for basic civil legal services and increased funding for basic civil legal services for veterans and their families; and
- Adopt recommendations of the Judicial Compensation Commission to:
 - Increase judicial compensation of the justices and judges of the supreme court, court of criminal appeals, courts of appeals, and district court judges by 15 percent;
 - Reduce the number of years required to receive judicial longevity pay from sixteen years of service to four years of service and to provide the judge or justice 0.2 percent of their current monthly state salary for every two years of judicial service; and
 - Fund an increase in the salaries of the Children’s Court Associate Judges at 90 percent of a district judge’s salary.

3. Interim Charges

Following the 2017 legislative session, Speaker Joe Straus and Lt. Governor Dan Patrick issued several interim charges for House and Senate committees to study before the Legislature convenes in January 2019. Some of the charges addressed the civil justice system. They were as follows:

- **Senate Committee on State Affairs**
 - *Court Fees*: Examine the structure of court fees and make recommendations to ensure statutory filing fees and court costs are appropriate and justified. Provide recommendations for proper agency oversight of fee collection.
 - *Campus Free Speech*: Ascertain any restrictions on Freedom of Speech rights that Texas students face in expressing their views on campus along with freedoms of the press, religion, and assembly. Recommend policy changes that protect First Amendment rights and enhance the free speech environment on campus.
 - *Religious Liberty*: Monitor the implementation of legislation that protects citizens' religious freedoms, including Senate Bill 24 (sermon safeguard) and House Bill 555 (religious liberty of county clerks), and make recommendations for any legislation needed to ensure that citizens' religious freedoms are not eroded by local ordinances or state or federal law.

- **House Committee on Business and Industry**
 - *Consumer Rights and Protection Laws:* Review all existing law concerning consumer rights and protections, including but not limited to statutes that address deceptive practices, landlord/tenant agreements, and homeowner/contractor disputes; determine whether the provisions offer adequate guidance and protections in disaster and recovery situations.
- **House Committee on General Investigating and Ethics**
 - *Judicial Campaign Fairness Act:* Examine the Judicial Campaign Fairness Act and identify opportunities to improve the Act.
- **House Committee on Judiciary and Civil Jurisprudence**
 - *Non-Traditional Methods of Resolving Legal Disputes:* Examine the increasing use of non-traditional methods of resolving legal disputes and interacting with the legal system, and the implications of this trend both for the parties involved and the legal system as a whole. Include an examination of the availability and use of self-help resources, recent efforts by the Legislature and courts to increase access to justice for unrepresented litigants, and the use of online dispute resolution.
 - *Fee Statutes:* Evaluate the statutes prescribing fees in civil and criminal matters, and examine opportunities to simplify and improve the fee structure. Identify fees that may be challenged on grounds similar to those raised in *Salinas v. Texas* (Tex. Crim. App., March 8, 2017), and recommend any necessary changes.
 - *Specialty Courts:* Study the increased use of specialty courts across the state. Examine the role these courts play in the judicial system and recommend improvements to ensure they continue to be appropriately and successfully utilized.
 - *Jurisdictional Thresholds of Texas Trial Courts:* Examine the jurisdictional thresholds of the justice, county, and district courts, including how these limits and other factors impact the caseload of the courts. Study possible improvements in the efficient organization and operation of the court system.
 - *Statewide Electronic Court Record Database:* Monitor the implementation of the statewide electronic database of court records (i.e., “re:SearchTX”).

Here is a full list of the charges issued by both chambers: [House Interim Charges](#) [Senate Interim Charges - Part 1](#) and [Part 2](#). Committee reports on the interim charges will be published prior to the start of the 2019 legislative session.

C. Summary

As in past sessions, the 86th Legislature will likely consider several bills that could significantly impact the judicial branch, the civil justice system, and the practice of law as a whole. The Legislature has yet to convene so it is unclear whether any of the anticipated bills will successfully move through the legislative process.

As a service to interested members of the bench and bar, the author produces an e-newsletter that includes summarized information and links to relevant bills in order to keep recipients up to date on what is happening in Austin and how proposed legislation might affect the practice of civil trial and appellate lawyers and the judiciary. For those interested in receiving the e-newsletter, please contact Jerry D. Bullard at either of the following addresses: jdb@all-lawfirm.com or j.bullard1@verizon.net.