

Hurtling Toward the Lege: A Preview of the 87th Legislature

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I. Pre-Filed Bills

Since pre-filing began on November 9th, a total of 887 bills and joint resolutions have been filed in the House and Senate through November 30th, which is well ahead of last session's pace over the same time period. In fact, November's bill-filing activity far exceeds the number of bills and joint resolutions filed during the same time period for each of the five previous regular sessions:

87 th Regular Session (2021):	887
86 th Regular Session (2019):	632
85 th Regular Session (2017):	715
84 th Regular Session (2015):	566
83 rd Regular Session (2013):	366
82 nd Regular Session (2011):	561

Of the 887 bills and resolutions filed so far, several address topics that impacted our daily lives this past year (i.e., election, pandemic, separation of powers, etc.). As of today, only a handful relate to the civil justice system. There will be more. Some of the more notable bills filed to date are as follows:

A. Court Costs

[SB 41 - Consolidation and Allocation of State Court Costs](#)

- **Summary:** SB 41, 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.
- *Effective date:* September 1, 2021.

B. Healthcare Liability

[HB 501 - Liability Limits in a Health Care Liability Claim](#)

- **Summary:** HB 501, filed by [Rep. Gene Wu \(D – Houston\)](#), would amend sections 74.301 and 74.302 of the Civil Practice and Remedies Code (CPRC) so as to provide for an adjustment to the noneconomic damages caps based on the consumer price index (CPI). More specifically, the bill provides that, when there is an increase or decrease in the CPI, the liability limit prescribed by the noneconomic damage limitation sections will be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the CPI that measures the average changes

in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average--All Items), between September 1, 2003, and the time at which damages subject to such limits are awarded by final judgment or settlement.

- *Effective date:* September 1, 2021. The changes in the law addressed in HB 501 would apply to a health care liability claim that accrues on or after the effective date.

C. Damages

[SB 207 – Recovery of Medical or Healthcare Expenses in Civil Actions](#)

- **Summary:** SB 207, jointly filed by [Sen. Charles Schwertner \(R- Georgetown\)](#), [Sen. Dawn Buckingham \(R - Lakeway\)](#), [Sen. Donna Campbell \(R- New Braunfels\)](#), would amend section 41.0105 of the CPRC to permit a party in an action in which a claimant seeks recovery of medical or health care expenses to introduce evidence of the reasonableness of the amount charged for the medical or health care services provided to the claimant, including any of the following amounts:
 - the amount actually paid for the medical or health care services provided to the claimant, unless there is a formal or informal agreement that the medical or health care provider will wholly or partly refund, rebate, or remit the amount paid to the payer or another person, in which case the amount actually paid is not admissible in evidence;
 - the amount billed by the medical or health care provider for the medical or health care services provided to the claimant;
 - the amount paid, the amount that would have been paid, or the amount likely to be paid for the medical or health care services provided to the claimant by a health benefit plan, workers' compensation insurance, an employer-provided plan, Medicaid, Medicare, or another similar source available to pay for services provided to the claimant at the time the services were provided or available to pay for the services after the services were provided, as applicable;
 - the average amount typically paid or allowed by health benefit plan issuers or governmental payers at or near the time the medical or health care services were provided to the claimant to medical or health care providers who:
 - (1) are located in the same geographic area as the medical or health care provider who provided the services to the claimant; and
 - (2) offer the same type of medical or health care services as the services provided to the claimant; or
 - the average of the amounts actually accepted for payment in the previous 12 months by the medical or health care provider who provided medical

or health care services to the claimant for the same services provided to patients other than the claimant.

- *Effective date:* September 1, 2021. The changes in the law addressed in SB 207 would apply to an action commenced on or after the effective date.

D. Insurance

[HB 359 – Recovery under Uninsured and Underinsured Motorist Insurance Coverage](#)

- **Summary:** HB 359, filed by [Rep. Charlie Geren \(R – Fort Worth\)](#), would amend the Insurance Code to, among other things, expressly: (1) define, at least to some degree, what constitutes sufficient notice under the Insurance Code for uninsured/underinsured motorists (UIM) claims; (2) state that an insurer may not require, as a prerequisite to asserting a claim under UIM coverage, a judgment or other legal determination establishing the other motorist's liability or uninsured/underinsured status; (3) state that an insurer may not require, as a prerequisite to payment of UIM benefits, a judgment or other legal determination establishing the other motorist's liability or the extent of the insured's damages before benefits are paid; and (4) require an insurer to attempt, in good faith, to effectuate a prompt, fair, and equitable settlement of a claim once liability and damages have become reasonably clear. HB 359 would also amend the Insurance Code to address when prejudgment begins to accrue on UIM claims and when a claim for attorney's fees is considered to be "presented" for UIM claim purposes.
- *Effective date:* September 1, 2021. The changes in the law addressed in HB 359 would apply to causes of action that accrue on or after the effective date, but does not affect the enforceability of any provision in an insurance policy delivered, issued for delivery, or renewed before January 1, 2022, that conflicts with the change in law made by HB 359.

E. Judiciary

[HB 339 - Composition of the Court of Appeals Districts](#)

- **Summary:** HB 339, filed by [Rep. Phil King \(R – Weatherford\)](#), would eliminate overlapping intermediate appellate court jurisdiction over certain counties located in the Fifth, Sixth, and Twelfth Courts of Appeals. More specifically, HB 339 would provide that: (1) Hunt County would be solely within the jurisdiction of the Sixth Court of Appeals (instead of having concurrent jurisdiction with the Fifth Court of Appeals); (2) Gregg County and Rusk County would be solely within the jurisdiction of the Twelfth Court of Appeals (instead of having concurrent jurisdiction with the Sixth Court of Appeals); and (3) Upshur County and Wood County would be solely within the jurisdiction of the Sixth Court of Appeals (instead of having concurrent jurisdiction with the Twelfth Court of Appeals).
- *Effective date:* September 1, 2021.

F. Probate Proceedings

[SB 156 - Transfer of Probate Proceedings to County in Which Executor/Administrator of Estate Resides](#)

- **Summary:** SB 156, filed by [Sen. Charles Perry \(R – Lubbock\)](#), would add section 33.1011 to the Estates Code 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 156 also defines “immediate family member” to be the parent, spouse, child, or sibling of the decedent.
- *Effective date:* September 1, 2021.

G. Qualified Immunity

[HB 614 - Cause of Action for Deprivation of Certain Rights, Privileges, and Immunities under Color of Law](#)

- **Summary:** HB 614, filed by [Rep. Senfronia Thompson \(D – Houston\)](#), would amend the Civil Practice and Remedies Code by adding Chapter 135 to provide for the following:
 - A person may bring an action for any appropriate relief, including legal or equitable relief, against another person, including a public entity, who, under the color of law, deprived or caused to be deprived the person bringing the action of a right, privilege, or immunity secured by the Texas Constitution;
 - A person must bring the action no later than two years after the date the cause of action accrues;
 - Statutory immunity or limitation on liability, damages, or attorney’s fees does not apply to an action brought under the proposed law. Qualified immunity or a defendant’s good faith but erroneous belief in the lawfulness of the defendant’s conduct is not a defense to an action brought under the proposed law;
 - A court shall award reasonable attorney’s fees and costs to a prevailing plaintiff. Further, if a judgment is entered in favor of a defendant, the court may award reasonable attorney’s fees and costs to the defendant only for defending claims the court finds frivolous;
 - A public entity shall indemnify a public employee of the entity for liability incurred by and a judgment imposed against the employee in an action brought under the proposed law. However, a public entity is not required to indemnify a public employee of the entity if the employee was convicted of a criminal violation for the conduct that is the basis for the action brought under this chapter.

Note: Rep. Senfronia Thompson also filed [HB 88](#), which would create a cause of action arising out of the acts of peace officers who, under the color of law, deprive or cause a person to be deprived of a “right, privilege, or immunity secured by the Texas Constitution.” Like HB 614, the proposed law expressly states that qualified immunity or a defendant’s “good faith but erroneous belief in the lawfulness of the defendant’s conduct” is not a defense under the proposed law. [Sen. Royce West \(D – Dallas\)](#) has filed a companion bill in the Senate: [SB 161](#).

- *Effective date:* September 1, 2021.

H. Separation of Powers

[HJR 15 - Executive Power Following Disaster or Emergency Declaration](#)

- **Summary:** HJR 15, filed by [Drew Springer \(R – Muenster\)](#), proposes a constitutional amendment requiring the Governor to call the Legislature into special session following certain disaster or emergency declarations and specifies the powers of the Legislature in those special sessions. More specifically, HJR 15 proposes an amendment that would require the Governor to call a special session: (1) if a state of disaster or emergency declared by the Governor continues for more than 21 days; or (2) upon receipt of a petition from any member of the Legislature requesting legislative review of a state of disaster or emergency declared by the Governor if the petition is signed by at least two-thirds of the members of the house of representatives and at least two-thirds of the members of the senate.

HJR 15’s proposed constitutional amendment would authorize a special session in which the Legislature may:

- review an order, proclamation, or other instrument issued by the Governor during the 90 days before the special session begins: (1) declaring a state of disaster or emergency in Texas; or (2) in response to a state of disaster or emergency in Texas declared by any federal, state, or local official or entity;
- terminate or modify an order, proclamation, or other instrument described above by passage of a resolution approved by majority vote of the members present in each house of the Legislature, which is not subject to the new constitutional provision;
- respond to the state of disaster or emergency, including by: (1) passing laws and resolutions the Legislature determines are related to the state of disaster or emergency; and (2) exercising the powers reserved to the Legislature under the Texas Constitution; and
- consider any other subjects stated in the Governor’s proclamation convening the Legislature.

II. Anticipated/Possible Bills

A. **Bills that failed to pass in 2019 and/or in prior sessions**

1) **Architects and Engineers**

Agreements by Architects and Engineers in Connection with Construction Contracts¹

HB 1211, filed in 2019, sought to amend section 130.002(b) of the CPRC to add to the existing list of void and enforceable construction-related contractual obligations any obligation placed on an architect or engineer to defend against damage claims arising from the negligence of any person other than the architect or engineer. Currently, section 130.002 states that obligations requiring an architect or engineer to “indemnify or hold harmless an owner or owner’s agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner’s agent or employee” are void and unenforceable. HB 1211 also sought to add section 130.0021 to the CPRC to state that a “contract for engineering or architectural services must require a licensed engineer or registered architect to perform services with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license.”

2) **Attorney’s Fees**

Recovery of Attorney’s Fees in Civil Cases²

HB 790, which was one of several bills filed in 2019, sought to amend section 38.001 of the CPRC to provide that a person may recover reasonable attorney’s fees “from an individual or a corporation, or other organization...” HB 370 further provided that the term “organization” would have 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 liability 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, the bills failed to pass.]

3) **Attorneys – Practice of Law**

Attorney Access to Courthouses³

HB 1359, filed in 2019, sought to amend the Government Code and permit Texas-licensed attorneys to enter a building that houses a justice court, municipal court, county court, county court at law, or district court without passing through security services by presenting a State Bar of Texas (SBOT) membership card instead of an identification card issued by a

county or municipality. HB 1359 did not include the appellate courts. In committee, HB 1359 was revised to permit an attorney to apply for an identification card through the SBOT. The card would have included the attorney's photo and could have been used in any county. The SBOT would have created a committee to accept applications and vet applicants, which would have included a criminal background check to be repeated annually. Each applicant would have paid a fee to cover the cost of issuing the cards. A part of the fee would go back to the lawyer's home county to be spent on court security.

4) Insurance

Disclosure by Liability Insurers and Policyholders to Third Party Claimants⁴

HB 649, filed in 2019, sought to amend the Insurance Code and require an insurance carrier and a policyholder to disclose to a third party claimant certain information about the insurance coverage of the party against who a claim is being made. More specifically, HB 649 would have required an insurance carrier to provide the claimant with a sworn statement of an officer or claims manager of the insurer that contained the following information for each policy known by the insurer that provides or may provide relevant coverage, including excess or umbrella coverage: (a) the name of the insurer; (b) the name of each insured; (c) the limits of liability coverage; (d) any policy or coverage defense the insurer reasonably believes is available to the insurer at the time the sworn statement is made; and (e) a copy of each policy under which the insurer provides coverage. An insurer that failed to comply with the request would be subject to an administrative penalty up to \$500. An insured who received such a request had to: (a) disclose to the claimant the name of and type of coverage provided by each insurer that provides or may provide liability coverage for the claim; and (b) forward the claimant's request to each insurer included in the disclosure.

5) Judiciary/Judicial Administration

Creation of a Business Court and a Court of Business Appeals⁵

HB 4149 and SB 2259 were companion bills filed in 2019 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, and business-related disputes in which the amount in controversy exceeds \$10 million. The proposed "business court" would not have had 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 business court would have been composed of seven (7) judges who were appointed by the governor for staggered six (6) year terms. The judges would have been selected from a list of qualified candidates compiled by a bipartisan advisory council (Business Court Nominations Advisory Council) and would have been required to have at least 10 years of experience in complex business law;

- The court clerk would have been located in Travis County, but individual judges could be based in the county seat of their respective counties;
- Current venue rules would have applied, but cases could be heard in an agreed-upon county or where the court decided to be more convenient or necessary;
- There would have been a removal procedure for cases filed in a district court;
- The business court would have been required to provide rates for fees associated with filings and actions in the business court, and such fees had to be set at a sufficient amount to cover the costs of administering the business court system; and
- The Court of Business Appeals, which would have handled appeals from the business trial court, would have been composed of seven (7) active justices from the court of appeals who were appointed by the governor based on a list of qualified candidates compiled by the advisory council. Justices would serve six (6) year terms and hear cases in panels of three (3) randomly-selected justices. Appeals from the Business CA would have gone to the Supreme Court.

HB 4149 and SB 2259 were substantially similar to the version of the 2015 chancery court bill (HB 1603) that was voted out of committee (but failed to pass in the House) and the 2017 chancery court bill (HB 2594) that was filed and referred to committee, but never received a hearing.

Appointment/Non-Partisan Election of Certain Judicial Offices⁶

The Texas Commission on Judicial Selection was created by the 86th Legislature (2019) to study and review the method by which statutory county court judges, district judges, and appellate justices are selected for office. You can watch all meetings and review materials submitted to the Commission by visiting its [website](#). The Commission is required to submit a report on its findings and recommendations to Governor Abbott and the Legislature no later than December 31, 2020.

In 2019, HB 4504 and HJR 148 sought to change the manner in which Texas selects certain district judges and appellate court judges and justices. Some of the highlights of HB 4504 and HJR 148 were as follows:

- All state appellate court judges and justices and all district judges in a judicial district: (1) that contained a county with a population that exceeded 500,000, or (2) in which the voters of the district voted to have district judge vacancies filled by appointment would be subject to an appointment/non-partisan retention election process that is triggered by a vacancy.
- All vacancies would be filled by gubernatorial appointment and appointees would then face a non-partisan retention election during the 4th and 8th years of their 12-year terms.
- During the retention election, if a majority of the votes received were for the retention of the judge or justice, the judge or justice would be entitled to continue

the term. However, if a majority of the votes received were to not retain the judge or justice, the resulting vacancy would be filled by gubernatorial appointment based on the recommendation of the Judicial Appointments Advisory Board.

- The Judicial Appointments Advisory Board (Board) would review the qualifications of gubernatorial nominees and advise the Senate on whether the Board believes the appointee is “unqualified,” “qualified,” or “highly qualified.”
- The Board would have been composed of eleven (11) members: three (3) members appointed by the majority party of the House; two (2) members appointed by the minority party of the House; two (2) members appointed by the majority party of the Senate; two (2) members appointed by the minority party of the Senate; one (1) member appointed by the Chief Justice of the Texas Supreme Court; and one (1) member appointed by the Presiding Judge of the Court of Criminal Appeals. Members of the Board would serve staggered six (6) year terms.
- Current judges and justices would have been permitted to complete their current terms before facing a nonpartisan retention election.

6) Litigation Financing

Mandatory Disclosure of Third Party Litigation Financing Agreements⁷

HB 2096 and SB 1567, which were companion bills filed in 2019, sought to require the Supreme Court to adopt rules to provide for the mandatory disclosure of third-party litigation financing agreements to parties in the civil action in connection with which third-party litigation financing is provided. HB 2096 and SB 1567 defined “third-party litigation financing” to mean “the provision of financing with repayment being conditioned on and sourced from the person's or group's proceeds from the civil action, regardless of whether the proceeds are obtained through collection of a judgment, payment of a settlement, or otherwise.” However, the term would not have included a contingent fee arrangement or an extension of credit to any attorney or law firm when the obligation of the attorney or law firm to repay the loan is required by the loan agreement and is not contingent on the outcome of a lawsuit or a portfolio of lawsuits. Under HB 2096 and SB 1567, “financing” would have meant “the provision of monetary or in-kind support to a person or group of persons who have or will file or prosecute a civil action, including a payment to an attorney who represents the person or group, a payment to a fact or expert witness, a payment of the costs of the civil action, or the provision of funds or credit to be used in the future to support the civil action.” The term would have included the provision of monetary or in-kind support, regardless of whether the support was called a loan, an advance, a purchase, or another term.

7) Wrongful Birth Claims

Elimination of Wrongful Birth Cause of Action⁸

HB 4199, filed in 2019, sought to amend the CPRC to expressly prohibit a cause of action and damages arising on a claim that “but for the act or omission of another, a person

would not have been permitted to have been born alive but would have been aborted.” The bill also expressly provided that the law should not be construed to eliminate any duty of a physician or health care practitioner that exists under applicable law.

B. Bills to Address New Issues

Thus far, four bills have been filed to address workers’ compensation coverage with regard to COVID-19. Each bill would create a presumption that certain classifications of employees who are diagnosed with COVID-19 contracted the disease during the course and scope of their employment for workers compensation purposes, to wit: [HB 541](#) (Public Safety Employees); [HB 47](#) (School District Employees); [HB 34](#) (Public Employees); and [HB 396](#) (Nurses).

Fourteen states and the District of Columbia have enacted laws that limit liability for healthcare providers treating patients in response to COVID-19, or who have altered or delayed treatment as a result of the COVID-19 pandemic, to only those instances in which the provider was grossly negligent or acted with malice. The 87th Legislature is likely to introduce similar legislation, as well as other bills designed to limit liability for manufacturers, distributors, sellers, and donors of personal protective equipment and other medical equipment required for the pandemic response effort.

Further, given the push to reopen businesses early this summer, the Legislature is likely to consider legislation that limits liability for bars, restaurants, and retail businesses, as well as for public, private, and charter schools and universities. As nearly every other state has done, the Legislature may also seek to limit liability if a business followed a government-issued public health directive in good faith.

C. Texas Judicial Council Resolutions

On September 24, 2020, the Texas Judicial Council adopted several [civil justice](#), [civic education](#), and [court funding](#) resolutions that memorialize the Council’s legislative priorities for 2021. These resolutions include requests for the Legislature do the following:

- simplify and consolidate the civil court filing fee system in a way that remedies potential constitutional issues in the current system and is revenue-neutral for both the state and local governments to the extent it can be;
- provide adequate funding to: (1) support and restore core services to the judicial branch, as outlined in the legislative appropriations requests for the courts and judicial branch agencies; (2) provide COVID-19 protections in Texas courtrooms and courthouses; (3) provide sufficient judicial education to the over 3,300 Texas judges; and (4) 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;
- make changes to civic education in Texas for grades K-12 to include the following components: (1) recognizing the foundational civic knowledge requirements that already exist in Texas educational standards but emphasizing the need for additional instruction on “civic skills as well as appropriate civic attitudes in addition to just civic facts”; (2) mandating a student-led but curriculum-based, non-partisan civics practicum or project in the 8th grade and in

high school to effectively demonstrate understanding of crucial civic behaviors; (3) requiring the Board of Education (BOE) to revise or enhance the current social studies teaching standards to provide for all four civic education domains (civic knowledge, civic skills, civic attitudes, and civic behaviors) and specifically include these civic education domains in existing history standards; (4) instructing the Texas Education Agency to infuse civics education into other disciplines by providing content rich, non-fiction civics texts in English Language Arts (ELA) testing where reading and writing prompts are used and in approved ELA reading lists; and (5) requiring social studies teachers to have 25% of their teacher continuing education hours mandated every 5 years by the Education Code be specifically on effective teaching of media literacy, simulations of democratic processes, civic practicums, and guided classroom discussions of current events.

III. Summary

The 87th Legislature will likely consider numerous bills that could significantly impact the judicial branch, the civil justice system, and the practice of law as a whole. The COVID-19 pandemic will certainly influence legislation concerning the civil liability issues facing Texas employers and healthcare providers. The Legislature convenes on January 12, 2021, so it remains to be seen whether any of the pre-filed or anticipated bills will successfully move through the legislative process.

As a service to interested members of the bench and bar, one of the authors 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.

¹ Tex. H.B. 1211, 86th Leg., R.S. (2019).

² Tex. H.B. 790, 86th Leg., R.S. (2019).

³ Tex. H.B. 1359, 86th Leg., R.S. (2019).

⁴ Tex. H.B. 649, 86th Leg., R.S. (2019).

⁵ Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. S.B. 2259, 86th Leg. R.S. (2019).

⁶ Tex. H.B. 4504, 86th Leg., R.S. (2019); Tex. H.J.R. 148, 86th Leg., R.S. (2019).

⁷ Tex. H.B. 2096, 86th Leg., R.S. (2019); Tex. S.B. 1567, 86th Leg. R.S. (2019).

⁸ Tex. H.B. 4199, 86th Leg., R.S. (2019).