TEXAS HOUSE OF REPRESENTATIVES
COMMITTEE ON CIVIL PRACTICES

INTERIM REPORT TO THE 77TH TEXAS LEGISLATURE

FRED M. BOSSE
Chairman

Committee Clerk
CRAIG P. CHICK

Committee On
Civil Practices

December 11, 2000

Fred M. Bosse
Chairman

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

The Honorable James E. "Pete" Laney
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 Civil Practices of the Seventy-Sixth Legislature hereby submits its interim report including recommendations for consideration by the Seventy-Seventh Legislature.

Respectfully submitted,

Fred M. Bosse, Chairman

Kyle Janek, Vice-Chair

Leo Alvarado, Jr.

Harold V. Dutton, Jr.

Toby Goodman

Ruben Hope

Joe Nixon*

John T. Smithee

Zeb Zbranek

Kyle Janek
Vice-Chairman

Members: Leo Alvarado, Jr.; Harold V. Dutton, Jr.; Toby Goodman; Ruben Hope; Joe Nixon; John T. Smithee; and Zeb Zbranek

* Note: Representative Nixon approves all sections, with exception to the findings in Charge Three.

Kyle Janek
Vice-Chairman

Members: Leo Alvarado, Jr.; Harold V. Dutton, Jr.; Toby Goodman; Ruben Hope; Joe Nixon; John T. Smithee; and Zeb Zbranek

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INTRODUCTION

HOUSE COMMITTEE ON CIVIL PRACTICES
INTERIM CHARGES

At the beginning of the 76th Legislature, the Honorable James E. "Pete" Laney, Speaker of the House of Representatives, appointed nine members to the Committee on Civil Practices. The committee membership includes the following: Fred M. Bosse, Chair; Kyle Janek, Vice-Chair; Leo Alvarado, Jr.; Harold V. Dutton, Jr.; Toby Goodman; Ruben Hope; Joe Nixon; John T. Smithee; and Zeb Zbranek.

During the interim, Speaker Laney charged this Committee with the following issues:

1) Examine the effect and potential of sales and other alienation of structured settlements on the use and advisability of such settlements.

2) Study the exercise of conflicts jurisdiction by the Supreme Court under Sections 22.001(a) and 22.007(a), Government Code.

3) Examine the impact of requiring trial court judges to specify the grounds upon which summary judgments are granted.

4) Examine the Supreme Court's rule-making authority, any conflicts between Section 22.004(c), Government Code, and Article 5, Section 31, Texas Constitution, and the role, if any, that the legislature should play in the Court's rule-making process.

5) Collect information from Texas trial and appellate courts that will assist the committee in evaluating the success of recent legislation and in making decisions regarding future legislation.

The Committee has completed its hearings and investigations and has issued the following findings. Each member approved all sections of the report, with the exception of Representative Nixon, who objected to the findings in Charge Three.

The Chairman wishes to express appreciation to the Committee members and their staffs; Texas Legislative Council, Statistics and Demographics Research Division; respondents to the judicial survey; the State Bar of Texas and staff; the Supreme Court and the Supreme Court Advisory Committee; and all of the various associations and individuals who testified and prepared valuable information for this report.

Committee on Civil Practices
Interim Report to the
77th Legislature

Charge One

Examine the effect and potential of sales and other alienation of structured settlements on the use and advisability of such settlements.

Charge One
Structured Settlements

History

The Legislature has undertaken the study of structured settlements because of interest in consumer protection and ensuring that structured settlements remain a viable option for the settlement of lawsuits and other claims. Structured settlements can provide long-term economic stability for an injured person or an injured person's family by protecting against rapid consumption of their awards. Structured settlements may also promote the public interest of keeping disabled persons off public assistance.

Since 1982, Congress has encouraged special tax treatment for structured settlement payments[1] by making them more attractive for the settlement of personal injury claims. The Internal Revenue Code provides that 100 percent of every payment be exempt from federal taxes.[2] As a result of favorable tax status, an industry of factoring companies which purchase these settlements has evolved. Current law states that the conditions of favorable tax treatment prohibit any settlement payments from being accelerated, deferred, increased or decreased by the injured person[3] and the structured settlement documentation almost universally prohibits such alienation.[4] However, through the years, factoring companies have found a number of means, some creative, to circumvent the tax law and contract terms to convert the periodic or deferred payments, specified under a structured settlement, to a lump sum payment.

Factoring companies obtain ownership of structured settlements by purchasing the remaining payment streams through discounted lump sum payments. Sometimes the discounts are steep.[5] By doing so, the factoring companies undermine Congress' public policy objective of creating an incentive for the injured persons to receive timed periodic payments as awards for personal injury claims. In addition, the purchase of a structured settlement circumvents the settlement agreement or court order initially creating

[1] Statements provided by the National Structured Settlement Trade Association's web site at http://www.nssta.com/Issues.asp?FormMode=Call&LinkType=Text&ID=7 (updated 2000).

[2] I. R. C. § 130 (1999).

[3] *Id.*

[4] Tex. Ins. Code, Art. 21.22, § 5.

[5] *See* Appendix A.

the structured settlement. Structured settlements are sometimes used to ensure that funds will be available to an injured minor for college expenses. Other times they are used to provide periodic payments over a lifetime to a person who has received a disabling injury. The subsequent reduction of those structured settlements to a lump sum is contrary to the intent of the parties at the time that the settlement was made and, in some instances, can leave the person without the resources for continued independence or planned education.

During the 76th Legislative Session, the Committee favorably reported H.B. 2691[6] by Representative David Counts and S.B. 731[7] by Senator Chris Harris. These bills included language that would have given the settlement recipient the opportunity and expertise to make an educated decision about the sale of a settlement. Both bills required that the settlement purchaser provide the settlement recipient with the aggregate amount of the payments, discounted present value of payments, and the purchaser's return on investment from the purchase of the settlement. The bills also required a hearing in the court of original jurisdiction to authorize the transfer or sale of a settlement that arose from a lawsuit. These provisions were removed from S.B. 731 prior to final passage, because of uncertainty regarding their tax consequences. If a settlement recipient elects to sell a settlement to a factoring company for a lump sum payment, it is currently unclear who is responsible for the tax consequences. Neither party is currently willing to assume any tax liability.

Comparison of Benefits

Lump Sum v. Structured Settlements[8]

In 1992, a 46 year-old Pennsylvania man was injured on the job. When his claim was settled, he had an option of taking a payment of about $96,000. Instead, having analyzed the financial implications with his attorney, he opted for a structured settlement that provides monthly payments for the rest of his life, with a 20-year guarantee. Each month, he receives a check for $600.

The following table, based on this case, shows a long-term financial benefit of taking a structured settlement over a lump sum award:

[6] *See* Appendix B.

[7] *See* Appendix C.

[8] Comparison provided by the National Structured Settlement Trade Association's web site at http://www.nssta.com/issues.asp?FormMode=Call&LinkType=Text&ID=3&Section=0 (updated 2000).

OPTIONS FOR PAYMENT	TOTAL GUARANTEED	TOTAL EXPECTED
LUMP SUM PAYMENT	$96,000	$157,800[9]
STRUCTURED SETTLEMENT ($600 per month for life with 20 years guaranteed)	$144,000	$206,640[10]

The benefit of taking a structured settlement comes to $48,840 over 20 years — or more than 30 percent higher than a cash settlement.[11]

Review

During the Committee's interim review, public testimony and written statements reflected an increasing trend toward the sale of structured settlement benefits. The purchase of these settlements by factoring companies circumvents the congressional intent of providing a tax benefit for payment of injury claims through periodic payments. Although the injured parties consent to this agreement, many times they are not fully aware of the overall financial implications resulting from the sale of the structured settlement. Frequently, structured settlement recipients lack the sophisticated comprehension of financial matters necessary to evaluate these factoring transactions.

In Texas, structured settlements are carefully negotiated between the parties to the underlying tort claim, any liability insurer involved, and their respective counsel. In addition, each party relies on the

[9] *Id*., Assuming the following: 7 percent annual return, 28 percent federal income tax, 3 percent state income tax and an annual payout of $7,200. The lump-sum payment would be completely gone in 21 years, 10 months.

[10] *Id*., Based on normal life expectancy of 28.7 years for a 50 year-old male.

[11] *See* note 8, supra.

assistance and guidance of licensed structured settlement brokers, financial planners, life care planners and other specialists.

A number of different strategies are used by factoring companies to locate and purchase structured settlements. One factoring company, J.G. Wentworth, uses an advanced telemarketing technique--a call center--to identify and convince settlement recipients to sell their settlements[12] for substantially reduced lump sums. The J.G. Wentworth call center is located in New Jersey with over 200 work stations which operate 24 hours a day, six days a week.[13] Public records, such as the court records of the settlement itself, are used to locate structured settlement recipients. Other factoring companies even advertise in bar publications.

The tax code prohibits the sale or transfer of structured settlements except for limited purposes, such as inheritance.[14] The initial transaction between the factoring company and the recipient is usually made without notification to or involvement by the annuity issuer or other parties to the original settlement. Common strategies of purchasing a settlement may be made by requiring the settlement recipient to: (a) direct the annuity issuer to begin sending the payment to a post office box or another address controlled but not associated with the factoring company; (b) grant the factoring company an irrevocable power of attorney to endorse payment checks and sign other documents pertaining to the structured settlement; (c) provide specimen signatures to be used by the factoring company in creating a stamp of the settlement recipient's signature; and (d) enter into a confession of judgment in favor of the factoring company, coupled with a garnishment of the periodic payments.[15]

These methods of transfer create numerous problems. If the settlement recipient backs out of the factoring company's agreement, an annuity issuer can be forced into a situation of "double payment," causing subsequent litigation. Double payments occur when both the factoring company and the settlement recipient have a questionable right to the original settlement. Annuity issuers also have a responsibility to protect the settlement recipient's original structured settlement. Litigation problems may also erupt when questions arise about who is responsible for tax liability incurred as a result of the transfer or acceleration of payments in the settlement agreement.

[12] Prepared research provided by the National Structured Settlement Trade Association to the Committee in Aug. 2000.

[13] *Id*.

[14] I. R. C. § 130 (1999).

[15] Refer to tapes of Committee on Civil Practices hearing April 21, 1999, provided by House Audio/Video Dept. or at http://www.house.state.tx.us/house/commit/archive/c100.htm (updated May 1999).

The Committee recognizes that the circumstances that exist when a structured settlement is created may later change. There maybe instances in which the services offered by a factoring company can be of benefit to a structured settlement recipient. However, alternative options and informative details about the settlements must be explained and carefully explored so the recipient, who often is receiving payments because he or she was the victim of some malfeasance, does not become victimized a second time. This is an area in which future legislation may be essential in protecting the recipient's original agreement, while allowing, in some situations, the recipient to maximize the potential realization from a sale of a structured settlement.

Legislation in other States

As of June 1, 2000, fifteen states[16] have enacted legislation similar to H.B. 2691. In twelve other states,[17] including Texas, similar legislation has either been filed or is now pending.

Testimony

The Committee held a public hearing on June 22, 2000, in San Antonio, Texas, in which the following people testified:

Earl S. Nesbitt--*Settlement Capitol Corp.*

National Association of Settlement Purchasers

Joseph D. Jamail--*Jamail & Kolius*

Mr. Nesbitt testified to the benefits of providing structured settlement recipients with the option of having the settlement purchased for an instant lump sum payment.[18] Mr. Jamail, however, had a clearly opposite opinion regarding the options afforded by factoring companies.[19]

[16] Fifteen states: California, Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, *See* note 12 supra, *See* Appendix D.

[17] Twelve states: Alabama, Iowa, Massachusetts, Michigan, Mississippi, New York, New Jersey, Rhode Island, South Carolina, Texas, Vermont, and Wisconsin, *See* note 12, *See* Appendix D.

[18] Refer to tapes of Committee on Civil Practices hearing June 22, 2000, provided by House Audio/Video Dept.

[19] *Id*., *See* attached letter Joseph Jamail, 20 Sept. 2000 on page 10 of this report.

The Committee still had several questions regarding structured settlements. Therefore, two other hearings were planned for Austin--August 24, 2000, and September 28, 2000. Unfortunately,

both hearings were canceled because of scheduling difficulties. The following people were invited to testify:

Christine Franze--*American General Insurance Company*

Joseph D. Jamail--*Jamail & Kolius*

*Earl S. Nesbitt--*Settlement Capitol Corp. and National Association of Settlement Purchasers*

Terry N. Taylor--*Plaintiff Structures Inc. and National Structured Settlement Trade Association*

Joe Woods--*Alliance of American Insurers*

Each witness's written comments are provided below.

* Attachment to letter by Mr. Nesbitt is located on page 39 of this report.

NASP and NSSTA Agreement

In the last two months, the two trade groups representing the opposing sides of this issue have negotiated a possible resolution to the issues raised before the Committee. The two associations are called the National Association of Settlement Purchasers (NASP) and the National Structured Settlement Trade Association (NSSTA). NASP is an association primarily composed of factoring companies. NSSTA is an association comprised of structured settlement brokers, annuity provider companies and some casualty insurance companies.

NSSTA and NASP jointly announced this ground-breaking agreement. The agreement has two components. The first component amends the Internal Revenue Code and the second component is an enabling model act to be followed by each state. The following documents clearly outline the agreement:

A) A letter to both Houses of Congress wrote to the respective chair's of both substantive committees;

B) A bullet point overview outlining the agreement;

C) United States Senate Resolution making changes to the Federal Tax Code; and

D) Enabling model act to be followed by each state.

These documents are provided below.

Finding

At this time the Committee on Civil Practices recommends that the 77th Legislature enact legislation necessary to compliment and/or enable the legislation currently pending in Congress, consistent with the compromise between the National Structured Settlement Trade Association and the National Association of Settlement Purchasers, provided that the pending federal legislation is completed.

In the event that the federal legislation fails, the Committee recommends that the 77th Legislature consider legislation which would impose moratorium periods during which court-ordered structured settlements could not be sold or factored and require court approval of the sale or factoring of court-ordered structured settlements.

Charge Two

Study the exercise of conflicts jurisdiction by the Supreme Court under Sections 22.001(a) and 22.007(a), Government Code.

Charge Two
Conflicts Jurisdiction

History

One of the more contentious issues considered by the Committee on Civil Practices, during the 76th Legislative Session, was class action reform. A recurring complaint voiced during that debate was that the Texas Supreme Court had consistently declined to hear interlocutory appeals from the Courts of Appeals on the certification of classes. An amendment to the Supreme Court's jurisdiction was suggested to address this issue. Since the 76th Legislative Session, the Supreme Court has handed down several decisions on class certification such as *Intratex Gas Co. v. Beeson*, 2000 W.L. 266700 (Tex. 2000).[20]

Review

No substantive testimony or written comment was received by the Committee urging amendment to the jurisdiction of the Texas Supreme Court.

Finding

At this time the Committee on Civil Practices finds no need to suggest any legislative changes to the Supreme Court's exercise of conflict jurisdiction statutes under § 22.001(a) and 22.007(a), Gov. Code.[21]

[20] *See* also *Southwestern Refining v. Bernal*, 22 SW 3rd 425 (Tex. 2000); *Balley Total Fitness Corp. v. Jackson et al*. Cause No. 99-1002 (Supreme Court granted petition for review in April 2000).

[21] *See* Appendix E

Charge Three

Examine the impact of requiring trial court judges to specify the grounds upon which summary judgments are granted.

Charge Three
Summary Judgement

History

During the 76th Legislative Session, H.B. 2186[22] by Representative Harold Dutton was reported favorably by the Committee and passed by both houses of the Legislature. It was subsequently vetoed by Governor George Bush. The explanation included in the veto proclamation was as follows:

> "House Bill No. 2186 proposes an unnecessary and confusing change to summary judgment law in civil cases. The proposed new requirements for trial judges conflict with the existing rules adopted by the Texas Supreme Court. This bill would discourage the speedy resolution of civil cases and encourage frivolous lawsuits."[23]

The concerns that gave rise to the bill were:

A) Adverse rulings were being rendered without a trial on the merits and without litigants knowing the reasons for the rulings, thus casting an adverse perception on the civil justice system, at least in the eyes of the litigants; and

B) Because of a long line of cases, such as *Carr v. Brasher*, 776 S.W.2d 567 (Tex. 1989),[24] holding that a summary judgment must be affirmed on appeal if it is proper on any ground raised in the motion--extensive and unnecessary briefing is required on all issues in the original motion, even though the judgment was granted on only one ground.

[22] *See* Appendix F.

[23] *Id*., Quote from 76th Legislature Veto Proclamation H.B. 2186, by Governor George Bush, see also on Texas Governor Official web site: http://www.governor.state.tx.us/legislative/Veto76/HB2186.html (updated June 2000).

[24] *See* Appendix G.

SCAC Proposal TRCP Rule 166a.

The following text was provided by the Supreme Court Advisory Committee (SCAC)[25] and reflects the current proposed rule under consideration by the SCAC. Subsection (j) and the included comments (which are underlined) are the only proposed amendments to Rule 166a.[26]

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use

[25] Refer to Charge Four of this report on page 58 for background information regarding the SCAC.

[26] Tex. R. Civ. P. 166a.

the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.[27]

(j) Statement of Grounds. An order granting summary judgment must state the ground or grounds on which the motion was granted. No judgment may be affirmed on other grounds stated in the motion unless they are asserted by appellee in the appellate court as alternative grounds for affirmance.

COMMENT

[27] *Id.*

1. New paragraph (j) requires courts to specify the grounds on which they have granted a motion that urged multiple grounds. The appellant's brief must challenge only the grounds on which the trial court based its ruling. If the appellee's brief asserts alternative grounds for affirmance, the appellant may address them in a reply brief.

2. Paragraph (j) requires only that summary judgments state which ground or grounds support the judgment when the court sustained some grounds but did not sustain others. It does not require any other explanation or statement of reasons.

3. Nothing in paragraph (j) prohibits orders stating that judgment was granted on each ground presented when appropriate.[28]

Testimony

During the interim review, the Committee heard testimony in San Antonio on June 22, 2000, at a hearing in conjunction with the Texas State Bar's Annual Meeting. The following people provided testimony on summary judgement:

Judge Scott Brister--*234th District Court*
Supreme Court Advisory Committee--Member
Charles L. "Chip" Babcock--*Jackson Walker L.L.P.*
Supreme Court Advisory Committee--Chairman
Anthony Grigsby--*Sanford, Kuhl & Perkins*
Texas Civil Justice League
David Davis--*Texas Association of Defense Counsel*[29]

During testimony regarding summary judgement Charles Babcock, Chair of the Supreme Court Advisory (SCAC), spoke generally about the proposals that have been discussed by members of the

[28] SCAC proposed amendment to Tex. R. Civ. P. 166a, currently pending before the Texas Supreme Court.

[29] Written testimony only.

SCAC and stated that proposals were still being considered.[30] Anthony Grigsby, representing Texas Civil Justice League (TCJL), and David Davis, representing Texas Association of Defense Counsel (TADC), provided the Committee with testimony. Both representatives of TCJL and TADC stated their opposition to H.B. 2186, during the 76th Legislative Session. TADC, also, commented on their success in urging the Governor's veto.[31] Their arguments focus on the potential negative effects of either legislation or rule similar to H.B. 2186. They believe such a change would deter a trial court's willingness to grant a motion for summary judgement to resolve a dispute with no material factual issues. They believe that trial courts are currently over burdened with cases.[32] By requiring the trial courts to specify in writing "… findings of fact and law in a summary judgement order will certainly discourage them from granting such orders."[33] Judge Scott Brister, who is also a member of the SCAC, also agreed that such a change would impose an undue burden when granting such motions.[34]

Review and Examination of SCAC Proposed Amendment to TRCP 166a

In an article by Mary Flood of the Houston Chronicle, entitled *Civil Courts Administer Swift Justice*,[35] judges in Harris County discussed the now non-existent backlog of cases in Harris County trial courts. Judge Sharolyn Woods stated, "There were dockets that were three times what we have today." She went on to say, "The dockets are just gone. We don't have to do things in the roller-coaster way we used to." From 1993 to 1998, statistics in Harris County show that new case filings decreased 18 percent, the number of days in trial decreased 43 percent, and the number of pending cases decreased 20 percent in civil district courts. Judge Brister himself stated, "When you've reached all your trials, all you do is sit around some days with nothing to do. That's why I've got projects and writing to do on my own."[36] Statistical information, as well as comments like these, lead the Committee to believe there would be a minimal burden on the trial courts when granting motions of summary judgement.

[30] Refer to tapes of Committee on Civil Practices hearing June 22, 2000, provided by House Audio/Video Dept.,

[31] Written testimony by David Davis, Texas Association of Defense Council, Inc., 22 June 2000.

[32] *Id*., Written testimony by Anthony Grigsby, Texas Civil Justice League, 22 June 2000. *See* note 30, supra.

[33] Written testimony by Anthony Grigsby, Texas Civil Justice League, 22 June 2000.

[34] *See* note 30, supra. *See* note 31, supra.

[35] Mary Flood, *Civil Courts Administer Swift Justice*. Houston Chronicle, 5 Aug. 2000, at A35+.

[36] *Id.*

Judge Brister also testified that changes to Rule 166a[37] would create a flood of appeals if trial courts are required to specify grounds for summary judgement.[38] The Committee, with assistance from the Texas Legislative Council, conducted a survey of appellate judges regarding summary judgement. All appellate judges were asked what effect they believe such change would have on their workload: 24 percent of respondents felt that the change would lessen workloads, 34 percent of respondents felt that there would be no effect, and 39 percent of respondents felt that such a rule change would increase their workload.[39]

During the interim review, the Committee staff also monitored the progress of the SCAC and the work of SCAC members, such as Mr. Babcock and Judge Brister, on an amendment to TRCP 166a. The rule, as currently proposed, would generally accomplish the intent of H.B. 2186, even though it does not address the concerns of all members of the Committee on Civil Practices. One major concern that Committee members have expressed is that trial judges could circumvent the intent of the rule by simply granting a summary judgment on all grounds raised by the motion. While recognizing that sometimes a summary judgment can be sustained on every ground stated in the motion, the Committee believes that the trial bench as a whole would not recklessly disregard the intent of the Supreme Court as set forth in the rule.

Finding

At this time the Committee on Civil Practices finds that the concept and intent of H.B. 2186 still serves the best interest of all litigants, particularly in the appellate process. The Committee feels that deliberate acts of the Legislature which are vetoed should, in the best interest of public policy, be recommended for reconsideration with such modifications to address any legitimate reasons given for the veto, as well as the best interests of litigants. The Committee finds that a proposed rule currently pending before the Supreme Court would substantially address the concerns which gave rise to H.B. 2186 and that matters such as this can sometimes be adequately addressed with Rules of Civil Procedure as well as an addition to the Civil Practice and Remedies Code. Therefore, the Committee finds that if the pending rule is adopted in a form that substantially addresses the concerns that gave rise to H.B. 2186, the Legislature should defer action on additional legislation on this subject until the effect of the adopted rule can be determined. In the event that the pending rule is not adopted in substantially the form proposed by the Supreme Court Advisory Committee, then the Committee on Civil Practices finds that the 77th Legislature should again consider this matter.

[37] *See* note 26, supra.

[38] *See* note 30, supra.

[39] Refer to Charge Five of this report on page 112 (Table 26, Court of Appeals Survey Question 3).

Charge Four

Examine the Supreme Court's rule-making authority, any conflicts between Section 22.004(c), Government Code, and Article 5, Section 31, Texas Constitution, and the role, if any, that the legislature should play in the Court's rule-making process.

Charge Four
Texas Supreme Court Rule-Making Authority

History

In 1939, during the 46th Legislative Session, H.B. 108[40] was enacted into law. H.B. 108 relinquished the Legislature's rule-making authority in civil judicial proceedings to the Supreme Court. The bill stated the following:

> "...Such rules, after promulgation by the Supreme Court, shall be filed with the Secretary of State and a copy thereof mailed to each elected member of the Legislature on or before December 1st immediately preceding the next Regular Session of the Legislature and shall be reported by the Secretary of State to the Legislature, and unless disapproved by the Legislature, such rules shall become effective upon September 1st, 1941, promulgate any specific rule or rules or any amendment or amendments to any specific rule or rules and make the same effective, except as hereinafter provided, at such time as the Supreme Court may deem expedient . . . "[41]

The bill appears to express a clear legislative intent that rules proposed for adoption by the Supreme Court be presented to the Legislature before the regular session. This procedure would allow the Legislature an opportunity to review each rule during the legislative session. In H.B. 108, the Legislature explicitly retains the ability to review the first set of rules enacted by the Supreme Court, by requiring those rules become effective on September 1, 1941.[42]

Members of the Supreme Court have expressed concern with implementing a legislative review before an order's effective date within the rule-making process. During the 76th Legislature, H.B. 1461[43] by Representative Jim Dunnam attempted to enact a similar review. The bill passed the House, but was not considered by the full Senate.

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[40] Ch. 25, Sub. IV, 1939 Tex. Sess. Law 201-203

[41] *Id.*

[42] *Id*.

[43] *See* Appendix H

Witnesses before the committee expressed concern that a legislative review may violate the "separation of powers." Unlike the federal system, rule-making authority under the Texas Supreme Court's current purview is a power of the legislative branch. *Armadillo Bail Bonds v. State*, 802 S.W.2nd 237 (Tex. Cr. App. 1990), and *Ex parte Mallares*, 953 S.W.2nd 759 (Tex. App.--Austin 1997) both hold that the Legislature has ultimate authority over judicial administration. Therefore, any preliminary review of rules proposed for adoption by the Texas Supreme Court would appear to be within the Legislature's prerogative and within it's power.

Supreme Court Advisory Committee

The Supreme Court Advisory Committee (SCAC) was created by the Texas Supreme Court based on a model used by the U. S. Supreme Court. The SCAC advises the Texas Supreme Court on the language and implementation of rules.[44] Currently, there are 36 members and 11 *ex officio* members, consisting of judges, lawyers and academicians with each member serving a three-year term.[45] Other groups within the State Bar may also recommend changes to the Texas Supreme Court, which are then referred to the SCAC for consideration.

Review

Statutory Language

The following language has been taken from statutes which grant rule-making authority to the Supreme Court.

Sec. 22.004(a), (b) and (c). Gov. Code

(a) The supreme court has the full rule-making power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to **rules remain in effect unless and until disapproved by the legislature**. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of

[44] *See* Appendix I--Supreme Court web site, http://www.supreme.courts.state.tx.us/rules/history.htm, Texas Court Rules: History and Process (updated 1998).

[45] *See* Appendix J--Order No. 99-9167 (Tex. 1999).

the State Bar of Texas not later than the 60th day before the date on which they become effective.[46] ***The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.***[47]

(c) So that the supreme court has full rule-making power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that in the court's judgment is **repealed**. The list has the same weight and effect as a decision of the court.[48]

Statutory Language Review

In 1985, § 22.004, Government Code, was enacted. In 1989, however, the last sentence of § 22.004 (b), Government Code, which stated that the Secretary of State shall notify the Legislature on December 1st of every odd numbered year, was deleted. While rule changes are published in the Texas Bar Journal, which every attorney holding a Texas license receives from the State Bar, there is no longer a notification of rule changes to the majority of the Texas Legislature who are not lawyers.[49]

The language in § 22.004 (c), Government Code, requires the Supreme Court, when notifying the Secretary of State of rule changes, to include a list of articles or sections of general law "that in the court's judgement [are] repealed." The problem with this language is that the Supreme Court only notifies the Secretary of State of rule changes when there is "in the court's judgement" a "repeal." Therefore, the Court may and often does modify a statute without notification of any changes. For example, the cover page of the July 15, 1987, order by the Supreme Court clearly reveals which "rules" are either amended or repealed. However, one had to look closely within the 100 plus page order to find that an enacted, but not effective, statute had been repealed by TRCP Rule 13, imposing sanctions for groundless or bad faith pleadings.

Section 22.004 (b), Government Code, states that the Legislature may disapprove of rules adopted by the court. The Supreme Court's official web site includes a report regarding the SCAC's history and

[46] Tex. Gov't. Code § 22.004(a) and (b). [emphasis added]

[47] Tex. Gov't. Code § 22.004 (b). [emphasis added] Underlined language *deleted* in 1989 by acts of the 71st Legislature.

[48] Tex. Gov't. Code § 22.004(c). [emphasis added]

[49] *See* note 47, supra.

process which states that the Legislature has never used this disapproval power.[50]

However, legislative archives reveal that the Legislature has disapproved of rules on two specific occasions. The first was in the re-enactment of Chapter 10, Civ. Prac. & Rem. Code, Sanctions for Frivolous Pleadings and Motions. In an order dated July 15, 1987, the Supreme Court **amended a pending order after the legislative session** to repeal Chapter 9, Civ. Prac. & Rem. Code, Frivolous Pleadings and Claims, **one day** before the act's effective date. Included in Chapter 10, Civ. Prac. & Rem. Code, is a protection prohibiting the Court from amending or adopting rules in conflict with this chapter. The report in Appendix I also gives several other examples of this prohibition used by the Legislature.

The next example of legislative disapproval can be found in the enactment of the Judicial Campaign Fairness Act. Immediately preceding the 74th Session, the Supreme Court promulgated rules for judicial campaign contribution limits through Cannon 5(5), Code of Judicial Conduct. (Note: The issue of whether the Legislature has the authority to repeal a provision of the Code of Judicial Conduct is unsettled.) During the 74th Session, the Legislature enacted the Judicial Campaign Fairness Act, § 253.151, Tex. Elec. Code. After the 74th Session, the Supreme Court later returned to the Code of Judicial Conduct and repealed its campaign contribution language in Cannon 5(5).

Constitutional Language

Art. 5, Sec. 31, Texas Constitution

(a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

(d) Notwithstanding Section 1, Article II, of this Constitution and any other provision of this Constitution, if the supreme court does not act on a motion for rehearing before the 180th day after the date on which the motion is filed, the motion is denied.

[50] *See* note 44, supra.

Constitutional Language Review

In Art. 5, § 31(c), of the Texas Constitution, the Legislature is granted the power to delegate rules to the Supreme Court so long as the powers are subject to such limitations and procedures as may be provided by law. This provides the Legislature with the power to enact any change to the Supreme Court's rule-making authority.

In the report regarding the history and process of the Court's rule-making authority, posted on the Supreme Court's web site, the report states that the Court is to develop rules not inconsistent with the laws of the State. The report also states that the Legislature is not the proper arena for debating rules because of the Legislature's ". . . piecemeal approach to rule-making and with the difficulty in achieving any improvement in court procedure through the legislative process."[51]

Supreme Court Advisory Committee (SCAC)

Since 1940, many necessary changes have been made to the Texas Rules of Civil Procedure (TRCP), as well as many other rules under the Supreme Court's current delegated authority. However, the Supreme Court has been criticized for some of its rules on the grounds that they cross over from matters that are purely procedural to those of more substance. Most notable are the rules of judicial campaign fund-raising, previously located in Cannon 5, Tex. Code of Jud. Cond., TRCP Rule 13 and the currently proposed TRCP Rule 18a.

In monitoring the Supreme Court's rule-making activities, the staff of the Committee on Civil Practices has attended SCAC meetings since January, 2000. One hotly debated proposal was that of TRCP Rule 18a regarding recusal. This proposed rule originated from S.B. 788[52] by Senator Chris Harris, enacted by the 76th Legislature. The proposed rule, however, adds to the scope of the statute in many areas, such as applying the rule to the Judicial Campaign Fairness Act.[53] Senator Harris' bill was developed to address a limited number of attorneys' practices of filing excessive and frivolous motions for recusal in order to receive continuances. During the debate of this proposed rule several questions arose regarding the Supreme Court's jurisdiction in this topic. The following was taken from transcripts of the SCAC hearing on April 7, 2000:

Member A stated: "I don't think that's in the statute."

[51] *See* note 44, supra.

[52] *See* Appendix K.

[53] Tex. Elec. Code § 253.151.

Member B stated: "That was a fairly ambitious effort on behalf of the committee to address those types of issues. It's not in the statute."

Member C stated: "So we might ought to agree that we're legislating here."

Member B stated: "It's pretty clear."[54]

The transcript shows clear concern and debate about whether the topic under consideration was an infringement on the domain of the Legislature. In this instance, the SCAC apparently decided to proceed anyway, recommending the broader rule.

An additional proposed ruled debated by the SCAC dealt with TRCP Rule 226(b), relating to voir dire examination of jury panels. According to an article in the Texas Lawyer, the proposal originated from unsuccessful legislation (S.B. 1863[55] by Senator David Cain) proposed during the 76th Legislature. In order to develop a proposal for an amendment to TRCP Rule 226(b), the issue was sent to a subcommittee within the SCAC for preliminary examination. The subsequent proposed rule received a vote of 4-2 against any changes. However, the proposed rule was still sent to the full SCAC for consideration. The debate began with a discussion about why the rule was being considered before the full committee when the subcommittee found no need for an amendment to the current rule.[56] This occurred because SCAC has no formal rules of procedure. Rules governing the effect of subcommittee actions and specifying whether further action by the full committee was in order would have prevented this debate and some of the confusion that surrounded it. The SCAC operates through an open debate style format which may be less conducive to public input than formats based on a more patterned approach.

One of the rule changes that the SCAC has been considering during the interim is the change to TRCP Rule 166a, governing summary judgements by requiring the specification of the grounds on which the motion is granted. This addresses H.B. 2186 by Rep. Harold Dutton which passed the House and Senate only to be vetoed by the Governor. This proposed rule, along with its implications, is covered more fully by Charge Three of this report.

Testimony

[54] SCAC afternoon transcript, 7 April 2000, SCAC web site provided by Jackson Walker L.L.P. http://www.jw.com/scac/4_7_200pm.cat%20(2).htm (updated Oct. 2000).

[55] *See* Appendix L.

[56] SCAC transcript, 25 August 2000, SCAC web site provided by Jackson Walker L.L.P. http://www.jw.com/scac/TRANSCRIPTS.HTM (update Oct. 2000).

During the interim review, the Committee heard testimony in San Antonio on June 22, 2000, at a hearing in conjunction with the Texas State Bar's Annual Meeting. The following people provided testimony on the Supreme Court's rule-making authority:

Charles L. "Chip" Babcock--*Jackson Walker L.L.P.*
Supreme Court Advisory Committee--Chairman

David Davis--*Texas Association of Defense Counsel*

Justice Sarah Duncan--*Fourth Court of Appeals*

Anthony Grigsby--*Sanford, Kuhl & Perkins*
Texas Civil Justice League

Chief Justice Phil Hardberger--*Fourth Court of Appeals*

Justice Nathan L. Hecht--*Supreme Court of Texas*

Joseph D. Jamail--*Jamail & Kolius*

Luther H. Soules, III--*Self (Supreme Court Advisory Committee--Member & Former Chairman)*

Public testimony regarding the Supreme Court's rule-making authority focused on concerns that the Legislature would preempt the current authority of the Court. Each witness emphasized the balance of power between the branches of state government. The witnesses generally felt that any changes to the current system would upset the balance of power between the judicial and legislative branches, even though the judiciary operated under the guidance of the Legislature as the rule-maker for civil judicial procedure for nearly 80 years.

Members of the Committee, as well as Rep. Jim Dunnam, author of H.B. 1461 (requiring a legislative review of the Supreme Court's rules), emphasized that it is not the intent of the Committee to return the Supreme Court's rule-making authority to the Legislature. In reviewing this issue, the Committee is trying to ensure that checks and balances are in place between the Legislative and Judicial branches of government, and that the Court does not undertake by rule matters which are better determined by the Legislature. While not specifically recommending that the Legislature have an opportunity to review every proposed Supreme Court rule prior to adoption at this time, the Committee believes that the Legislature has a constitutional responsibility for oversight of rule-making and should continue to monitor these activities.

Finding

The Committee on Civil Practices has identified several areas within the Texas Supreme Court's delegated rule-making authority where the State can make improvements. The Committee makes the following recommendations:

(1) Require the Supreme Court to develop parliamentary rules of procedure under which the Supreme Court Advisory Committee would operate and conduct all hearings.

(2) Require the Supreme Court to implement an official web site providing all information regarding public hearings and all related materials, such as written transmittals and transcripts from each hearing and correspondence in support of or opposition to pending rules, along with the ability to collect comments electronically.

(3) Apply the Open Meetings Act and Open Records Act to the Supreme Court Advisory Committee and require the Supreme Court to publish notice of all Advisory Committee hearings and subcommittee meetings in the Texas Register, the Texas Bar Journal, the Supreme Court's official web site, and the Capitol Posting Boards located throughout the State Capitol Building in Austin, Texas.

(4) Amend § 22.004(c), Gov. Code, which currently reads as follows:

> "or each part of an article or section of general law that in the court's judgment is repealed."

to read:

> "or each part of an article or section of general law that is repealed or modified in any way."

(5) Amend § 22.004(b), Gov. Code, to re-insert the following sentence, which was deleted by acts of the 71st Legislature in 1989:

> "The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session."

Charge Five

Collect information from Texas trial and appellate courts that will assist the committee in evaluating the success of recent legislation and in making decisions regarding future legislation.

Charge Five
Texas Trial and Appellate Court Survey

The following survey information was collected, compiled, and reported by the Texas Legislative Council--Statistical and Demographic Analysis Division. Under the direction of Don R. Warren, Ph.D., the staff of this division was instrumental in collecting information regarding the Texas Trial and Appellate Courts. The survey collected pertinent information regarding past and future legislation before the Committee.

This division provides statistical and demographic research assistance for formulating long-term policy, evaluating information provided by state agencies and others concerning proposed legislative actions, and assessing the impact of previous actions and the implications of proposed actions. The section handles requests from individual legislators and committees, providing:

- Compilation, estimation, and projection of statistical and demographic data
- Analysis of statistical data
- Advice on using and interpreting statistical information
- Review of methodologies and conclusions in quantitative research conducted by others
- Preparation, conduct, and compilation of results of scientific surveys
- Preparation of reports, charts, tables, and other materials relating to statistical and demographic data

The Committee on Civil Practices would like to take this time to express appreciation to the staff, and more specifically Don Warren and Richard Sanders, for their hard work in preparing the following statistical survey information.

The statistical survey results are preceded by the following:

1) A copy of the Trial Court Survey;
2) A copy of the Appellate Court Survey; and
3) Cumulative responses by trial court judges in Harris and Travis counties.

Appendices A-L

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E

Appendix F

Appendix G

Appendix H

Appendix I

Appendix J

Appendix K

Appendix L