
**HOUSE COMMITTEE ON BUSINESS & INDUSTRY
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2006**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
80TH TEXAS LEGISLATURE**

**CHAIR
HELEN GIDDINGS**

**COMMITTEE CLERK
JESSICA SANN**



Committee On Business & Industry
Helen Giddings, Chair

January 3, 2007

The Honorable Tom Craddick
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 Business & Industry of the Seventy-Ninth Legislature hereby submits its interim report including recommendations for consideration by the Eightieth Legislature.

The issues surrounding the charges studied are very complex. It comes without surprise that not every member of the committee agreed on every finding and recommendation. This includes the Chair.

After the committee hearings and the initial draft, suggestions for revisions, comments, and input were solicited from all committee members. Rather than incorporating suggestions into the report, three members of the committee chose to provide statements to attach to the report detailing differences. Those statements follow the report's findings and recommendations.

Although, the Committee researched every issue thoroughly, sometimes facts come to light after the deadline has passed. In the case of Interim Charge #1 (regarding contract-for-deed legislation) the Committee has become aware of some concerns not detailed in this report, and this issue will continue to be studied. This study, as submitted, lays a solid foundation for further deliberation and offers the framework for policy decisions and legislative action.

Respectfully submitted,

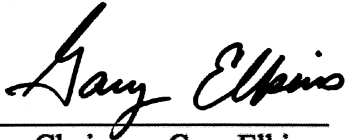
A handwritten signature in cursive script that reads "Helen Giddings".

Chair Helen Giddings

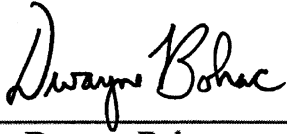
Helen Giddings, Chair

Gary Elkins, Vice-Chairman

Members: Kevin Bailey, Dwayne Bohac, Armando "Mando" Martinez, Burt Solomons, Larry Taylor, Hubert Vo, William "Bill" Zedler.



Vice-Chairman Gary Elkins



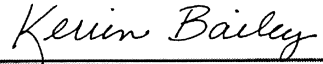
Rep. Dwayne Bohac



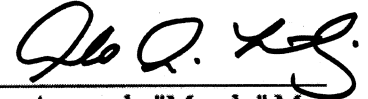
Rep. Burt Solomons



Rep. Hubert Vo

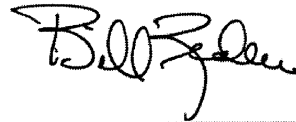


Rep. Kevin Bailey



Rep. Armando "Mando" Martinez

Rep. Larry Taylor



Rep. William "Bill" Zedler

Helen Giddings, Chair

Gary Elkins, Vice-Chairman

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INTRODUCTION

At the beginning of the 79th Legislature, the Honorable Tom Craddick, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Business & Industry. The committee membership included: Representatives Helen Giddings, Chair; Gary Elkins, Vice-Chair; Kevin Bailey; Dwayne Bohac; Armando "Mando" Martinez; Burt Solomons; Larry Taylor; Hubert Vo; and William "Bill" Zedler.

During the interim, Speaker Craddick assigned the Committee on Business & Industry the following five charges:

- 1) Monitor the implementation of House Bill 1823, 79th Legislature, to determine if there is a need to further legislate the protection of homebuyers who purchase dwellings under the "rent-to-own" or "contract-for-deed" procedures. There should be particular attention paid to assure that no unintended consequences materialize.
- 2) Study the problem of identity theft, and recommend any legislative changes needed to combat the problem. (Joint Interim Charge with the House Committee on State Affairs)
- 3) Monitor the Texas workers' compensation system reforms and implementation of House Bill 7, 79th Legislature, by the Texas Department of Insurance and other state agencies. (Joint Interim Charge with the House Committee on Insurance)
- 4) Study the powers and practices of homeowner associations in Texas and the possible need for legislation, such as the proposed Texas Uniform Planning Community Act, to address the rules, enforcement, restrictions and other matters within the authority of a homeowner association. (Joint Interim Charge with the House Committee on Land and Resource Management)
- 5) Monitor the agencies and programs under the committee's jurisdiction. (These agencies are the State Office of Risk Management, the Risk Management Board, the Texas Workers' Compensation Commission, now the Division of Workers' Compensation within the Texas Department of Insurance, the Texas Mutual Insurance Company Board.)

This report represents the final conclusions and recommendations for each charge and supporting documentation.

HOUSE COMMITTEE ON BUSINESS & INDUSTRY

INTERIM STUDY CHARGES

- CHARGE 1** Monitor the implementation of House Bill 1823, 79th Legislature, to determine if there is a need to further legislate the protection of homebuyers who purchase dwellings under the "rent-to-own" or "contract-for-deed" procedures. There should be particular attention paid to assure that no unintended consequences materialize.
- CHARGE 2** Study the problem of identity theft, and recommend any legislative changes needed to combat the problem. (Joint Interim Charge with the House Committee on State Affairs)
- CHARGE 3** Monitor the Texas workers' compensation system reforms and implementation of House Bill 7, 79th Legislature, by the Texas Department of Insurance and other state agencies. (Joint Interim Charge with the House Committee on Insurance)
- CHARGE 4** Study the powers and practices of homeowner associations in Texas and the possible need for legislation, such as the proposed Texas Uniform Planning Community Act, to address the rules, enforcement, restrictions and other matters within the authority of a homeowner association. (Joint Interim Charge with the House Committee on Land and Resource Management)
- CHARGE 5** Monitor the agencies and programs under the committee's jurisdiction.

INTERIM CHARGE 1: Monitor the implementation of House Bill 1823, 79th Legislature, to determine if there is a need to further legislate the protection of homebuyers who purchase dwellings under the "rent-to-own" or "contract-for-deed" procedures. There should be particular attention paid to assure that no unintended consequences materialize.

Background

A contract-for-deed procedure is a way of financing a piece of property. Under a standard contract, the purchaser finances the house through a bank or other lending company. The bank gives the seller the funds, and the seller executes a standard warranty deed which makes certain guarantees to the buyer. The buyer then holds legal title to a house that is guaranteed to be, among other things, properly subdivided and platted.¹

Under a contract-for-deed financing arrangement, the purchaser pays periodic payments to the seller. The seller retains title to the property, and the buyer only obtains title after all payments are made.

Sellers often use rent-to-own or leases with an option to buy as a similar financing arrangement. Under H.B. 1823, these types of transactions are all defined as "executory contracts" and treated the same.

The rent-to-own, lease option, or contract-for-deed conveyance was often used by low income buyers who cannot obtain credit through a standard home loan. However, there is a great potential for abuse. House Bill 1823 instituted greater protections for the buyers in these arrangements to prevent abuse.

Problems with Contracts-for-Deed, Generally

This section refers to problems with contracts-for-deed - however, the same problems can arise with other similar conveyances, such as lease options and rent-to-own contracts.

Preferential to the Seller

The contract-for-deed is preferential to the seller, and can often put the buyer at a disadvantage, even if the seller is acting appropriately. For example, a buyer may miss a payment due to various circumstances. Under a normal sale using a warranty deed, the bank would assess a fine and allow the buyer to pay the payment late. If many payments were missed, the bank may proceed to foreclose judicially, with all the protections of the judicial

¹ Mike Lee, "Contracts for Deed: Extinction Long Overdue," *Texas Tech Law Review*, Volume 37, Number 4, Summer 2005, pp. 1233-34.

system available for the buyer. Under a contract-for-deed, a seller is within his or her rights to cancel the contract and take back the property if a payment is late. The terms in the contract-for-deed must be followed exactly, or the seller may legally rescind the contract. This aspect of the contract-for-deed does not allow any room for error on the part of the buyer, and can be a windfall for the seller.

The buyer under a contract-for-deed has none of the benefits of homeownership. For example, the buyer cannot use the equity in the house to gain a home equity loan, or sell the house and move elsewhere.²

Unscrupulous Sellers

A seller not only has many opportunities to cancel the contract if the buyer does not follow its terms exactly, but the seller has the incentive to cancel the contract because it is a windfall to the seller. If the seller can find a reason to cancel the contract when the buyer is close to paying off the property, the seller walks away with all the payments plus retains the original title to the property, which the seller can now contract to another tenant.

Because of this power imbalance, it is easy for an unscrupulous seller to prey on a buyer by rescinding the contract over a trivial matter.

Under a warranty deed, in order to foreclose on a property, a bank or other creditor must do so judicially. In such a case, the court can oversee the procedure to make sure the foreclosure is legally authorized. In a contract-for-deed, the seller can essentially take back the house without the protections of the judicial process.

When the Legislature began to enact laws to protect buyers under a contract for deed, unscrupulous sellers began to use a lease option arrangement. These are contingent contracts as well, with similar problems. Sellers could charge tenant homebuyers thousands of dollars for a nonrefundable option fee. Sellers could declare these fees forfeit for the most minor default.³

Unmarketable Deeds

Under a warranty deed, the deed must be marketable or it cannot be transferred from the seller to the buyer. Under a warranty deed, the seller makes certain assurances such as that the land is properly platted, that no other person owns the land, and that the land is unencumbered (unless those encumbrances are disclosed). However, under a contract-for-deed, no transfer occurs until the final payment on the property is made. At that point, the buyer may find out that the deed is not marketable, and that the transfer cannot take place.

A common example of this situation is a property owner who builds multiple houses on the same plot of land and then sells these houses under contract-for-deeds. However, the zoning

² Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 1.

³ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 1.

ordinances prohibit multiple dwellings on that plot of land, and therefore the land cannot legally be subdivided into multiple pieces of property.⁴ At the end of the contract, the seller cannot transfer under a warranty deed because he cannot produce good title to the parcel.

Encumbrances and Foreclosures

Because the seller still holds the deed to the property under a contract-for-deed, he or she could encumber the property without the permission or notification of the buyer. A lienholder also may have no knowledge of the contract-for-deed, and has no responsibility to notify the buyer. It was also unclear who was supposed to pay the taxes on the property. If the taxes were not paid, the property may be foreclosed.

As a result of this, a contract-for-deed may be completed, and the buyer may finally own the property, only to realize that the property is encumbered. Worse, the seller could default on the mortgage of the property; in that case, the property was foreclosed and the buyer ejected without notice or the ability to make payments to settle the debt.⁵

Colonias

The result of these contracts-for-deed were colonias which were low income neighborhoods which were created along the Texas-Mexico Border. Often low income persons could purchase the land under a contract-for-deed and build their houses as the materials were obtained. Developers of colonias did not provide adequate water or sewage, leading to unsanitary conditions.⁶

Approximately 400,000 Texans live in colonias. There are more than 2,294 Texas colonias, located primarily along the United States-Mexico border.⁷

Texas Legislation

Texas Property Code Protections

Beginning with the 70th Legislature, the Texas Legislature began taking proactive steps towards addressing the issues with contracts-for-deed. These were primarily aimed at improving conditions in colonias.

Legislation passed in 1995 included notice provisions for foreclosure under a contract-for-

⁴ Mary Alice Robbins, "Good Deeds: New Law Will Curb Executory Contract Abuses," *Texas Lawyer*, August 15, 2005, p. 4; Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 2.

⁵ Mary Alice Robbins, "Good Deeds: New Law Will Curb Executory Contract Abuses," *Texas Lawyer*, August 15, 2005, pp. 2, 4.

⁶ Mike Lee, "Contracts for Deed: Extinction Long Overdue," *Texas Tech Law Review*, Volume 37, Number 4, Summer 2005, pp. 1234-35.

⁷ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 1.

deed, a specified time period for curing a default, a partial reimbursement for payments made in the case of foreclosure, disclosure and accounting statement requirements, the right of the buyer to rescind, fines for failure to timely transfer title after final payment on the contract, and a Spanish-language requirement for contracts, notices, and other documents.⁸ Amendments in 2001 modified and strengthened these provisions, enhanced penalties, and required documents to be in the buyer's native language, not just in Spanish.⁹

However, sellers were able to skirt these provisions by using lease contracts with the option to buy.¹⁰

House Bill 1823, 79th Legislature

House Bill 1823 added protections for buyers under a contract for deed which addressed many of the above listed concerns. The highlights of this law are:

- The definition of "executory contracts" includes lease option and rent-to-own contracts, so buyers under these conveyances are also protected.
- The purchaser has a right to convert the contract at any time to a deed for sale by tendering the remainder of the purchase price.
- The purchaser may demand an accounting of how much is owed.
- The purchaser has the right to cancel the contract and get a refund of the payments, any payments toward property taxes, and the value of any improvements if the property is improperly platted. The seller may opt to fix the deficiency or refund the money.
- Only certain types of liens are allowed on the property and they must be fully disclosed prior to sale. The purchaser may pay the lienholder directly and deduct that from the amount owed to the seller, should the seller not make timely payments. The seller must notify the buyer of foreclosure, default, or other loan events.

Results of H.B. 1823

Complaints to the Texas Low Income Housing Information Service have dropped substantially due to this legislation.¹¹ Reports from Texas Acorn indicate that this legislation is helping to protect buyers under these contracts from abuses.¹² It appears that this legislation has been successful in achieving its purpose, and that no unexpected problems have arisen.

⁸ Mike Lee, "Contracts for Deed: Extinction Long Overdue," *Texas Tech Law Review*, Volume 37, Number 4, Summer 2005, pp. 1239-44.

⁹ Mike Lee, "Contracts for Deed: Extinction Long Overdue," *Texas Tech Law Review*, Volume 37, Number 4, Summer 2005, pp. 1244-47.

¹⁰ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 2.

¹¹ Conversation with John Henneberger, Texas Low Income Housing Information Service.

¹² Conversation with Virginia Goldman, Texas ACORN of Houston.

Lease Options

Although previous legislation provided protections for contract-for-deed conveyances, lease options were not included. H.B. 1823 prohibits a seller from forfeiting an option fee for late payments, increasing the price of the home, or penalizing the tenant buyer for exercising a right. Many unscrupulous sellers had used lease options instead of contracts for deed, and this law had a dramatic effect on these practices.¹³

Executory Contract Conversion

At any time, without penalty, the purchaser of an executory contract may convert the sale to a recorded legal title. Sellers may no longer institute prepayment penalties.¹⁴ This provision is beginning to have a dramatic effect on contract for deed buyers. However, many buyers are still not aware of this right. Hopefully, over time, buyers will become aware of their rights and convert their executory contracts.¹⁵

Government Disclosure of Platting

Prior to the enactment of H.B. 1823, the City of Houston would not disclose to a buyer under an executory contract whether a specific lot in the city was properly platted. H.B. 1823 required the city or municipality to disclose such information to a buyer under an executory contract, as the city or municipality is already required to do for an owner of the property.¹⁶

Right to Cancel for Improper Platting

H.B. 1823 authorizes a buyer under an executory contract to rescind the contract at any time if the buyer learns the land is not properly platted. However, because most purchasers want to keep their home, this remedy is not often used. If a purchaser does decide to recoup his losses, he will not have to hire an attorney, as was the case prior to H.B. 1823, but rather he can simply ask the seller for the money back, and does not have to vacate the property until the sums are paid back.¹⁷

Seller Must Maintain Property Without Liens

Prior to H.B. 1823, liens were problematic because a buyer had no control over whether liens were taken out on the property or whether they were paid off. H.B. 1823 prohibits a potential seller from executing an executory contract with a potential purchaser if the seller does not own the property in fee simple free from any liens and encumbrances. There are certain exceptions, including a loan for the original purchase price. However, the law now provides

¹³ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 2.

¹⁴ Texas Property Code, Section 5.081.

¹⁵ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 3.

¹⁶ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 2.

¹⁷ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session*, August 21, 2006, p. 3; Texas Property Code, Section 5.083(d)

for explicit disclosures to the buyer of the loan, as well as obligates the seller to pay the loan or notify the buyer if the seller fails to do so, and authorizes the seller to cure deficiencies with the loan company.¹⁸ This provision has been very successful in deterring unscrupulous sellers, but at the same time allows those who want to sell their homes under an executory contract to do so.¹⁹

Reduction in Penalty for Failure to Deliver Statement

H.B. 1823 also changed the law to make it more fair to sellers. Prior to H.B. 1823, sellers were penalized \$250 per day for failure to provide an annual accounting statement to a buyer. This resulted in large and unfair penalties for the seller. H.B. 1823 modified the law to provide for penalties of \$100 when a seller who conducts less than two transactions in a 12 month period fails to give the annual statement.²⁰ Those sellers who conduct two or more transactions in a 12 month period are subject to the \$250 a day penalty, but the total penalty may not exceed the value of the property.²¹

Recommendations

- 1) Continue to monitor this legislation in case unexpected consequences do occur. Particular attention should be paid to ensuring that buyers under these executory contracts are aware of their rights.

¹⁸ Texas Property Code, Section 5.085.

¹⁹ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session, August 21, 2006*, p. 3.

²⁰ Texas ACORN, *A Report on The Impact of H.B. 1823, 79th Regular Session, August 21, 2006*, p. 2; Texas Property Code, Section 5.077(c).

²¹ Texas Property Code, Section 5.077(d).

INTERIM CHARGE 2: Study the problem of identity theft, and recommend any legislative changes needed to combat the problem. (Joint Interim Charge with the House Committee on State Affairs)

Background

Identity theft is a growing problem in the United States, and in Texas in particular. In 2004, 9.3 million Americans were reportedly victims of identity theft, resulting in costs over \$52.6 billion.²² Texas ranks fourth of the 50 states for the highest number of complaints filed per 100,000 citizens.²³ "The Houston area and the Dallas-Fort Worth Metroplex ranked fourth and fifth nationally, among cities, for identity theft complaints per 100,000 inhabitants."²⁴

In 2003, almost 10 million Americans discovered they were the victim of some sort of identity theft within the previous year.²⁵ The total cost of this crime approaches \$50 billion per year, with the average loss from the misuse of personal information being \$4800. While many victims do not have to pay out-of-pocket expenses, the average out-of-pocket expense is \$500. Victims on average spent 30 hours straightening out their problems with identity theft, with some victims spending upwards of 60 hours.²⁶ (See APPENDIX A.)

Types of Identity Theft

Identity theft falls into the following categories:

- Use of an existing credit card or bank account
- Opening a new credit card or bank account
- Other fraud, including misuse of the victim's identity when charged with a crime, in renting an apartment or home, when obtaining employment, and other misuses.

By far, creation of a new account or other fraud are the most detrimental offenses. Usually these offenses are less quickly discovered, criminals are able to exploit the data for longer, time spent by victims dealing with the identity theft is longer, losses are higher than other forms of identity theft, and out-of-pocket expenses are more frequent.²⁷ Those who are victims of new accounts or other frauds are also more likely to have credit card problems, be harassed by a creditor, have a loan rejected, or even be the subject of a criminal investigation.²⁸ (See APPENDIX A.)

²² Crime Victims' Institute, *Identity Theft Report*, June 14, 2006.

²³ Federal Trade Commission, *Identity Theft Victim Complaint Data: Figures and Trends In Texas, January 1 - December 31, 2005*, Washington DC, January 25, 2006, Figure 4a.

²⁴ Crime Victims' Institute, *Identity Theft Report*, June 14, 2006.

²⁵ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, p. 4.

²⁶ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, p. 6.

²⁷ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, pp. 24-26, 41-46.

²⁸ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, pp. 47-48.

How Identity Theft Happens

Identity theft happens when sensitive information is acquired by persons who exploit it. Generally, the information is released in one of the following ways:

- **Data collection.** Consumers fail to adequately safeguard their information and may give out unnecessary personal information to others.
- **Data safeguarding.** Legitimately collected data must be safeguarded adequately to ensure that it is not misused. Physical protections such as locks are used, and computerized data is often encrypted with a password protection.
- **Data disposal.** Companies must make sure that records are not available to the general public when they are disposed of. For example, a company should not dispose of paper records without first shredding the documents.

In general, most problems seem to occur with data safeguarding, when data is accessed illegally.²⁹

Accessing Personal Data

Personal data can be accessed legally or illegally. Sometimes data accessed legally can be used in an illegal manner, while other times the data is used for legitimate purposes, such as law enforcement.

Legal Access to Personal Data

Personal data can be accessed legally. Examples of this are public records and publicly available information. Public records include birth and death records, property records, tax lien records, motor vehicle registrations, voter registrations, licensing records, and court records. Publicly available information is found in places accessible to the general public, such as a phone book or the internet.³⁰

The availability of this data is a problem mainly due to the increasing prevalence of information resellers. Before computers were widespread, public records were difficult to obtain, and often involved a physical trip to the site of the record. Information resellers, on the other hand, gather a variety of publicly available information about individuals, and then offer that information to subscribers in an easily searchable database. The ease of accessing the private information makes it more likely that the information will indeed be accessed.³¹

²⁹ Leslie Pettijohn, Consumer Credit Commissioner, Testimony Before the Business and Industry Committee and the State Affairs Committee, April 25, 2006.

³⁰ United States Government Accountability Office, *Report to Congressional Committees: Personal Information, Agency and Reseller Adherence to Key Privacy Principles*, April 2006, p.8.

³¹ United States Government Accountability Office, *Report to Congressional Committees: Personal Information, Agency and Reseller Adherence to Key Privacy Principles*, April 2006, p.7.

Illegal Access to Personal Data

Most of these data collection methods do not involve complex computer hacking or specialized skills. The following are common methods of data collection:

- **Pretexting**: Pretexters call a business posing as the consumer and ask for personal information.
- **Phishing**: Thieves create a webpage that masquerades as the home page of a legitimate business. E-mails are sent out directing potential victims to the fake website where victims unwittingly provide identifying information.
- **Old Computers**: It is easy to pull personal information off the hard drives of discarded computers.
- **Stealing company data**: One attack by hackers, company insiders, or thieves of equipment can access databases where personal information is stored.
- **Spyware**: A software program that can be used for legitimate purposes to tailor advertising to a consumer's tastes, but can also be used to raid the user's hard drive.
- **Skimming**: Criminals can use handheld magnetic card readers to gain information from debit or credit cards. Criminals have also rigged automatic teller machines to read the magnetic strips.³² Skimming can easily happen when a consumer gives his or her credit card to a restaurant to pay a tab or to a bartender to keep open a tab because the credit card is out of the consumer's possession for an extended period of time.³³
- **Mail Theft**: Criminals can steal bank statements, credit card offers, new checks, and tax information.
- **Dumpster Diving**: Criminals rummage through trash to gain sensitive information.
- **Physical Theft**: Wallets or purses can be stolen from the individual, or sensitive documents could be stolen from the person's house.
- **Change of Address Form**: A criminal may fill out a change of address form to divert mail to another location. The customer then does not receive the statements in the mail and may take longer to discover the theft.³⁴

When information is not hacked through sophisticated means, human error is often to blame. Pretexting is highly effective because a phone representative will often feel sorry for the "consumer" and hand out information contrary to company policy.

It should be noted that one fourth of the respondents in the 2003 Federal Trade Commission study who had been the victim of financial fraud knew the offender: in half of these instances the offender was a friend, relative, or neighbor.³⁵

³² Office of the Consumer Credit Commissioner, *Legislative Report: Reviewing Identity Theft and Senate Bill 473*, December 30, 2004.

³³ Helen Chernikoff, "Warning: Hands off, ID thieves," *Austin American-Statesman*, July 15, 2005.

³⁴ Federal Trade Commission, *About Identity Theft*, www.consumer.gov/idtheft/con_about.htm.

³⁵ Dean Foust, "ID Theft: More Hype Than Harm," *Business Week*, July 3, 2006.

Effects of Identity Theft

A thief can use personal information in a variety of ways:

- changing the billing address on a victim's credit card account, so that the thief can run up charges on the credit card account without the consumer's knowledge
- opening new credit cards in the victim's name
- taking out loans in the victim's name
- establishing utility service in the victim's name
- opening bank accounts in the victim's name and writing bad checks
- counterfeiting checks in the victim's name
- filing for bankruptcy in the victim's name
- obtaining an identification card, such as a driver's license, in the victim's name
- getting a job or filing fraudulent tax returns under a stolen identity
- giving the victim's name to the police during an arrest, causing a warrant to be issued in the victim's name if the thief does not show up for a court date³⁶

It can be very expensive and time-consuming to recover from an identity theft. Victims of identity theft can have difficulty for years in obtaining loans due to credit destroyed by an identity thief. Also bearing the brunt of expenses are banks, which refund to consumers funds that are fraudulently obtained by identity thieves. Likewise, check verification services cover amounts in fraudulent checks if the subscriber business has purchased that insurance.

Data Exposure versus Data Misuse

An issue that is both comforting and troubling is the lack of "follow through" by criminals following a data exposure. There have been several high profile data loss cases in which the data was never accessed or used fraudulently. Often, the victim of the data exposure immediately notifies his or her bank or credit card company, making it difficult for a would-be criminal. Also, even if the data falls into the wrong hands, often it is encrypted and is difficult to access.³⁷ While it is beneficial that many security breaches do not lead to identity theft, it would be better to minimize data exposure.

Recent High Profile Texas Cases

Texas Guaranteed Student Loan Company

On May 24, 2006, Texas Guaranteed Student Loan Corporation had a piece of equipment disappear, on which was stored personal information (names and social security numbers) for 1.3 million people. In many cases, the accounts in question had been closed more than a decade ago. The lost device was password-protected, but the information was not

³⁶ Federal Trade Commission, *About Identity Theft*, www.consumer.gov/idtheft/con_about.htm.

³⁷ Dean Foust, "ID Theft: More Hype Than Harm," *Business Week*, July 3, 2006.

encrypted.³⁸

Although the records do not seem to have been accessed, such a case brings up concerns about how data should be safeguarded.³⁹

University of Texas at Austin, McCombs Business School

In April, 2006, electronic records of nearly 200,000 people were accessed illegally at the University of Texas' McCombs School of Business. Information accessed included names, biographical information, and social security numbers. The data had been accessed by a hacker in the Far East. The school accepted responsibility and took action to alert those whose information had been exposed.⁴⁰

Legislation on Identity Theft

Federal Legislation

The Federal Fair and Accurate Credit Transactions Act (FACTA)

The Fair and Accurate Credit Transactions Act (FACTA) is a federal statute that was signed into law on December 3, 2003, to "help reduce identity theft and help victims recover."⁴¹ FACTA amends the federal Fair Credit Reporting Act (FCRA) and requires:

- "Credit bureaus to provide free annual credit reports to consumers who request them.
- "Credit reporting agencies to stop reporting, or to block allegedly fraudulent information resulting from identity theft when the consumer submits an identity theft report.
- "Debt collectors who learn that information in a consumer report is the result of identity theft or fraud notify the consumer's creditor or consumer reporting agency.
- "Creditors or businesses to provide any consumer who requests them the records of the fraudulent accounts or related transactions associated with the consumer's files.
- "Credit and debit card numbers to be truncated.
- "The creation of a national fraud alert system that allows consumers who reasonably believe they are the victims of identity theft, or who are military personnel on active duty away from home, to place an alert on their credit files. The alert warns potential creditors to be cautious when granting credit in that consumer's name."⁴²

³⁸ A student loan company does not have a duty under the Gramm-Leach-Bliley statute to encrypt a customer database on a laptop computer that fell into the wrong hands. Eric Sinrod, "The Technology Trade," *Modern Practice* at www.findlaw.com, February 21, 2006.

³⁹ Pete Slover, "Loan Records Vanish," *Dallas Morning News*, June 2, 2006.

⁴⁰ Ralph K.M. Haurwitz, "UT Breach: 200,000 put at risk of ID theft," *Austin American-Statesman*, April 24, 2006.

⁴¹ Office of the Consumer Credit Commissioner, *Legislative Report: Reviewing Identity Theft and Senate Bill 473*, December 30, 2004, p. 7.

⁴² Office of the Consumer Credit Commissioner, *Legislative Report: Reviewing Identity Theft and Senate Bill 473*, December 30, 2004, pp. 7-8.

The Gramm-Leach-Bliley Act (GLBA)

The Gramm-Leach-Bliley Act (GLBA) imposes privacy and security obligations on financial institutions. Financial institutions are prohibited from disclosing non-public personal information, with certain exceptions, without giving the consumer notice and an opportunity to opt out. Financial institutions are also required to implement appropriate safeguards to protect the integrity of the personal information received from customers.⁴³

Section 5 of the Federal Trade Commission Act

Under this section, the Commission can prosecute "unfair or deceptive acts in or affecting commerce." This statute has allowed the Commission to challenge practices related to identity theft, including the failure to safeguard sensitive information.⁴⁴

The Driver's Privacy Protection Act (DPPA)

The Driver's Privacy Protection Act (DPPA) prohibits a state's department of motor vehicles from disclosing personal information in motor vehicle records, with certain exceptions.⁴⁵

The Real ID Act

The Real ID Act regulates security features on drivers' licenses and what documentation must be shown to obtain one. States remain in control of issuing and manufacturing licenses and prosecuting offenses related to tampering with these licenses. Although states are not required to comply, after May 11, 2008, Real ID-compliant licenses must be shown in order to board an airplane or enter a federal building.⁴⁶

Although the cards are tamper-resistant, there are still privacy implications that can arise. The first is that the cards must be readable by machine, which may give thieves the ability to read the cards illicitly. The second is that in order to implement the provisions of this act, the states may have to create a 50-state database, a one-stop shop for thieves.⁴⁷

This law should not affect Texas' ability to prosecute drivers' license forgeries under state

⁴³ *Prepared Statement of The Federal Trade Commission on Identity Theft and Social Security Numbers Before the Subcommittee on Social Security of the House Committee on Ways and Means*, Washington DC, March 30, 2006, pp. 5-8.

⁴⁴ *Prepared Statement of The Federal Trade Commission on Identity Theft and Social Security Numbers Before the Subcommittee on Social Security of the House Committee on Ways and Means*, Washington DC, March 30, 2006, pp. 8-9.

⁴⁵ *Prepared Statement of The Federal Trade Commission on Identity Theft and Social Security Numbers Before the Subcommittee on Social Security of the House Committee on Ways and Means*, Washington DC, March 30, 2006, p.10.

⁴⁶ *Real ID Act of 2005 Driver's License Title Summary*, National Conference of State Legislatures, www.ncsl.org.

⁴⁷ Anita Ramasastry, "Why the 'Real ID' Act is a real mess," *CNN.com*, August 12, 2005.

law. If a forged Real ID license is used to board an airplane or enter a federal building, however, it is a federal offense.⁴⁸

The Health Information Portability and Accountability Act (HIPAA)

The Health Information Portability and Accountability Act (HIPAA) prohibits disclosure of a consumer's medical information without prior consent, with certain exceptions.⁴⁹

Effect of Federal Preemption

Although the federal laws have addressed certain identity theft issues, many areas remain open for regulation. Congress is currently considering several bills that may preempt Texas laws, including those related to security breach notification and credit freezes.⁵⁰

The federal laws have not addressed the regulation of social security numbers as it applies to entities other than consumer reporting agencies. Currently, the social security number is used as a personal identifier for many things, including on a voter registration card. It would be beneficial to legislate limits on the use of social security numbers.

State Legislation

Senate Bill 473, 78th Legislature

During the 78th Session, the Texas Legislature passed Senate Bill 473 to assist consumers in preventing and detecting identity theft.

S.B. 473 contains the following major provisions:

- Restricts when and how a consumer's social security number may or may not be used.
- Allows consumers to place an alert on a credit file, and requires prospective creditors to contact the person with an alert on file before extending credit.
- Allows consumers to freeze or block their files with credit reporting agencies.⁵¹

Shortly thereafter, the Federal Fair and Accurate Credit Transactions Act was passed, which mirrors and preempts some, but not all, of the provisions in S.B. 473.

Texas Legislation, 79th Legislature

⁴⁸ Texas Department of Public Safety, *Impact Analysis of the Real ID Act (handout and presentation)*, July 25, 2006.

⁴⁹ *Prepared Statement of The Federal Trade Commission on Identity Theft and Social Security Numbers Before the Subcommittee on Social Security of the House Committee on Ways and Means*, Washington DC, March 30, 2006, p.10.

⁵⁰ Kavan Peterson, "States Failing to Secure Personal Data," *Stateline.org*, July 12, 2006.

⁵¹ Office of the Consumer Credit Commissioner, *Legislative Report: Reviewing Identity Theft and Senate Bill 473*, December 30, 2004, p. 8.

The 79th Legislature cracked down on identity theft by passing a variety of bills to prevent the dissemination of personal information.⁵² H.B. 1130 requires businesses that required disclosure of a social security number to adopt and enforce a privacy policy regarding that social security number. S.B. 122 requires businesses to protect sensitive personal information and personal identifying information. It requires notification of consumers when businesses experience a breach in security, regardless of whether the information has been improperly used. However, notification can be delayed if a law enforcement agency determines that the notification will compromise an investigation.⁵³ H.B. 698 requires a business to dispose of both print and electronic records containing personal identifying information.

In total, at least five bills were passed dealing with various forms of identity theft. These bills contain many duplicative or conflicting provisions. It would be beneficial for Texas codes to be internally consistent, but in doing so, the legislature must make sure not to create a conflict with federal laws.⁵⁴ (See APPENDIX B.)

In addition, many pieces of legislation are passed which have privacy implications which are not highlighted by the legislature. When making laws for the good of the citizens of Texas, legislators need to be aware of the risks that the legislation may pose to the privacy interests of Texas residents.

Texas Attorney General's Passport Pilot Program

During the 79th Legislature, Regular Session, House Business & Industry Committee Chair Helen Giddings filed H.B. 1032, which would have instructed the Attorney General to create a program that assists identity theft victims in correcting credit histories and dealing with law enforcement. A key feature of this program was the issuance of a "passport" to prove a victim's identity and to prove that the victim was a victim of identity theft. This measure was never passed due to cost concerns.

In response to legislation passed during the 79th Legislature concerning identity theft, following the model set forth by H.B. 1032, the Attorney General secured a grant of \$115,000 to implement and develop the Identity Theft Verification Passport Program in order to assist victims of identity theft.

The program supplies victims of identity theft with a state-verified "passport" which may be presented to law enforcement and creditors to prove that the person is a victim of identity theft. Having proof of identity theft will help the victim navigate the legal system and get his or her life back together.

⁵² John Podvin & Irene Kosturakis, "Identity Theft," from the seminar *Identity Theft: How To Protect Your Practice And Your Clients*, State Bar of Texas Webcast, May 10, 2006.

⁵³ Dave Lieber, "Law allows delay in notifying customers of security breach," Fort Worth Star-Telegram, May 21, 2006.

⁵⁴ Office of the Consumer Credit Commissioner, *Testimony Before the Business and Industry Committee and State Affairs Committee*, April 25, 2006.

The victim will also receive the Identity Theft Victim's Kit, which contains instructions on whom to contact, an application for a court order declaring the applicant to be a victim of identity theft, and a certificate of enrollment in the program.⁵⁵

The program is currently being launched in the southeasternmost counties in Texas, with the goal that other counties will be invited to join the program if the program proves valuable. Eventually, all counties in Texas should participate. Expansion will begin in and around the major Texas cities where identity theft is more of a problem, and radiate out from each city until all of Texas participates.⁵⁶

Notification issues

Check Verification Services are not informed of ID theft

Currently, when an identity theft victim notifies the bank of a misuse of identity, the bank is not required to notify any other entities. Check verification companies should be notified, because, while not all merchants use these companies, most major chains and mainstream stores do use check verification companies.

Because check verification services are not notified of identity theft, the service will initially approve forged checks. It can take several weeks for a check verification service to receive notification from the merchant that the check was dishonored by the bank. This delay likely results in losses for check verification services; most check verification services offer a service to the merchant that guarantees the amount of the check if the check verification service approves the transaction. Under some circumstances, merchants who have check verification services will bear the loss if the merchant does not purchase the check guarantee service. Merchants who do not have check verification services, such as small merchants or those in rural areas, will bear losses as well.

The losses to check verification companies are completely preventable with timely notification. Despite this, many check verification services refuse to accept from the consumer a report that the consumer's identity has been stolen. This may be due to the check verification companies having purchased insurance to absorb their losses.

Other states have voluntary databases set up for identity theft. However, these databases are incomplete because they are voluntary, and only allow law enforcement and banking institutions to access them, which does not solve the problem of notification of check verification services.

Law Enforcement

⁵⁵ Office of the Attorney General, *Identity Theft Passport Program (Pilot Project)*, February 2006, pp. 3-5.

⁵⁶ Office of the Attorney General, *Identity Theft Passport Program (Pilot Project)*, February 2006, pp. 6-8.

In 61% of cases of identity theft, the victim did not notify law enforcement of the theft.⁵⁷ In order to combat identity theft, it is important for police to have accurate data to track trends and apprehend wrongdoers.

The Crime Victims' Institute made the following suggestions for legislation:

- Require law enforcement to take a police report when requested. A law has been passed on this issue in California.
- Require financial institutions, credit card companies, and law enforcement to report identity theft to a national clearinghouse, such as the Federal Trade Commission.
- Encourage the establishment of specialized identity theft divisions within law enforcement agencies.⁵⁸

State Entities Exempt From Business-to-Consumer Notification of Data Exposure

Currently, a business that experiences a security breach that exposes a consumer's personal information must notify that consumer.⁵⁹ However, in Texas, the notification requirement does not apply to government agencies.⁶⁰

Consumer Security Freezes

In Texas, along with four other states, consumers can place a security freeze on their credit with the major credit reporting agencies only if they are victims of identity theft. Twenty states allow a security freeze to be placed regardless of whether the person is a victim of identity theft.⁶¹

Statute of Limitations

Currently, the statute of limitations is 3 years for prosecuting identity theft crimes. It has been proposed that the statute of limitations be extended to 10 years.⁶²

Some victims of identity theft may not discover the theft for longer than three years. Sometimes, the identity theft is only discovered when a consumer is turned down for a loan

⁵⁷ Federal Trade Commission, *Identity Theft Victim Complaint Data: Figures and Trends, January 1-December 31, 2005*, Washington D.C., January 25, 2006, Figure 10.

⁵⁸ Crime Victims' Institute, *Identity Theft Report*, June, 2006, pp. 4, 9.

⁵⁹ Senate Bill 122, 79th Legislature, Regular Session, 2005.

⁶⁰ Kavan Peterson, "States Failing to Secure Personal Data," *Stateline.org*, July 12, 2006.

⁶¹ A consumer may freeze his or her credit only if he or she is a victim of identity theft in the following five states: Hawaii, Kansas, South Dakota, Texas, and Washington. A consumer may freeze his or her credit, regardless of whether he or she is a victim of identity theft, in the following twenty states: California, Colorado, Connecticut, Delaware, Florida, Illinois, Kentucky, Louisiana, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, Utah, Vermont, and Wisconsin. Marcia Coyle, "Into the Breach," *National Law Journal*, August 7, 2006.

⁶² Dallas County District Attorney's Office, North Texas Identity Theft Task Force, Testimony Before the Business and Industry Committee and State Affairs Committee, April 25, 2006.

and discovers discrepancies on his or her credit report. According to the Federal Trade Commission, 12% of identity theft victims discover the theft four or more years after it occurred.

Official Texas Identification Documents: Identity Theft

Driver's License Identity Theft

Currently identity theft regarding a driver's license can only be prosecuted under the Transportation Code, rather than under the Penal Code provision for tampering with a government record. The Penal Code provision has harsher penalties, and forgers of driver's licenses should not be able to slip through this loophole.⁶³

Birth Certificate Access

Currently, the public can obtain a birth record of any person after the 75th anniversary of the date of birth.⁶⁴ Previously this law allowed a birth record to be obtained after the 50th anniversary of birth, but that was extended to 75 years in 2003.⁶⁵

Record Retention & Disposal

The federal and state governments require that certain records, such as loan data, be kept for a statutorily required amount of time before those records can be destroyed. However, there are no provisions that require destruction of records. Many institutions have voluntarily instituted schedules for destruction and disposal of records.

Recommendations

- 1) Write legislation requiring a bank, if it receives notification of an identity theft, to offer the consumer the service of the bank notifying check verification services. A reasonable fee may be charged if no other solution can be found.
- 2) Increase the statute of limitations to 5 or 6 years for identity theft crimes.
- 3) Amend the Transportation and Penal Codes to allow driver's license forgeries to be prosecuted under either the Penal Code or the Transportation Code.
- 4) Require that records containing sensitive information be purged after a certain amount of time, provided that this law does not conflict with federal or state laws regarding record retention.

⁶³ Dallas County District Attorney's Office, North Texas Identity Theft Task Force, Testimony Before the Business and Industry Committee and State Affairs Committee, April 25, 2006.

⁶⁴ Texas Government Code, Section 552.115(a)(1).

⁶⁵ Senate Bill 861, 78th Legislature, Regular Session, 2003.

- 5) Require check verification services to accept a consumer's report that he or she has been a victim of identity theft, with appropriate documentation to support the claim.
- 6) Limit the use of social security numbers for identification purposes.
- 7) Examine ways to make legislators aware of the privacy impacts of the legislation being considered in committee and on the floor.
- 8) Revise Texas legislation regarding identity theft to make it internally consistent.

INTERIM CHARGE 3: "Monitor the Texas workers' compensation system reforms and implementation of House Bill 7, 79th Legislature, by the Texas Department of Insurance and other state agencies. (Joint Interim Charge with the House Committee on Insurance)"

Background

Workers' compensation is a complex system which stems from a contract between an employer and an employee. The employer has a responsibility to compensate a worker if a worker is injured on the job, both for medical care and for lost wages. Workers' compensation insurance takes care of an employee's needs post-injury and, in turn, the employee cannot sue the employer. In the absence of this insurance, the employee is free to sue the employer to compensate for the injury.

The workers' compensation system has been problematic for Texas for some time. Problems have included both overutilization (provision of unnecessary care) and underutilization (denial of necessary care) of medical care, resulting in patients not getting the appropriate medical care for the injury. Costs have been high, not just due to overutilization by providers, but also due to poor return-to-work outcomes which result in income benefits being paid for longer. Injured workers in the state of Texas deserve appropriate, quality medical care with the ultimate goal of returning these workers to jobs.

History of Workers' Compensation in Texas

Texas enacted its first workers' compensation law in 1913. In 1917, The United States Supreme Court ruled that states could legally require employers to provide compensation to injured workers. Many states revised their laws to make workers' compensation mandatory. Today, Texas is the only state that allows employers of any size or of any industrial affiliation to choose not to carry workers' compensation insurance.⁶⁶

In 1989, The Texas Legislature adopted the Texas Workers' Compensation Act, which, among other things, strengthened workplace health and safety, improved benefits and benefits delivery, and created an administrative income benefit dispute resolution process.

House Bill 2600

The 77th Legislature passed House Bill (H.B.) 2600, a workers' compensation reform bill aimed at reducing medical costs. The Research and Oversight Council on Workers' Compensation found that Texas's workers' compensation average medical costs per claim were higher than those in other state workers' compensation systems and other health care

⁶⁶ Although New Jersey also allows employers to opt out, in reality none of them do. Business and Industry Committee, *Interim Report to the 79th Legislature*, 2004.

delivery system. However, despite these high medical costs, injured workers in Texas were no more satisfied with their care than workers in other states. In addition, return to work rates in Texas were found to be poor: injured workers in Texas spent more time off the job and were less likely to return to work.⁶⁷

In response to these factors, H.B. 2600 was passed. H.B. 2600, in order to cut costs, required the Texas Workers' Compensation Commission, the state agency that was in charge of workers' compensation at the time, to adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structure found in the federal Medicare system.

It also authorized the creation of regional health care delivery networks in the workers' compensation system. The governor-appointed Health Care Network Advisory Commission was created to do a feasibility study on whether regional health care networks could be implemented. Although the feasibility study recommended the initiation of a network pilot project, the recommendations were not fully followed and the network system was not fully implemented after the passage of H.B. 2600. Employees could opt out of networks, and therefore it was difficult to negotiate and establish networks.⁶⁸

H.B. 2600 also created the Medical Quality Review Panel (MQRP), a panel of doctors that are used to oversee medical care, to ensure quality care for injured workers.

Departmental Restructuring under House Bill 7

House Bill 7, 79th Legislature, made sweeping reforms to the Texas workers' compensation system. Following the recommendations of the sunset review of The Texas Workers' Compensation Commission (TWCC), TWCC was abolished and its functions were transferred to the Division of Workers' Compensation (DWC), a new body created under the oversight of the Texas Department of Insurance (TDI).⁶⁹ In addition, the Office of Injured Employee Counsel (OIEC), a new state agency, was created to help injured workers with the administrative dispute resolution process.

Division of Workers' Compensation (DWC)

The Division of Workers' Compensation was created within TDI to replace TWCC. Instead of six commissioners, as TWCC had, DWC is under a single Commissioner of workers' compensation, appointed by the governor.

Office of Injured Employee Counsel (OIEC)

⁶⁷ Research and Oversight Council on Workers' Compensation and Med-FX, LLC, *Striking the Balance: An Analysis of the Cost and Quality of Medical Care in the Texas Workers' Compensation System, A Report to the 77th Texas Legislature*, January 2001, p. 83.

⁶⁸ House Business and Industry Committee, *Interim Report to the 79th Legislature*, 2004, p. 43.

⁶⁹ Sunset Advisory Commission, *Report to the 79th Legislature*, February 2005, pp. 197-210.

The Office of Injured Employee Counsel (OIEC) is an independent state agency headed by a governor-appointed Public Counsel which helps injured employees who have complaints about their benefits or medical care or need assistance navigating the system. This office aids injured workers with the DWC administrative dispute resolution process; however, OIEC does not have the jurisdiction to represent injured employees in district court after administrative remedies have been exhausted.⁷⁰ The main office is in Austin, and the ombudsman and regional attorneys are located in DWC offices across the state.

One key program in OIEC is the ombudsman program, which was formerly a function of TWCC and was transferred to OIEC as part of H.B. 7. Ombudsmen are non-attorney advocates for employees and help assist employees in the DWC administrative dispute resolution process. The ombudsman program boasts a 50.9% win rate for the period between January and June 1st of 2006.⁷¹

OIEC has also been active in commenting on DWC's rulemaking initiatives. OIEC's Injured Employee's Rights and Responsibilities publication has been approved and adopted.⁷² (See APPENDIX C.)

Networks

Previously, a worker could pick any doctor from the Approved Doctor List (ADL) to treat his or her injury. House Bill 7 instituted networks for the workers' compensation system to improve care and cut costs. If an employer chooses to use a network, employees must use network doctors for workers' compensation claims, if the employee both lives in the network's service area and has received a copy of the network's rules and notices. The injured worker picks a treating doctor from a list provided by the network, and that doctor determines the extent of the injury and either treats the worker or refers the worker to a specialist. Under this system of the "gatekeeper" treating physician, it is expected that the injured worker will get the appropriate medical care. Workers whose employers have not opted for a network plan or who do not live in the network's service area will continue to seek medical treatment from doctors on the ADL.

As of October 26, 2006, seventeen networks have been approved by DWC. (See APPENDIX D.)

DWC is also required to adopt a closed formulary list for prescriptions to cut down costs. Previously, Texas used an open formulary for workers' compensation.

Network Advantages

There are several advantages to networks.

⁷⁰ Brian White, Counsel for Policy Development, OIEC, *Memorandum: Injured Employee's Representation at District Court*, June 22, 2006.

⁷¹ Office of Injured Employee Counsel, *OIEC Quarterly Review*, April-June 2006.

⁷² Office of Injured Employee Counsel, *OIEC Quarterly Review*, April-June 2006.

One is that the patients will be directed to the specialist who can best help them, if a specialist is necessary, thereby ensuring appropriate care.

Networks are able to avoid the injured worker being subject to underutilization or overutilization, whereas under the ADL system, the patient was free to pick any doctor, and that doctor may not necessarily have a history of good outcomes. It is hoped that networks will save money in the long run, not necessarily due to cutting medical costs, but because better care will be given, leading to better return-to-work outcomes.

Another advantage is the fact that the network will be responsible for some of the paperwork, thereby freeing doctors from doing this task. This should attract some doctors who were previously put off by the hassle of paperwork back into the workers' compensation system.

Network Disadvantages

There is a concern that networks may not be adequate, both in quality and quantity of doctors. It is the purpose of networks to provide adequate patient choice while at the same time retaining only qualified doctors in the network who are judged by performance standards. The committee has been monitoring the networks as they are created and implemented.

Network Adequacy

Network adequacy refers to both the quality and quantity of doctors of appropriate specialties in the network, to ensure that the employee receives appropriate care. TDI plans to monitor network adequacy through complaints and the results of the annual network report card (see below).

Quantity of Doctors

There is no precise figure that makes the network automatically adequate in the quantity of doctors. It is important to remember that the number of doctors must be adequate for the number of patients in a specific area. The adequacy of the number of doctors depends on which employers sign up with that network. Networks need to be flexible to add doctors should the need arise. Abstractly, it is hard to tell if a network has an adequate number of doctors before the network signs up any employers.

Quality of Doctors

There is a concern that the networks may only accept doctors willing to be paid low fees, and these will be the poorest quality doctors. While non-network care is paid in accordance with DWC fee guidelines, under H.B. 7 networks and doctors negotiate their fees. This may lead to poor return-to-work outcomes. One solution which has been suggested is legislating a "floor" for doctor pay.

TDI and the committee will continue to monitor these issues and determine whether a legislative fee guideline is needed. In the meantime, DWC will continue to adopt new fee guidelines and review its existing fee guidelines to determine whether adjustments for non-network fees are necessary. Though network fees are not linked to non-network fee guidelines, an adjustment of non-network fees may indirectly affect negotiations between networks and providers.

Network Hospitals

An emerging issue is the negotiation between networks and hospitals. TDI reported that it cannot approve a network certification in a non-rural county without a network hospital. TDI realizes that network applicants may have trouble contracting with hospitals. However, a lack of a network hospital in a non-rural county would effectively make that county deficient in specialty care.⁷³ The committee should continue to monitor this issue.

Network Report Card

According to House Bill 7, the Workers' Compensation Research and Evaluation Group (Research Group) of TDI is required to produce a report card on the network system 18 months from the date the first network was certified. The first network was certified in March 2006, therefore the report card is due in September 2007.

The Research Group has drawn up a comprehensive plan of what topics will be covered in the first report card and how data will be collected for that report card. The Research Group plans to use both an injured worker survey and DWC medical billing data in order to complete the report.⁷⁴

However, the initial report card is problematic for the following reasons:

- Due to the short timeframe, the injured workers polled may not be more than 6 months post-injury. It will be impossible to track outcomes for more serious injuries that take more than 6 months to heal.
- The data pool is small because networks are new, and employers may not sign on to use networks during the first year or two of their implementation. This small data pool may alter the results.⁷⁵

Oversight and Review

⁷³ "Texas Network Hospital, TPA Issues Clarified," *WorkCompCentral.com*, July 24, 2006.

⁷⁴ Workers' Compensation Research and Evaluation Group, Texas Department of Insurance, *Proposed Workers' Compensation Network Report Card Topics, Measures and Data Sources (Draft)*, presented to the Workers' Compensation Work Group Meeting, June 14, 2006.

⁷⁵ Amy Lee, Team Leader, Workers' Compensation Research and Evaluation Group, Texas Department of Insurance, Testimony at Workers' Compensation Working Group Meeting, June 14, 2006.

Medical Quality Review Panel (MQRP)

The Medical Quality Review Panel was created by H.B. 2600 as a way to oversee medical care to ensure that injured workers were receiving appropriate medical care.

In the past, the determinations of the Medical Quality Review Panel (MQRP) have been under scrutiny for being arbitrary and the MQRP process was criticized for not being clearly communicated and transparent. As a result, Commissioner Betts of DWC suspended all functions of the MQRP temporarily starting in November, 2005.⁷⁶ When the MQRP was reinstated, the following changes were made to make the process more transparent and fairer:

- Cases are selected based on selection criteria established by the Quality Monitoring and Enforcement Team (QMET), a group of DWC deputy commissioners. Cases are purged of identifying information before the review.
- The subject of the review (e.g., a health care provider or an insurance carrier) has the opportunity to give a preliminary response, which may end the review.
- Multiple reviewers are used.
- The subject is offered the opportunity for an informal resolution conference.
- A quality assurance panel ensures the quality of MQRP reviews and findings.
- QMET has been expanded to determine both the review criteria and the final outcome. A final decision on a specific outcome or action for recommendation to DWC Commissioner requires majority of QMET concurrence with recommendation.
- Response timeframes have been modified.⁷⁷

Performance Based Oversight

The sunset review of TWCC recommended that DWC be required to regularly assess the performance of carriers and medical providers against certain key regulatory goals to identify entities needing enhanced regulatory oversight.⁷⁸ As a result of this recommendation, performance based oversight was required by H.B. 7.

Performance based oversight is a method to assess the performance of individual healthcare providers and insurance carriers in providing timely and adequate income and medical benefits to injured workers, and to provide incentives to promote compliance with goals set up by DWC. Performance based oversight evaluates health care providers and insurance carriers based on a tier system which classifies providers as high, average, or low performers. A small subgroup of the Workers' Compensation Work Group is working on this matter in order to suggest the specifics of implementation of the tier system.

The subgroup began meetings on June 14, 2006, and has been meeting weekly. DWC has a

⁷⁶ Commissioner Albert Betts, DWC, Testimony before the Business and Industry Committee and Insurance Committee, January 12, 2006

⁷⁷ Texas Department of Insurance, *Presentation to House Business and Industry Committee and House Insurance Committee*, May 9, 2006.

⁷⁸ Sunset Advisory Commission, *Report to the 79th Legislature*, February 2005, p. 201.

timeframe for the development and implementation of the Performance Based Oversight System, which anticipates completion of the system by October 31, 2006.

DWC has been charged by H.B. 7 with the following tasks for the Performance Based Oversight System:

- Develop Key Regulatory Goals
- Identify Assessment Mechanism
- Identify Tiers & Tier Placement Methodology
- Develop Options for Incentives
- Develop Rule Proposal for Incentives
- Initiate Assessments
- Complete Initial Assessments
- Tier Placement.

The subgroup has already identified six key regulatory goals on which the performance assessments should be based:

- Promote safe and healthy workplaces.
- Encourage the safe and timely return of injured employees to productive roles.
- Provide timely and accurate income benefits and medical benefits.
- Ensure each injured employee shall have access to prompt, high-quality, cost-effective medical care.
- Increase timely and accurate communications within system.
- Limit disputes to those appropriate and necessary.⁷⁹

Review of Provider Decisions

Insurance companies use peer review doctors to do reviews of workers' compensation cases, and make recommendations about issues such as medical necessity of medical care, both prospectively and retrospectively, impairment ratings, maximum medical improvement, compensability, and extent of injury. Previously, out-of-state doctors could be used as peer reviewers as long as they conducted these reviews under the supervision of a Texas-licensed doctor. The legislature sought to make sure that Texas doctors were doing all peer reviews due to the fact that it is difficult or impossible to sanction out-of-state doctors for misconduct.

There is a conflict of language in the law regarding peer review. House Bill 7 provided that peer review doctors must be licensed in this state.⁸⁰ However, that same bill created a conflict in statute by not amending the provision of the Labor Code that provided that

⁷⁹ Texas Department of Insurance, Division of Workers' Compensation, *Performance Based Oversight - Tier Structure and Tier Placement Methodology Discussion Paper for July 12, 2006*; "Texas DWC Explains Oversight Effort," *WorkCompCentral.com*, July 25, 2006.

⁸⁰ Texas Labor Code, Section 408.0231(g).

utilization review doctors in workers' compensation cases may be licensed in another state, so long as they are under the direction of a doctor licensed in Texas.⁸¹ In general, "utilization review" refers to the review of the medical necessity and appropriateness of treatment while "peer review" applies to medical opinions regarding other aspects of a workers' compensation claim such as impairment rating and maximum medical improvement.

A rule has recently been passed by DWC that echoes the Labor Code provision that workers' compensation *utilization* review may be performed by an out-of-state doctor under the direction of a Texas-licensed physician.⁸² It was the intent of the legislature that all doctors reviewing *any* medical issues in workers' compensation cases be licensed in Texas, and this language should be changed to reflect the intent of the legislature.

Data Call on Peer Review

DWC is initiating a mandatory data call on the topic of peer review. Data will be collected for the months of September and October from the top 25 workers' compensation insurance carriers, representing 75 percent of the workers' compensation claims.⁸³ The data will be due on November 30, for September data, and December 29 for October data. The carriers are required to submit the data in the Excel matrix format provided for peer review collection information.⁸⁴ DWC will prepare a report on the data and post it on its website.⁸⁵

Return-to-Work

In Texas, return-to-work outcomes have been historically poor.⁸⁶ This is a multifaceted problem. A common misconception is that workers are lazy and do not want to return to work because they would rather continue to receive benefits for being unemployed. In fact, many factors can contribute to poor return-to-work outcomes, including an employer's unwillingness to keep a job open for an injured worker or rehire an injured worker, or an insurance company's refusal to certify that the employee is ready to go back to work. An open dialogue needs to happen between insurance companies, employer, and employees to better deal with this issue.

An overarching goal in the workers' compensation system is to improve these outcomes. Employees who return to work do not need to receive income benefits, thereby lowering costs by insurance companies, and eventually, insurance rates. According to some statistics, it is cheaper to have an employee at work, at 40 percent productivity, than to pay temporary

⁸¹ Texas Labor Code, Section 408.023(h).

⁸² Texas Department of Insurance, Division of Workers Compensation, Rule 180.22(g)(1)(B).

⁸³ Allen McDonald, Workers' Compensation Working Group Minutes, August 9, 2006.

⁸⁴ Texas Department of Insurance, *Notice of Peer Review Data Collection*, at www.tdi.state.tx.us/wc/mr/peerdata.html.

⁸⁵ Allen McDonald, Workers' Compensation Working Group Minutes, August 9, 2006.

⁸⁶ Research and Oversight Council on Workers' Compensation and Med-FX, LLC., *Returning to Work: An Examination of Existing Disability Duration Guidelines and Their Application to the Texas Workers' Compensation System, A Report to the 77th Texas Legislature*, January 2001.

income benefits and lose that employee's productivity altogether.⁸⁷ Also, being employed is good for the injured employee's mental health and a positive outlook, which aids in his or her recovery.

Networks are one step in this direction. By ensuring that employees are getting appropriate care, and are directed to see a specialist if one is needed, better return to work outcomes are anticipated. However, since a significant number of claims will fall outside of network care in the immediate future, H.B. 7 made several changes to increase the focus of the system on return-to-work, including the small business return to work pilot program, improved DWC and Department of Assistive and Rehabilitative Services coordination, requiring DWC to adopt return-to-work guidelines, and placing return-to-work as a key legislative goal for the system. The Division of Workers Compensation considers return-to-work a high priority.

Small Business Return-to-Work Reimbursement Program

An employer return-to-work reimbursement program has been instituted for small businesses. This program was required by H.B. 7 as a pilot program and ends in 2009. Small businesses can apply for reimbursement for up to \$2500 for workplace modifications made in order to assist an injured employee in returning to work. This is problematic because small businesses may not expend money in the first place without assurances that the funds will be repaid.

As of July, there is one employer who gave notice to DWC that it plans to apply for reimbursement. No employers have applied for reimbursement.⁸⁸

Since the small business return-to-work pilot project rule was adopted in February 2006, DWC has been actively involved in public outreach to disseminate information about the pilot project. Press releases were sent to various chambers of commerce and other employment-related offices. Articles have been published in various magazines and newsletters.⁸⁹

Coordination with Department of Assistive and Rehabilitative Services

H.B. 7 required a report to the legislature on coordination between DWC and the Department of Assistive and Rehabilitative Services (DARS). The report was required to include:

- a description of the actions taken by each agency to improve communication regarding coordination of vocational rehabilitation programs;
- an analysis identifying the population of injured employees that have the poorest

⁸⁷ Sam McMurry, Lockheed-Martin, Presentation to the Workers' Compensation Working Group of Lockheed-Martin's Return to Work Program, Minutes of the Workers' Compensation Working Group, August 9, 2006.

⁸⁸ Katie Winter, DWC, e-mail on August 23, 2006.

⁸⁹ Texas Department of Insurance, *Information Dissemination and Marketing of RTW Pilot Program for Small Employers*, August 2006.

return-to-work outcomes and are in the greatest need for vocational rehabilitation services;

- any changes recommended to improve the access to and effectiveness of vocational rehabilitation programs for the populations identified; and
- a plan to implement these changes.

A joint workgroup has been established through a Memorandum of Agreement, and this group meets regularly.

Several steps have been taken to improve return-to-work outcomes. DARS now has specialized training to assist staff in providing vocational rehabilitation services to those with workers' compensation injuries. An agency performance measure for Fiscal Year 2008-2009 has been created to track the percentage of workers' compensation claimants who received benefits for 90 days or less, which will aid in identifying injured employee populations less likely to return to work. Outreach and education programs are also being implemented for non-state-agency vocational rehabilitation professionals, caseworkers, occupational therapists, physical therapists, and others involved in the rehabilitation of employees.

By DWC rule, employees with certain injuries are automatically referred to DARS for rehabilitative services to improve return-to-work outcomes. DWC is reviewing these rules to determine if additional injury types require automatic referral.

DWC and DARS will continue to collect data on return-to-work, and implement rules and policies to improve return-to-work outcomes.⁹⁰

It appears that this report did not fully address the concerns of H.B. 7. The report was intended to identify populations of workers who need the most care and create action plans for those populations. Instead, the report created an action plan to do such things in the future.

Dispute Resolution

H.B. 7 streamlined the income benefit disputes by eliminating multiple benefit review conferences, requiring the appeals panel to adopt a precedent manual, requiring additional training of benefit review officers, and requiring parties to show evidence of prior attempts to resolve the dispute. H.B. 7 also streamlined the medical dispute process by eliminating appeals to the State Office of Administrative Hearings.

H.B. 7 required rules to be created regarding dispute resolution. DWC has adopted some rules and proposed others that streamline the administrative dispute resolution process by treating both network and non-network complaints with the same procedure. These rules also require compensability issues to be determined before fee disputes can be brought,

⁹⁰ Texas Department of Insurance, Division of Workers' Compensation and Texas Department of Assistive and Rehabilitative Services, *New Approaches to Providing Vocational Rehabilitation Services to Injured Employees in the Texas Workers' Compensation System: A Joint Report to the Legislature*, August, 2006.

further streamlining the process.⁹¹

The OIEC ombudsman is available to help a claimant through these proceedings. Appeals go to district court rather than to the State Office of Administrative Hearings.

Legacy Claims

In early 2006, there were over 13,000 pre-H.B. 7 medical disputes, primarily fee disputes, in the area of workers' compensation.⁹² The Commissioners of TDI and DWC, Mike Geeslin and Albert Betts, are aggressively encouraging parties to settle these disputes, since these disputes occurred pre-H.B. 7 and are occupying a significant amount of agency resources. A letter was sent out on May 17, 2006, encouraging the parties to settle the disputes, or DWC would be forced to resolve these disputes in an expedited fashion through the administrative dispute resolution process.

Reduction of Rates

One of the key goals of H.B. 7 was to reduce insurance rates. Costs should be contained in two ways. The first way is that network care would cut down on unnecessary care by using the treating physician as a gatekeeper. The second way is through networks and other methods, return-to-work should be improved, thereby cutting the costs of the income benefits paid to injured workers. It may be too soon to tell whether savings are being realized by insurance companies and consequently passed on to their customers. The committee will continue to monitor this issue to see if rates decrease as anticipated.

Status and Schedule

House Bill 7 set out a very definite timetable for the transfer of functions for TWCC to DWC, rulemaking, and other requirements. This committee has received periodic reports from TDI, DWC, and OIEC, and required deadlines are being met. (See APPENDIX E.)

Outreach

TDI, DWC, and OIEC are dedicated to making sure employees and employers know their rights and responsibilities. Various regional presentations are being made regarding the changes to the workers' compensation system.⁹³

⁹¹ Texas Department of Insurance, Division of Workers' Compensation, Rules 140.1, 140.4 145.1-145.28; Texas Department of Insurance, Division of Workers' Compensation, Proposed Rules 133.305, 133.307, 133.308.

⁹² Commissioner Albert Betts, DWC, Testimony before the Business and Industry Committee and Insurance Committee, May 9, 2006. There are 3 types of medical disputes: preauthorization (disputes over prospective denials), medical necessity (disputes over retrospective denials), and fee disputes (disputes over medical fees or billing practices).

⁹³ Division of Workers' Compensation, Events Calendar at <http://www.tdi.state.tx.us/wc/services/outreachcal/puboutreach.html>.

Proposed rules are published online, and comments are accepted from stakeholders. There are monthly meetings of the Workers' Compensation Working Group which are open to the public, in which stakeholders can participate in the process and voice their concerns. TDI also holds weekly open conference calls during which anyone can ask questions about the changes to workers' compensation.

Recommendations

- 1) Ensure that all doctors performing medical reviews of workers' compensation cases are licensed in Texas.
- 2) Modify the return-to-work reimbursement program for small businesses to include a preauthorization provision so that small businesses' expenditures may be approved before the modifications are made.
- 3) Continue to monitor network adequacy.
- 4) Continue to monitor the disposition of legacy claims.
- 5) Require a briefing from DARS and DWC to the joint committee on plans to identify populations needing assistance and programs to help those populations.

INTERIM CHARGE 4: Study the powers and practices of homeowner associations in Texas and the possible need for legislation, such as the proposed Texas Uniform Planning Community Act, to address the rules, enforcement, restrictions and other matters within the authority of a homeowner association. (Joint Interim Charge with the House Committee on Land and Resource Management)

Scope of Report

Over the years, numerous legislative reports, court cases, law review articles, and other legal works have studied and explained every aspect of planned communities in this and every other state of the union. This report generally focuses on the background, controversies, and the current law governing such communities in this state, and more specifically analyzes how the proposed Texas Uniform Planned Community Act (TUPCA) reflects current law and understandings.⁹⁴ This report, through the use of numerous footnotes, attempts to direct the reader to various other sources that address specific issues in greater detail. The Committee does not believe that it is necessary to restate work that has already been completed.

Background

Planned Communities

Today, an estimated fifty-seven million Americans live within 286,000 community associations in this nation.⁹⁵ These property owner associations (POAs) are individually and generally delineated as condominium associations, cooperative associations, or homeowners' associations. Often, these communities exist in combination with one another and are generally grouped together in what is commonly referred to as Master Planned Communities.

Home Owners' Associations

Homeowner associations (HOAs) are non-profit POAs formed to provide services for homeowners in exchange for required assessment fees.⁹⁶ A number of services may be

⁹⁴ For example, this report has limited information on mixed-use communities. § 83.254(2) of TUPCA specifically excludes mixed-use communities containing residential and non-residential lots unless the lots would comprise a planned community in the absence of the non-residential lots. An example of a mixed-use association is the Las Colinas Association (LCA), which is a nonprofit corporation that serves as the permanent POA for all residential and commercial properties in Las Colinas. See, The Las Colinas Association, at <http://www.lascalinasassn.com>; Las Colinas is a 12,000-acre master planned community located within the city of Irving, Texas.

⁹⁵ See, Community Associations Institute, *Facts About Community Associations*, at <http://www.caionline.org/about/facts.cfm>.

⁹⁶ The Committee has made a decision to refer to all associations that are relevant to this report as "HOAs", even though some might argue that "POA" is more appropriate. This decision is inline with the specific

afforded to homeowners that are designed to improve the safety, function, and aesthetic quality of a neighborhood or subdivision in order to preserve the property values of the homes within the HOA's jurisdiction. Services may include the provision of street lighting and garbage services and the maintenance or creation of common areas like parks, swimming pools, and other amenities. Homeowners are generally obligated to maintain their property in accordance with deed restrictions in place at the time they purchased property in the HOA.⁹⁷ Frequently, HOAs are managed by a board of directors elected by homeowners, and are governed by deed restrictions and by the HOA's articles of incorporation, bylaws, and rules that are enforced through a system of fines for infractions.

General History⁹⁸

During the nineteenth century, common ownership associations (the forerunners of HOAs) were developed in the United States by urban planners as a tool to create exclusive neighborhoods that were confined and separate from surrounding areas.⁹⁹ By the late 1920s, land use restrictions in many high-end subdivisions were employed to protect property values. Following World War II, during a period of rapid municipal growth, it became increasingly costly for municipalities to provide basic services to their residents. As a result, some municipalities began to refuse to provide certain basic services, such as road maintenance and garbage collection, to new developments, and left those duties for the HOAs to provide themselves.¹⁰⁰

Currently, this state, as well as much of the rest of the country, is experiencing a rapid growth in the creation of planned communities. Not only do some homebuyers wish to live in communities that are regulated, but many municipalities find it beneficial to pass on to the private sector that which has traditionally been the function of local governments.

Texas History¹⁰¹

By and large, HOAs in Texas are governed by the Texas Property Code and by case law.¹⁰²

language of the charge given to the Committee.

⁹⁷ Restrictive covenants (restrictions placed in deeds) govern the uses of property as well as the behaviors of individuals living under them. These covenants often establish fees for a variety of services. In most cases, the developer of the neighborhood creates the covenants before any individual lots are sold, precluding any prospective owner's input in their composition.

⁹⁸ See, e.g., Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (New York: Vail-Ballou Press, 1994); Wayne S. Hyatt & Jo Anne P. Stubblefield, "The Identity Crisis of Community Associations: In Search of the Appropriate Analogy," *27 Real Prop. Prob. & Tr. J.* 589 (1993); Uriel Reichman, "Residential Private Governments: An Introductory Survey," *43 U. Chi. L. Rev.* 253 (1976).

⁹⁹ Some of the earliest common ownership associations were created in Gramercy Park in New York, and in Louisburg Square in Boston.

¹⁰⁰ See, e.g., Shirley L. Mays, "Privatization of Municipal Services: A Contagion in the Body Politic," *34 Duq. L. Rev.* 41, 57 (1995).

¹⁰¹ See, e.g., Karen Ellert Pena, "Comment: Reining In Property Owners' Association's Power: Texas's Need For a Comprehensive Plan," *33 St. Mary's L. J.* 323 (2002).

¹⁰² See, TEX. PROP. CODE, Chs. 201-210; TEX. PROP. CODE, Ch. 51.

Eleven specific chapters in Title 11 of the Property Code deal with a variety of HOA issues.¹⁰³ As such, Texas HOA law is not codified as a uniform set of consistent rules. Instead this set of laws has developed over time in a piecemeal fashion, usually in response to a particular situation or a constituent's complaint.

Legislative Activity

In the past eight years, at least ninety-two separate bills involving HOAs have been introduced, and three interim committees, including the current House Joint Committee, have been charged with studying issues related to HOAs.¹⁰⁴ It is important to understand that many of the proposals debated by the legislature in recent years have been aimed at associations comprised primarily of single-roofed family homes in which the HOA has limited maintenance functions. Any legislative debate is incomplete if it does not take into consideration the fact that other types of HOAs, often times requiring greater HOA involvement in day-to-day affairs, are now part of the equation.¹⁰⁵ In addition, previous debates have often focused on the two obvious parties involved in HOA questions: associations and its members, while often not taking into account the affect that any proposal will have on other stakeholders such as developers and financial institutions. Future legislative proposals and debates should be sure to include these other parties.¹⁰⁶

76th Regular Legislative Session

In 1998, the Senate Committee on State Affairs issued an interim report dedicated to the study of the legal powers, duties, and structure of HOAs in Texas.¹⁰⁷ This report concluded that HOAs have acquired so much power over member homeowners (in essence de-facto political subdivisions) that they need to be more strenuously regulated by state law.¹⁰⁸ Of particular concern to the committee was the fact that "due process concerns are not

¹⁰³ Chapter 201 applies to the creation, extension, and amendment of restrictive covenants in HOAs located in larger cities (population of 100,000) and in Harris County and its surrounding counties. Chapter 202 applies to the construction and enforcement of restrictive covenants throughout the state. Chapter 204 applies the powers of HOAs in Harris, Brazoria, Galveston, and Montgomery counties. Chapter 205 applies to limited situations in counties with a population larger than 65,000. Chapter 206 applies to the extension of assessment restrictions in certain HOAs in and around Harris County. Chapter 207 applies to disclosure of HOA information, particularly resale certificates by all HOAs. Chapter 208 applies to the amendment and termination of restrictive covenants in Houston. Chapter 209 is the Texas Residential Property Owners Protection Act that is statewide in affect. Chapter 210 applies to the extension and modification of restrictive covenants in Tyler and its surrounding counties. Chapter 211 applies to the amendment and enforcement of restrictive covenants in the unincorporated parts of smaller counties.

¹⁰⁴ See, Footnote 27 at 8 for a list of bills.

¹⁰⁵ Throughout the state and the nation POAs that comprise garden homes, town homes, and other non-traditional living arrangements are being created. In many cases, these new associations have responsibilities to maintain yards, roofs, fencing, and other jobs that have traditionally been left to individual homeowners.

¹⁰⁶ See, Committee Recommendation 6.

¹⁰⁷ *Texas Senate Interim Committee on State Affairs Report to the 76th Legislature*, November 1998, Charge Two: "Study the legal powers, duties, and structure of homeowners associations in Texas, including lien and foreclosure abilities."

¹⁰⁸ *Ibid.*, at 16.

adequately addressed by the current foreclosure process."¹⁰⁹

During the subsequent 76th Legislative Session, a number of bills were filed as a direct result of the preceding year's interim report from the Senate State Affairs Committee.¹¹⁰ Generally, these bills aimed to lessen HOA abuses by, for example, prohibiting foreclosure as a remedy available to HOAs, requiring arbitration prior to filing liens on property, and prohibiting mandatory membership in an association. Most of these piecemeal pieces of legislation failed to be enacted.

A more comprehensive piece of legislation was filed during this session that attempted to codify rights, obligations, and procedures for homeowners and associations. Known as the Texas Planned Community Act (TPCA), S.B. 699 by Senator John Carona proposed the establishment of a statewide statutory outline for the functioning of HOAs. Though this bill was not enacted, it does nevertheless reflect the ever-increasing desire by the legislature to find a balance between the powers and duties of HOAs.

77th Regular Legislative Session

In March, 2001, Ms. Wenonah Blevins, an eighty-two year old widow from Houston, witnessed the Champions Community Improvement Association auction away her \$150,000 home because she had failed to pay two years of homeowner fees totaling \$814.50. The home was eventually sold for \$5,000.¹¹¹ A number of bills were filed during the 77th Legislative Session to address this and other evident problems that surrounded the operations of HOAs in Texas.¹¹²

The most significant piece of legislation that was enacted during this session was broad in scope and attempted to give direction to associations and to protect homeowners that live within them. S.B. 507 by Senator Carona created the Texas Residential Property Owners Protection Act (TRPOPA), currently Chapter 209 of the Property Code, which includes procedural instructions and protections, prohibits the foreclosure of a home for fines and attorney's fees only, limits attorney's fees, and authorizes the redemption of a foreclosed home by the homeowner within 180 days of sale.¹¹³

78th Regular Legislative Session

In 2002, the Senate Committee on Intergovernmental Relations appointed an interim subcommittee chaired by Senator Jon Lindsay and charged with studying "the

¹⁰⁹ *Ibid.*

¹¹⁰ See, HB 554 (Yarbrough); HB 901 (Dutton); HB 904 (Yarbrough); HB 1017 (Yarbrough); HB 1299 (Yarbrough); HB 2224 (Solomons); HB 2459 (Yarbrough); HB 2460 (Yarbrough); HJR 37 (Dutton); SB 317 (Ellis); SB 318 (Ellis); SB 319 (Ellis); SB 434 (Brown); SB 699 (Carona).

¹¹¹ See, S.K. Bardwell, Eric Berger, and Dale Lezon, "Sale of Widow's Home Outrages Officials: Homeowners' Group Tried to Buy Home," *Houston Chronicle*, May 3, 2001.

¹¹² See, HB 879 (Dutton); HB 1423 (Bailey); HB 2685 (Bosse); SB 507 (Carona); SB 1834 (Lindsay); SB 1835 (Lindsay); SJR 53 (Lindsay).

¹¹³ See, TEX. PROP. CODE, § 209.001 *et seq.*

appropriateness of foreclosure and other powers granted to property owners associations to enforce covenants."¹¹⁴ The committee made seventeen recommendations to the 78th Legislature, including prohibiting non-judicial foreclosures, prohibiting foreclosure for non-assessment liabilities alone, finding an alternative to foreclosure, increasing the redemption period to two years, various provisions regarding the retention and payment of attorneys, and a suggestion that association laws be re-codified.¹¹⁵

Many of the proposals recommended by the Senate State Affairs Interim Committee were introduced as legislation during the 78th Legislative Session.

Senator Lindsay introduced S.B. 949 that provided a number of protections for consumers pertaining to the collection of dues and fees and the enforcement of deed restrictions by HOAs. Had it become law, S.B. 949, among other things, would have created open meetings and open records rules, placed limitations on foreclosures, and would have allowed the of redemption of property up to two years following foreclosure.

Proposed Texas Uniform Planned Community Act¹¹⁶

The Texas Uniform Planned Community Act (TUPCA) is a legislative initiative that was discussed and drafted by the Texas College of Real Estate Attorneys over a number of years.¹¹⁷ TUPCA reflects the attempt to create a comprehensive set of laws regarding planned communities throughout Texas. As drafted, TUPCA is a noble attempt to codify as law all of the issues surrounding the creation and maintenance of HOAs. However, it contains numerous provisions that appear to leave the door open for continued abuses by HOAs.

Summary of Committee Action

The full Committee, joined by the House Committee on Land and Resource Management, heard testimony in Austin during a scheduled public hearing on March 21, 2006.

Proponents of TUPCA

The witnesses who testified in favor of enactment of TUPCA explained that it is necessary and appropriate, and that it had been drafted after thorough research and discussion to ensure a balance between the competing interests of associations, developers, and property owners.

These witnesses explained that TUPCA is necessary and appropriate for at least two specific

¹¹⁴ See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002.

¹¹⁵ *Ibid.*

¹¹⁶ See, Texas Uniform Planned Community Act, *TUPCA* s.v. "Bill Analysis" at <http://www.tupca.org>, in order to view a copy of TUPCA and an analysis of it. Any future references in this report to specific provisions in TUPCA will refer to the "Proposed TUPCA" which is the Texas Legislative Council draft (79R7394) found at the preceding web page.

¹¹⁷ *Ibid.*, *History of TUPCA*.

reasons. First, due to the rapidly increasing number of Texans living within HOAs, it is especially important for the state to have a uniform, consistent, and coherent policy in place that governs associations. This is especially true given the ubiquitous trend of creating HOAs for new developments and the fairly standard practice of municipalities requiring prospective property developers to establish HOAs prior to the development of new tracts.

Second, these witnesses testified that the piecemeal set of laws governing the operations of HOAs is inconsistent, confusing, unnecessarily bracketed for individual situations, and generally an inappropriate manner for the state to govern such an important issue. In addition, these witnesses argued that it is inappropriate for the state to attempt to micromanage individual HOAs through statute, and a uniform act would be more coherent and consistent. It was noted that the Texas Uniform Condominium Act, which has been in place for over ten years, has functioned without problems or substantive amendments and that a uniform act regulating planned community associations will function similarly.¹¹⁸

Opponents of TUPCA

Some witnesses who testified against the enactment of TUPCA, at least in its present form, explained that they are generally opposed to any new law that affects homeowners' associations. The witnesses expressed a general fear that HOAs are already too powerful and unresponsive to their needs, and that any new law or set of laws will exacerbate the problems that plague them now. They are particularly concerned with the drastic nature of remedial actions available, most importantly foreclosure, and the seeming refusal of their associations to work with them to mitigate damages.

Other opponents of TUPCA argued that city ordinances are sufficient to regulate land use and that current law is more than adequate in the governance of HOAs. These opponents argued that TUPCA placed too many burdensome requirements on smaller, less complicated associations that require little more than the payment of assessments to pay bills.

Discussion

The controversies surrounding HOAs in Texas involve two broad categories of issues. First, due to the steady growth of HOAs in the state and the current piecemeal set of laws that govern them, it is especially important for the state to have a uniform, consistent, and coherent policy in place that governs associations. A single set of laws would allow those affected to find more certainty in the law, would allow homeowners to more easily decipher the law, and would allow a single set of case law to be formed around a single set of provisions.

The second set of issues, in broadest terms, involve questions of how to protect the property interests of individual members while at the same time granting enough authority to HOAs so that they can function adequately. These issues involve questions of the creation,

¹¹⁸ See, TEX. PROP. CODE, § 82.001 *et seq.*

governance, and enforcement remedies available to HOAs, as well as a policy decision as to which rights should be available to homeowner members.

Necessity of a Comprehensive Set of Laws

There is currently a strong desire in Texas from those people affected by HOA laws to create a uniform and universal set of provisions to guide the actions of associations and to protect the rights of homeowners. During each legislative session a number of bills are introduced that in one way or another involve planned communities.¹¹⁹ Generally, these bills are aimed at a narrow, often local, issue. These "band-aid" fixes have created a non-uniform and complicated set of laws regarding HOAs.

The legislature recognized the importance of codification in 1963 when it directed the Texas Legislative Council to begin statutory revisions, a program that is now codified as the Statutory Revision Program.¹²⁰ Admittedly this program involves non-substantive revisions to law; however, the purpose of the program, "to clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable", is equally applicable to substantive codifications.¹²¹

In 2002, the Senate Interim Committee on Intergovernmental Relations recommended that association laws be re-codified or that the Uniform Planned Community Act be adopted, given that association laws in the Property Code are "confusing, redundant, and occasionally conflicting [. . . and that] association provisions are scattered throughout the Civil Statutes, Tax Code, Government Code, and others, making it difficult for owners and associations to follow."¹²²

The drafting of TUPCA was motivated in large part by this desire for codification, and the

¹¹⁹ During the 79th Regular Legislative Session the following bills were introduced in the House and Senate: HB 638 (Hegar); HB 873 (Dukes); HB 927 (Dutton); HB 1072 (Casteel); HB 1240 (Hochberg); HB 1344 (Gattis); HB 1446 (Orr); HB 1631 (Hilderbran); HB 1632 (Hope); HB 1770 (Harper-Brown); HB 2215 (Bailey/et al.); HB 2426 (Puente); HB 2535 (Hartnett); HB 2539 (Davis, John); HB 2802 (Smith, Todd); SB 54 (Nelson); SB 244 (Wentworth/et al.); SB 362 (Carona); SB 534 (Lindsay/et al.); SB 892 (Carona/et al.); SB 1018 (Staples); SB 1234 (Fraser); SB 1360 (Wentworth); SB 1631 (Carona); SB 1886 (Lindsay).

During the 78th Regular Legislative Session the following bills were introduced in the House and Senate: HB 468 (Berman); HB 645 (Puente); HB 766 (Davis, John); HB 844 (Howard); HB 1129 (Farrar); HB 1279 (Zedler/et al.); HB 1454 (Eiland); HB 1641 (Bailey); HB 1866 (Coleman et al.); HB 2200 (Solomons); 2646 (Bailey/et al.); HB 2789 (Edwards); HB 2790 (West, George "Buddy"); HB 3077 (West, George "Buddy"); HB 3276 (Guillen); HB 3419 (Davis, John); SB 779 (Armbrister); SB 949 (Lindsay).

During the 77th Regular Legislative Session the following bills were introduced in the House and Senate: HB 707 (Bailey); HB 879 (Dutton); HB 1423 (Bailey); HB 1580 (Coleman); HB 1859 (Davis, John); HB 2592 (Davis, John); HB 2683 (Allen); HB 2685 (Bosse); HB 2727 (Hilderbran); HB 3322 (Yarbrough/et al.); HB 3479 (Eiland); HB 3517 (Turner, Bob); HB 1378 (Dutton); SB 1677 (Jackson); SB 1834 (Lindsay/et al.); SB 1835 (Lindsay/et al.); SB 507 (Carona); SB 620 (Jackson); SJR 53 (Lindsay/et al.).

¹²⁰ See, Chapter 448, Acts of the 58th Legislature, Regular Session, 1963 (Article 5429b-1, Vernon's Texas Civil Statutes): TEX. GOV. CODE, § 323.007.

¹²¹ TEX. GOV. CODE, § 323.007(a).

¹²² See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.17, at 43.

authors of TUPCA propose certain legislative findings that argue the importance of a universal state-wide code.¹²³ First, TUPCA maintains that "it is in the best interests of the state and the residents of the state to establish a clear, comprehensive, and uniform framework for the creation and operation of [. . . HOAs]."¹²⁴ The authors of TUPCA next address the issue of the piecemeal nature of Texas HOA law by suggesting that "it is in the best interests of the state and the residents of the state to have the same legal framework for [. . . HOAs] in every part of this state, without exceptions for particular developments or regions."¹²⁵ The further proposed legislative findings argue, for example, that such a uniform set of laws will alleviate tensions between members and their associations, and will give more certainty to developers, builders, and lending institutions.¹²⁶

Although TUPCA may be well-intended and contains some useful provisions that the Committee can and does support, overall it contains provisions that appear to us to leave the door open for continued abuses by some HOAs, and does not adequately protect the homeowner.

For the foregoing reasons, the Committee recommends that a new chapter in the Texas Property Code, with state-wide and general application, should be enacted that addresses the creation, governance, obligations, and rights of POAs.¹²⁷

The new chapter to be enacted should apply to most if not all of the associations in the state. Current provisions in law regarding property owners' associations should be repealed to the extent that they are duplicative or inconsistent with the new chapter, but with the caveat that many of these current provisions encompass sound public policy and reflect years of legislative study, debate, and compromise. Since the new chapter would not be uniform to any other state law it would not have the word "Uniform" in the title.

The new chapter to be enacted should resolve a number of issues presented by the growth in the creation of HOAs in Texas. TUPCA, as drafted, contains some provisions the Committee can support, including creation of the new chapter, while other TUPCA provisions are not supported by the Committee.

Creation of HOAs

Voluntary Nature

The legislature has periodically addressed the policy question regarding whether HOA membership must be mandatory for all property owners living within the jurisdiction of the HOA. For example, in 1999, Representative Ken Yarbrough introduced H.B. 904 that would have prohibited any new dedicatory instruments from requiring a homeowner to join an

¹²³ Proposed TUPCA SECTION 1.

¹²⁴ *Ibid.*, (1).

¹²⁵ *Ibid.*, (2).

¹²⁶ *Ibid.*, (3)-(8).

¹²⁷ *See*, Committee Recommendation 1.

HOA. There is a strong argument to be made that if all homeowners enjoy the benefits of an HOA (such as swimming pools, common areas, and private security) then all members should equally share the cost of these amenities. It is overly burdensome, and impossible in some situations, for an HOA to determine who within its jurisdiction should receive the benefits of the association based on membership status.

In addition, questions periodically arise regarding the seeming de facto involuntary nature of HOAs. These questions appear to have greater weight given the ubiquitous creation of HOAs, a fact that makes it more difficult for homeowners to purchase new homes outside the jurisdiction of an HOA in many urban and suburban areas of the state. Therefore, living within an HOA, on the surface at least, appears to be increasingly involuntary.

However, homeowners purchase homes within HOAs with the knowledge that they will be afforded certain benefits and be required to live up to certain obligations. While it may be more difficult to find a home, especially new homes, in the more desirable areas of a given region, it does not negate the fact that potential homeowners make a voluntary decision, after weighing the costs and benefits, to purchase a home within an HOA.

However, under current law some homeowners may involuntarily be made to be part of an HOA simply by living in a neighborhood that chooses to create an association. Chapter 204 of the Property Code authorizes the creation of an HOA under a specified procedure that includes approval by the owners of sixty percent of the property in the neighborhood.¹²⁸ In addition, TUPCA would authorize "constructive" notice to a homebuyer as a manner in which to inform a homebuyer that the lot is in a planned community prior to any public declaration being filed.¹²⁹ However, without "actual" notice, it is possible that a homebuyer will not be aware that they are buying a lot that will be subject to an HOA.

Forced Creation By Municipalities

Currently, some municipalities require property developers to initially create HOAs to ensure that the HOA will be responsible for the provision of certain services that the municipality is unable or unwilling to provide. In some cases, residents of the HOA must pay for services in their assessment fees to the HOA in addition to paying taxes to the municipality for the same service. In effect, residents are taxed twice for one service that is provided by the HOA.

The Committee believes that any prohibition placed on municipalities regarding the mandatory creation of HOAs will have little practical effect on whether they are created or not. If such a prohibition were enacted, it would be in essence a statement of a legislative finding that municipalities should not have such a power. In reality, many developers of new subdivisions will likely continue to create HOAs for their projects because of the demand for the special services and protections that associations offer, and because it makes good economic sense to the developer.

¹²⁸ TEX. PROP. CODE, § 204.006.

¹²⁹ Proposed TUPCA, § 83.051(c).

Governance of HOAs

In 2002, the Senate Intergovernmental Relations Committee determined that "associations carry out many of the duties and responsibilities of small governments and should be recognized as quasi-governments."¹³⁰ As such, it has been argued that HOAs should be required to follow the same types of laws regarding notices, meetings, records, voting, hearings and an array of other issues that all political subdivisions of the state must follow. The Committee believes that HOAs, being similar in many if not most regards to governmental entities, should be required to act as a body in a similar way as governmental bodies.

Boards of Directors

Many issues have surfaced over the past decade regarding the quality, qualifications, tenure, and personal liability of boards of directors.

A concern frequently expressed in witness testimony before the various legislative committees that have studied HOAs is that boards of directors are often unknowledgeable regarding the documents that govern their association and that they must rely on management companies or attorneys to make important decisions or interpretations. As a consequence, these elected boards are sometimes compromised when board members are unwilling or unable to be educated on the issues that affect the homeowners within their association.

In regards to the qualifications of board members, many critics of HOAs have argued that board members should be vested in the association by owning property within it. According to this argument, such a personal interest in the association would lend itself to more reasoned and reasonable decisions and actions. As proposed, TUPCA does not require board members to own property within the HOA.¹³¹ In addition, there has been some debate regarding the personal background of board members, and whether certain earlier activities should preclude a person for serving as a board member. For example, in 2005, Representative Burt Solomons was successful in amending H.B. 2215 to prohibit a person convicted of a crime of moral turpitude from serving on an HOA board.¹³²

Regarding tenure of board members, TUPCA would authorize the removal of a director by the owners for or without cause.¹³³ Under TUPCA, this removal could only be done by vote or petition, of which generally a majority of votes, either in the form of proxies or actual votes is garnered. TUPCA would also authorize board members to fill vacancies on the board for unexpired portions of terms, provided the association's governing documents permit.¹³⁴

¹³⁰ *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, at 10.

¹³¹ Proposed TUPCA, § 83.103(c).

¹³² HB 2215 (Bailey, et al). SECTION 9. Amendment 11.

¹³³ Proposed TUPCA, § 83.171(a).

¹³⁴ *Ibid.*, § 83.103(b).

Notice, Meetings, and Records

Currently, most HOAs in Harris County are regulated by both the Open Meetings Act and the Public Information Act.¹³⁵

Under TUPCA as drafted, notices of meetings of an HOA would be required to be given to homeowners, but only as provided by the governing documents.¹³⁶ This would create an unwise loophole that could be easily closed by specifying in statute the specific manner in which notice is to be given by an association to its members.

In addition, under TUPCA, homeowners could not be prohibited from attending HOA meetings, as long as the board is not in executive session.¹³⁷ The situations in which an HOA can meet in executive session would be similar to those authorized by the Open Meetings Act.¹³⁸ Also, an owner could not be prohibited from speaking, so long as the length of the discussion is reasonable.¹³⁹ The Committee supports these provisions from TUPCA.

Under TUPCA, homeowners appear to be granted fair access to the records of HOAs, as long as they are willing to formally request the inspection, inspect the records at a reasonable time and for a reasonable purpose, and are willing to pay a reasonable fee for copying.¹⁴⁰ Because the use of "reasonable" within the draft text of TUPCA grants HOAs some latitude to deny such requests or to create exorbitant copying fees, the Committee recommends that more specific language be used to better solidify homeowners' rights regarding inspection of records. For example, in 2003, Representative Kevin Bailey attempted to pass a more definitive set of provisions regarding records that prohibited an HOA from questioning the basis of the requestor's request and by setting a twenty cents per page copying fee.¹⁴¹ While this is only one example as to how to address this issues, the Committee believes that a comprehensive set of specific provisions that protect homeowners' rights to see and copy the documents of its association should be put in place.¹⁴²

Amendments to Governing Documents

Under current law, various chapters of the Property Code require different methods and approval percentages needed to amend or extend restrictive covenants governing HOAs. For example, Chapter 204, Property Code, authorizes the extension, addition, or modification of restrictive covenants under a specified procedure that includes approval by the owners of

¹³⁵ TEX. GOV. CODE, § 551.0015; TEX. GOV. CODE, § 552.0036.

¹³⁶ Proposed TUPCA, § 83.169(f).

¹³⁷ *Ibid.*, § 83.169(a): In addition, a homeowner may not be prevented from attending meetings even if that member's voting rights have been suspended. *See, Ibid.*, § 83.166(c)(4).

¹³⁸ *Ibid.*, § 83.169(d)

¹³⁹ *Ibid.*, § 83.169(b).

¹⁴⁰ *Ibid.*, § 83.170.

¹⁴¹ HB 2646 (Bailey 76th) SECTION 7.

¹⁴² For example, *See*, SECTION 7. HB 2646 (Bailey 76th) for a detailed set of provisions protecting homeowner rights.

seventy-five percent of the property in the HOA.¹⁴³ Chapter 206 authorizes the extension of a restriction imposing an assessment to be approved by a majority of owners who vote.¹⁴⁴ Chapter 210 requires a vote of sixty-six percent of the owners of real property in order to extend or modify restrictions.¹⁴⁵ Chapter 211 authorizes an amendment to a restriction upon a vote of two-thirds of the owners of real property.¹⁴⁶

TUPCA would create procedures and voting requirements (with broad exceptions) for amending an HOA's governing document.¹⁴⁷ As the general rule, if the governing document does not specifically state that it is not amendable, then the document could be amended upon approval by more than fifty percent of the allocated votes.¹⁴⁸ However, TUPCA would provide exceptions to the voting requirement for the declarant, board of directors, and certain lot owners, with the board and certain lot owners being allowed to make changes without a vote as "permitted by this chapter."¹⁴⁹ In addition, TUPCA contains provisions that would require a court, under certain circumstances, to "excuse compliance" with a provision of a governing document that "unreasonably interferes" with certain duties of an HOA.¹⁵⁰ Some opponents of TUPCA find these provisions problematic.

While not determining a voting percentage required for changing governing documents, the Committee recommends that some percentage greater than a mere majority is appropriate given the fact that these type of amendments may make substantial changes to the duties and rights of both HOAs and their members.

Enforcement Remedies Available to HOAs

HOAs must have a mechanism in place by which they can collect assessments given that these assessments are vital to maintaining neighborhoods, providing services, and protecting property values. In addition, a question of fairness is raised due the fact that without some collection power, some property owners are forced to offset the costs of those unwilling or unable to pay dues.

Informal Enforcement Options

Legal action is costly, burdensome, and often unnecessary in the enforcement of homeowner obligations to their associations. The Committee believes that HOAs and homeowners should be encouraged and possibly required by law to utilize inexpensive and informal methods for the resolution of problems and the collection of monies due the HOA.

Whenever a controversy arises between an HOA and a member homeowner, it is crucial that

¹⁴³ TEX. PROP. CODE, § 204.005.

¹⁴⁴ *Ibid.*, § 206.003.

¹⁴⁵ *Ibid.*, § 210.006.

¹⁴⁶ *Ibid.*, § 211.004.

¹⁴⁷ Proposed TUPCA, § 83.061.

¹⁴⁸ *Ibid.*, § 83.061(a) and (b).

¹⁴⁹ *Ibid.*, § 83.061(c).

¹⁵⁰ *Ibid.*, § 83.062(a).

the homeowner be made aware of the problem and be afforded ample opportunity to respond, whether that response is in the form of a denial or an admission followed by a desire to take corrective action. Problems have arisen in the past when a homeowner was construed to have had notice from an HOA of a problem, but was not actually informed.

Written notice of any violation should be sent via certified mail, return receipt requested, and state such things as the violation, the governing language regarding the violation, the availability of an opportunity to cure any violation, the process that will be followed to collect a payment, and the possibility of litigation and under certain circumstances foreclosure.¹⁵¹

Informal meetings at which an HOA and a homeowner sit down together to discuss the matter in controversy should be strongly encouraged by any new law. During such a meeting, a homeowner should be encouraged to suggest corrective action to the problem or to arrange a payment plan.

There have been several unsuccessful attempts to authorize payments in installments if a homeowner is unable to pay. For example, in 2005, Representative Bailey proposed requiring HOAs to adopt guidelines and accept partial payments of assessments until the delinquency was satisfied.¹⁵² Under TUPCA, as drafted, an HOA would be required to inform an owner of payment plans, and must accept a payment plan that meets its standards; however, this requirement would only applied to HOAs that have such standards in place for payment plans.¹⁵³

Payment plans seem a reasonable way for an HOA to collect dues that are owed to it without unnecessarily adding costs that may become burdensome for the homeowner. It is reasonable to require an HOA to offer to meet with a homeowner to discuss and reasonably negotiate payment plans prior to any formal enforcement action being taken.

The Committee believes a homeowner should also be afforded the due process right of a hearing prior to any action being formally taken by an HOA. TUPCA, as drafted, appropriately would authorize such a hearing upon written request of the homeowner.¹⁵⁴ Equally appropriate is a TUPCA provision that would allow the homeowner to appeal any decision by the HOA upon written request.¹⁵⁵

Only upon the exhaustion of all informal attempts to remedy the situation should the law authorize the retention of a lawyer. It has been suggested that a waiting period be established to prevent an HOA from employing an attorney to collect assessment dues from a

¹⁵¹ See, TEX. PROP. CODE, § 209.006 (outlining notice requirements); Proposed TUPCA § 83.155(d).

¹⁵² HB 2215 (Bailey, et al) SECTION . This bill also prohibited the accrual of attorney's fees prior to the time that a payment plan was offered to a homeowner. See also, HB 1641 (Bailey, 2003) SECTIONS 2 and 3.

¹⁵³ Proposed TUPCA, § 83.158.

¹⁵⁴ *Ibid.*, § 83.156.

¹⁵⁵ *Ibid.*, § 83.157.

homeowner.¹⁵⁶

Foreclosure¹⁵⁷

Under current law, Texas HOAs can foreclose on a home owned by a member to attempt to collect payment for overdue dues, penalties, and attorney fees incurred in collection attempts.¹⁵⁸ However, the legislature has made it clear that an HOA may not foreclose on a lien on property solely based on fines or attorney's fees.¹⁵⁹ The right of an HOA to foreclose on an assessment lien is controversial and has been debated by the legislature in previous years.¹⁶⁰

The Texas Constitution mandates that resident homesteads can be subject to foreclosure only for failure to pay mortgages, taxes, home equity loans, and liens for renovation or repairs of the property.¹⁶¹ However, in *Inwood North Homeowners Association, Inc. v. Harris*, the Texas Supreme Court ruled that this constitutional provision does not prevent an HOA from foreclosing on a homeowner who fails to pay monthly assessment fees.¹⁶² The court stated that the "remedy of foreclosure [. . .] is generally the only method by which other owners will not be forced to pay more than their fair share or be forced to accept reduced services."¹⁶³

The Committee believes that the legislature (as the constitutionally authorized policy maker for the state) has a duty and right to legislate if foreclosure should be a remedy available to HOAs, and if so, under what circumstances this remedy can be used.

Opponents of HOAs' power of foreclosure argue that associations are abusive when they foreclose on homes for minor infractions of deeds or rules, or for small overdue assessments. They contend that the Texas Constitution provides for foreclosures in only exceptional cases involving taxes, mortgages, and liens for repair and renovations to property. Further, other important service providers like physicians and lawyers do not have the power of foreclosure in the collection of debts and that HOAs should collect payments using similar tactics of other creditors.

Conversely, proponents argue that HOAs must have the option to foreclose on homes as a means of collecting assessments that are vital to maintaining neighborhoods, providing

¹⁵⁶ See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.5, at 41.

¹⁵⁷ Several valuable reports have been created by the legislature regarding the power of an HOA to foreclose a homeowner's property. See *Interim Committee on State Affairs Report to the 76th Legislature*, November, 1998, at 29-32; Kellie Dworaczyk, "Foreclosure by Homeowner Associations: Striking a Balance," *House Research Organization: Interim News*, July 23, 2002.

¹⁵⁸ TEX. PROP. CODE, § 209.009.

¹⁵⁹ *Ibid.*

¹⁶⁰ The Senate Committee on Intergovernmental Relations recommended that this change be made. See *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.3, at 40.

¹⁶¹ TEX. CONST. Art. 16, Sec. 50.

¹⁶² *Inwood North Homeowners Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987).

¹⁶³ *Ibid.*, at 636.

services, and protecting property values. They claim that a question of fairness is raised due the fact that without the power of foreclosure, some property owners would be forced to offset the costs of those unwilling or unable to pay dues. Proponents cite the power of taxing authorities to foreclose on large and small debts as a reason that HOAs should maintain the power of foreclosure. This same logic, they argue, applies to the foreclosure on a minimal mechanic's lien. Additionally, they contend that HOAs serve a valuable function to municipalities because they provide services to homeowners that would otherwise be too expensive or inadequate.

One of the most strongly expressed objections on the issue of foreclosure pertains to the amount of debt for which a home may be foreclosed upon. Currently, in Texas law, there is no provision establishing a threshold dollar amount of indebtedness that an owner may amass before foreclosure is an option. It stands to reason that small debts owed an association do not warrant such a drastic measure as foreclosure. The public outrage generated by the case of Ms. Wenonah Blevins, of Houston, whose association auctioned away her \$150,000 home because she had failed to pay two years of homeowner fees totaling \$814.50 suggests that there should be substantial debt owed before foreclosure. Further, in such cases, the attorney fees and court costs involved in judicial foreclosure may far exceed the amount an owner is in debt. The Committee believes that smaller debts should be settled through a reasonable payment plan negotiated by the owner and the association.

Important to the discussion of foreclosure is whether non-judicial foreclosure should be authorized by law. There are two types of foreclosure, judicial (court-ordered) and non-judicial (also known as a "private power of sale"). Under the judicial foreclosure system, if the publicly recorded restrictions of an HOA creates a lien but does not say how the lien may be foreclosed, then an HOA must use judicial foreclosure. This procedure requires the HOA to file a lawsuit against the delinquent owner. If the HOA wins its lawsuit, the court can order the county sheriff to foreclose the HOA's assessment lien at the "sheriff's sale." Importantly, TUPCA as drafted would authorize an HOA to use judicial foreclosure as a means to collect money owed to it under a lien.¹⁶⁴

Under the non-judicial foreclosure system, an HOA may use non-judicial foreclosure only if the authority for this process is stated in the publicly recorded restrictions. The procedures for non-judicial foreclosure are found in Chapter 51 of the Property Code. There have been several attempts by the legislature over the years to prohibit the use of non-judicial foreclosure by HOAs.¹⁶⁵ Most recently, Representative Bailey introduced H.B. 2215 that attempted to amend the Property Code to prohibit an HOA from foreclosing on an

¹⁶⁴ Proposed TUPCA, § 83.116(a).

¹⁶⁵ In 2002, The Senate Committee on Intergovernmental Relations recommended that non-judicial foreclosures be prohibited by law. The committee concluded that "While non-judicial foreclosure is less costly and time consuming than judicial foreclosure, the benefits of due process far outweigh other considerations." *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.1, at 40.

During the 79th Legislature the following bills were introduced that prohibit the use of non-judicial foreclosure: H.B. 2215 (Bailey); S.B. 1886 (Lindsay).

assessment lien unless the association first obtained a court judgment.¹⁶⁶

Importantly, TUPCA would authorize the use of non-judicial foreclosure as a means to foreclose on a lien if so authorized by the HOA's governing documents.¹⁶⁷ Similar to provisions in the Property Code, TUPCA would prohibit the use of non-judicial foreclosure regarding a lien consisting "solely of fines, late fees, interest, attorney's fees, or a combination of these."¹⁶⁸ Perhaps more significantly, and in important ways a diminishment of current law, TUPCA does not propose this same restriction in regards to judicial foreclosures, opting instead to leave it up to judicial discretion.

The Committee believes that any new provisions regarding the enforcement remedies allowed to associations should be the least extreme remedy necessary to enforce those obligations that are due to it. Non-judicial foreclosure by HOAs should be prohibited by law. Judicial foreclosure, if continued in law, should be authorized only under limited circumstances and in accordance with procedure allowed by law. Foreclosure proceedings, if continued in law, should be allowed to be instituted only when an homeowner owes the association an amount that surpasses a high threshold dollar amount.¹⁶⁹

Redemption

If the legislature determines that foreclosure should be a remedy available to HOAs, the Committee believes that a meaningful right of redemption should be authorized, given the importance that the protection of homesteads has been and continues to be to Texans.¹⁷⁰ While it is certainly good public policy to encourage certainty in property ownership by allowing a limited redemption period, it is also important that a property owner be given sufficient time to reclaim their homestead.

Under current law homeowners are allowed 180 days after they receive notice of the sale to redeem their property that has been foreclosed by an HOA for an assessment lien.¹⁷¹ In contrast, the Texas Tax Code authorizes two years for tax foreclosure redemptions of homesteads.¹⁷²

Various legislative proposals have suggested varying limits of time during which a homeowner would be allowed to redeem a home that had been foreclosed. In 1999, the Texas Planned Community Act authorized a ninety day redemption period.¹⁷³ In 1998, the Senate State Affairs Interim Committee recommended that the Uniform Planned Community Act's ninety day period be extended.¹⁷⁴ In 2001, Senator Carona, in S.B. 507, called for an

¹⁶⁶ HB 2215 (Bailey et al), SECTION 7. See also HB 1641 (Bailey, 2003) SECTION 5.

¹⁶⁷ Proposed TUPCA, § 83.116(b).

¹⁶⁸ *Ibid.*, § 83.160(b).

¹⁶⁹ *See*, Committee Recommendation 5.

¹⁷⁰ *See, Ibid.*

¹⁷¹ TEX. PROP. CODE, § 209.011(b).

¹⁷² TEX. TAX CODE, § 34.21(a).

¹⁷³ *See*, S.B. 699 (76th Regular Session), adding § 207.127, Texas Property Code.

¹⁷⁴ *See, Interim Committee on State Affairs Report to the 76th Legislature*, November, 1998, Recommendation

180 day redemption period, a provision that was codified in the TRPOPA.¹⁷⁵ In 2002, the Senate Intergovernmental Relations Interim Committee recommended that an owner should be allowed two years to redeem property sold at foreclosure sale.¹⁷⁶ Most recently, Representative Bailey introduced H.B. 2215 that attempted to amend the Property Code to grant a one year redemption period.¹⁷⁷

As drafted, TUPCA would follow provisions currently in law under the TRPOPA by allowing a 180 day redemption period.¹⁷⁸ However, given the two year redemption period authorized by the Tax Code, the Committee believes that it is not unreasonable for the legislature to authorize at least a 180 day redemption period, and perhaps as long as two years.

Attorney's Fees

HOAs do need to use attorneys in some situations. Regardless of any potential litigation, an HOA will periodically be in need of the advice of an attorney in understanding and acting upon provisions in their governing documents. When an HOA becomes involved in a controversy, especially when it involves a member homeowner who will ultimately bear the costs of legal services, many issues arise regarding the use and costs of hiring a lawyer. During the past number of years, the legislature has looked at various ways of ensuring that if an attorney must be hired, the costs of such services are reasonable and necessary, given that the homeowner is often personally liable while the HOA board members have no individual liability.

Many attempts have been made to prevent legal fees and costs from accruing to a homeowner during an initial period of controversy, with the intent that during this period the matter can be resolved in a less formal way. Under current law, reasonable attorney's fees and costs can only be charged to a homeowner following written notice that they will be charged if a payment delinquency or violation continues after a certain date.¹⁷⁹ In addition, current law prohibits attorney's fees from accruing against a homeowner until after a hearing (as prescribed by law) is held at which the homeowner is allowed to discuss and verify facts and resolve the matter at hand.¹⁸⁰ As proposed, TUPCA contains almost identical provisions.¹⁸¹

In 2002, the Senate Intergovernmental Relations Interim Committee recommended that statutory language prohibiting "deferred billing" arrangements with attorneys be enacted.¹⁸²

6, at 79.

¹⁷⁵ TEX. PROP. CODE, § 209.011(b).

¹⁷⁶ See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.4, at 40.

¹⁷⁷ HB 2215 (Bailey et al), SECTION 8. See also HB 1641 (Bailey, 2003) SECTION 6.

¹⁷⁸ Proposed TUPCA, § 83.162(a).

¹⁷⁹ TEX. PROP. CODE, § 209.008(a).

¹⁸⁰ See, TEX. PROP. CODE, § 209.008(b); TEX. PROP. CODE, § 209.007(a).

¹⁸¹ Proposed TUPCA, § 83.164.

¹⁸² See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.7, at 41.

Under a deferred billing arrangement, an attorney is authorized to collect money directly from a homeowner for the benefit of the HOA. The committee found that "eliminating such practices will force associations to be more conscious of attorney billings because they would receive regular invoice statements and pay accordingly."¹⁸³ TUPCA recognizes the problematic nature of deferred billing and would prohibit it not only in regards to attorneys but as to "third parties" as well.¹⁸⁴

Finally, it has been suggested that a homeowner should be able to recover reasonable attorney fees from an HOA if the association is found to have had no reasonable basis on which to sue the homeowner.¹⁸⁵ The Committee believes that such a provision is appropriate in that it will encourage informal means of dispute resolution.

Homeowner Rights and Privileges

Water Conservation

Many homeowners associations have deed restrictions, covenants, or regulations in place that address landscaping practices. Often these rules undermine water conservation goals by mandating certain amounts and types of turf grass coverage or excessive maintenance standards and irrigation systems, while at the same time prohibiting native or climatically appropriate landscapes and rainwater harvesting systems. Given the ever scarcity of available water resources in the state, it is important that a balance be found between a homeowner's decision to practice water conservation and an HOA's ability to control the property values of all of its members.

In 2003, the 78th Legislature enacted H.B. 645 by Representative Robert Puente in an attempt to find a balance between HOA regulations regarding landscaping practices and the important state policy of water conservation. The new law prohibits an HOA from including or enforcing any provision that restricts a property owner from installing a rainwater harvesting system or implementing an efficient irrigation system, including underground drip or other drip systems.¹⁸⁶

During the 79th Legislature, Representative Puente introduced, but did not pass, H.B. 2426. This bill attempted to expand the water conservation goals enacted with H.B. 645 by, for example, prohibiting an HOA from restricting the use of drought-tolerant or native landscape vegetation, or by requiring a defined irrigation schedule or the installation of turf grass.

TUPCA contains a provision that would prohibit the enforcement of any governing document provision that may "discourage or prohibit water conservation activities within

¹⁸³ See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, at 33.

¹⁸⁴ Proposed TUPCA, § 83.064(a); Proposed TUPCA, § 83.065(c).

¹⁸⁵ See, *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.6, at 41.

¹⁸⁶ TEX. PROP. CODE, § 202.007.

fenced or screened portions of a lot, including the implementation of water conservation procedures, the installation of water conservation improvements, and the maintenance of turf and landscape material that promote water conservation."¹⁸⁷

First Amendment

During the past decade, HOAs throughout the state have attempted to enforce restrictions that prohibit their members from exercising certain First Amendment Rights. As a result, the Texas Legislature has worked to enact provisions that prohibit an HOA from infringing on these rights.

Representative Dawnna Dukes introduced and passed H.B. 873 during the 79th Legislative Session that prohibits an HOA from restricting a homeowner from displaying an endorsement for a political candidate or ballot item in the form of a sign, poster, flag, or banner except for the protection of public health or safety or if the posting or display violates a local, state, or federal law.¹⁸⁸ Importantly, the United States Supreme Court has ruled that municipalities may not prohibit homeowners from exercising their free speech rights through the placement of political signs in their windows and on their lawns.¹⁸⁹ Even though this ruling was applicable to a municipality and not a homeowners' association, it is important to note the judicial opinion on the critical role of signs in political discourse.

Similarly, Senator Jane Nelson attempted to pass S.B. 54 in 2005 that would have allowed all homeowners, regardless of their participation in a homeowners' association, to display the American flag.

Conclusions

The protection of private property rights is one of the core functions of all governments. This nation, and this state in particular, has always held fast to the notion that the true independence of its citizens rests squarely with the ability of those people to hold private property with the assurance that government will not interfere with that natural right.

However, also central to the idea of private property is the concept that individual property owners can contract away all or portions of that right as they see fit. Government has a very limited role in interfering with such contracts, as long as such contracts do not violate either manmade or natural law. When potential homeowners contract to be part of an HOA through deeds of sale, they should not generally look to the government to protect them when they are unhappy with the bargain that they made.

On the other hand, when HOAs (which have taken on many of the attributes and functions of governmental entities) violate the spirit or the letter of the law regarding their duties and

¹⁸⁷ Proposed TUPCA, § 83.067(e)(3).

¹⁸⁸ TEX. PROP. CODE, § 202.009.

¹⁸⁹ *City of Ladue v Gilleo*, 512 U.S. 43 (1994) (striking down a citywide ban on residential signs calling these signs a "venerable means of communication that is both unique and important.").

rights, then it becomes incumbent on government to rein in these abuses.

Recommendations

- 1) A new chapter in the Texas Property Code, with state-wide and general application, should be enacted that addresses the creation, governance, obligations, and rights of property owners' associations. Although the Committee supports the enactment of certain provisions proposed in TUPCA, the Committee does not support the wholesale enactment of TUPCA. Taken as a whole, there are provisions in TUPCA that do not adequately protect the homeowner.

The new chapter should apply to most if not all of the associations in the state.

Since the new chapter will not be uniform to any other state law it should not have the word "Uniform" in the title.

Current provisions in law regarding property owners' associations should be repealed to the extent that they are duplicative or inconsistent with the new chapter.

- 2) The new chapter should generally be directed at protecting the interests of homeowners, with the balance of power and presumptions in their favor and not that of the associations that represent them.
- 3) The new chapter should include provisions that encourage, to the greatest extent possible, member participation in the discussions and actions of the association as a whole.
- 4) The new chapter should include provisions that encourage non-legal and inexpensive resolutions to the conflicts that occur between the association and its members.
- 5) The new chapter should limit remedies allowed to associations to the least extreme necessary to enforce obligations due to it.

Non-judicial foreclosure by HOAs should be prohibited by law.

Judicial foreclosure by HOAs, if continued in law, should be authorized only under limited circumstances and in accordance with procedure allowed by law.

Foreclosure proceedings by HOAs, if continued in law, should be allowed to be instituted only when a homeowner owes the association an amount that surpasses a high threshold dollar amount.

If the legislature determines that foreclosure should be a remedy available to HOAs, a meaningful right of redemption should be authorized.

- 6) The new chapter should take into account the ever-changing nature of HOAs and the various stakeholders, in addition to associations and homeowners, that will be affected by any new law.

INTERIM CHARGE 5: Monitor the agencies and programs under the committee's jurisdiction.

State Office of Risk Management (SORM)

The State Office of Risk Management (SORM) was created in the 75th Legislature and is administratively attached to the Attorney General. A sunset report on this entity is pending.

SORM's function is comprehensive risk management. It administers the workers' compensation program for state employees, provides risk management services and training to state agencies, and administers an insurance purchasing program for state agencies.¹⁹⁰ It covers most state agencies, except certain ones that are exempt.¹⁹¹ Funding comes from both legislative appropriations and interagency contracts.¹⁹² Injury rates have declined since implementation of the Risk Management Program.¹⁹³

A 2004 interim study by the Texas Department of Insurance revealed that SORM's costs are similar to private sector expenditures, but higher than the programs administered by the exempt self-insured state systems. The reasons for this were: differences in health care network utilization, staff turnover and salaries, and weaknesses in SORM's cost containment program. SORM implemented changes to rectify these problems.¹⁹⁴

SORM lacks the ability to compel compliance by a constituent agency. This makes it difficult for SORM to fulfil its statutory mandates, and the financial viability of the risk pool is endangered.¹⁹⁵ Another problem SORM faces is high staff turnover.¹⁹⁶

Currently SORM, as the state's workers' compensation administrator, is waiting for more workers' compensation networks to be certified before issuing a request for proposal.

SORM is concerned that it, along with other state agencies, has been asked to cut its budget. If employees are laid off, the cost of claims will go up because there will not be enough manpower to flag inappropriate claims (such as duplicate claims) and those claims will be

¹⁹⁰ State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 1.

¹⁹¹ Texas A&M System, the University of Texas System, and the Texas Department of Transportation "operate separate workers' compensation and risk management programs pursuant to Texas Labor Code Chapters 502, 503, and 505, respectively. Texas Tech University is partially exempted and operates its own risk management program, but workers' compensation services are statutorily provided by the Office pursuant to Texas Labor Code 501.022. State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 4. "The Employees Retirement System and Teacher Retirement System have authority pursuant to recent legislation... to obtain the services provided by the Office through other means, but currently both are participating in the Office's programs with separate cost reimbursement methodologies from other participating agencies." State Office of Risk Management, *Self-Evaluation Report*, August 2005, pp. 4-5.

¹⁹² State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 23.

¹⁹³ State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 27.

¹⁹⁴ State Office of Risk Management, *Self-Evaluation Report*, August 2005, pp. 12-13.

¹⁹⁵ State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 5.

¹⁹⁶ State Office of Risk Management, *Self-Evaluation Report*, August 2005, pp. 5-6.

paid, thereby raising the premium costs of state agencies. SORM feels that cutting its budget will not result in savings to the State of Texas due to increased premium costs resulting from reduced staff.¹⁹⁷ To compound this problem, fines are levied against SORM for errors, and those fines diminish resources needed to prevent compliance issues from occurring in the future.¹⁹⁸

Risk Management Board

This entity no longer exists.

Texas Workers' Compensation Commission

TWCC is now the Division of Worker's Compensation within TDI. This entity is addressed in Interim Charge #3, above.

Texas Mutual Insurance Company Board

Texas Mutual Insurance Company (Texas Mutual) is a privately run insurance company, created by statute, which is required to provide workers' compensation insurance to any business in Texas, with few exceptions.

In the late 1980s and early 1990s, workers' compensation rates were high and companies had trouble finding insurance coverage. In 1991, the Texas Legislature created the Texas Workers' Compensation Insurance Fund (now the Texas Mutual Insurance Company) to ensure the availability and affordability of workers' compensation coverage. In 1992, the Fund began underwriting workers' compensation insurance, and in 1994, it became the state's insurer of last resort for businesses that were unable to find coverage elsewhere.

In 2001, House Bill 3458 was enacted, changing the Texas Workers' Compensation Insurance Fund's name to Texas Mutual Insurance Company and authorizing the company to operate as a domestic mutual insurance company. However, the state continued to have political oversight. The bill maintained statutory mandates that the company remain a competitive force in the marketplace, guarantee the availability of workers' compensation insurance in Texas, and act as insurer of last resort.¹⁹⁹

Texas Mutual is governed by a 9-member board of directors. The Governor, with the advice and consent of the Texas Senate, appoints five directors, including the chair. The policyholders elect the other four directors.²⁰⁰

Texas Mutual currently holds a 27.18 percent market share of the workers' compensation

¹⁹⁷ Jonathan Bow, SORM Executive Director, Interview on June 26, 2006. State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 13.

¹⁹⁸ State Office of Risk Management, *Self-Evaluation Report*, August 2005, p. 6.

¹⁹⁹ Texas Mutual Website, <http://www.texasmutual.com/aboutus/aboutus.shtm>

²⁰⁰ Texas Mutual Website, <http://www.texasmutual.com/aboutus/aboutus/BoD.shtm>

insurance market, with the next highest market share held by another company at 7.58 percent.²⁰¹ This may be due to the fact that many insurers are reluctant to write policies for small companies due to high administrative costs, so Texas Mutual insures many, if not most of, small companies in the state.²⁰² This summer, \$100,000,000 in individual dividends were distributed, the largest payout in company history, and \$46,000 in a group dividend to Lone Star Energy.²⁰³

Texas Mutual contracts with one of the first two certified networks under the new workers' compensation system, the TexasStar Network. Texas Mutual is offering a twelve percent discount to customers who choose to sign up with the network.²⁰⁴ Texas Mutual also monitors the number of doctors in specific areas, and makes sure that the network is adequate for the needs of their insured companies.²⁰⁵

Texas Mutual, at end of July 2006, applied to the Texas Department of Insurance to expand its network for treating injured workers. As of that date, approximately 10% of Texas Mutual's policyholders have chosen the network option.²⁰⁶ The network expansion was approved in August, and the network option is now available to approximately 85% of company policyholders.²⁰⁷

The Texas Department of Insurance allows employers in similar businesses to form purchasing groups in order to reduce their workers' compensation insurance premiums. Texas Mutual Insurance Company announced its newest workers' compensation purchasing group on August 7, 2006: Texas Association of Manufacturers (TAM). Members can adopt a safety plan developed specifically for their industry, and they are eligible to participate in the Texas Mutual individual and group dividend programs.²⁰⁸

Texas Mutual also has a scholarship program for surviving spouses or children of a worker who died from an on-the-job injury while working for an employer insured by Texas Mutual. The scholarship pays \$4000 per semester.²⁰⁹

²⁰¹ Texas Department of Insurance Website, <http://www.tdi.state.tx.us/company/top40.html>

²⁰² Meeting with Terry Frakes, Senior Vice President of Public Affairs, Texas Mutual, June 30, 2006.

²⁰³ Texas Mutual Press Releases, <http://www.texasmutual.com/news/stories2006Q3.shtm>; "Texas Mutual Insurance doling out \$100M to policyholders," *Austin Business Journal*, July 26, 2006.

²⁰⁴ "Texas Mutual Wins Network Expansion Approval," *WorkCompCentral.com*, August 22, 2006.

²⁰⁵ Meeting with Terry Frakes, Senior Vice President of Public Affairs, Texas Mutual, June 30, 2006.

²⁰⁶ Bill Kidd, "Texas Mutual Seeks to Expand Network," *WorkCompCentral.com*, July 31, 2006.

²⁰⁷ "Texas Mutual Wins Network Expansion Approval," *WorkCompCentral.com*, August 22, 2006.

²⁰⁸ Texas Mutual Website, Press Releases at <http://www.texasmutual.com/news/stories2006Q3.shtm> and Purchasing Groups at <http://www.texasmutual.com/agents/group.shtm>.

²⁰⁹ Texas Mutual Website, <http://www.texasmutual.com/workers/scholarship.shtm>

ATTACHED STATEMENTS

Statement of Vice-Chairman Gary Elkins

COMMITTEES
BUSINESS & INDUSTRY, VICE-CHAIR
CALENDARS
LOCAL GOVERNMENT
WAYS AND MEANS

REPRESENTATIVE GARY ELKINS



TEXAS HOUSE OF REPRESENTATIVES

December 14, 2006

The Honorable Tom Craddick
Speaker, Texas House of Representatives
Texas State Capitol, Room 2W.13
P.O. Box 2910
Austin, TX 78768-2910

Dear Speaker Craddick:

As Vice-Chairman of the House Committee on Business & Industry, I commend Chairwoman Giddings, her staff and the committee members for all the hard work that has been put forth to complete this interim report. For this reason I have signed the report, however it contains recommendations that I cannot completely support.

I believe that there are legitimate concerns regarding "contract-for-deed" and the powers of homeowner associations. I am not sure that the concerns on both sides of these issues have been adequately addressed. I look forward to having committee hearings during the 80th Legislative Session so we can more fully explore these issues and find a balance between the needs of all concerned parties.

Sincerely,

A handwritten signature in cursive script that reads "Gary Elkins".

Gary Elkins
State Representative
Vice-Chairman, House Committee on Business & Industry

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Statement of Representative Hubert Vo



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HUBERT VO
STATE REPRESENTATIVE
DISTRICT 149

Houston Office
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Houston, TX 77072
281-988-0212

Comments on item #4 under recommendations (Interim Charge 4):

Item #4 states "the new chapter should include provisions that encourage non-legal and inexpensive resolutions....."

I am looking into ways to provide a specific mechanism to resolve conflicts between homeowners and homeowner associations through new legislation.

During my first term in office, I had more constituent requests for help with Homeowners Associations than almost anything else except concerns about property tax. In Houston these associations have gained great power since we have no zoning. The majority of them provide a vital service for their areas but there are many problems. While we all know the problems with foreclosures, I hear more about other issues. People complain that there is no authority or entity to appeal to for resolutions of problems with homeowner boards.

A handwritten signature in black ink, appearing to read "Hubert Vo".

Committees: Border & International Affairs, Business & Industry
Email: hubert.vo@house.state.tx.us

Statement of Representative Burt Solomons



The State of Texas
House of Representatives

BURT R. SOLOMONS
District 65

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District Office:
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December 14, 2006

The Honorable Tom Craddick
Speaker, Texas House of Representatives
Room CAP 2W.13
P.O. Box 2910
Austin, TX 78768

Dear Speaker Craddick:

I am signing this House Committee on Business & Industry Interim Report with the understanding by Chairwoman Helen Giddings that I do not support various recommendations contained in the Report. Several of the recommendations outlined in the homeowner association section may increase the burden on HOA's to the point of being unreasonable interference by state government in the development and maintenance of subdivisions. The Contract For Deed section includes the recommendation that we only "monitor the situation" resulting from the passage of HB 1823. This legislation has resulted in almost no contract-for-deed real estate or rent-to-own residential transactions rather than just protecting buyers from abuse. Finally, I do not agree with the identity theft recommendations as they relate to imposing even more burdens on financial institutions at this time.

Sincerely,

A handwritten signature in black ink that reads "Burt R. Solomons".

Burt R. Solomons
State Representative
Member
House Committee on Business & Industry

APPENDIX A: Identity Theft Graphs and Statistics

Discovered That You Were a Victim in the Last Year	
New Accounts & Other Fraud ³	1.5 %
Misuse of Existing Non-Credit Card Account or Account Number	0.7 %
Misuse of Existing Credit Card or Credit Card Number	2.4 %
Total Victims	4.6 %
Discovered That You Were a Victim in the Last Five Years	
New Accounts and Other Fraud	4.7 %
Misuse of Existing Non-Credit Card Account or Account Number	2.0 %
Misuse of Existing Credit Card or Credit Card Number	6.0 %
Total Victims	12.7 %

Figure 1: Incidence of Identity Theft in 2003, By Type of Misuse²¹⁰

	New Accounts & Other Frauds	Misuse of Existing Accounts (Both Credit Card & Non-Credit Card)	All ID Theft
Victims in the Last Year			
Percent of Population	1.5 %	Credit Card – 2.4 % Non Credit Card – 0.7 %	4.6 %
Number of Persons ²	3.23 million	6.68 million	9.91 million
Loss to Businesses, inc. Financial Institutions			
Average Per Victim ¹	\$10,200	\$2,100	\$4,800
Total	\$32.9 billion	\$14.0 billion	\$47.6 billion
Loss to Victims			
Average Per Victim	\$1,180	\$160	\$500
Total	\$3.8 billion	\$1.1 billion	\$5.0 billion
Hours Victims Spent Resolving Their Problems			
Average Per Victim	60 hours	15 hours	30 hours
Total	194 million hours	100 million hours	297 million hours

Figure 2: Costs of Identity Theft in 2003.²¹¹

²¹⁰ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table 1, p. 5.

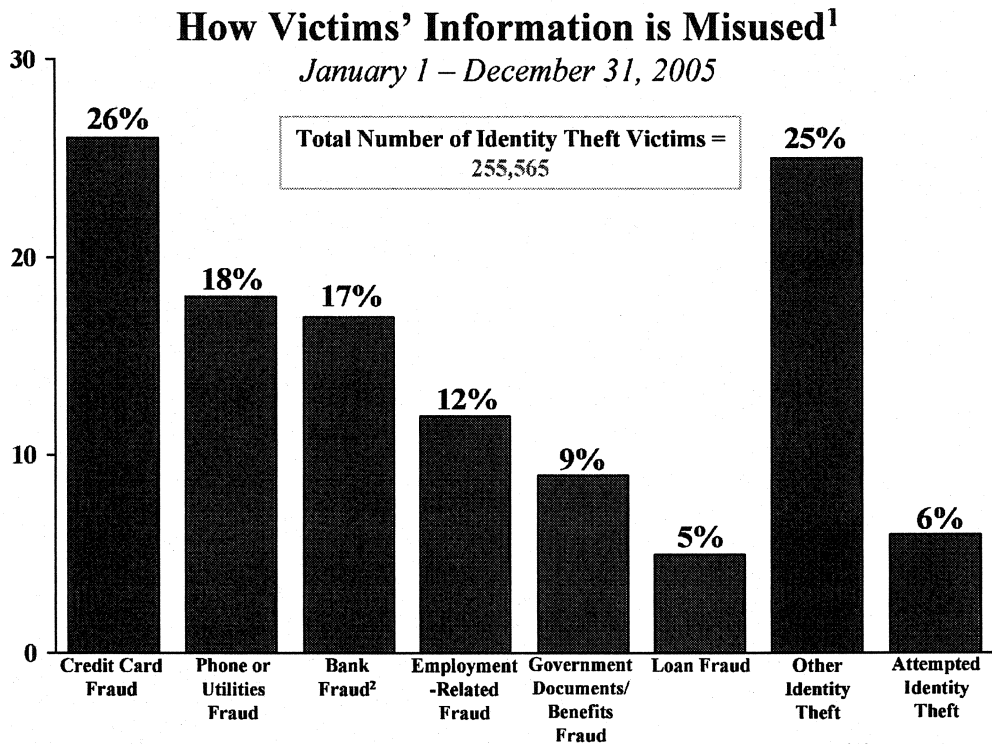


Figure 3: How Identity Theft Victims' Information is Misused²¹²

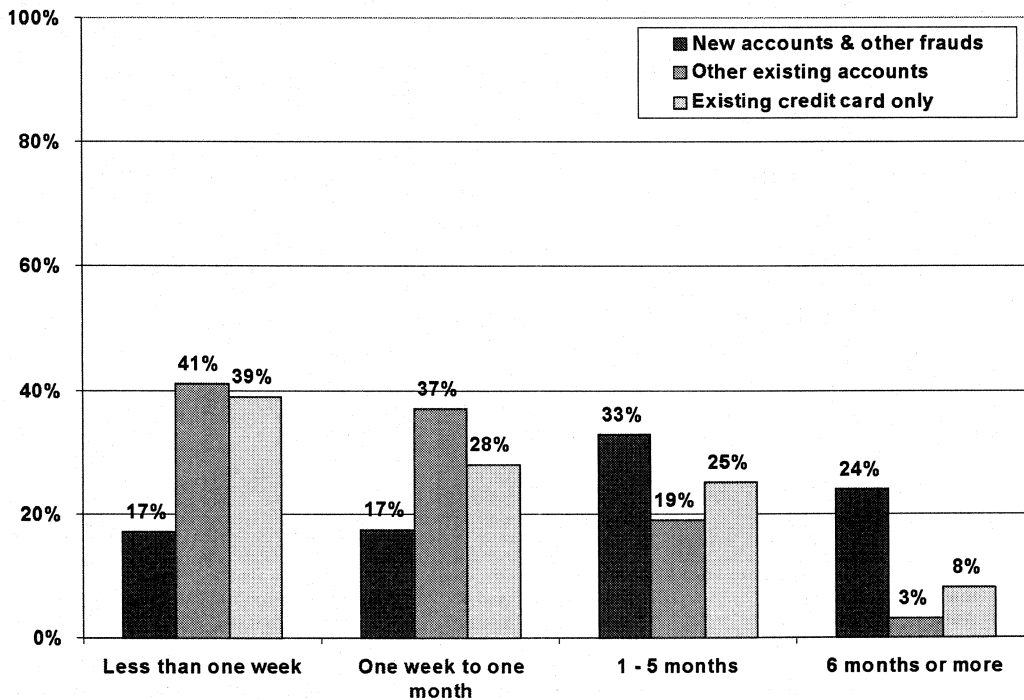


Figure 4: Length of Time for Identity Theft Victim to Discover Misuse of Personal Information.²¹³

²¹¹ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table 2, p. 7.

²¹² Federal Trade Commission, *Identity Theft Victim Complaint Data: Figures and Trends, January 1-December 31, 2005*, Washington D.C., January 25, 2006, Figure 4.

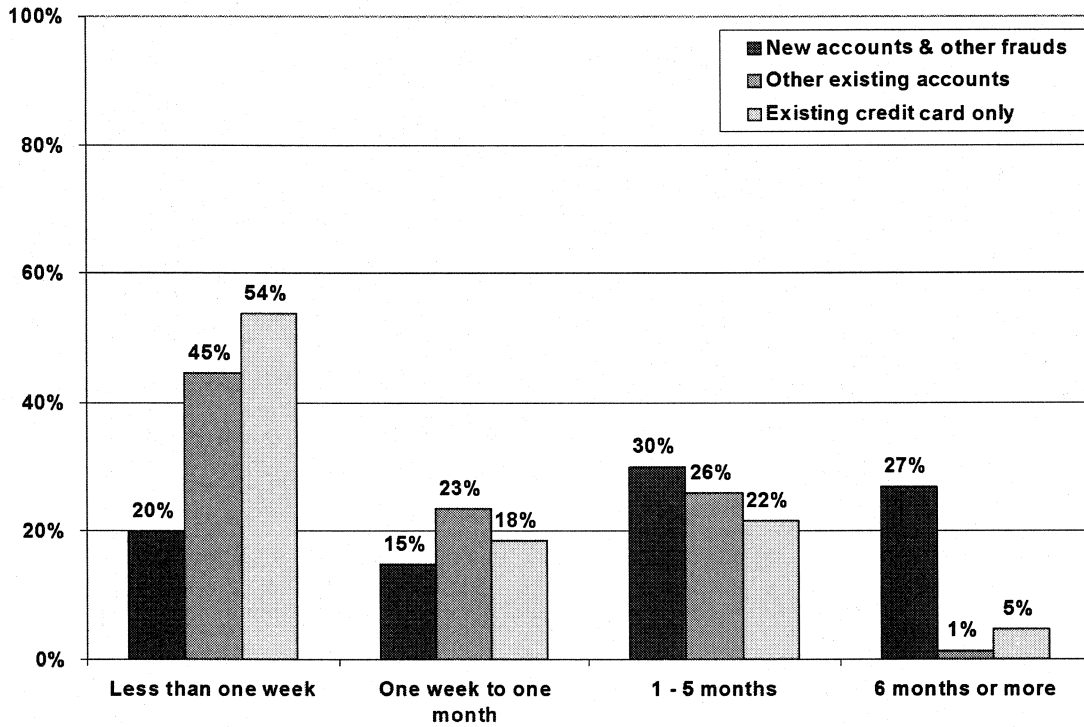


Figure 5: Period of Misuse of Identity Theft Victim's Information.²¹⁴

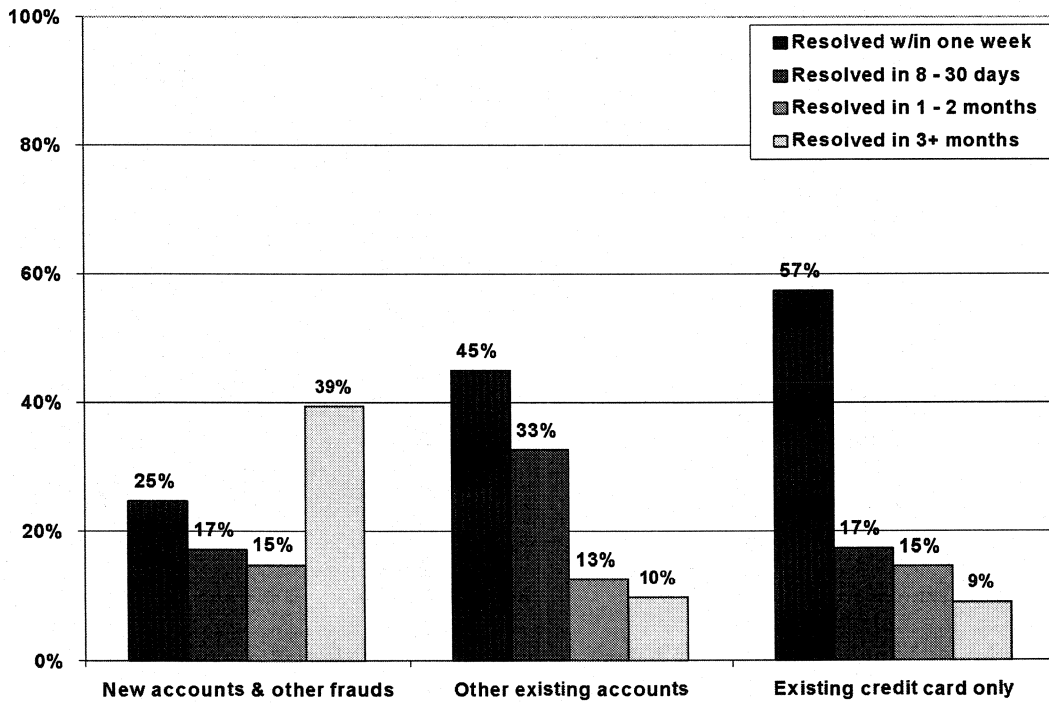


Figure 6: Time Until Resolution of Identity Theft Problems.²¹⁵

²¹³ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q7, p. 20.

²¹⁴ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q10, p. 24.

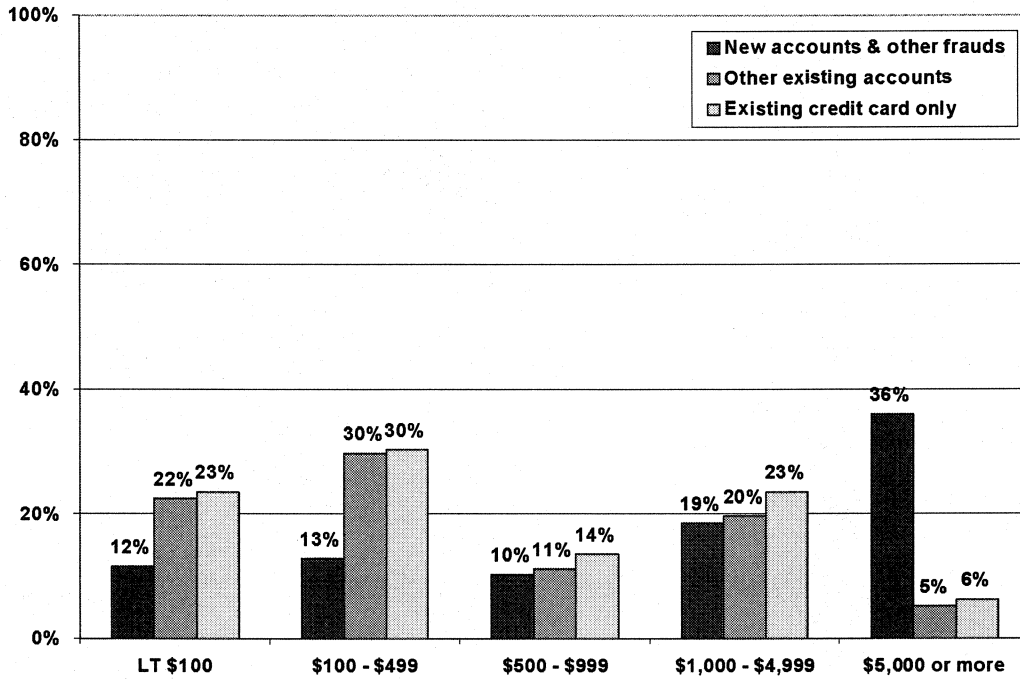


Figure 7: Dollar Value an Identity Thief Obtained.²¹⁶

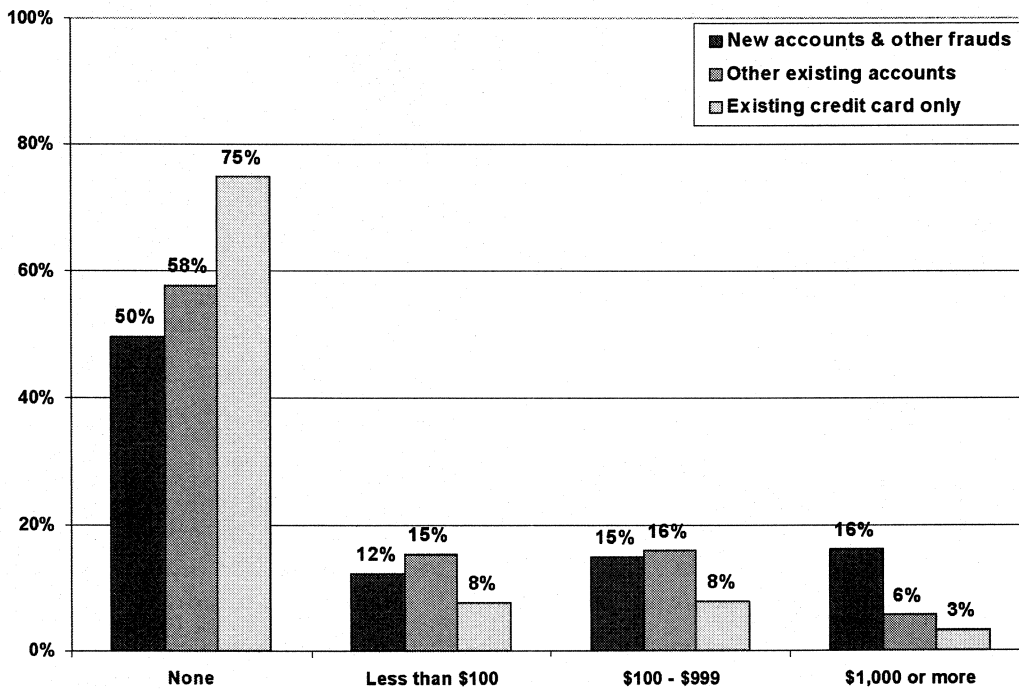


Figure 8: Money Paid Out-Of-Pocket By Identity Theft Victim²¹⁷

²¹⁵ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q11/Q12, p. 26.

²¹⁶ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q29, p. 41.

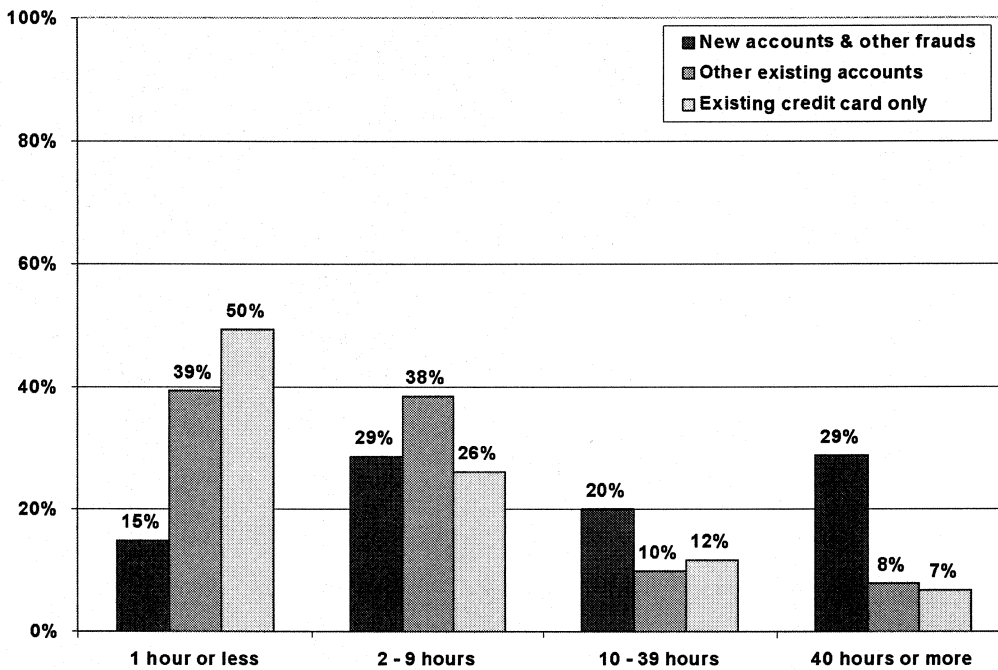


Figure 9: Time Spent By Identity Theft Victim Resolving Problems.²¹⁸

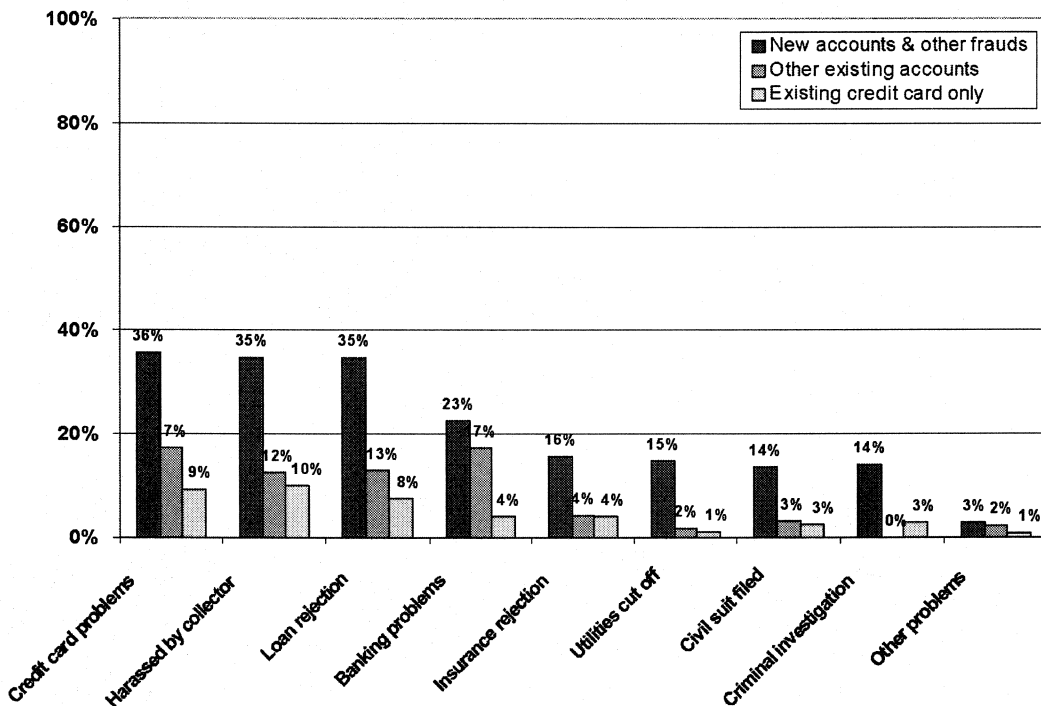


Figure 10: Other Problems Experienced By Identity Theft Victims.²¹⁹

²¹⁷ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q30, p. 43.

²¹⁸ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q31, p. 45.

Number of Months Between Date Identity Theft First Occurred and Date First Discovered by Victim¹

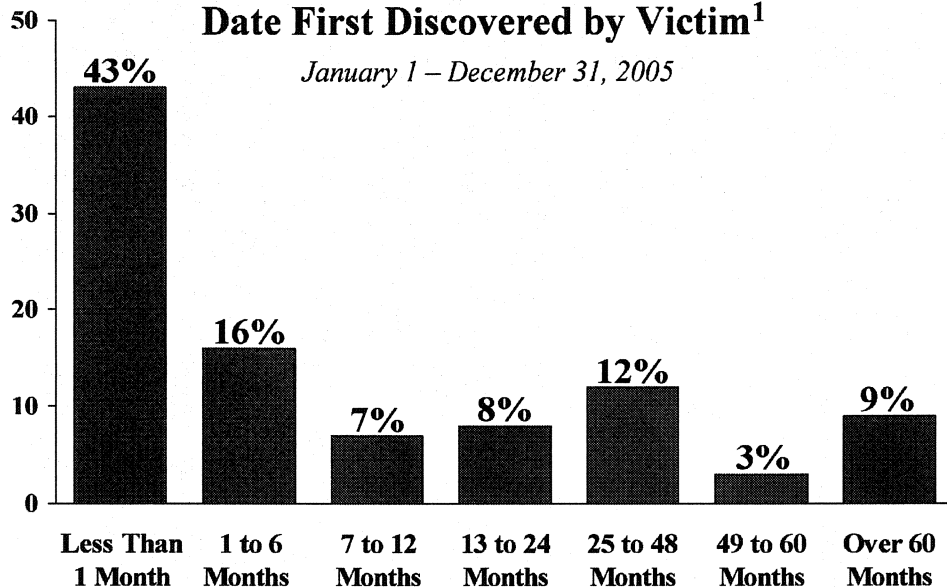


Figure 11: Number of Months Between Date Theft First Occurred and Date First Discovered by Identity Theft Victim.²²⁰

Law Enforcement Contact¹

January 1 – December 31, 2005

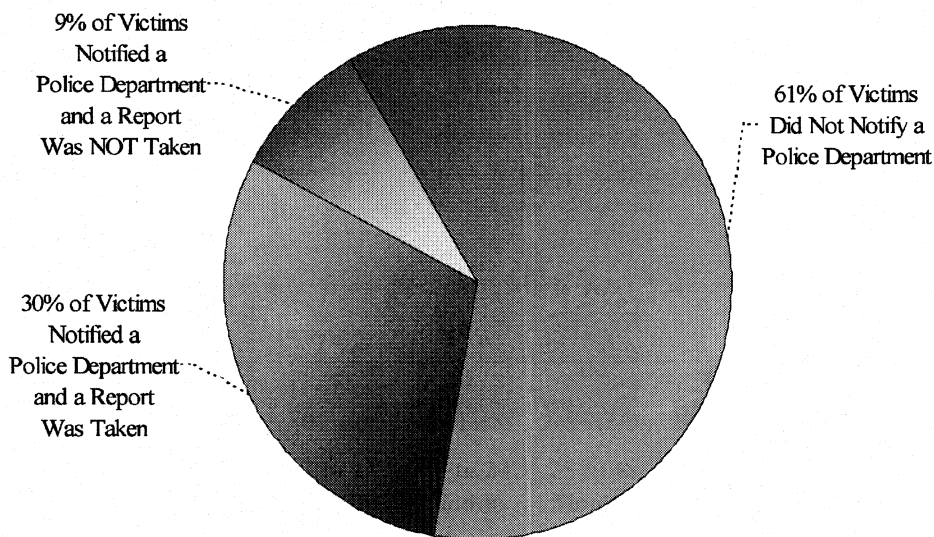


Figure 12: Identity Theft Victims in 2005 - Law Enforcement Contact.²²¹

²¹⁹ Federal Trade Commission, *Identity Theft Survey Report*, September 2003, Table Q32, p. 47.

²²⁰ Federal Trade Commission, *Identity Theft Victim Complaint Data: Figures and Trends, January 1-December 31, 2005*, Washington D.C., January 25, 2006, Figure 8.

²²¹ Federal Trade Commission, *Identity Theft Victim Complaint Data: Figures and Trends, January 1-December 31, 2005*, Washington D.C., January 25, 2006, Figure 10.

APPENDIX B: Analysis of Certain Identity Theft Legislation²²²

<p>79th session status Definitions</p>	<p>SB 122 By Hinojosa</p> <p>Passed. Effective 9/1/05</p> <p>Personal identifying information means information that alone or in conjunction with other information identifies an individual, including an individual's: (A) name, social security number, date of birth or government-issued identification number; (B) mother's maiden name; (C) unique biometric data, including the individual's fingerprint, voice print, and retina or iris image; (D) unique electronic number, address, or routing code; and (E) telecommunication</p>	<p>SB 327 By Zaffirini</p> <p>Passed. Effective 9/1/05</p> <p>"Personally identifiable information," with respect to an individual who is the owner or operator of a computer, means: (A) first name or first initial in combination with last name; (B) a home or other physical address, including street name; (C) an electronic mail address; (D) a credit or debit card number; (E) a bank account number; (F) a password or access code associated with a credit or debit card or bank account; (G) a social security number, tax identification number, driver's</p>	<p>HB 698 By McCall</p> <p>Passed. Effective 9/1/05</p> <p>Personal identifying information means an individual's first name or initial and last name in combination with any one or more of the following items: (A) date of birth; (B) social security number or other government-issued identification number; (C) mother's maiden name; (D) unique biometric data, including the individual's fingerprint, voice print, and retina or iris image; (E) unique electronic identification number, address, or routing code; (F) telecommunication access device,</p>	<p>HB 1130 By Cook</p> <p>Passed. Effective 9/1/05</p>	<p>HB 1682 By McCall</p> <p>Passed house, but not senate.</p> <p>Consumer reporting agency</p> <p>Personal identifying information (A) means an individual's first name or first initial with last name and with one or more of the following items of information: (i) a social security number; (ii) a driver's license number or other government-issued identification number; (iii) an account number or a credit or debit card number, in combination with any required security code, access code, or password that permits access to an individual's financial account;</p>	<p>SB 674 By West</p> <p>Passed Senate. Died in House Calendars.</p>	<p>Federal Guidelines 12 CFR part 30.208; 225.364; 568.570</p>
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²²² Commissioner Leslie L. Pettijohn, Office of the Consumer Credit Commissioner, *Testimony Before the Business and Industry Committee and State Affairs Committee*, April 25, 2006.

<p>Definitions <i>(Continued)</i></p>	<p>SB 122 By Hinojosa</p> <p>access device.</p>	<p>SB 327 By Zaffirini</p> <p>license number, passport number, or other government-issued identification number; or (H) any information if the information alone or in combination with other information personally identifies the individual: (i) account balances; (ii) overdraft history; or (iii) payment history.</p>	<p>HB 698 By McCall</p> <p>including debit and credit card information; or (G) financial institution account number or any other financial information.</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p> <p>and (B) does not include publicly available information that is lawfully made available to the public from federal, state, or local government records.</p>	<p>SB 674 By West</p>	<p>Federal Guidelines 12 CFR part 30;208; 225;364;568;570</p> <p>Sensitive personal information means a customer's name, address, or telephone number, in conjunction with the customer's social security number, driver's license number, account number, credit or debit card number, or a personal identification number or</p>
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<p>Definitions (Continued)</p>	<p>SB 122 By Hinojosa</p>	<p>government-issued identification number; or (iii) account number or credit or debit card number in combination with any required security code, access code, or password, that would permit access to an individual's financial account; and (B) does not include publicly available information that is lawfully made available to the general public from the federal government or a state or local government.</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p>	<p>Federal Guidelines 12 CFR part 30; 208; 225; 364; 568; 570</p> <p>password that would permit access to the customer's account. Sensitive customer information also includes any combination of components of customer information that would allow someone to log onto or access the customer's account, such as user name and password or password and account number.</p> <p>Service Provider means a person that is authorized to hold or use a computerized database containing personal identifying information on</p>
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<p>Definitions (Continued)</p>	<p>SB 122 By Hinojosa</p> <p>35.48(3) Telecommunication access device has the meaning assigned by Section 32.51, Penal Code.</p> <p>Victim means a person whose identifying information is used by an unauthorized person.</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p> <p>35.48(3) Telecommunication access device has the meaning assigned by Section 32.51, Penal Code</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p> <p>behalf of another person that owns or licenses the database.</p>	<p>SB 674 By West</p>	<p>Federal Guidelines 12 CFR part 30;208; 225;364;568;570</p>
<p>Unauthorized Use of Information</p>	<p>Prohibition to obtain, possess, transfer, or use personal identifying information of another person without consent and with intent to misuse. Provides defense to prosecution</p>	<p>A person may not knowingly cause software to be copied to a computer and use the software to collect, through intentionally deceptive means, personally identifiable information</p>					

<p>Business Duty to Protect Information</p>	<p>SB 122 By Hinojosa</p> <p>Business shall implement and maintain reasonable procedures to protect and safeguard from unlawful use or disclose any sensitive personal information collected or maintained by the business.</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p> <p>A person that requests a customer's number to complete a credit check shall: 1) destroy each record of the number by shredding, erasing, or other means after credit check completed; (2) maintain the number: (A) for the sole purpose of allowing authorized employees to use the number to collect a debt or to protect against fraud; and (B) in a database or other location that ensures security and confidentiality of data and protects against unauthorized access.</p>	<p>Federal Guidelines 12 CFR part 30; 208; 225; 364; 568; 570</p> <p>A financial institution must protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.</p>
<p>Disclosure of Social Security Number</p>	<p>A person may not require an individual to disclose the</p>	<p>A person may not require a customer's social security number, or</p>	<p>A person may not require an individual to disclose the</p>	<p>A person may not require an individual to disclose the</p>	<p>A person may not require a customer's social security number, or</p>	<p>A person may not require a customer's social security number, or</p>	<p>A person may not require a customer's social security number, or</p>

<p>Disclosure of Social Security Number (Continued)</p>	<p>SB 122 By Hinojosa</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p>	<p>HB 1130 By Cook</p> <p>individual's social security number to obtain goods or services unless the person:</p> <p>(1) adopts a privacy policy; (2) makes the policy available; (3) maintains the confidentiality and security of the number.</p> <p>Policy must include how personal information is collected, how and when the personal information is used and protected, who has access to the personal information, and how the personal information is disposed.</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p> <p>another number that contains four or more digits of a customer's social security number, as an identifier unless the number is needed to complete a credit check that is required to provide a service or product requested by the customer.</p> <p>A person may not request an existing customer's social security number, or another number that includes four or more consecutive digits of an existing customer's social security number, to verify the customer's relationship with the person.</p>	<p>Federal Guidelines 12 CFR part 30;208; 225;364;568;570</p>
<p>Disposal of Records</p>	<p>Business shall destroy or arrange for destruction of records containing sensitive personal</p>	<p>When a business disposes of a business record that contains personal</p>			<p>When a customer's number is no longer maintained by the person, the person shall</p>		

<p>Disposal of Records (Continued)</p>	<p>SB 122 By Hinojosa</p> <p>information within the business's custody or control that are not to be retained by the business by: (1) shredding; (2) erasing; or (3) otherwise modifying the sensitive personal information in the records to make the information unreadable or undecipherable.</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p> <p>identifying information of a customer of the business, the business shall modify, by shredding, erasing, or other means, the personal identifying information to make it unreadable or undecipherable.</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p> <p>destroy each record by shredding, erasing or other means.</p>	<p>Federal Guidelines 12 CFR part 30; 208; 225; 364; 568; 570</p>
<p>Breach of Security of Computerized Data System</p>	<p>Breach of system security means unauthorized acquisition of computerized data that comprises the security, confidentiality, or integrity of sensitive personal information maintained by a person.</p>	<p>A breach is considered to have occurred when there is unauthorized access to data electronically stored that compromises the security, confidentiality, or integrity of personal identifying information.</p>	<p>When financial institution becomes aware of an incident of unauthorized access to sensitive customer information, the institution should conduct a reasonable investigation to promptly determine the likelihood that the information has been or will be misused.</p>				

<p>Notification Required following Breach of Security</p>	<p>SB 122 By Hinojosa</p> <p>A person that conducts business in this state and owns or licenses computerized data that includes sensitive personal information shall disclose any breach of system security, after discovering or receiving notification of the breach, to any resident of the state whose sensitive personal information was, or is reasonably believed to have been, acquired by an unauthorized person.</p> <p>Disclosure shall be made as quickly as possible. Notice may be delayed at request of law enforcement agency.</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p> <p>A person that owns or licenses computerized data that includes identifying information of a resident of this state must notify the resident of any breach if the resident's unencrypted personal identifying information was, or may have been, obtained by an unauthorized person.</p> <p>Notification must be made promptly after the date the person discovers the breach, taking into law enforcement agency requests.</p>	<p>SB 674 By West</p>	<p>Federal Guidelines 12 CFR part 30;208; 225;364;568;570</p> <p>If the institution determines that misuse of its information about a customer has occurred or is reasonably possible, it should notify the affected customer as soon as possible.</p> <p>Customer notice may be delayed if an appropriate law enforcement agency determines that notification will interfere with a criminal investigation and provides the institution with</p>
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<p>Notification Required following Breach of Security (Continued)</p>	<p>SB 122 By Hinojosa</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p>	<p>Federal Guidelines 12 CFR part 30:208; 225;364;568;570 written require for delay.</p>
					<p>A service provider holding or using the data shall immediately notify and cooperate with the owner or licensee of the information of any breach of the service provider's system if person identifying information was, or may have been, obtained by an unauthorized person.</p> <p>The person may provide the notification in writing or by electronic notice.</p>		<p>Notice should be delivered in any manner designed to ensure that a customer can reasonably be expected to receive it.</p>

<p>Notification Required following Breach of Security (Continued)</p>	<p>SB 122 By Hinojosa</p>	<p>Notice may be: written, electronic, or if cost would exceed \$250,000 or more than 500,000 persons are affected, then notice may be by email, website posting, or broadcast by major statewide media.</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p>	<p>HB 1130 By Cook</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p>	<p>Federal Guidelines 12 CFR part 30;208; 225;364;566;570</p>
		<p>If cost would exceed \$250,000 or more than 500,000 affected, then notice may be by email, website posting, or broadcast by major statewide media.</p>				<p>If person required to notify more than 1,000 persons then person must also notify all consumer reporting agencies.</p>		
		<p>If person required to notify more than 10,000 persons in single event, the person must also notify all consumer reporting agencies.</p>						
		<p>Provides safe harbor if notice given in conformity with information security policies that provide for notification within time requirement of the section.</p>						

<p>Civil Penalties</p>	<p>SB 122 By Hinojosa</p>	<p>Violation liable to state for civil penalty of at least \$2000 but not more than \$50,000 for each violation.</p>	<p>AG may seek restraining order or injunction to prevent violation.</p>	<p>SB 327 By Zaffirini</p>	<p>Violation liable to state for a civil penalty in an amount not to exceed \$100,000</p> <p>Violation liable for damages in amount equal to greater of actual damages or \$100,000</p>	<p>Person bringing action may seek injunction relief</p>	<p>HB 698 By McCall</p>	<p>Violation liable for a civil penalty of up to \$500 for each record.</p>	<p>AG may bring an action against the business to recover penalty and restrain or enjoin violations</p> <p>Safe Harbor: A business that modifies (attempting to render unreadable) a record in good faith is not liable for a civil penalty if the record is reconstructed, in</p>	<p>HB 1130 By Cook</p>	<p>Violation liable to the state for a civil penalty in an amount NTE \$500 for each calendar month during which a violation occurred.</p>	<p>AG may bring action to restrain or enjoin violations.</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p>	<p>Violation liable to state for civil penalty of \$1000 for each violation.</p> <p>AG may bring action to restrain or enjoin violations.</p>	<p>Federal Guidelines 12 CFR part 30;208; 225;364;568;570</p>
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<p>Affected / Exempted entities (Continued)</p>	<p>SB 122 By Hinojosa</p> <p>entities HIPAA covered entities Exemption from destruction provisions for: Gramm-Leach-Bliley financial entities</p>	<p>SB 327 By Zaffirini</p>	<p>HB 698 By McCall</p> <p>Insurance Code</p>	<p>HB 1130 By Cook</p> <p>Educational Rights and Privacy Act covered entities. Covered entities under Insurance rules relating to insurance health or financial privacy info; governmental bodies; a person with respect to a loan transaction, if the person is not engaged in the business of making loans.</p>	<p>HB 1682 By McCall</p>	<p>SB 674 By West</p> <p>under 601 or 602 Insurance Code; governmental entity; HIPAA covered entity</p>	<p>Federal Guidelines 12 CFR part 30; 208; 225; 364; 568; 570</p>
<p>Business & Commerce Code provision being amended</p>	<p>Adds new Chapter 48: Identity Theft Enforcement and Protection Act</p>	<p>Adds new Chapter 48: Computer Protection Against Computer Spyware Act</p>	<p>Amends 35.48</p>	<p>Adds 35.581</p>	<p>Adds new Chapter 50: Disclosures Relating to Maintenance of Personal Identifying Information</p>	<p>Adds 35.62: Prohibited Acts with Respect to Use of Social Security Numbers</p>	
<p>Other provisions</p>						<p>Requires study by OCC and AG to evaluate proposals to limit use of social security numbers by businesses</p>	

APPENDIX C: Notice of Injured Employee's Rights and Responsibilities²²³

Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System

As an injured employee in Texas, you have the right to free assistance from the Office of Injured Employee Counsel. This assistance is offered at local offices across the state. These local offices also provide other workers' compensation system services from the Texas Department of Insurance. This is the state agency that administers the system through the Division of Workers' Compensation.

You can contact the Office of Injured Employee Counsel by calling the toll-free telephone number 1-866-EZE-OIEC (1-866-393-6432). More information is available on the Internet at: www.oiec.state.tx.us.

You can contact the Division of Workers' Compensation by calling the toll-free telephone number 1-800-252-7031. More information about the Division is available on the Internet at: www.tdi.state.tx.us/wc/indexwc.html.

Your Rights in the Texas Workers' Compensation System

1. You may have the right to receive benefits.

You may receive benefits regardless of who was at fault for your injury with certain exceptions, such as:

- You were intoxicated at the time of the injury;
- You injured yourself on purpose or while trying to injure someone else;
- You were injured by another person for personal reasons;
- You were injured by an act of God;
- Your injury occurred during horseplay; or
- Your injury occurred while voluntarily participating in an off-work activity.

2. You have the right to receive medical care to treat your workplace injury or illness. There is no time limit for this medical care.

3. You have the right to choose your treating doctor. If you are in a Workers' Compensation Health Care Network, you can choose your doctor from the network's treating doctor list. If you are not in a network, you can choose a doctor from the Approved Doctor List kept by the Division of Workers' Compensation.

It is important to follow all the rules in the workers' compensation system. If you don't follow these rules, you may be held responsible for payment of medical bills.

4. You have the right to hire an attorney at any time to help you with your claim.

5. You have the right to receive information and assistance from the Office of Injured Employee Counsel at no cost.

Staff is available to answer your questions and explain your rights and responsibilities by calling the toll-free telephone number 1-866-EZE-OIEC (1-866-393-6432).

6. You have the right to receive ombudsman assistance if you do not have an attorney and a dispute resolution proceeding about your claim has been scheduled.

An ombudsman is an employee of the Office of Injured Employee Counsel. Ombudsmen are trained in the field of workers' compensation and provide free assistance to injured employees without attorneys. Ombudsmen cannot sign documents for you, make decisions for you or give legal advice. Proceedings about your claim may include benefit review conferences (BRCs) or contested case hearings (CCHs). Proceedings are held at local field offices. At least one ombudsman is located in each local office.

7. You have the right for your claim information to be kept confidential.

In most cases, the contents of your claim file cannot be obtained by others. Some parties have a right to know what is in your claim file, such as your employer or your employer's insurance carrier. Also, an employer that is considering hiring you may get limited information about your claim from the Division of Workers' Compensation.

(SEE REVERSE SIDE FOR RESPONSIBILITIES)

²²³ Office of Injured Employee Counsel, Notice of Injured Employee's Rights and Responsibilities, at <http://www.tdi.state.tx.us/wc/information/documents/ierandr.pdf>

Notice of Injured Employee Rights and Responsibilities in the Texas Workers' Compensation System

Your Responsibilities in the Texas Workers' Compensation System

1. You have the responsibility to tell your employer if you have been injured at work or in the scope of your employment.

You must tell your employer within 30 days of the date you were injured or first knew your injury or illness might be work related.

2. You have the responsibility to know if you are in a Workers' Compensation Health Care Network ("network").

If you do not know whether you are in a network, ask the employer you worked for at the time of your injury. If you are in a network, you have the responsibility to follow the network rules. Your employer must give you a copy of the Texas Department of Insurance network rules. Read the rules carefully. If there is something you do not understand, ask your employer or call the Office of Injured Employee Counsel.

If you would like to file a complaint about a network, call the Consumer Help Line at 1-800-252-3439.

Or file a complaint on the Internet at: www.tdi.state.tx.us/consumer/complfrm.html#wc

3. You have the responsibility to tell your doctor how you were injured and whether the injury is work-related.

4. You have the responsibility to send a completed claim form (DWC-41) to the Division of Workers' Compensation. You have one year to send the form after you were injured or first knew that your illness might be work related.

Send the completed DWC-41 form even if you already are receiving benefits. You may lose your right to benefits if you do not send the completed claim form to the Division of Workers' Compensation.

Call toll-free 1-800-252-7031 or 1-866-393-6432 for a copy of the DWC-41 form.

5. You have the responsibility to provide your current address, telephone number, and employer information to the Division of Workers' Compensation and the insurance carrier.

6. You have the responsibility to tell the Division of Workers' Compensation and the insurance carrier any time there is a change in your employment status or wages. Examples include:

- You stop working because of your injury;
- You start working; or
- You are offered a job.

(SEE REVERSE SIDE FOR RIGHTS)

Contact the Office of Injured Employee Counsel by calling the toll-free telephone number 1-866-EZE-OIEC (1-866-393-6432). More information is available on the Internet at: www.oiec.state.tx.us.



Contact the Division of Workers' Compensation by calling the toll-free telephone number 1-800-252-7031. More information about the Division is available on the Internet at: www.tdi.state.tx.us/wc/indexwc.html.

APPENDIX D: Certified Workers' Compensation Health Care Provider Networks as of October 26, 2006²²⁴

<u>Applicant</u>	<u>Date Certified</u>
1. Concentra HCN	3/29/ SAE 8/18
2. Concentra Texas Star	3/29/ SAE 8/18
3. Memorial Hermann	6/28
4. Corvel	7/18
5. First Health HCN	8/15
6. First Health/Travelers	8/18
7. Genex Services, Inc	8/18
8. Intracorp	8/21
9. Liberty Health Care	8/22/ SAE 10/3
10. First Health/AGCIS	8/23
11. Compkey/Forte	8/28
12. SHA, LLC/FirstCare	9/14
13. Physicians Cooperative of TX	10/2
14. The Hartford HCN	10/2
15. Specialty Risk Tx WC HCN	10/3
16. IMO Med-Select	10/23
17. Zurich Services Corp HCN	10/26

SAE: "Service Area Expansion"

²²⁴ Texas Department of Insurance, Listing of Certified Workers' Compensation Networks, at <http://www.tdi.state.tx.us/wc/wcnet/wcnetworks.html>

APPENDIX E: HB 7 Implementation Update²²⁵

DATE	HB-7	STATUTORY CITATION	STATUS
August 31, 2005*	Last day that a party may request a State Office of Administrative Hearing (SOAH) appeal of a Texas Workers' Compensation Commission (TWCC) medical dispute decision.	Section 8.013 of HB 7 (p. 363)	Complete
September 1, 2005*	The Act takes effect	Section 8.020 of HB 7 (p. 366)	Complete
September 1, 2005*	TWCC is abolished and the Division of Workers' Compensation at the Texas Department of Insurance (TDI) is established.	Section 8.001 of HB7 (pp 356-357)	Complete
September 1, 2005*	SOAH may not accept a request for an appeal of a TWCC medical dispute decision on or after this date. A medical dispute that is not pending for a hearing by SOAH on or before August 31, 2005 is subject to the new dispute resolution provisions of this bill and is not subject to a hearing at SOAH.	Section 8.013 of HB 7 (p. 363)	Complete
September 1, 2005*	The state average weekly wage (SAWW) becomes \$540 and remains at this level until September 30, 2006. This provision expires October 1, 2006.	Section 408.047, Labor Code (p. 134)	Complete
September 1, 2005*	The Medical Advisory Committee abolished.	Section 8.012 of HB 7 (pp. 362-363)	Complete
September 1, 2005*	A number of Insurance Code and Labor Code provisions are repealed to conform with HB 7, including provisions related to: <ul style="list-style-type: none"> • the former TWCC Commissioner board; • definitions affected by the name change; • acceptance of grant paid by Texas 	Article 7 of HB 7 (pp. 355-356)	Complete

* indicates the due date is contained in HB 7

10/24/2006

²²⁵ Texas Department of Insurance, *House Bill 7 Implementation Update, 79th Legislature, October 2006*

DATE	HB-7	STATUTORY CITATION	STATUS
September 1, 2005	<p>Mutual Insurance Company;</p> <ul style="list-style-type: none"> • application of Sunset Act; and • discontinued programs such as Field Safety Representative Program, the Hazardous Employer Program, the Approved Professional Source Program, and the Drug Free Workplace Program, the Medical Advisory Committee (MAC), and the Health Care Network Advisory Committee (HNAC). <p>Date by which the Commissioner of Insurance shall adopt the first annual research agenda for the Workers' Compensation Research and Evaluation Group of TDI.</p>	Section 405.0026 Labor Code (p. 67) Section 8.001(d) of HB 7	Complete. Research agenda adopted on 2/10/06.
October 1, 2005*	Date by which the Governor shall appoint the Commissioner of Workers' Compensation of the Division of Workers' Compensation	Section 8.001(d) of HB 7 (p. 357)	Complete 9/1/05 Albert Betts appointed as Commissioner of Workers' Compensation
October 1, 2005*	TDI shall provide, in Austin and in each regional field office, suitable office space, personnel, computer support, and other administrative support to the Office of Injured Employee Counsel no later than this date.	Section 8.002(d) of HB 7 (pp. 357-358)	Complete
October 1, 2005	Date by which the division shall compute and publish the interest and discount rate quarterly, using the treasury constant maturity rate for one-year treasury bills issued by the U.S. government, as published by the Federal Reserve Board on the 15 th day preceding the first day of the calendar	Section 401.023, Labor Code (p. 43)	Complete. Interest and discount rate for October 1, 2005 through December 31, 2005 was published on September 22, 2005.

* indicates the due date is contained in HB 7
10/24/2006

DATE	HB-7	STATUTORY CITATION	STATUS
	quarter for which the rate is to be effective, plus 3.5 percent. For this purpose, calendar quarters begin January 1, April 1, July 1, and October 1.		
December 1, 2005*	Date by which the Commissioner of Insurance shall adopt rules regarding the certification of workers' compensation networks.	Section 8.014 of HB 7 (p. 363)	Complete Network rules adopted 11/15/05
December 1, 2005*	Date by which the Commissioner of Insurance and the Commissioner of Workers' Compensation shall adopt rules relating to the transfer of TWCC programs to TDI.	Section 8.002(c) of HB 7 (p. 357)	Complete. Determination made that no rules were required for the transfer of programs.
January 1, 2006*	TDI shall accept applications from a workers' compensation network seeking certification under Chapter 1305, Insurance Code.	Section 8.014 of HB 7 (p.363)	TDI began receiving network applications January 2, 2006.
January 1, 2006*	The Commissioner of Workers' Compensation shall adopt rules regarding electronic submission of medical bills by this date.	Section 8.008 of HB 7 (p. 361)	Complete Rules were adopted July 2006. Electronic medical billing required for insurance carriers and health care providers on or before 1-1-08.
January 1, 2006*	Effective date for the creation of the small employer return-to-work pilot program at the Division of Workers' Compensation at TDI.	Section 8.010 of HB 7 (pp. 361-362)	Complete Rules adopted 2/2/06. Program become effective 2/22/06.
February 1, 2006*	The Commissioner of Workers' Compensation shall adopt rules regarding changes to Section 408.004 (Required Medical Examinations) and Section 408.0041 (Designated Doctor	Section 8.007 of HB 7 (p. 361)	Complete Rules adopted July, 2006. Effective for designated doctor and required medical

* indicates the due date is contained in HB 7
10/24/2006

DATE	HB-7	STATUTORY CITATION	STATUS
February 28, 2006*	Examinations), Labor Code. Except as otherwise provided by the bill, all powers, duties, obligations, rights, contracts, funds unspent appropriations, records, real or personal property, and personnel of TWCC shall be transferred to the Division of Workers' Compensation at the TDI not later than this date.	Section 8.001(b) of HB 7 (p. 357)	examination requests on or after 1-1-2007. Complete
March 1, 2006*	All powers, duties, obligations, rights, contracts, etc. and personnel of TWCC's ombudsman program is transferred to the Office of Injured Employee Counsel not later than this date. An ombudsman transferred to the Office of Injured Employee Counsel shall begin providing services not later than this date. Date by which the LBB may adopt an order under Section 317.005, Government Code, to transfer the appropriations of TWCC to TDI and the Office of Injured Employee Counsel.	Section 8.002(e) of HB 7 (p. 358)	Complete
March 31, 2006*	Date by which the Division of Workers' Compensation at TDI and the Department of Assistive and Rehabilitative Services shall report to the legislature not later than this date on their actions to improve the access to and effectiveness of vocational rehabilitation programs for injured workers. On or after this date, the state average weekly wage (SAWW) is equal to 88 percent of the average weekly wage of covered employment as computed by the Texas Workforce Commission (TWC) under Section 207.002, Labor Code.	Section 8.006 of HB 7 (p. 361)	Transfer of appropriations of TWCC to TDI and the Office of Injured Employee Counsel did not require an order to be adopted by the LBB. Complete.
August 1, 2006*	Date by which the Division of Workers' Compensation at TDI and the Department of Assistive and Rehabilitative Services shall report to the legislature not later than this date on their actions to improve the access to and effectiveness of vocational rehabilitation programs for injured workers. On or after this date, the state average weekly wage (SAWW) is equal to 88 percent of the average weekly wage of covered employment as computed by the Texas Workforce Commission (TWC) under Section 207.002, Labor Code.	Section 409.012(f), Labor Code (p. 163)	Complete. Report delivered to the Legislature on 8-3-2006.
October 1, 2006*	Date by which the Division of Workers' Compensation at TDI and the Department of Assistive and Rehabilitative Services shall report to the legislature not later than this date on their actions to improve the access to and effectiveness of vocational rehabilitation programs for injured workers. On or after this date, the state average weekly wage (SAWW) is equal to 88 percent of the average weekly wage of covered employment as computed by the Texas Workforce Commission (TWC) under Section 207.002, Labor Code.	Section 408.047, Labor Code (p. 134) Section 8.009 of HB 7 (p. 361)	Complete 10-1-06

* indicates the due date is contained in HB 7
10-24-2006

DATE	HB-7	STATUTORY CITATION	STATUS
October 1, 2006*	The Commissioner of Workers' Compensation shall compute the maximum and minimum weekly income benefits for each state fiscal year not later than October 1 st of each year.	Sections 408.061-408.062, Labor Code (p. 135)	Complete 10-1-06
October 1, 2006*	The Commissioner of Workers' Compensation shall report to the governor, lieutenant governor, speaker and the 79 th Legislature on the implementation of changes to the Designated Doctor program (Section 408.1225, Labor Code)	Section 8.011(a) of HB 7 (p. 362)	Complete and sent to the Legislature on 10-4-06.
December 1, 2006*	The Commissioner of Workers' Compensation shall forward legislative recommendations regarding changes to the WC Act to the legislature no later than this date every even-numbered year.	Section 402.066, Labor Code (p. 23)	Pending
December 1, 2006*	The Commissioner of Insurance shall issue the first report to the governor, lieutenant governor, speaker and the legislature on the impact of HB 7 on the affordability and availability of workers' compensation insurance for Texas employers. All subsequent reports shall be issued by December 1 st of every even-numbered year.	Section 8.011(c) of HB 7 (p. 362)	Pending
December 31, 2006	In its evaluation of networks, TDJ shall offer recommendations to the 80 th Legislature regarding whether statutory changes are needed to allow an injured worker to receive workers' compensation medical care from PPO providers (i.e., allow a worker to select his or her PPO primary care provider as the worker's treating doctor within a workers' compensation network). HB 7 contained no specific statutory timeline for this legislative report.	Section 1305.105(d), Insurance Code (p. 293)	Pending

* indicates the due date is contained in HB 7

10/24/2006

DATE	HB-7	STATUTORY CITATION	STATUS
December, 2006	The Division of Workers' Compensation at TDI shall study the issue of required accreditation of interdisciplinary pain rehabilitation programs or interdisciplinary pain rehabilitation treatment facilities that provide services to injured employees and shall report to the legislature regarding any statutory changes that the division considers necessary to require that accreditation. HB 7 contained no specific statutory timeline for this legislative report.	Section 408.032, Labor Code (p. 131)	Pending
June, 2007	The Workers' Compensation Research and Evaluation Group at TDI shall issue the first workers' compensation network report card no more than eighteen months after the date that TDI certifies the first workers' compensation network.	Section 8.015 of HB 7 (pp. 363-364)	Pending
January 1, 2008*	The Commissioner of Insurance may adopt rules, but not before this date, regarding the electronic payment of medical bills by insurance carriers to health care providers upon sufficient evidence that such payments can be made without undue burden to carriers.	Section 408.0251, Labor Code (p. 123)	Pending
October 1, 2008*	The Commissioner of Workers' Compensation shall report to the governor, lieutenant governor, speaker and the legislature on the implementation and results of the small employer return-to-work pilot program.	Section 8.011(b) of HB 7 (p. 362)	Pending

* indicates the due date is contained in HB 7
10-24-2006

DATE	HB-7	STATUTORY CITATION	STATUS
December 1, 2008*	The workers' Compensation Research and Evaluation Group at TDI shall issue the first report to the governor, lieutenant governor, speaker and the legislature on the impact of workers' compensation networks on the cost and quality of medical care on this date. All subsequent reports shall be issued by December 1 st of every even-numbered year. Expiration date of the small employer return-to-work program.	Section 8.003 of HB 7 (p. 358) Section 8.011(d) of HB 7 (p. 362)	Pending
September 1, 2009*		Section 413.022, Labor Code (pp. 214-216)	Pending
September 1, 2009*	This is the Sunset date for TDI, the Division of Workers' Compensation at the TDI, and the Office of Injured Employee Counsel.	Section 31.004, Insurance Code (pp.340-341) Section 404.003, Labor Code (p. 51)	Pending

* indicates the due date is contained in HB 7

10/24/2006