
**HOUSE COMMITTEE ON BUSINESS & INDUSTRY
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT DECEMBER 2008**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
81ST TEXAS LEGISLATURE**

**HELEN GIDDINGS
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Committee On
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11/25/2008

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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:

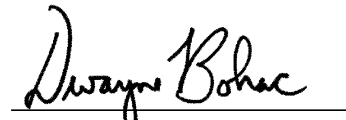
The Committee on Business & Industry of the Eightieth Legislature hereby submits its interim report, including recommendations and drafted legislation for consideration by the Eighty-first Legislature.

Respectfully submitted,

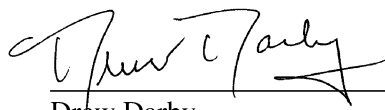

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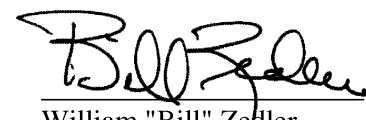

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INTRODUCTION

At the beginning of the 80th 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; Joaquin Castro; Drew Darby; Armando "Mando" Martinez; Burt Solomons; and William "Bill" Zedler.

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

- 1) Study the problem of identity theft and the impact of identity theft legislation enacted in recent legislative sessions. Examine the problem of electronic data breaches, as well as the feasibility of requiring periodic destruction of records for businesses and state entities to limit exposure to identity theft. Examine the issue of personal information contained in publicly available government records. Recommend any legislative changes needed to combat the problem.
- 2) Study Articles 2 and 2A of the Uniform Commercial Code (UCC) and consider amending Chapters 2 and 2A of the Business and Commerce Code to conform with recent amendments to the UCC.
- 3) Study the original purposes, development, and current need for the Subsequent Injury Fund and determine whether this fund should be continued or altered.
- 4) Study the problem of digital piracy and make recommendations for legislative changes to address the problem facing movie producers and distributors, retailers, book publishers, the music industry, universities, and other copyright holders of creative content. This review should include an examination of the impact on state and local government sales tax revenues.
- 5) Monitor the Texas workers' compensation system, and the continued implementation of the reforms of HB 7, 79th Legislature, Regular Session, by the Texas Department of Insurance and other state agencies. Specifically evaluate the recent decision by the Texas Supreme Court in *Entergy v. Summers* in terms of its impact on the system. (Joint Interim Charge with the House Committee on Insurance)
- 6) Monitor the agencies and programs under the committee's jurisdiction.

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

HOUSE COMMITTEE ON BUSINESS & INDUSTRY

INTERIM STUDY CHARGES

CHARGE 1: Study the problem of identity theft and the impact of identity theft legislation enacted in recent legislative sessions. Examine the problem of electronic data breaches, as well as the feasibility of requiring periodic destruction of records for businesses and state entities to limit exposure to identity theft. Examine the issue of personal information contained in publicly available government records. Recommend any legislative changes needed to combat the problem.

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INTERIM CHARGE 1: Study the problem of identity theft and the impact of identity theft legislation enacted in recent legislative sessions. Examine the problem of electronic data breaches, as well as the feasibility of requiring periodic destruction of records for businesses and state entities to limit exposure to identity theft. Examine the issue of personal information contained in publicly available government records. Recommend any legislative changes needed to combat the problem.

Background

Identity theft is a growing problem in the United States, particularly in Texas. In 2005, 8.3 million Americans were reportedly victims of identity theft, resulting in costs over \$15.6 billion.¹ Texas ranks fourth of the 50 states for the highest number of complaints filed per 100,000 citizens.²

While more than 50% of victims do not have to pay out-of-pocket expenses, the average out-of-pocket expense is \$500. Victims on average spent 4 hours addressing their problems with identity theft, with some victims spending upwards of 130 hours.³

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.

In general, when a person fraudulently uses an existing credit card or draws upon a bank account belonging to someone else, the illegal activity is usually discovered quickly because the rightful owner of the card or bank account is aware of what charges he makes and should notice unauthorized charges. This quick detection generally decreases the financial impact of the fraudulent activity.

¹ Federal Trade Commission, *2006 Identity Theft Survey Report*, pp. 3, 9.

² Federal Trade Commission, *Identity Theft Victim Complaint Data: Figures and Trends In Texas, January 1 - December 31, 2006*, Figure 4a.

³ Federal Trade Commission, *2006 Identity Theft Survey Report*, pp. 5-6.

However, with other, more complicated types of fraud such as misuse of the victim's identity when charged with a crime, in renting an property, or when obtaining employment, it may take longer to discover the theft. Therefore, it may be more difficult to control the damage.

How Identity Theft Happens

Identity theft happens when sensitive information is acquired by persons who exploit it with fraudulent intentions. 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 adequately safeguarded 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 insure that records are unavailable to the general public when they are disposed of. For example, a company should not dispose of paper records without first shredding the documents.

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 through public records and publicly available information. This issue will be explored in more detail below.

Illegal Access to Personal Data

Most of these data collection methods do not involve complex computer hacking or specialized skills. Common methods of data collection include stealing paperwork from dumpsters or trash receptacles, theft of purses or wallets, diverting a person's mail, or posing as a legitimate business on the phone or electronically. Higher-tech methods include computer viruses (such as spam bots) and electronic readers that capture the magnetic strips on credit cards (skimming).

Effects of Identity Theft

A thief can use personal information in a variety of ways, such as using the information to obtain money, thereby ruining a victim's credit. A victim then has to repair his or her credit history, and until that is done, may have trouble taking out a loan, or getting a line of credit. Victims may be harassed by creditors for debts they did not incur or have their utilities terminated.⁴

⁴ Federal Trade Commission, *2006 Identity Theft Survey Report*, p. 41.

Five percent of victims report that their name and/or personal information were given to the police when the thief was stopped or charged with a crime.⁵ This criminal record is difficult to expunge and in the meantime may prevent the victim from obtaining a job or, in some cases, may cause the person to be arrested. Three percent of victims reported that the thief had obtained medical treatment, services, or supplies using their personal information.⁶ Identity theft for medical services is particularly dangerous because the thief's medical history can become part of the victim's medical record, and that could potentially lead to inappropriate treatment based on an incorrect record.

State Legislation on Identity Theft

77th Legislature, 2001

By way of history, HB 678 amended the Business & Commerce and Government codes regarding biometric identifiers. Examples of such identifies are: a retina or an iris scan, fingerprint, voiceprint, or record of hand or face geometry. The bill required informed consent before a person may capture an individual's identifier for commercial purposes. In addition, a governmental body or private citizen is prohibited from selling, leasing, or disclosing a biometric identifier. However, exceptions to this rules are: if the individual consents; the disclosure completes a financial transaction requested or authorized by the individual; the disclosure is required or permitted by a federal or state statute; or the disclosure is made for law enforcement purposes.

SB 694 provided that all credit and debit card numbers held in governmental records and certain e-mail addresses are confidential.

The legislature further required the Texas Department of Insurance to adopt a policy on privacy and disclosure of nonpublic personal financial information applicable to the insurance industry in compliance with the Federal Gramm-Leach-Bliley Act (SB 712). The legislature gave an individual a right to be informed about information collected about the individual by government agencies, a right to notice about certain information collection practices, and a right to make a correction of incorrect information compiled about the individual with HB 1922.

78th Legislature, 2003

Criminal law

In HB 2138, the Legislature prohibited using a device to record the magnetic strip on a credit card (skimming) without the cardholder's consent.

Consumer Protection

⁵ Federal Trade Commission, *2006 Identity Theft Survey Report*, p. 21.

⁶ Federal Trade Commission, *2006 Identity Theft Survey Report*, p. 21.

SB 473 allowed a victim of identity theft to place a credit freeze on his or her credit report. This was modified in the 80th Legislature in SB 222 to allow a consumer to place a credit freeze without filing a police report.

HB 2409 authorized a consumer to obtain information about that consumer held by check verification entities. SB 235 provided that only the last 4 digits of credit card numbers can be printed on credit card receipts, and expiration dates may not be included.

78th Legislature, 2003

Open Records

HB 149 provided that the Public Utility Commission is no longer required to collect full addresses for the no-call list. In an attempt to purge publicly available records of personal identifying information, HB 500 provided that a driver's license, personal identification certificate number, or social security number must not be provided as part of an exemption application to a chief tax appraiser for a residential homestead. Furthermore, identification numbers, as provided on the voter registration application, are confidential and excluded from disclosure under the Open Records Act (HB 1863). Certain personal identifying information (social security number & driver's license number) may be removed from real property records prior to filing. Notice must be given that this information may be removed. (HB 2930, SB 1559 and SB 461, 79th Legislature).

Social Security Numbers

SB 473 provided that Social Security Numbers are confidential, and the display of an individual's social security number on any device required to access products or services is prohibited, except as used for internal verifications or as required by law (SB 611).

79th Legislature, 2005

Credit & Debt

HB 628 prohibited debt collection concerning an identity theft victim who did not incur the debt. SB 99 prohibited a lender from denying or limiting loans or credit because a person has been a victim of identity theft.

Illegal Collection of Personal Identifying Information

HB 1098 clearly prohibited phishing (attempting to gain financial information through e-mail and other online methods), and HB 982 required restaurants and bars to post signs to make employees aware that skimming (reading credit card information electronically without the cardholder's permission) is prohibited.

Acts of spyware are prohibited and an offense and penalty are created for the unauthorized collection, transmission, and use of personally identifiable information about a person using a

computer (SB 327).

Fraudulent Checks

HB 2223 required a financial institution, when it returns a check due to identity theft, to make a notation of "forgery" on that check. Furthermore, a business that accepts checks must delete negative information about a customer's dishonored check if that customer proves he or she was a victim of fraud (HB 1855).

Disposal of Business Records

HB 698 requires businesses to dispose of records containing personal information by destroying, modifying the record through shredding, or other means that renders the information illegible.

Privacy of Social Security Numbers

HB 1130 states that a privacy policy is necessary when a person requires disclosure of an individual's social security number to obtain goods or services or enter into a business transaction. However, certain professionals already required to keep social security numbers confidential by Federal Law are exempt from this requirement (HB 863, 80th Legislature). Social Security Numbers are exempt from the Public Information Act (SB 1485).

An Exception

It is permissible to share personal information in the course of an investigation by a law enforcement agency, and the business sharing the information in this context is exempt from civil liability (HB 1379).

80th Legislature, 2007

Criminal Offenses

The legislature clarified that it is illegal for a person, with the intent to defraud or harm another, to obtain, possess, transfer or use the personal identifying information of a child (HB 649) or a deceased person (HB 460). Tampering with a government record is an offense for which an enhanced penalty could be sought if the offense was committed as part of organized criminal activity (HB 126).

HB 73 prohibited pretexting (pretending to be a legitimate business or customer on the telephone to obtain confidential information). HB 887 increased the statute of limitations for identity theft crimes from 3 years to 7 years, which was a recommendation of the 79th Legislature interim report.

Consumer Protection

The Closed Account Notification System (CANS) was created so that financial institutions are

able to notify check verification entities of compromised accounts (HB 2002). This legislation was responsive to two of the committee's recommendations during the last interim: to create a system by which financial institutions can notify check verification entities of an identity theft, and to require the check notification entities to accept a report from a consumer that the consumer was a victim of identity theft.

HB 3093 encouraged businesses to check a customer's identity by verifying a zip code associated with that credit card with the credit card issuing company. However, businesses may not retain the zip code after the purchase or service has been completed. HB 2061 provided that property records do not need to contain a social security number, and a person may request a social security number redacted by the county or district clerk. However, the county or district clerk is not liable for the disclosure of the social security number, and is not responsible for ensuring that recorded documents do not contain social security numbers. This legislation was responsive to the committee's recommendation to limit the use of social security numbers for identification purposes.

79th Interim Recommendations

During the interim following the 79th Regular Session, this committee studied the issue of Identity Theft and gave recommendations.⁷ In the 80th Regular Session, the legislature promulgated bills responsive to some of the recommendations, as noted above.

Identity theft continues to be a problem and many of these recommendations did not have easy solutions in practice. Therefore, the committee has continued to discuss this complex and troubling issue.

Criminal Enforcement

The Texas Department of Public Safety runs a fraud investigation unit that was established in 2004. There are 13 troopers who investigate cases of driver's license fraud, identity theft, forgery and counterfeiting.⁸

⁷ Business & Industry Committee Report to the 80th Texas Legislature, pp. 19-20.

- 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.
- 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.

⁸ Presentation by the Texas Department of Public Safety, Fraud Investigation Unit to the Business & Industry

One of the biggest problems faced is that of counterfeit driver's licenses. Currently, counterfeit driver's licenses are legally and openly sold as "novelties." A "novelty" license is required to contain certain features to make it clear that the novelty license is not an official identification card issued by a government.

However, these safeguards that separate the novelties from the counterfeits are easily circumvented. Enterprising thieves can easily remove the required disclaimer on the license that would indicate that it is not official. However, thieves do not have to be all that enterprising, as the shops purposely manufacture the licenses in such a way that it is easy to remove the required disclaimer from the license.⁹

The committee finds that there is no legitimate purpose for these novelty driver's licenses, and that the current safeguards are not adequate to prevent novelty driver's licenses from being modified to look like legitimate state-issued identification cards.

Civil Enforcement

The Attorney General's office has used its civil enforcement authority to be a partner in the fight against identity theft. It has successfully sued entities who fail to safeguard personal information, including those who fail to properly dispose of records. It has also brought enforcement actions against entities that solicit personal information from consumers and then sell that information to third parties.¹⁰

Consumer Protection

To protect consumer information, it is important to minimize the risk of exposure. There are three methods, that should be used in conjunction, to accomplish this:

1. Limit use of personal identifying information
2. Keep needed records secure
3. Dispose of unneeded records

Businesses should apply these three principles in order to prevent data breaches and to limit the exposure of sensitive personal information if a data breach does occur.

Limit Use of Personal Identifying Information

Every time a piece of personal identifying information is transmitted or stored, the risk of identity theft is increased. Limiting the use of personal identifying information to situations

Committee, April 22, 2008.

⁹ Testimony of Barry Dyson, Dallas County DA's Office, and John Brewer, Harris County DA's Office, to the Business & Industry Committee, April 22, 2008.

¹⁰ Testimony of Esther Chavez, Office of the Attorney General, to the Business & Industry Committee, April 22, 2008.

where it is truly necessary will lower the risk of that information falling into the wrong hands.

Social Security Numbers

The Office of the Consumer Credit Commissioner prepared a Social Security Number Study at the request of the legislature which was published in November 2006. American society has become increasingly dependent on Social Security Numbers for identification purposes. The study did not find a feasible alternative to using social security numbers for identification purposes for credit reporting agencies and businesses.¹¹

However, a business should limit exposure of social security numbers. One method for doing so is reverifying an existing customer's identity using other methods, such as a pin, password, or other challenge question.¹²

Keep Needed Records Secure

There are both "high tech" and "low tech" ways to keep records secure. While many companies employ software to prevent hacking, many recent breaches have occurred due to simple employee negligence when a piece of equipment such as a laptop has been lost or stolen.

Data Security & Encryption

Companies store consumer sensitive personal information in the course of business. The major ways in which this data is exposed is by:

- malicious outsiders who gain access illegally (through hacking or impersonating someone with appropriate credentials);
- malicious insiders, who purposely access information they are entitled to see, but use it for an illegitimate purpose; and
- non-malicious insiders, who inadvertently expose data in the course of their duties.¹³

Therefore part of the solution is to secure data against outside threats. The other part entails monitoring employees for illegal activity. More importantly, employees must be educated so that they do not inadvertently create a data breach in the course of their duties. Non-malicious insiders probably account for the majority of the risk.¹⁴

Encryption itself is expensive and costly on resources. It takes longer to access information that is encrypted. One solution to this problem is to encrypt sensitive personal information but not

¹¹ Office of the Consumer Credit Commissioner, Social Security Number Study, November 2006, p. 14.

¹² Office of the Consumer Credit Commissioner, Social Security Number Study, November 2006, pp. 14-15.

¹³ "Protecting Against Electronic Data Breach," Presentation of Neal Hartsell, TippingPoint Technologies, April 22, 2008.

¹⁴ "Protecting Against Electronic Data Breach," Presentation of Neal Hartsell, TippingPoint Technologies, April 22, 2008.

encrypt the entire database.¹⁵ Another solution is to virtually "wall off" the business's network and only encrypt documents when they exit the business's secure environment ("endpoint encryption").¹⁶

Retail & Credit Card Fraud

Identity theft by credit/debit card is the #1 most reported category of fraud in the nation.¹⁷ In the first quarter of 2008, 8.3 million personal records have already been compromised.¹⁸ These data breaches can be quite costly to the card issuers. The average cost to reissue a credit or debit card is \$11. The majority of that cost can fall on the issuer and not the merchant whose database was compromised.¹⁹

However, merchants should not be singled out in identity theft legislation. The Privacy Rights Clearinghouse noted that 4% of reported privacy breaches in 2006 involved retailers, compared to 23% involving educational institutions and 31% involving governmental entities.²⁰ Although some entities see PCI (Payment card industry) standards as the goal for data security, the Texas Association of Retailers objects to the fact that the retailers have no say in those standards.²¹

It is the opinion of the committee that standards to which all parties should adhere should be developed with input from all parties and should not be subject to change at the direction of one party.

Mortgage Fraud

A growing problem is also mortgage fraud. HB 716 created a task force to stop mortgage fraud. The reason mortgage fraud is so prevalent is that often, there is cash back at closing. That cash back can be stolen for illegal purposes, including funding terrorism.²²

Spam Bots

E-mail spam has become a routine part of life for just about everyone with an e-mail account. However, it is more than just an annoyance. It is a cost drain because it takes up a disproportionate share of bandwidth. This cost is ultimately passed on to the consumer. It is also a method for identity thieves to steal personal identifying information.

¹⁵ Testimony of Neal Hartsell, TippingPoint Technologies, April 22, 2008.

¹⁶ "Protecting Against Electronic Data Breach," Presentation of Neal Hartsell, TippingPoint Technologies, April 22, 2008.

¹⁷ Texas Credit Union League, Presentation to the Committee on Business & Industry, April 22, 2008, p. 4.

¹⁸ Texas Credit Union League, Presentation to the Committee on Business & Industry, April 22, 2008.

¹⁹ Texas Credit Union League, Presentation to the Committee on Business & Industry, April 22, 2008.

²⁰ Testimony of Ronnie Volkening before the Business & Industry Committee, April 22, 2008.

²¹ Testimony of Ronnie Volkening before the Business & Industry Committee, April 22, 2008.

²² Testimony of Tom Morgan, Texas Association of Realtors, before the Business & Industry Committee, April 22, 2008.

More than 90% of all e-mail is spam.²³ This spam slows down networks and infects people's computers with viruses. A virus can be downloaded to a personal computer simply by the user reading an e-mail - opening an attachment is not necessary.

A "botnet" is a network of personal computers that are infected with a virus (these computers are called "zombies") such that they can be controlled remotely by a "herder". The herder can cause the zombies to spew out advertising e-mails at very little cost to the herder. Entities will hire these herders to use their botnets to spew out advertising e-mails.²⁴

The fiscal implications of this are enormous - the internet service providers are forced to provide more and more bandwidth to their customers to keep up with the illegitimate uses of their customers' machines.

However, the identity theft implications are even graver. There are obvious dangers in the ability of a remote computer to control or monitor a consumer's personal computer. Consumers have personal information stored on their machines and often enter personal or financial information when entering into internet transactions, such as purchasing merchandise or managing bank accounts online.

A possible solution to this issue is to give the internet service providers the tools and economic incentive they need to protect their customers. Internet service providers fear that educating their users about spambots will make the customers believe that using the internet service is unsafe and cancel their subscriptions. However, currently, all action taken against spam bots must be with the knowledge and consent of the individual owners of the computers where the virus resides.

Employing more aggressive countermeasures comes with a risk of lawsuit or prosecution. These countermeasures would include (1) cutting off service to infected users without permission, despite contractual obligations to serve; or (2) remotely entering computers, again without permission, to eradicate the botnet, which would be illegal under both state and federal law. If the legislature wants the internet service providers to use these methods, the legislature must create a safe harbor immunity from lawsuit or prosecution.

Dispose of Unneeded Records

Current law addresses the manner in which records must be destroyed to prevent identity theft. However, the law does not require businesses to destroy records containing personal identifying information that are no longer needed. If a security breach occurs, the exposure would be limited if unneeded records were no longer kept or disposed of and appropriately.

Records Retention and Destruction: The State Agency Model

Currently, each state agency is required to develop and implement a records retention schedule

²³ Darren Waters, "Spam blights e-mail 15 years on," at <http://news.bbc.co.uk/1/hi/technology/7322615.stm>

²⁴ Testimony of Professor Ronald Chichester before the Business & Industry Committee, April 22, 2008.

that is approved by the director and librarian of the Texas State Library and Archives Commission.²⁵ The schedule may not keep records for a shorter period of time than a minimum indicated in state law. A record also may not be destroyed if there is any litigation, claim or other action pending to which the record is relevant. There is no maximum time that records may be kept, however. The key is to create a schedule that allows records to be destroyed when they have outlived their useful purpose.

Under the model of periodic destruction, state agencies are encouraged to dispose of records that are unneeded, and do not fear ramifications for doing so. As the nation has seen with the Enron case, disposing of records can be seen as suspicious if there is no regimented schedule in place for periodic destruction. Businesses, witnessing the Enron case, are fearful of destroying records.

It is in the public interest for businesses to minimize data exposure if possible by destroying unneeded records. Therefore it is the opinion of the committee that each private business should also be required to develop and implement a records retention schedule which, like the state schedules, keeps the records for at least the minimum time required by state or federal law. If a business adheres to the stated schedule, the business would be held harmless for destroying a record that was later needed. However, there would also be penalties for failure to adhere to the schedule.

Government & Public Records

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.²⁶

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.²⁷

Sensitive Personal Information of State Employees

In 2004, *The Dallas Morning News* requested a variety of information about the Comptroller of Public Accounts' employees, including date of birth. The Comptroller refused stating that birthdates could be used in identity theft (and offered to provide the age of all employees

²⁵ Government Code, Section 441.185.

²⁶ United States Government Accountability Office, *Report to Congressional Committees: Personal Information, Agency and Reseller Adherence to Key Privacy Principles*, April 2006, p.8.

²⁷ United States Government Accountability Office, *Report to Congressional Committees: Personal Information, Agency and Reseller Adherence to Key Privacy Principles*, April 2006, p.7.

instead).

An Attorney General Open Records Letter Ruling advised that a birthdates combined with other data can be used for identity theft and to obtain confidential information about that person.²⁸ Indeed it is a growing trend for other states to protect public employees' dates of birth, and the majority of states currently do so.²⁹

The court ruled that *The Dallas Morning News* was entitled to this information by law, and that birthdates of state employees are not specifically protected by any current law. A petition for review was submitted to the Texas Supreme Court in March 2008, and as of September 2008, no response has been received from the court and the Comptroller has not disclosed the dates of birth.

Texas law does provide partial protection regarding birthdates disclosure:

- DOBs held by Tex. Dept. of Health's bureau of vital statistics are confidential for 75 years (with certain exceptions). Tex. Gov't Code § 552.115.
- DOBs of a person licensed to practice law in Texas held by the State Bar is confidential if

²⁸ Attorney General Open Records Letter Ruling OR2006-01938, February 29, 2006.

²⁹ Attorney General Open Records Letter Ruling OR2006-01938, February 29, 2006, p. 3.

Courts have held that dates of birth are private and their disclosure is a clear invasion of personal privacy. See *Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y.1991) (applying balancing test under exemption 6 of the federal Freedom of Information Act, 5 U.S.C. § 552); *Scottsdale Unified School Dist. v. KPNX*, 955 P.2d 534 (Ariz.1998) (applying balancing test under state law); *Data Tree, LLC v. Meek*, 109 P.3d 1226 (Kan. 2005) (same); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994) (same). In a request similar to this one, the Delaware Attorney General found that the public release of the dates of birth of all state employees would constitute an invasion of personal privacy under that state's personnel file exception. See Del. Atty. Gen. Op. No. 94-1019 (1994). In addition to these judicial and attorney general decisions, the trend in many other states is to protect government employee date of birth information. In conducting a survey of other states' laws and practices concerning the required public disclosure of date of birth information, this office has learned that a majority of the fifty states protect date of birth information in government employee personnel files. See *State Practices for Classification of Date of Birth in Public Records* (on file with Open Records Division of the Office of the Attorney General). According to the survey, states with an "unwarranted invasion of personal privacy" exemption in their open records law protect date of birth information. See Haw. Rev. Stat. § 92F-13(1); Ill. Comp. Stat. 140/7 (1)(b); Kan. Stat. Ann. § 45-221(30); Ky. Rev. Stat. § 61.878(1)(a); Mass Gen. Laws Ann. ch. 66, §10; Mich. Comp. Laws Ann. § 15.243; N.H. Rev. Stat. Ann. § 91-A:5; N.J. Stat. Ann. § 47:1A-10; N.Y. Pub. Off. § 89(2)(b)(iv); Utah Code Ann. § 63-2-302(2)(d). One state grants date of birth protection under a similar standard, "unreasonable invasion of personal privacy." See S.C. Code Ann. § 30-4-40(a)(2). Several states protect date of birth information under an exception for employee "personnel" records. See Ariz. Admin. Code R2-5-105; Del. Code Ann. tit. 29 § 10002; Kan. Stat. Ann. § 45-221(4); Iowa Code § 22.7; Md. Code Ann., State Gov't § 10-616(h)(2)(I); Miss. Code Ann. § 25-1-100; N.D. Cent. Code §44-04-18.1; Or. Rev. Stat. § 192.502(3); R.I. Gen. Laws § 38-2-2; Va. Code Ann. § 2.2-3705.1(1); Wyo. Stat. Ann. § 16-4-203. The state of Georgia protects employee date of birth information under a statute that specifically makes confidential date of birth information "if technically feasible at a reasonable cost." See Ga. Code Ann. § 50-18-72 11.3 (A). Several states protect date of birth information by unofficial policy. Finally, the state of Washington protects date of birth information under a state plan to curtail identity theft.

the attorney elects to withhold the information (with certain exceptions). Note that this provision applies only to State Bar records; it does not extend to other agencies. Tex. Gov't Code § 552.1176.

- DOBs are "personally identifying information" which, when combined with an individual's first name or initial and last name, must generally be destroyed within three years of the date the record was created. See the statute for the requirements relating to the retention and destruction of records. Note that this appears to apply to non-governmental business entities. Tex. Bus. & Com. Code § 35.48. *See also* references to DOBs in Tex. Bus. & Com. Code §§ 32.51, 521.002.
- DOBs may be released in certain circumstances to certain requestors. Tex. Transp. Code § 730.007(b)(2).

Publicly Available Records

A concern about publicly available records is that they can be used for identity theft if personal identifying information is used. There have been laws passed recently that it is not required to put a social security number on many documents. However, sometimes people add the social security number anyway. And older documents would still have the social security number or other personal identifying information on them.

Going Back: Records Redaction

It is possible, but expensive, to redact publicly available records. The Secretary of State is in the process of a social security number redaction project for its filings available on the internet. Although the Secretary of State has never required social security numbers, some were in the filings voluntarily or from old forms promulgated by the Comptroller (prior to 2004). The Secretary of State has been redacting Social Security Numbers from its publicly available documents since 2005 when the legislature allowed governmental bodies to redact social security numbers from public records.³⁰

The cost of records redaction rises with accuracy. The most accurate way to locate information that requires redaction is by using "double manual redaction." Two different people view the document and flag any personal information (no computers are involved). With this method 99.95% accuracy rate can be guaranteed. However, this method is expensive. Another very accurate method involves scanning the documents first with an electronic eye, and then having employees view the documents that an electronic eye has flagged. This method is very accurate with images of good quality and is less useful for older records with poor quality images.³¹

The Secretary of State employs an electric eye that scans for 9 digit numbers, and a staff member reviews those documents flagged by the electric eye. The electric eye could potentially flag 9 digit numbers that are not social security numbers, so human oversight is important for

³⁰ Secretary of State, Memorandum to the House Committee on Business & Industry RE: Social Security Redaction Project, April 21, 2008, pp. 1-2.

³¹ Testimony of Dan Carlson, AmCad and Jake Hanson, Mobilis Technologies, before the Committee on Business & Industry, April 22, 2008.

addressing that problem. All documents are scanned and redacted as necessary before being posted online. If a document that is not online is requested, it is scanned before being placed online. If a document online is found to contain personal identifying information, the document can be brought down and redacted in a matter of minutes.³²

Going forward: Sensitive Information Sheets & Continued Scanning

Going forward, it would be possible to use a separate sheet for sensitive personal information when filing a document. That way, the information would be available to the appropriate personnel if needed, but would not be provided to the public when there is an open records request.³³

Currently the Secretary of State scans incoming paper filings to make sure that these filings do not contain social security numbers. Electronic filings do not currently have a field for social security number.³⁴ Sensitive information sheets are not necessary since social security numbers and other personal information is not required in filings.

Bulk data concerns

Information resellers also present a problem to our state resources when records are not available on the internet. County and District clerks are required to fulfill requests for bulk data at a statutorily prescribed cost. Fulfilling these requests takes enormous staff resources and the statutory fees are inadequate to cover the costs of staff time on these matters. Bulk data can be used legally, and requesting bulk data should not be banned. One solution to this issue is to prohibit those who legally receive bulk data from selling it, mining it, or reselling it.³⁵ It is important that the legal uses of this data are allowed to continue to facilitate real estate transactions.

Education and Victim Services

Many resources, public and private, are available to assist victims of identity theft. The attorney general's office launched the website www.texasfightsidtheft.gov in April, 2008. This website gives victims a step-by-step process to follow, complete with forms, when they discover identity theft. It also contains resources to help consumers prevent identity theft.³⁶

³² Testimony of Jay Dyer, General Counsel for Secretary of State, before the Committee on Business & Industry, April 22, 2008.

³³ Testimony of the District and County Clerks Association before the Committee on Business & Industry, April 22, 2008.

³⁴ Secretary of State, Memorandum to the House Committee on Business & Industry RE: Social Security Redaction Project, April 21, 2008, p.2.

³⁵ Testimony of the District and County Clerks Association before the Committee on Business & Industry, April 22, 2008.

³⁶ Testimony of Esther Chavez, Office of the Attorney General, before the Business & Industry Committee, April 22, 2008.

The Victims Initiative for Counseling, Advocacy, and Restoration of the Southwest (VICARS) is a program of the Texas Legal Services Center, supported by a grant awarded by the United States Department of Justice. Its website www.idvictim.org provides self-help publications to assist victims in resolving identity theft matters. However, if that is not sufficient for complicated cases, VICARS also offers free legal assistance and representation. This is particularly crucial for victims who are entangled in lawsuits for debts they did not incur and require defense counsel. Counsel can also assist with expunging criminal records in the case where the identity thief gives the police the victim's name upon an arrest. The program was opened January 2, 2008, and as of the April 22, 2008 hearing, VICARS has given direct legal assistance to 167 people, 90% of whom were Texans.³⁷

Closed Account Notification System

Responding to a recommendation this committee gave to the 80th Legislature, House Bill 2002, required a system to be developed that would allow the financial institutions to electronically submit information to a check verification entity that an account has been closed due to identity theft. The check verification entity, in turn, was required to update its database to reflect the account closure, and to cease recommending acceptance of checks drawn on the compromised account. In this way, identity thieves are quickly stopped from using a compromised account, and millions of dollars are saved.

The Closed Account Notification System was the technical solution that was developed by the Texas Department of Banking in consultation with system stakeholders. This secure electronic notification system was launched March 1, 2008. As of October 2, 2008, there are six check verification entities and 891 financial institutions registered with the Department of Banking. Those 891 financial institutions have made over 1,276 notifications through the system.³⁸

The committee is optimistic about this new system and will continue to monitor its operations.

Recommendations

1. Eliminate "novelty" identification cards of any kind.
2. Exempt public employees' dates of birth from open records law.
3. Require private businesses that store personal information to develop and adhere to a records retention schedule.
4. Sensitive/Confidential Data form should be used when filing records which are to be publicly available.
5. Remote internet access to public records shall be limited to an index indicating the location of the record. This allows the SSN etc to be scrubbed when the document is

³⁷ Testimony of Paula Pierce, VICARS, before the Business & Industry Committee, April 22, 2008.

³⁸ Via phone call to Texas Department of Banking.

requested, thereby saving the effort of scrubbing every document in the database.

6. Give Internet Service Providers monetary incentives for pursuing botnets and for educating their users about this issue.

INTERIM CHARGE 2: Study Articles 2 and 2A of the Uniform Commercial Code (UCC) and consider amending Chapters 2 and 2A of the Business and Commerce Code to conform with recent amendments to the UCC.

Background

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) developed the Uniform Commercial Code as a model for states to adopt. The model facilitates commercial transactions by having standardized laws across the nation. All 50 states, the District of Columbia, the United States Virgin Islands and Puerto Rico have enacted the UCC. Since there are certain Texas-specific amendments to the UCC incorporated into the Business & Commerce Code, Texas's version is not strictly "uniform."

Article 2 of the UCC governs sales and was promulgated in 1951. Texas adopted Article 2 of the UCC in 1967. Article 2 provides the fundamental rules of contract for the sale of goods. The rules of Article 2, with few exceptions, are the default rules that may be waived or modified by agreement.³⁹

Article 2A of the UCC governs leases of goods. It was added to the UCC in 1987 and amended in 1990. It was adopted by Texas in 1993.⁴⁰

Proposed Changes

The revision proposed by the State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee incorporates some, but not all, of the changes in the official draft supported by NCCUSL and ALI. NCCUSL and ALI finished work on the revised Articles 2 and 2A in 2003, but in the last 4 years no state has enacted them. The proposed changes to Article 2A strive to conform to the proposed Article 2.⁴¹

Summary of Proposed Changes

Form, Formation, Terms and Readjustment of Contract

Section 2.207, often referred to as the "battle of the forms" has produced years of litigation. This rule governs the terms of an agreement when the parties exchange forms with conflicting terms

³⁹ 2003 Amendments, Uniform Commercial Code Article 2 - Sales, A Summary, NCCUSL.

⁴⁰ 2003 Amendments, Uniform Commercial Code Article 2A - Leases, A Summary, NCCUSL.

⁴¹ Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 5.

but, nonetheless, go ahead with the sale. The proposed amendment attempts to prevent chicanery in terms in the fine print. To accomplish this, the amendment provides that the contract contains terms that appear in the documents of both parties (where the forms match) and terms to which both parties have actually agreed.

Statute of frauds requirements limit when an oral contract may be enforced. Previously the threshold amount that required a written contract to be enforceable was \$500. The revisions raise this amount to \$5,000.⁴²

General Obligation and Construction of Contract

A new category of sales contracts, consumer contracts, are created by the amendments and provide certain protections for consumers that enter into such contracts. Sellers in consumer contracts that disclaim warranties of quality must do so in clear and conspicuous language.

The new amendments also enhance the warranty protections. For example, the seller would have an obligation to the remote purchaser based on any documentation that the buyer included with the product⁴³ to remote purchasers.⁴⁴

Amendments have been proposed for disclaimers in terms of simplification and required language. The amendments recognize the difference between a warranty (assurance about the quality or performance of goods) and a remedial promise (a promise to repair or refund).⁴⁵

Performance

The proposed amendments clarify buyers' rights to recover goods under circumstances such as the seller's insolvency and risk of loss. This change should reduce litigation by providing a remedy. The seller has also been given a limited right to cure after a buyer's revocation of acceptance.⁴⁶

⁴² 2003 Amendments, Uniform Commercial Code Article 2 - Sales, A Summary, NCCUSL; Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 2.

⁴³ 2003 Amendments, Uniform Commercial Code Article 2 - Sales, A Summary, NCCUSL; Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 3.

⁴⁴ Remote purchasers are consumers who buy the good from the immediate buyer of the good or another person in the normal chain of distribution

⁴⁵ Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 2.

⁴⁶ Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code

Breach & Remedies

Changes have been proposed that will simplify the provisions relating to the rights of one party when the other party breaches the contract. They simplify the requirements for a buyer to revoke acceptance of goods or to recover damages for nonconforming goods.⁴⁷

Amendments have been proposed for the provisions regarding remedies, including measuring damages. First, a seller is allowed recovery of consequential damages. Second, there are new rules for measuring damages in repudiation cases. Third, the use of liquidated damages in non-consumer contracts is expanded.⁴⁸

The amendments expand the statute of limitations slightly to accommodate a later discovery of the breach of contract.⁴⁹

Conflicts with Other Applicable Law

The revisions specify that a transaction under Article 2 is also subject to an applicable certificate of title statute (i.e. the motor vehicle Certificate of Title Act). But the revisions will not have so much reach as affecting the rights of a buyer in the ordinary course of business arising before registration of title in the name of another buyer. The revisions recognizes other laws pertaining to consumer transactions, and when there is a conflict between Article 2 and a recognized rule, the other law prevails.⁵⁰

National Changes Not Included

- The proposed changes do not include the definition of "information" as a good governed by UCC Article 2. The appropriate treatment of software embedded in goods will be left

Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 2; Written Testimony of Randy Burton, May 15, 2008, pp. 2-3.

⁴⁷ Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 4.

⁴⁸ Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 4; Written Testimony of Randy Burton, May 15, 2008, p. 3.

⁴⁹ Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 4.

⁵⁰ 2003 Amendments, Uniform Commercial Code Article 2 - Sales, A Summary, NCCUSL; Executive Summary of Proposed Legislation Prepared by State Bar of Texas business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008, p. 2.

to the courts.

- The proposal does not statutorily extend to remote purchasers warranty rights as a result of a seller's advertising.
- Electronic contracting provisions are not included due to existing Texas and Federal law applicable to this issue.
- The proposed amendments do not expand the use of liquidated damages terms.

Texas Additions

- Warranty information shipped with the item "in the box" may be enforced by a remote purchaser.
- Contains simplified terms for disclaimer of implied warranties in consumer sales.
- Includes a seller's obligation to mitigate damages after a buyer's breach.
- A seller's recovery of damages is measured by the results of an actual sale of goods rather than theoretical "market" damages.

Opinion

Proponents of Changes

Proponents of making changes to the UCC articles 2 and 2A argue that the ambiguities in the existing 40 year old Code have created litigation and uncertainty. They believe that amending the code to clarify the ambiguities will reduce the amount of litigation and strengthen the confidence of buyers and sellers as well as businesses and consumers in the enforceability of their contracts.⁵¹

Some of these amendments reflect judicial opinions that have interpreted a particular provision, and others are designed to bring Chapter 2 in line with current related statutory law. The proponents believe that these changes are not likely to cause a significant change in the substantive law.⁵²

The proponents acknowledge that there will be costs in shifting over to a new set of laws. However, in the long run, these changes will cut down on costly litigation.⁵³

Opponents of Changes

The primary concern of opponents is the lack of uniformity between states. To this point, no other state has adopted the revisions to the UCC. If Texas adopts changes, Texas businesses

⁵¹ Written Testimony of Randy Burton, May 15, 2008, p. 2.

⁵² Executive Summary of Proposed Legislation Prepared by State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Before the Texas House of Representatives, Committee on Business and Industry, Interim Hearing on Proposed Amendments to the Texas Business and Commerce Code Chapters 2 (Sales) and 2A (Leases), May 15, 2008.

⁵³ State Bar of Texas Business Law Section, Uniform Commercial Code Committee, Article 2 Subcommittee, Amendments to Articles 2 and 2A of the Uniform Commercial Code, Criticisms and Responses, May 15, 2008.

would have transition costs to adapt to the new law, and national businesses would face the costs of compliance under two versions of the law.

Furthermore, the Texas version proposed differs from the national version. Therefore, even if the national version is adopted by the other states, Texas will be operating under a different set of laws than the other states, resulting in increased costs for businesses. Some opponents of the changes to the UCC 2 and 2A acknowledge that the proposed Texas amendments alleviate some of the concerns that were brought up by the national version, but the risk of non-uniformity is still an overwhelming concern.⁵⁴

Another complication may be increased litigation. Although the proposed amendments are intended to decrease litigation by clarifying the law, new laws may bring unforeseen and unintended ambiguities - whereas the current version of the UCC, while the language may be confusing, has a body of case law over the last 40 years.⁵⁵

Recommendations

1. While the current code is outdated and some of the language is confusing, the costs of non-uniformity are too high for Texas. The committee recommends waiting to see if a consensus can be reached by the states before adopting amendments to the UCC articles 2 and 2A.

⁵⁴ Testimony on Behalf of AFFECT (Americans for Fair Electronic Commerce Transactions), Before the Texas House of Representatives Committee on Business and Industry, May 15, 2008; Letter to Mr. J. Scott Sheehan from the National Association of Manufacturers, National Electrical Manufacturers Association, and Marine Retailers Association of America, January 25, 2007 p. 2.

⁵⁵ Testimony of Charles Keeton, General Electric, May 15, 2008; Letter to Mr. J. Scott Sheehan from the National Association of Manufacturers, National Electrical Manufacturers Association, and Marine Retailers Association of America, January 25, 2007 p. 1.

INTERIM CHARGE 3: Study the original purposes, development, and current need for the Subsequent Injury Fund and determine whether this fund should be continued or altered

Background

The Subsequent Injury Fund (SIF), formerly known as the "Second Injury Fund," was created in 1947 to facilitate the employment of handicapped persons, including disabled veterans. The Legislature directed that if an employee who had previously lost an eye, leg, or hand were to lose a second eye, leg, or hand in a work-related incident, the insurance carrier would only be liable for compensation payable for the second injury. The SIF would be liable for the remainder of any total and permanent disability award.⁵⁶

Currently the SIF reimburses carriers for the following:

- overpayment of benefits to employees in certain circumstances
- increased income benefit costs due to an employee's multiple employment
- pharmaceutical costs ultimately determined to be non-compensible
- funds paid to an eligible beneficiary after having already paid to the SIF

The SIF is funded by death benefits that are collected from insurance carriers when there are no eligible beneficiaries.

Changes in the 80th Session

The most notable change to the SIF is that parents can now receive death benefits. Previously, parents could not receive death benefits and therefore that money went directly to the SIF. Because the SIF is no longer receiving death benefits for deceased workers with living parents but no other beneficiaries, the SIF will likely lose money. It is unclear at this time whether the loss of revenue will be significant.

New rules were recently issued from the Texas Department of Insurance, Division of Workers' Compensation regarding death benefits. The rules provides that an eligible parent's failure to file a claim for death benefits within the one year timeframe will not bar the claim in cases where the eligible parent submits proof meeting the requirements of a *compelling reason* standard as delineated by the Commissioner of Worker's Compensation.⁵⁷

In addition, the adopted amendments to Workers' Compensation Rules incorporate "eligible parents" into Chapter 132 (relating to Death Benefits -- Death and Burial Benefits). These

⁵⁶ Written Testimony of the Texas Department of Insurance, May 15, 2008.

⁵⁷ As summarized by the Texas Department of Insurance, Division of Worker's Compensation, Death Benefits - Summary, September 3, 2008, email.

amendments also outline other requirements that apply exclusively to an "eligible parent."⁵⁸

SB 1169 also allowed reimbursement of the carrier when the overpayment of benefits was caused by a designated doctor opinion and provided for reimbursement to insurance carriers for death benefits where an employee's multiple employment causes an increase in income and death benefits.

Fiscal Status

The charts below show that the SIF has a surplus at the end of each fiscal year that currently rolls over to the next fiscal year. It is too soon to tell whether there will be a surplus or a deficit due to the changes in the 80th Legislative Session.

Subsequent Injury Fund No. 5101				
Presentation to House Committee on Business and Industry on May 15, 2008				
Fund Balance and Revenue				
Fiscal Year	Expended 2006 ¹	Expended 2007 ¹	Budgeted 2008 ¹	Estimated 2009 ²
Beginning Balance	\$46,725,624	\$50,041,216	\$54,369,343	\$56,699,203
Revenue	\$5,942,361	\$6,877,356	\$6,000,000	\$4,725,000
Expenditures	(\$2,626,769)	(\$2,549,229)	(\$3,670,140)	(\$3,670,140)
Ending Balance	\$50,041,216	\$54,369,343	\$56,699,203	\$57,754,063
Appropriations and Expenditures				
Fiscal Year	Expended 2006 ^{1,3}	Expended 2007 ^{1,3}	Budgeted 2008 ^{1,4}	Estimated 2009 ^{2,4}
Appropriations	\$3,670,140	\$3,670,140	\$3,670,140	\$3,670,140
Expenditures	(\$2,626,769)	(\$2,549,229)	(\$3,670,140)	(\$3,670,140)
Lapse	\$1,043,371	\$1,120,911	\$0	\$0
Sources:				
1. Texas Department of Insurance 2008 Operating Budget				
2. Texas Department of Insurance 2008-09 Legislative Appropriations Request				
3. Seventy-ninth Legislature, General Appropriations Act, 2006-07 Biennium				
4. Eightieth Legislature, General Appropriations Act, 2008-09 Biennium				

Figure 1: Legislative Budget Board Calculations for the Subsequent Injury Fund

It appears that revenue consistently exceeds expenditures and that the fund continues to grow. The committee will continue to monitor the fund and see what effects the changes in the 80th legislature have caused.

⁵⁸ As summarized by the Texas Department of Insurance, Division of Workers' Compensation, Death Benefits - Summary, September 3, 2008, email.

Continuation of the SIF

Some critics of the SIF argue that the fund is outdated due to the Americans with Disabilities Act. Previously, an employer could deny employment to someone who had lost an eye out of fear that the worker would lose the other eye and become permanently disabled. The SIF was needed to remove any disincentive to hire someone who was disabled. Now, the Americans with Disabilities Act makes it illegal to discriminate against a disabled person - and therefore, some argue, the SIF is no longer necessary as a safeguard against such discrimination.

However, employment discrimination is hard to prove. In a right-to-work state such as Texas, an employee can be not-hired or terminated for no reason at all. It is more protective of disabled employees for the SIF to remove the disincentives to hiring them rather than to leave those employees to sue after a discriminatory employment decision.

Equally important are the other functions of the SIF. The SIF reimburses carriers for certain benefits that were erroneously paid to the injured employee. Without that reimbursement, the carrier would be less likely to pay benefits up front (even if the carrier were ordered to pay those benefits) because if the employee turned out to not be entitled to the benefits, the carrier would not be compensated. Also, without the SIF, the carrier may demand reimbursement for erroneous payments from the employee. An injured employee is not in a position to return money that was erroneously paid.

Recommendations

1. Keep the SIF intact.
2. Continue to monitor to see if a deficit occurs.
3. Refrain from authorizing new types of expenditures from the SIF in the 2009 session.

INTERIM CHARGE 4: Study the problem of digital piracy and make recommendations for legislative changes to address the problem facing movie producers and distributors, retailers, book publishers, the music industry, universities, and other copyright holders of creative content. This review should include an examination of the impact on state and local government sales tax revenues.

Background

Digital piracy is the illegal reproduction of a copyrighted work. This illegal copying robs the artists of the money they deserve for their work, as well as reducing jobs and profits from the relevant industries.

Ever since technology existed to make a copy, and even before, there have been pirated works. However, as we become more technologically advanced, there has been an increase in piracy activity.

Due to technological advances in DVD and CD burners, scanners, and printers, a physical copy of a work can now look and sound just as good as the original. Therefore, the incentive to buy legitimately is diminished because the copy is no longer an inferior product.

The internet also has increased piracy activity due to availability of pirated works. No longer does the consumer need to seek out pirated works at a flea market, street corners, or other establishments. Also, the internet gives the consumer a sense of anonymity and protection. A consumer may be afraid to openly buy a physical copy of a pirated work but feels safe downloading that same pirated copy.

Types of Piracy

In general, piracy takes two forms. The first is physical piracy, in which a physical copy of the work (such as a CD or DVD) is made. The second is download piracy, in which the copyrighted work is downloaded to a person's computer via the internet.

In general, most media are vulnerable to piracy. The most well-known examples of piracy are music piracy and motion picture piracy. However, there are other less-publicized media that are pirated. The video gaming industry is particularly vulnerable to piracy, because a game makes 80% of its revenue in the first 6-8 weeks after release.⁵⁹ Many legitimate companies unintentionally commit software piracy when they run more copies of the software than they

⁵⁹ Testimony of Chun Wright, ESA, May 15, 2008.

have licensed.⁶⁰ A concern is that state agencies also engage in such activity, but cannot be sued due to sovereign immunity.⁶¹ Software piracy is prevalent on online auction sites, where 90% of the software is pirated. This pirated software may not work, and diminishes consumer confidence in the legitimate product.⁶² There is also the issue of content piracy, where a company will circulate copies of a newspaper, magazine, or newsletter articles.⁶³

Economic Impact

Intellectual property (IP) industries contribute 40% of the growth achieved by all United States private industry and nearly 60% of the growth of United States exportable high-value-add products and services.⁶⁴ IP industries are among the largest employers in the country, with nearly 18 million workers.⁶⁵

It is difficult to quantify losses precisely. A person who illegally downloads a song or movie may not be willing to pay legitimate prices for a legal copy. Therefore the monetary amount that is lost person who does not purchase a legal copy, cannot be counted as lost revenue.⁶⁶

Direct revenue losses refer to the producers of creative content, such as movie studios and record labels. These are the losses that are suffered when a media item is illegally copied rather than legitimately sold.⁶⁷

Indirect revenue losses refer to losses outside the industry. Our economy intertwines, such that there will be revenues lost both "upstream" (those who supply the industry) and "downstream" (those who buy from the industry).⁶⁸ Changes in supply and demand in one industry affect supply and demand in other industries.⁶⁹

Using the motion picture industry as an example, if there is a higher demand for legitimate copies, the movie industry will produce more or higher-quality pictures to meet demand. Those

⁶⁰ Prepared Statement of Mark Bohannon, Software & Information Industry Association, May 15, 2008, pp. 3-4.

⁶¹ Prepared Statement of Mark Bohannon, Software & Information Industry Association, May 15, 2008, pp. 7-8.

⁶² Software & Information Industry Association, SIIA Anti-Piracy 2007 Year In Review

⁶³ Prepared Statement of Mark Bohannon, Software & Information Industry Association, May 15, 2008, p. 2.

⁶⁴ Stephen E. Siwek, *Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries*, Economists Incorporated, 2005, p. 1.

⁶⁵ Stephen E. Siwek, *Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries*, Economists Incorporated, 2005, p. 3.

⁶⁶ Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Institute for Policy Innovation, August 2007, p. 5. This study estimates that 65% of those who buy physical pirated copies of music would pay legitimate prices for legal copies, while 20% of those who download music illegally would pay for legal downloads.

⁶⁷ Stephen E. Siwek, *The True Cost of Motion Picture Piracy to the U.S. Economy*, Institute for Policy Innovation, September 2006, p. 2.

⁶⁸ Stephen E. Siwek, *The True Cost of Motion Picture Piracy to the U.S. Economy*, Institute for Policy Innovation, September 2006, pp. 3-4.

⁶⁹ Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Institute for Policy Innovation, August 2007, p. 2.

who supply the industry will benefit - these include advertising agencies that market the films. On the other side, video retailers will be able to sell and rent more titles. The effect can even trickle down to corn growers, because if more people go to the movies, more popcorn will be sold.⁷⁰

There will also be tax revenue losses. These losses come from sales taxes on the products not being sold and from potential income tax on the jobs that would have been available were it not for piracy.

The final cost factor is that of internet resources. Download piracy consumes a lot of bandwidth. Most consumers pay for unlimited bandwidth, which means their base cost is increased to absorb excessive bandwidth used by pirating activities.

It is estimated that due to *sound recording piracy*, the United States economy loses \$12.5 billion in total output annually. The U.S. economy loses 71,060 jobs, of which 26,860 would have been added to the recording industry or retail industries and 44,200 would have been added in other industries. This translates to a loss of \$2.7 billion in earnings annually. A minimum of \$422 million of tax revenues are lost annually.⁷¹

It is estimated that due to *motion picture piracy*, the United States economy loses \$20.5 billion in total output annually. 141,030 jobs would have been created but for motion picture piracy, 46,597 in the motion picture industry and 94,433 in other industries. This results in a loss of \$5.5 billion annually in lost earnings. Motion picture piracy costs governments \$837 million in lost tax revenue.⁷²

The *software industry* loses about \$11-12 billion in revenue to software piracy annually.⁷³

The *entertainment software industry* (i.e. video games) lost an estimated \$3.5 billion to piracy in 2007, not including losses attributable to Internet piracy.⁷⁴ The entertainment software industry contributes greatly to Texas's economy. "Texas has the nation's third largest concentration of computer and video game personnel, with 7,688 direct and indirect employees. In 2006, the industry grew at a 17 percent rate, adding \$395 million to the state economy."⁷⁵

⁷⁰ Stephen E. Siwek, The True Cost of Motion Picture Piracy to the U.S. Economy, Institute for Policy Innovation, September 2006, p. 3.

⁷¹ Stephen E. Siwek, The True Cost of Sound Recording Piracy to the U.S. Economy, Institute for Policy Innovation, August 2007, p. i.

⁷² Stephen E. Siwek, The True Cost of Motion Picture Piracy to the U.S. Economy, Institute for Policy Innovation, September 2006, p. i.

⁷³ Prepared Statement of Mark Bohannon, Software & Information Industry Association, May 15, 2008, pp. 7-8; Testimony of James E. Rogan, Under Secretary of Commerce for Intellectual Property, Director of the U.S. Patent and Trademark Office, before the United States Senate Committee on the Judiciary, February 27, 2002.

⁷⁴ Testimony of Chun Wright, ESA, May 15, 2008.

⁷⁵ Video Games & The Economy, ESA Website, <http://www.theesa.com/gamesindailylife/economy.asp>; Stephen E. Siwek, Video Games in the 21st Century: Economic Contributions of the US Entertainment Software Industry, 2007.

The piracy losses sustained by the four major United States Copyright industries listed above was approximately \$58.0 billion in total output in 2005.⁷⁶ In 2005 the U.S. economy lost approximately 373,375 jobs in total as a result of copyright piracy, which translates to \$16.3 billion in lost earnings.⁷⁷ Governments lose a minimum of \$2.6 billion in tax revenues annually.⁷⁸

Potential Solutions

Education

Children are starting to use the internet at a young age. They develop internet habits before they reach college. That is why it is so important that these children be educated about digital piracy in grade school.

HB 3171 required TEA to develop and make available to school districts a list of resources concerning Internet safety, including digital piracy issues. Industries affected by piracy have also created resources to educate young people about digital piracy. The Entertainment Software Association (ESA) is an association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for various uses. ESA has developed "join the © team" materials which provides a sample curriculum for schools.⁷⁹

However, HB 3171 does not mandate that a curriculum be developed around these resources. While these resources are a good start, it is the opinion of the committee that simply making resources available without the corresponding required lesson plan is inadequate to combat this fast-growing problem of digital piracy.

Lessons learned at the grade school level should be reinforced by education at the middle school, high school, and college levels by required courses.

Technology

It is possible to use technology to prevent illegal downloading on the internet and to prevent hardware devices from being used to make physical copies.

However, the Common Solutions Group⁸⁰ found that technology cannot stop all (or even most) unauthorized sharing of copyrighted material without interfering with the efficiency of the

⁷⁶ Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Institute for Policy Innovation, October 2007, p. 11.

⁷⁷ Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Institute for Policy Innovation, October 2007, pp. 11-12.

⁷⁸ Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Institute for Policy Innovation, October 2007, p. 12.

⁷⁹ www.jointheteam.com

⁸⁰ CSG is limited by charter to 30 members, at least 25 of which must be research universities. University of Texas at Austin is one of the current members.

networks essential to research and teaching in higher education, and can suppress legitimate traffic along with infringing traffic.⁸¹ Software cannot distinguish between illicit copying and such copying for legal "fair use" purposes.⁸² It is also expensive to install such software, which would drive up the cost of internet use for consumers - and, if implemented on a college campus, drive up the cost of tuition.⁸³

A filter can also raise a security risk because it depends on seeing all traffic flowing over a network. An attacker could use the filtering infrastructure to monitor all the network traffic that goes through the filter - and as such could use that access for identity theft or financial theft.⁸⁴

A final issue is that of the "arms race." If a program is created to block content, there will always be a hacker who will succeed in finding a way around it. Encryption, for example, can easily confuse a filter because encrypting information makes it impossible to distinguish infringing activity from legitimate activity.⁸⁵ Encouraging hackers by creating such an obstacle creates dangerous code that could be used for worse purposes than circumventing piracy prevention software.⁸⁶

If technology is to be implemented, it needs to be implemented across the board. Otherwise, would-be pirates can merely seek out a different provider that does not have blocking technology.

College Campuses

It used to be that college campuses had superior access to the internet compared to the general population. However, this is no longer the case. Most residences off-campus have access to broadband through cable or DSL - the fast connection necessary for download piracy is available to everyone.

At UT Austin, approximately 85% of students live off-campus. Students who live on some campuses must pay according to how much bandwidth they use, making them *less* likely to

⁸¹ Infringement-Suppression Technologies: Summary Observations from a Common Solutions Group Workshop, January 9, 2008; Letter by Professors Eugene H. Spafford & Edward Felten, Association for Computing Machinery, to the United States Senate Committee on Health Education Labor & Pensions and the United States House Committee on Education and Labor, April 14, 2008.

⁸² Letter by Professors Eugene H. Spafford & Edward Felten, Association for Computing Machinery, to the United States Senate Committee on Health Education Labor & Pensions and the United States House Committee on Education and Labor, April 14, 2008.

⁸³ Letter by Professors Eugene H. Spafford & Edward Felten, Association for Computing Machinery, to the United States Senate Committee on Health Education Labor & Pensions and the United States House Committee on Education and Labor, April 14, 2008.

⁸⁴ Letter by Professors Eugene H. Spafford & Edward Felten, Association for Computing Machinery, to the United States Senate Committee on Health Education Labor & Pensions and the United States House Committee on Education and Labor, April 14, 2008.

⁸⁵ Letter by Professors Eugene H. Spafford & Edward Felten, Association for Computing Machinery, to the United States Senate Committee on Health Education Labor & Pensions and the United States House Committee on Education and Labor, April 14, 2008.

⁸⁶ Testimony of Brian Roberts, University of Texas at Austin, May 15, 2008.

pirate than their off-campus counterparts who subscribe to an unlimited service.⁸⁷

There is controversy regarding how much of the piracy problem is attributable to college students. A Motion Picture Association study from 2005 states that 44% of the money the industry lost within the United States was attributable to peer-to-peer file sharing by college students. It now appears that the figure was closer to 15% for students on and off campus combined, leaving the figure for on-campus students around 3% of domestic losses.⁸⁸ The amount of losses attributable to on-campus college students may be overstated.

Requiring a university to intervene in this issue also creates tension between the university and the students. While universities have a duty to stop illegal behavior, detecting such illegal behavior would involve privacy issues. In an environment that is supposed to foster free thought and open discourse, it would have a chilling effect if the students felt their internet activities were being monitored.

Furthermore, there is the issue of rising education costs. Presuming that universities were required to install technology or hire staff to monitor on-campus internet activities, that cost would be passed on to the student.⁸⁹ The obvious solution for the university is to simply outsource the internet service in the residence halls to private companies, which would cost the university nothing and take the monitoring duties out of their hands.

It is the opinion of the committee that the problem is much larger than just college students, and in order to address it, the laws must apply equally regardless of internet service provider.

Recommendations

1. Create legislation *encouraging* schools (elementary school, middle schools, high schools, and colleges) to incorporate into their curricula on ethics and character a program regarding digital piracy.

⁸⁷ Testimony of Brian Roberts, University of Texas at Austin, May 15, 2008.

⁸⁸ Andy Guess, "Downloading by Students Overstated," www.insidehighered.com, January 23, 2008.

⁸⁹ Letter by Professors Eugene H. Spafford & Edward Felten, Association for Computing Machinery, to the United States Senate Committee on Health Education Labor & Pensions and the United States House Committee on Education and Labor, April 14, 2008.

INTERIM CHARGE 5: Monitor the Texas workers' compensation system, and the continued implementation of the reforms of HB 7, 79th Legislature, Regular Session, by the Texas Department of Insurance and other state agencies. Specifically evaluate the recent decision by the Texas Supreme Court in *Entergy v. Summers* in terms of its impact on the system. (Joint Interim Charge with the House Committee on Insurance)

Workers' Compensation

In 2005, House Bill 7 was passed, which drastically reformed the workers' compensation system. Many of the changes legislated in HB 7 were to be implemented over time, and their effects would not be fully realized for years. In the 80th Regular Session, only small changes were made to the workers' compensation system, to fix issues that were not addressed by HB 7. The committee was tasked, during the interim, to address both the long-term implementation of House Bill 7 and the implementation of the smaller changes made in the 80th Legislature.

Workers' Compensation Bills Passed in the 80th Regular Session

Bill Number	Author	Description
HB 34	Solomons	Prohibits kickbacks and other payments relating to a workers' compensation claim.
HB 472	Solomons	Regulations of third-party administrators in the workers' compensation system.
HB 473	Solomons	Regulates informal networks (fee agreements)
HB 724	Solomons	Creates a system whereby certain disputes are decided in the local offices and others are decided at SOAH. Death benefits are now payable to parents of the deceased worker. Addresses subclaims
HB 886	Giddings	Optional preauthorization for Small Employer Return-To-Work program
HB 888	Giddings	Authorizes OIEC ombudsman to obtain copies of medical records at the carrier's expense.
HB 1003	Giddings	Independent review organization doctors must be licensed in Texas.
HB 1005	Giddings	Doctors who erroneously bill the wrong insurance carrier will not be barred from billing the proper workers' compensation carrier by the 95 day deadline.
HB 1006	Giddings	All peer review doctors, including utilization review

		doctors, must be licensed in Texas.
HB 2004	Giddings	All doctors doing medical reviews must be certified in the appropriate specialty.
SB 458	Watson	Workers' Compensation benefits will be paid for damage to prosthetic limbs.
SB 471	Brimer	Modifies information reporting requirements for workers' compensation claims
SB 908	Brimer	Sunset bill for State Office of Risk Management
SB 1169	Janek	Reimbursement of an insurance carrier for overpayment of certain benefits from subsequent injury fund.
SB 1627	Carona	Workers' compensation fraud may be prosecuted under any applicable law.

Networks

One of the larger changes that was made was that Workers' Compensation Health Care networks were created. In March of 2006, the first network was certified. As of April 2008, there are 32 certified networks serving 231 Texas counties.⁹⁰ As of February 1, 9 of the 31 networks then certified did not have any insurance carrier contracts in place.⁹¹

12 out of 13 carrier groups have contracted with or established a certified workers' compensation network, which is an increase from 9 in September, 2006. 11 of the 12 carrier groups with a network have already begun offering it to policyholders, with a premium discount of approximately 10-12%.⁹² Approximately 18% of covered employees are in-network.⁹³

A total of 39,991 injured workers have been treated by 18 networks, with 2 networks treating 77% of these workers. Six percent of the workers treated in network had legacy claims (injuries happened prior to network certification), and 40 percent of the workers treated in network had "lost time" claims - at least one day of lost time was recorded.⁹⁴

Network Report Card, 2007 and 2008

In 2007, generally, network and non-network care was statistically similar, except in a few areas:⁹⁵

⁹⁰ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

⁹¹ Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 10.

⁹² Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 9.

⁹³ Letter by Amy Lee, Workers' Compensation Research and Evaluation Group, to the joint committees, May 29, 2008.

⁹⁴ Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 10.

⁹⁵ 2007 Workers' Compensation Network Report Card, pp. 4-6

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- Injured workers in-network were less satisfied with the medical care that they received than non-network injured workers.
 - Although perceptions regarding access to care in networks are worse compared to non-networks, networks actually provided non-emergency care faster than non-networks. care, the networks in-network (11 days from the date of injury in networks versus 17 days non-network).
 - Return-to-work outcomes were better for network injured employees. The network injured workers were off work an average of 13 weeks, as opposed to an average of 16 weeks for those not in network. 65% of network injured workers surveyed reported that they were currently working, versus 63% of non-network injured workers.

The second network report card was issued in September, 2008. The sample size is larger in this report which gives a better indication of how the system is working. The report also compares different networks to each other, including: Texas Star, Corvel Corecare, Liberty Health Care Network (HCN), and other networks. Individual network numbers are also considered against non-network numbers. Differences have certainly emerged among the networks themselves and when compared to non-network claims.⁹⁶

The networks have lower medical costs, better return to work outcomes, and comparable perceptions about access than non-networks.⁹⁷ However, results indicate that not all networks have lower costs than non-networks, especially in the areas of hospital and pharmacy costs. Similar to the 2007 Network Report Card, perceptions about access to care linger among network injured workers. Despite negative perceptions about access, some of the networks actually had some of the shortest waiting times from the date of injury to see a doctor. The study includes medical data for injured workers with injuries occurring between March 29, 2006 and May 31, 2007.

More detailed results of the 2008 Report Card are included under the appropriate title, such as "medical costs" or "return to work."

Voluntary or "Informal" Networks

HB 7 authorizes a carrier to contract with a provider for a fee that is different than that of the fee guideline in a situation where the provider is not in a certified network. This is permissible if the contract is for a fee deviation only and not for management of the worker's case.⁹⁸ The original intent of this provision was to allow the carrier to pay *above* the fee guideline if the worker was having difficulty finding a doctor to treat a specific injury. HB 473 clarifies this original intent and prohibits fee contracts for less than the fee guidelines as of 2011.

⁹⁶ The Report Card can be viewed online. See: http://www.tdi.state.tx.us/reports/wcreg/documents/2008_Workers_Compens.pdf

⁹⁷ 2008 Workers' Compensation Network Report Card

⁹⁸ TDI Bulletin B-0005-06

Recently, the Commissioner of Workers' Compensation has adopted rules implementing HB 473, including rules for notice to providers in an informal or voluntary network, and reporting requirements to DWC.⁹⁹

Medical Costs

Medical costs were evaluated in several different categories including: average costs per claim; for professional medical services; for hospital services, and for pharmacy services. Generally, Texas Star had the lowest costs overall, and the other networks had the highest. The costs are averaged six months after the injury.

Costs Per:	<i>Non-Network</i>	Texas Star	Corvel-Care	Liberty HCN	Other Networks
Claim	\$2,075	\$1,947 *	\$2,574	\$2,892	\$3,014 +
Professional Services	\$1,289	\$1,204 *	\$1,779	\$2,041	\$2,077 +
Hospital Services	\$2,300	\$2,415	\$2,832	\$2,107 *	\$2,877 +
Pharmacy Services	\$191	\$125 *	\$237	\$299 +	\$243

Figure 2: Medical Costs in Worker's Compensation Per Type of Service.

* Indicates the lowest cost, + Indicates the highest cost.¹⁰⁰

Health Care Utilization

The 2008 Worker's Compensation Network Report Card measures health care utilization in two ways: one, as the percentage of workers who received different types of health care services, and two, as the average number of services received by the claimants at six months after the injury.¹⁰¹ The Report Card does an excellent job in breaking down these two types of utilization and even outlines statistics for 11 types of professional services and five types of prescription medication.

Although the numbers concerning utilization are not a categorical measure of network/non-network success, readers should note that prior to House Bill 7, Texas on average had higher medical costs, lower worker satisfaction, and lower return to work numbers.

Generally speaking, the following graphs address the percent of workers receiving care in professional, hospital, and pharmacy services, six months after injury. REG broke down these categories further. See below.

⁹⁹ Texas Administrative Code Sections 133.4 and 133.5.

¹⁰⁰ 2008 Workers' Compensation Network Report Card, pp 5, 14-15.

¹⁰¹ 2008 Workers' Compensation Network Report Card, pp. 3-4.

Utilization of Professional Services

The percentage of workers receiving professional services by service type was evaluated in 11 categories, ranging from: evaluation & management; physical medicine modalities; other physical medicine; CT scans; MRI scans; nerve conduction studies; other diagnostic testing; spinal surgery; other surgery; pathology & lab results; and other services. The most notable professional services are as follows:

Type of Professional Service	<i>Non-Network</i>	Texas Star	Corvel-Care	Liberty HCN	Other Networks
Physical Medicine Modalities	17%	14% *	24%*	30% *	23%*
CT Scans	2%	3%	2%	2%	3%
MRI Scans	15%	13%	21%	25%	21%
Spinal Surgery	<1%	<1%	<1%	<1%	<1%

Figure 3: Percent of Worker's Receiving Professional Services, by Service Type, 6 months post injury.¹⁰²

* indicates that the differences between the network and non-network are statistically significant.

Utilization of Hospital Services

In terms of hospital services, the report measures in and out patient services and other hospital services which includes a broad range of services, such as: skilled nursing, home health, clinic, and special facilities.

Type of Hospital Service	<i>Non-Network</i>	Texas Star	Corvel-Care	Liberty HCN	Other Networks
In-Patient	6%	7% *	2%*	7%	6%
Out-Patient	86%	96%*	56%*	98%*	99%
Other Hospital Services	13%	1%*	44%*	0%	2%*

Figure 4: Percent of Workers Receiving Hospital Services by Served Type, 6 month post injury

* indicates that the differences between the network and non-network are statistically significant.

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Utilization of Pharmacy Benefits

The 2008 Network Report Card analyzed pharmaceutical use in a range of drug groups. Differences within the networks can be detected.

Please see chart on next page.

¹⁰² See 2008 Worker's Compensation Report Card for a complete listing of services, pp. 3, 30.

¹⁰³ 2008 Workers' Compensation Network Report Card, p. 32.

Drug Group	<i>Non-network</i>	Texas Star	Corvel Corcare	Liberty HCN	Other Networks
Analgesics- Opioid	54%	54%	57%	58%	57%
Analgesics- Anti-Inflammatory	59%	61%*	70%*	72%*	63%*
Musculoskeletal Therapy agents	32%	31%	37%*	38%*	30%
Mood Stabilizers	8%	7%*	8%	9%	9%
Other Therapeutic Groups	42%	43%*	40%	42%	39%

Figure 5: Pharmacy Utilization, Percentage of Workers Receiving Pharmacy Drugs by Type, 6 months post injury.

* indicates that the differences between the network and non-network are statistically significant.¹⁰⁴

Access to Care

The fee guidelines allow a 10% incentive payment above the Maximum Allowable Reimbursement (MAR) for health care providers who provide professional services to injured employees in 122 zip codes that are designated "underserved areas."

Generally, however, in the workers' compensation system as well as in other health-care delivery systems, there is a shortage of primary care physicians due to the payment structuring system resulting in low reimbursement rates for their time versus reimbursement rates for medical procedures.¹⁰⁵

While the Texas Medical Association continues to receive complaints about access to specialists in the non-network workers' compensation system, to date there are no published studies to quantify the problem or to determine whether abolishing the Approved Doctor List had an impact on this issue.¹⁰⁶ The new medical fee guidelines may alleviate some of these issues by bring doctors back into the system or attracting new doctors.

In terms of the 2008 Worker's Compensation Network Report Card, access to care was also measured in several categories, including: getting needed care, getting care quickly, satisfaction with treating doctor, and agreement with treating doctor. To fully evaluate these categories, the Texas Department of Insurance, Worker's Compensation, Research and Evaluation Group asked

¹⁰⁴ 2008 Workers' Compensation Network Report Card, p. 32.

¹⁰⁵ Testimony of Bernard Swift, Texas Medical Association, April 29, 2008.

¹⁰⁶ Written Testimony of the Texas Medical Association, April 29, 2008.

employees several sub-questions that expanded on each category¹⁰⁷. Overall, injured workers in network reported more access to care problems and were less satisfied with the medical care they received than non-network injured workers.¹⁰⁸

Return to Work

The return-to-work rate is slowly but steadily increasing. In 2005, 75 percent of workers returned to work within 6 months post-injury, compared to 70 percent in 2001.¹⁰⁹ And in 2005, within 6 months post-injury, 68 percent of workers were back at work and remained for three successive quarters, as opposed to 61 percent in 2001.¹¹⁰ The mean and median days off work are also decreasing.¹¹¹

Recently, DWC has been increasing efforts to promote Return-to-Work through vocational rehabilitation. Working with the Department of Assistive and Rehabilitative Services (DARS), DWC sends the injured employee a referral to DARS after the employee has been off work after an injury for 12 weeks. DWC field staff are following up these "12 week letters" with phone calls to the injured employees.¹¹²

While DWC can strongly encourage Return-to-Work, DWC cannot impose requirements. The workers' compensation system is voluntary, and return-to-work requirements may cause employers to opt out.¹¹³ DWC has continued to educate employers, through publications and seminars on bringing injured employees back to work.¹¹⁴

The ability to return to work is compromised if the employer refuses to accept workers who are not 100% recovered. It is crucial that employers make accommodations for workers who are willing to return to work so that they return to work as quickly as possible.¹¹⁵ Texas Medical Association suggests requiring employers to give the injured worker's treating physician a job description upon injury. The job description would help the treating physician assess which duties the injured employee can and cannot perform.¹¹⁶

¹⁰⁷ 2008 Workers' Compensation Network Report Card pp 35-45.

¹⁰⁸ 2008 Workers' Compensation Network Report Card p. 8.

¹⁰⁹ Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 4.

¹¹⁰ Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 5.

¹¹¹ Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 6.

¹¹² Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹¹³ Bill Kidd, "Division's Efforts on Return-to-Work Draws Varied Stakeholder Responses", www.workcompcentral.com, June 27, 2008.

¹¹⁴ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹¹⁵ Written Testimony of Bernard Swift, Texas Medical Association, April 29, 2008.

¹¹⁶ "Let's Get Texas Injured Workers Healthy and Back to Work," Texas Medical Association, July 21, 2008.

Small Employer Return-To-Work Program

House Bill 886 created an optional preauthorization procedure for small employers who wish to take advantage of the pilot program that allows reimbursement up to \$2500 for modifications made in order to bring an injured employee back to work. New rules and a revised employer application were approved in February 2008. There is an ongoing widespread marketing effort to Texas's small employers. Mailers were sent to 2800 small employers about the program, and e-mails were sent to 7000 employers and 200 chambers of commerce.¹¹⁷

Further, between February 2006 and September 2008, approximately 16,000 people received return-to-work (RTW) training, including small employer RTW by TDI-DWC outreach and education staff.¹¹⁸

As of July 21, 2008, six applications for reimbursement have been received. Two applications were approved and reimbursement was paid. A report on this program was issued in October 2008, and in addition to the above, the Texas Department of Insurance makes three recommendations that may increase employer participation in the small employer return-to-work program.

1. The Return-To-Work Program for small employers should be extended for two years. The current RTW pilot program funding expires on September 1, 2009.
2. Increase the current maximum reimbursement amount for workplace modifications from \$2500 to \$5000 in order to encourage participation by small employers who may need more complicated modifications to encourage RTW percentages.
3. Restructure the program to all employers to receive a portion or all of the funding in advance. If permitted, TDI-DWC would likely verify the modifications to ensure appropriate use of such advance funding.¹¹⁹

From 2008 Network Report Card

Overall, return to work was lower among injured workers treated in Texas Star, Corvel Care, and Liberty HCN, when compared to the non-network¹²⁰. The report evaluated return to work outcomes based upon the most frequent reasons why injured workers were not working. Corvel was ranked the highest at 69% based upon the reason that the "worker not physically able to perform job duties;" the other networks ranked the lowest in this category at 52%.¹²¹ A summary of the other reasons are outlined in the chart below:

¹¹⁷ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹¹⁸ Texas Department of Insurance, Division of Worker's Compensation October 1, 2008, memo: Implementation of the Return-To-Work Pilot Program for Small Employers in Texas.

¹¹⁹ Ibid.

¹²⁰ 2008 Workers' Compensation Network Report Card p. 9.

¹²¹ 2008 Workers' Compensation Network Report Card p. 45.

Return to work

Most Frequent Reasons Given by Injured Workers Who Said They Were Not Currently Working at the Time of the Survey

Most frequent reasons	NON-NETWORK	TEXAS STAR	CORVEL CORCARE	LIBERTY HCN	OTHER NETWORKS
Worker not physically able to perform job duties	59%	55%*	69%	53%	52%
Worker was laid off	26%	31%*	13%*	16%	37%*
Worker was fired	23%	23%	9%*	30%	34%*
Retired	14%	12%	9%	12%	10%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2008.

Notes: Asterisks (*) indicates that the differences between the network and non-network are statistically significant. The figures presented above are adjusted for injury type, type of claim, race/ethnicity, gender, age, education, age of injury at the time of the survey, medical insurance coverage, and self-rated health differences that may exist between the groups. Totals may not add up to 100 percent because workers were allowed to select more than one reason.

Figure 6: Most Frequent Reasons Given by Injured Workers Who Said They Were Not Currently Working.
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Additional Findings from the 2008 Network Report Card

Most injured worker's perceptions regarding medical care for their work related injuries compared to the medical care they normally receive when injured or sick was comparable among the networks and non-networks, ranging from a 48% rate at Liberty HCN and a 58% rate at Texas Star. Most workers being treated in the Corvel system ranked it worse for care they normally receive when injured or sick at 36%; whereas non-networks got a 17% ranking.¹²³

¹²² 2008 Workers' Compensation Network Report Card pp 34.

¹²³ 2008 Workers' Compensation Network Report Card p.20.

Income Benefits

Five types of income benefits are paid in workers' compensation.

Temporary Income Benefits (TIBs) are paid during the period of temporary disability (lost time from work) while the worker is recovering from an on-the-job injury. TIBs are paid at an applicable percentage of the employee's pre-injury average weekly wage (AWW) (70-75% depending on circumstances including length of disability), with a cap of \$712 a week.

Impairment Income Benefits (IIBs) are paid to injured workers for permanent impairment. These are paid after TIBs have ended. The duration of TIBs benefits depends on the impairment rating. The benefit amount is 70% of the worker's AWW up to a cap of \$498 a week.

Supplemental Income Benefits (SIBs) are paid to injured workers for ongoing disability after IIBs have been exhausted, with all eligibility for SIBs ending at 401 weeks after the date of injury; Only workers with a 15 percent impairment rating and who are unemployed or underemployed as a result of their work-related injuries are eligible to receive SIBs. SIBs are calculated by determining the amount that is equal to 80% of the difference between 80% of the injured employee's AWW and current post-injury wages, up to a cap of \$498 a week.

As of 2006, approximately 19-21% of workers receiving IIBs or SIBs were capped at the statutory maximum weekly benefit rate. Statutory changes made by H.B. 7 increased the maximum weekly benefit in Fiscal Year 2008, which should result in a lower percentage of workers being capped at the statutory maximum.¹²⁴

Lifetime Income Benefits (LIBs) are paid for the life of the injured worker for specific catastrophic injuries as set forth in Section 408.161 of the Texas *Labor Code*. LIBs are paid at 75% of the injured employee's pre-injury AWW up to the maximum of \$712 a week (with a 3% annual cost of living increase).

Death Benefits (DBs) and Burial Benefits are paid to the deceased workers' spouse or eligible beneficiaries as a result of a death from a compensable injury. DB's are paid at 75% of the deceased employee's pre-injury AWW, up to a maximum for \$712 a week (with a 3% annual cost of living increase). Burial benefits are reimbursed up to \$6000.¹²⁵

It has come to the committee's attention that income benefits may not be sufficient to compensate a person for an injury or to support that person should he or she be unable to work. The Workers' Compensation Research and Evaluation Group intends to study the sufficiency of these benefits.

¹²⁴ Permanent Impairment Income Benefits in the Texas Workers' Compensation System, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, April 2008, p. 8.

¹²⁵ Letter from Albert Betts, Commissioner of Workers' Compensation, Re: House Business & Industry and House Insurance Committees Hearing - April 28, 2008, Interim Charge: Monitor the Texas Workers' Compensation System, May 28, 2008, pp. 2-3; Overview of Recent Workers' Compensation Research Findings, Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, presented April 29, 2008, p. 20.

eBilling

HB 7, 79th Legislature, 2005, required the Commissioner of Workers' Compensation to adopt rules regarding the electronic submission and processing of medical bills by health care providers to workers' compensation insurance carriers.¹²⁶ Rules were adopted on July 21, 2006.¹²⁷

Since that time, stakeholder input has been gathered to assist in implementation. Stakeholders have encountered difficulties with system interoperability, connectivity, and technical formats.

Some carriers and providers have requested and obtained waivers for a limited amount of time so that they do not have to implement e-billing right away. Temporary waivers are issued typically for three to six months, financial burden waivers are issued for one year duration, and certain providers qualify for the small practice waiver that is of two years duration.¹²⁸

	Total Estimated Number	Financial Burden Waivers	Temporary Waivers	Pending Waivers	Small Practice Waivers
Insurance Carriers	660	35	202	7	
Health Care Providers	80,000	56	140	28	450

Figure 7: eBill Waivers as of April 15, 2008¹²⁹

Disputes & Denials

H.B. 7, 79th Legislature, Regular Session, 2005, eliminated appeals to the State Office of Administrative Hearings (SOAH) for all types of disputes and, in turn, created a problem for medical necessity and fee disputes because there is no longer an administrative hearing for such disputes. Therefore, there are no administrative records to review if and when such disputes are appealed to court. This elimination of the administrative hearing was ruled unconstitutional and legislation was necessary to resolve the issue.

H.B. 724 sends medical necessity disputes with a cost lower than \$3,000 and fee disputes with a cost lower than \$2,000 to a contested hearing and sends any disputes above these amounts to an SOAH hearing.

Hospital Fee Disputes

¹²⁶ Labor Code Section 408.0251,

¹²⁷ 28 Tex. Admin. Code Sections 133.500 and 133.501.

¹²⁸ These are providers with fewer than 10 employees and workers' compensation consists of less than 10% of their practice.

¹²⁹ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

In 1997, the Texas Workers' Compensation Commission (now DWC) created a hospital fee guideline that included a stop-loss provision under which hospitals were to be paid 75% of qualifying audited charges in cases where charges were more than \$40,000 and treatment was "unusually extensive." Interpretations varied on what this provision meant, causing numerous fee disputes. Vista Community Medical Center filed suit against Texas Mutual Insurance Co, alleging that when a hospital's audited charges exceed \$40,000 the hospital becomes eligible for reimbursement at the 75% rate. Texas Mutual argued that in order to trigger the 75% rate, the charges must be over \$40,000 *and* unusually extensive.

Further complicating this issue was the problem of implantables. The fee guidelines allow implantables to be billed at cost plus ten percent. However, if the total treatment costs are above \$40,000, this allowed the hospital to receive 75% of billed charges for the implantable.

In October 2007, the court sided with the hospitals and stated that the rule only requires the audited charges to be over \$40,000 to entitle the hospital to 75% reimbursement.¹³⁰

Subsequently, new fee guidelines were adopted in March 2008 and the 1997 guidelines repealed. These guidelines allow hospitals to "carve out" implantables and bill for them separately (at cost plus a reasonable percentage) or to simply bill the entire surgery including implantables at a higher set rate.¹³¹

Although the new Medicare-based fee guidelines should lessen disputes going forward, pending disputes are still a problem. DWC is actively encouraging mediation and settlement.

Stop-Loss Fee Disputes
State Office of Administrative Hearings
 May 2007 – Mid-April 2008

Number of successful mediations	182
Number of docketed cases dismissed	333
Number of docketed cases where a decision and order has been issued	330

Figure 8: Stop-Loss Fee Disputes at SOAH

Stop-Loss Fee Dispute Appeals*
State District Court
 April 2008

Hospital direct Stop-loss appeals - no SOAH hearing	238
Carriers' post SOAH hearing stop-loss appeal	96

*This chart only includes litigation in which Texas Department of Insurance, Division of Workers' Compensation is a party.

¹³⁰ Bill Kidd, "Judge's Ruling in Stop-Loss Case May Increase Hospital Costs", www.workcompcentral.com, October 18, 2007; Bill Kidd, "Trial on Hospital Stop-Loss Provision Begins", www.workcompcentral.com, September 5, 2007.

¹³¹ Texas Administrative Code Sections 134.403 and 134.404.

Figure 9: Stop-Loss Fee Dispute Appeals at State District Court

Pending Hospital Fee Disputes

As of April 18, 2008

Pending Hospital Fee Disputes by Year

Calendar Year	Number of Disputes Pending
1993	1
1995	1
1996	1
1997	1,067
1998	225
2002	59
2003	786
2004	1,340
2005	1,624
2006	1,861
2007	2,137
2008 (as of 4/18/08)	587
Total	9,689

Figure 10: Pending Hospital Fee Disputes by Year

Pending Hospital Fee Disputes

As of April 18, 2008

Pending Hospital Fee Disputes by Issue

Type of Hospital Dispute	Number of Disputes Pending
1992 Hospital Fee Guideline	1,289
Hospital Outpatient	6,324
Hospital Inpatient <\$40k	103
Hospital Inpatient >\$40k (stop loss)	1,524
Hospital Inpatient/Trauma Code	319
Hospital Outpatient/Inpatient contract	130
Total	9,689

Figure 11: Pending Hospital Fee Disputes by Issue

Medical Fee Disputes

New medical fee guidelines were adopted in March 2008. These guidelines are based on Medicare and use the Medicare Economic Index (MEI) as a conversion factor to calculate payment, rather than reimbursing on a percentage of Medicare, as was done under the existing guideline. The MEI is the weighted average of price changes for goods and services used to deliver physician services. By using the MEI, the guidelines will keep pace with medical inflation and not be subject to changes in Congress.¹³²

¹³² Bill Kidd, "Division Adopts New Medical Fee Guideline Effective March 1", www.workcompcentral.com, January 4, 2008.

The existing guideline provided for reimbursement at 125% of Medicare. Using the new guideline, reimbursement would be approximately 139% of Medicare for general medical services and 172% for surgical services. These percentages are variable based on the MEI.

The higher reimbursement rates may reduce future disputes and encourage doctors to reenter the system. However, the older disputes must be litigated under the old fee guidelines, and there is a substantial backlog.

As of April 18, 2008, there are 13,640 pending medical fee disputes. Many of these are hospital outpatient fee disputes that will be governed by the new hospital fee rules going forward. DWC is working to lessen the backlog by contracting with the University of Texas Center for Public Policy and Dispute Resolution to perform mediation of hospital outpatient disputes.¹³³

Medical Dispute Resolution

Medical dispute resolution rules were adopted and effective May 25, 2008. Amendments were necessary to comply with HB 724 (concerning dispute resolution hearings, as noted above), HB 1003 (requiring IRO doctors to be licensed in Texas), and HB 2004 (requiring IRO doctors to be of the appropriate specialty for the review).

Peer Review Data Call

In 2006, DWC issued a peer review data call to collect certain information on peer reviews. The results were compiled by the TDI Workers' Compensation Research and Evaluation Group and were instrumental in passing House Bills 1003 and 1006 which require all doctors performing medical reviews in the workers' compensation system to be licensed in Texas.

In 2008, DWC issued another data call to update the results of the 2006 analysis and monitor compliance with HB 1003 and 1006 and had similar results.¹³⁴ The objective was to collection information regarding the cost of peer reviews requested by insurance carriers; the reasons why they were requested; thy types of licensure of doctors performing peer review; the opinions of peer review doctors; and the actions taken or not taken by insurance carriers as a result of the peer review.¹³⁵ Between the 2006 and the 2008 reviews, the same 25 insurance carriers were used, which represent about 70% or the medical payments in 2003.¹³⁶

About 680 Texas licensed doctors (80% Texas resident and 20 % non-resident) conducted these reviews. A small number of reviews were conducted by non-doctors, including PhDs, psychologists, and physical therapists.¹³⁷ The costs range between \$100-\$150 but can go up to

¹³³ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹³⁴ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹³⁵ Workers' Compensation Medical Peer Review Data Call by REG, July 2008 p. 2.

¹³⁶ Workers' Compensation Medical Peer Review Data Call by REG p. 4.

¹³⁷ Workers' Compensation Medical Peer Review Data Call by REG p. 5.

\$250.¹³⁸

Insurance carrier request the majority of peer reviews for medical necessity determinations. More specifically, 81% for preauthorization and 8% for retrospective review.¹³⁹

For medical necessity peer review, MD, DO, DC peer review doctors generally reviewed the care requested by other MDs, Dos, DCs. But there were some preauthorization peer reviews where the provider type match may need further investigation to determine whether these peer review doctors had the appropriate qualifications to conduct the review.¹⁴⁰ The Business and Industry Committee has been in recent communication with TDI Workers' Compensation Research and Evaluation Group about the status of the peer review data enforcement referrals. The Committee is still waiting an update.

Occupational medicine, physical medicine, and rehabilitation, and orthopedic surgery specialties are the most frequent medical specialty for MD and DO peer reviews. Finally, peer review opinions and the resulting carrier actions did not vary notably from the 2006 data call. About half of the preauthorization peer reviews resulting carrier actions agreed that the proposed care was required.¹⁴¹ About 46% of all peer reviews conducted resulted in some sort of adverse action take by the insurance carrier. Medical necessity and compensability had different results. For instance, insurance carriers tended to follow the advice of their peer review doctors regarding medical necessity. However, they did not always do so when it came to compensability or the text of injury and related treatment plans.¹⁴²

Networks and Non-networks

According to TDI, overall network claims were paid at 81% while non-network claims were paid at 76%. However, it should be noted that the preauthorization requirements are different, which may affect the denial rates on retrospective review.¹⁴³

Rulemaking

Pharmacy Formulary

Section 408.028, Labor Code, requires the Commissioner of Workers' Compensation to adopt a closed formulary. Currently the DWC Medical Advisor is working with a Pharmacy Work Group to study existing closed formularies and assist DWC in its rulemaking. DWC has

¹³⁸ Workers' Compensation Medical Peer Review Data Call by REG p. 6.

¹³⁹ Workers' Compensation Medical Peer Review Data Call by REG p. 6.

¹⁴⁰ Workers' Compensation Medical Peer Review Data Call by REG p. 6.

¹⁴¹ Workers' Compensation Medical Peer Review Data Call by RE p. 8.

¹⁴² Ibid.

¹⁴³ Letter from Mike Geeslin, Commissioner of Insurance, and Albert Betts, Commissioner of Workers' Compensation, Re: House Business & Industry and House Insurance Committees Hearing - April 28, 2008, Interim Charge: Monitor the Texas Workers' Compensation System, May 23, 2008.

reviewed pharmacy formularies in other states as well as the recently updated pharmacology portion of the Work Loss Data Institute's Official Disability Guidelines (ODG).¹⁴⁴

Pharmacy payments for each year were approximately \$130 million and account for 13-14% of all Texas workers' compensation medical payments. Approximately half of all injured employees receive prescriptions, and the majority of prescriptions are for injuries that occurred more than a year ago.¹⁴⁵

Rules are currently being developed. A stakeholder meeting will be convened in the summer of 2008 and rules should be developed following that meeting. Rules are expected to be adopted in December 2008.¹⁴⁶

Subclaims

Sometimes an injured worker obtains health care through his or her health care insurance policy when the injury is covered by workers' compensation. HB 724 addressed subclaims in the workers' compensation system. It requires the workers' compensation insurer to reimburse the health care insurer the lesser of the amount payable under the appropriate fee guideline or the amount actually paid by the health care insurer. The bill also provides a procedure for dispute resolution.

The commissioner of workers' compensation and the commissioner of insurance are required to amend or adopt rules regarding reimbursement for any amounts an employee has paid for his or her health care (such as a copay or a deductible). These rules were issued in September 2008. They are going to be added to Chapter 140, Dispute Resolution, of the Worker's Compensation Rule. Before the new amendments, Chapter 140 contained only five sections and addressed the general provisions of dispute resolution by providing: definitions; rules for special accommodations; how to expedite proceedings; how to conduct oneself during the hearing; and how to correct clerical errors.¹⁴⁷ The new rules expand upon subclaims by defining subclaim status and outlining procedures for health care insurers to pursue reimbursement of medical benefits.

Privacy

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the HIPAA privacy rule allow for an exemption for workers' compensation from the privacy provisions. The privacy rule that protect personal information does not apply to workers' compensation insurers, workers' compensation administrative agencies (DWC), or employers when disclosing to each

¹⁴⁴ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹⁴⁵ Memo from Howard W. Smith, MD, to Commissioner Betts, Pharmacy Closed Formulary - April 2008 Report to the Commissioner, May 1, 2008.

¹⁴⁶ Memo from Howard W. Smith, MD, to Commissioner Betts, Pharmacy Closed Formulary - April 2008 Report to the Commissioner, May 1, 2008.

¹⁴⁷ See sections 140.1-140.5, Dispute Resolution, Worker's Compensation Rules.

other the employee's health information as required by law. However, it would be a violation of HIPAA to disclose the health information to other persons or entities.¹⁴⁸

The Labor Code also protects workers' compensation claim information. The claim file is confidential and may not be disclosed by DWC except as provided by law. If DWC legally discloses the information to a person, that person may not disclose that information to a person not authorized to receive that information from DWC. OIEC has access to confidential information from DWC, but may not disclose it.¹⁴⁹

Furthermore, the Insurance Code states that entities not subject to HIPAA may not disclose personal health information without appropriate authorization to do so.¹⁵⁰ The Insurance Code also provides for confidentiality of medical information obtained by utilization review agents and independent review organizations.¹⁵¹

Enforcement

DWC has initiated 138 enforcement cases, which include a total of 234 violations from September 1, 2007 to February 29, 2008. In Fiscal Year 2008, TDI collected a total of \$1,004,968 in penalties between September 1, 2007 and April 1, 2008.¹⁵² DWC enforcement focuses its efforts on the violations that have the biggest impact on the system.

Performance-Based Oversight

House Bill 7 required the Commissioner of Workers' Compensation to adopt a system of performance-based oversight to provide incentives for compliance in the workers' compensation system and to help focus oversight on poor performers.¹⁵³ The providers and carriers were ranked in 3 tiers: High Performers, Average Performers, and Poor Performers.

There are various categories for ranking carriers and providers. For instance, carriers were ranked based on the following criteria: timeliness of medical bill processing, timeliness of payment of initial TIBs, and winning percentage of contested case hearings. Whereas, health care providers were ranked based on the timeliness of filing DWC Form-69, Report of Medical Evaluation.¹⁵⁴

Some changes in performance based oversight will take place for the 2009 evaluations. Carriers will be ranked on the timely payment of initial temporary benefits, timely processing of medical

¹⁴⁸ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹⁴⁹ Labor Code Sections 402.082 and 404.111

¹⁵⁰ Chapter 602, Insurance Code.

¹⁵¹ Chapters 4201 and 4202, Insurance Code.

¹⁵² Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹⁵³ Labor Code Section 402.075.

¹⁵⁴ Compliance in the Workers' Compensation System: Performance Based Oversight, Texas Department of Insurance, August 30, 2007 at www.tdi.state.tx.us.

bills, timely electronic submission of initial payment data, and timely electronic submission of medical bill processing. Then, providers will be ranked on timely filing of DWC Form 69 (Report of Medical Evaluation), timely filing of DWC Form 73 (Work Status Report), and completeness of Form 73.¹⁵⁵

It is the opinion of the committee that the performance measures used for providers are not meaningful because they do not speak to the quality of care employees are receiving in the system. While the carrier measures are more meaningful, the committee would like to see carriers ranked according to factors that speak to whether the injured employees are getting the appropriate medical care and whether that care is delivered in a timely manner without undue hassle or denials.

Educational Outreach

Designated Doctors

In order to make sure that designated doctors have the appropriate education, training, and experience to address issues associated with the examination, as required by House Bill 2004, DWC delivered presentations on the effect of HB 2004 to medical societies and other entities around the state in conjunction with disability management discussions.¹⁵⁶

Workplace Safety

DWC conducts ongoing safety training in Spanish and English, and provides training and training materials to employers and employees. Some materials are available on the internet. Regional safety summits have been conducted or scheduled to provide information to target industries on preventing fatal and nonfatal occupational injuries in eight Texas cities.¹⁵⁷

On the whole, the nonfatal injury rate is lower in Texas than in the rest of the country, and has been declining since 1996.¹⁵⁸

Nonsubscribers

Rider 19 on the 2008-2009 General Appropriations Act requires DWC to include certain information about nonsubscribers in its biennial report submitted to the Legislature beginning in December 2009. Nonsubscribers are required to notify DWC that they do not provide workers' compensation coverage and are also required to notify DWC of occupational injuries or illnesses, but many nonsubscribers are not compliant. DWC is actively working to identify

¹⁵⁵ Bill Kidd, "Division Unwraps New Rules for 'Report Cards' for Carriers, Providers", www.workcompcentral.com, July 2, 2008.

¹⁵⁶ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹⁵⁷ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹⁵⁸ Nonfatal Injury Rate Data, Texas Department of Insurance Website www.tdi.state.tx.us

nonsubscribers and sending notifications to non-compliant employers.¹⁵⁹

Employer Participation in the Texas Worker's Compensation System: 2008 Estimates¹⁶⁰

Since 1913, employers have the option to participate in the worker's compensation system in Texas. Texas is the only state that allows this type of voluntary system. The purpose of this analyses was to approximate the annual percentage of Texas employers and employees who are or are not covered under worker's compensation coverage, in addition to other statistics.

Overall, some important statistics are as follows. The percentage of Texas employers who do not participate in the worker's compensation system decreased from 37% in 2006 to 33% in 2008.¹⁶¹ However, the percentage of Texas employees who are employed by non-subscribers also increased during this time from 23% in 2006 to 25% in 2008. This is due to the trend of employers who have more than 500 employees leaving the worker's compensation system.¹⁶² Simultaneously, more small and mid-sized employers have re-entered the system, primarily due to premium decreases.

Nonsubscription is at its lowest rate at 33% since 1993.¹⁶³ But, the number of employees that are covered by non-subscribers is at its highest at 25% since 1993.¹⁶⁴ Two industries that saw increases in non-subscription rates from 2004-2008 are one, the agriculture/forestry/fishing/hunting from 25% to 27% and, two, the mining/utilities/ and construction from 21% to 28%.¹⁶⁵

Employer's perceptions and knowledge of worker's compensation requirements and HB 7 are worth noting. The number one reason why employers said they purchase worker's compensation insurance is that they are required by law. Then, the number one reason why employers said they do not subscribe to worker's compensation insurance is that the insurance premiums are too high.¹⁶⁶ A general trend correlated the more employees employed by a employer, the higher the satisfaction level *outside* of network.¹⁶⁷

In terms of House Bill 7, employer knowledge of the 2005 legislative reforms in HB 7 has not altered significantly since the 2006 survey. Approximately 60% of Texas employers are not conversant about the rules established in House Bill 7. Additionally about 14% of Texas employers say that House Bill 7 changes have had a positive impact on their determination to

¹⁵⁹ Texas Department of Insurance, Division of Workers' Compensation, Legislative Briefing Information for Joint Committee House Business & Industry and House Insurance, April 29, 2008.

¹⁶⁰ Produced by Texas Department of Insurance, Workers' Compensation Research and Evaluation Group (REG), September 2008, hereinafter, will be referenced as " 2008 Employer Participation Estimates by REG."

¹⁶¹ September 12, 2008, email from Texas Department of Insurance, Government Relations

¹⁶² September 12, 2008, email from Texas Department of Insurance, Government Relations

¹⁶³ 2008 Employer Participation Estimates by REG p. 6.

¹⁶⁴ 2008 Employer Participation Estimates p. 7.

¹⁶⁵ 2008 Employer Participation Estimates p. 9.

¹⁶⁶ 2008 Employer Participation Estimates p. 13. This is also true for employers with 500 or more employees.

¹⁶⁷ 2008 Employer Participation Estimates p. 18.

buy or continue worker's compensation coverage. This is an increase of 2% in 2006.¹⁶⁸

Use of Arbitration By Non-Subscribing Employers

An increase from 12% in 2004 to 14% in 2008 occurred among non-subscribers and their request of their employees to sign an agreement stating that the employee will resolve disputes through arbitration.¹⁶⁹ However, this is almost done prior to the injury. Alarming, more than a third of employers reported that an employee would not receive any benefits if the employee did not agree to resolve the dispute through arbitration. However, this last statistic decreased to 36% percent from 38% in 2004.¹⁷⁰

Entergy v. Summers¹⁷¹

Currently, when a business buys workers' compensation insurance for its employees, it is covered by the exclusive-remedy defense. The employee gives up his or her right to sue the employer, and in exchange the employer gives up some of its rights, such as using negligence of the employee as a common-law defense. A general contractor can qualify for the exclusive remedy defense if that general contractor provides workers' compensation insurance for its subcontractors. In this opinion, the court ruled that a premises owner can qualify as a general contractor in certain circumstances, and therefore is entitled to use the exclusive remedy defense.

The ruling in the Entergy v. Summers opinion has been controversial for a variety of reasons. The first is that it makes a ruling that allows a premises owner to be considered a general contractor and therefore eligible to purchase workers' compensation and be covered by the exclusive-remedy defense. This is a hotly-contested policy issue. The second is that the case suggests that this has been current law in Texas since the definitions of "general contractor" and "subcontractor" were changed in 1989 (erroneously identified by the court as a change in 1993). Third, the court erroneously states that the change in definitions upon which the opinion relies happened in 1993 during a nonsubstantive revision, thereby casting doubts onto whether revisions that are labeled nonsubstantive can be interpreted as substantive. Finally, the court's plain meaning analysis of the statute in question caused some critics to question whether the court was accurately taking into account legislative intent, and led to accusations of an activist court.

Summary of the Case

The question at issue was whether a specific premises owner can also be a "general" contractor under the Labor Code and thus qualify for the exclusive-remedy defense. The court held that certain premises owners who otherwise meet the definition of a general contractor, who

¹⁶⁸ 2008 Employer Participation Estimates p. 39.

¹⁶⁹ 2008 Employer Participation Estimates p. 30.

¹⁷⁰ 2008 Employer Participation Estimates p. 30

¹⁷¹ The *Entergy* case is set for oral arguments on October 16, 2008, in Dallas Texas at Southern Methodist University Dedman School of Law.

"undertakes to procure" work, fall within the statute's definition of a general contractor.

The court reasoned that a change in the definitions of "general contractor" and "subcontractor" made in the 1993 revisions to the Labor Code allowed certain premises owners to qualify as general contractors - that the current definitions of those terms "do not preclude a dual role for premises owners." The court rejected the argument that the legislature did not intend to make this change because the 1993 amendment was nonsubstantive,¹⁷² by stating that "a generic statement disclaiming substantive changes cannot trump the statute's clear and specific wording." By the plain meaning of the statute, a premises owner can qualify as a general contractor who is eligible for the exclusive remedy defense.

Exclusive Remedy Defense: Public Policy

While the court stated that the law had allowed premises owners to act as general contractors since the definitions of "general contractor" and "subcontractor" were changed, this had not been occurring since system participants were not aware that the law allowed for this. As a result, the landscape of workers' compensation has been changed in a very dramatic way, even though the law has been "on the books" since 1991.

Income Benefits

One concern is that the employees will receive less compensation from workers' compensation than from a lawsuit. Workers' compensation benefits are capped and vary depending on extent of injury. At the April 29, 2008 hearing, victims of workplace catastrophes and their families testified. Those who recovered income benefits or death benefits prior to the *Entergy* decision would not have been entitled to the same amount of money after the *Entergy* decision - some surviving family members would have been ineligible for death benefits under workers' compensation.¹⁷³

Safety & Accountability

Some parties argue that the current system in which wrongdoers pay a monetary penalty for their deeds in the court system creates incentives to make dangerous workplaces safer. Workers' Compensation, however, limits employee recovery, and therefore does not give incentive for premises owners to keep a safer workplace to avoid liability.¹⁷⁴

Under *Entergy*, premises owners would not be held accountable for the injuries caused by dangerous conditions on the premises, whether those conditions are known or unknown, hidden

¹⁷² However, as noted below, the change in definitions to which the court refers was made in the 1989 substantive revisions.

¹⁷³ In light of the *Entergy* decision, the Workers' Compensation Research and Evaluation Group will be studying the adequacy of income benefits.

¹⁷⁴ Amicus Brief by Texas AFL-CIO, *Entergy v. Summers*, pp. 2-7; "Testimony of the Texas AFL-CIO Concerning *Entergy v. Summers* Before the House Committee on Business and Industry and the House Committee on Insurance, Tuesday, April 29, 2008."

or obvious, or caused by active negligence.¹⁷⁵ The costs would fall to the workers' compensation system.

Rights & Responsibilities under the Workers' Compensation System

The decision also brings up issues of the rights and responsibilities of the premises owner as general contractor, both when a workers' compensation policy is in place and when one is not. An employer who provides workers' compensation insurance is required to abide by Workers' Compensation laws,¹⁷⁶ and is subject to enforcement actions by the Division. The employer is also prohibited from using common-law defenses regardless of whether the employer purchases Workers' Compensation insurance. This is the trade-off inherent in the workers' compensation system.

However, it is unclear what happens if a premises owner, who is considered a general contractor and eligible for the exclusive remedy defense, chooses not to provide workers' compensation insurance. If a regular employer did that, the employer would be considered a *nonsubscriber*, and still would be subject to various requirements by law. The nonsubscriber also is barred from asserting certain common-law defenses in court, such as assumption of risk and comparative negligence. If a premises owner can be considered a general contractor but chooses not to provide workers' compensation insurance, would that premises owner be treated as a nonsubscribing employer, subject to regulation by the Division of Workers' Compensation?¹⁷⁷

If the premises owner is allowed to opt into the system to gain all the benefits but does not lose common law defenses if the premises owner chooses not to provide workers' compensation system, this gives the premises owner an unprecedented advantage that is not allowed for conventional employers.¹⁷⁸

Other Ramifications of the Court's Decision

Fact-dependent analysis

Adding more confusion to the above issue is that the court's analysis was dependent on the facts of the case. Not every premises owner is a general contractor - only certain ones that independently meet the definition of a general contractor. This may be confusing in practice for premises owners who would not be able to determine in which category they fell, and would not know what type of insurance to purchase - general liability or workers' compensation.

¹⁷⁵ Amicus Brief by Texas Trial Lawyers Association, *Entergy v. Summers*, pp. 4-5

¹⁷⁶ All employers, for example, must provide notice regarding coverage, comply with injury reporting requirements, and take actions to provide and maintain a reasonably safe and healthful place of employment.

¹⁷⁷ Brief of Amicus Curiae Steve Bresnen, pp. 21-25

¹⁷⁸ "Testimony of the Texas AFL-CIO Concerning *Entergy v. Summers* Before the House Committee on Business and Industry and the House Committee on Insurance, Tuesday, April 29, 2008."

Already Existing Law

Some critics find it troubling that, according to the court, the premises owner could qualify as general contractor since the definition was changed. This already was the law, but nobody, not legal practitioners, not even the legislature, knew it.

What has been brought up by critics of the Entergy opinion is that the legislature itself did not know that premises owners could be considered general contractors for purposes of workers' compensation. If the legislature had known, bills would not have been filed to allow a premises owner to avail itself of the exclusive remedy defense.¹⁷⁹

Nonsubstantive changes

The changes to the definitions upon which the court relies were enacted in the 1989 substantive amendments to the Labor Code rather than in the 1993 nonsubstantive changes that are referenced by the Court.¹⁸⁰ The court, believing that the definition changes were in the 1993

¹⁷⁹ 75th Legislature

House Bill 2630 (Brimer) amended the Insurance Code to define "general contractor" and "project owner," and allowed a project owner to qualify for the exclusive-remedy defense. House Bill 3024 (Brimer) amended Chapter 406, Labor Code, and defined "principal" as a person who undertakes work for himself or herself or contracts to perform work for another and enters into an agreement with a contractor for execution by or under the contractor of all or any part of the work, including an owner or lessor of real property. A principal could elect to obtain workers' compensation insurance coverage for a contractor or a worker and qualify for the exclusive-remedy defense.

76th Legislature

Senate Bill 1404 (Fraser) amended Section 406.121, to change the definition of "general contractor" to expressly include "an owner or lessor of real property." The definition of "principal" used in House Bill 3024, Acts of the 75th Legislature, Regular Session, 1997, was also added. Under this bill, both the general contractor and principal could be covered by the exclusive-remedy defense. House Bill 3548 (Heflin) amended the definition of "general contractor" in Section 406.121, Labor Code, to include an express reference to "a premises owner contracting for work or services on its premises or in connections [sic] with its business."

78th Legislature

House Bill 2982 (Nixon) amended Chapter 417, Labor Code, to expressly provide that an employee of a subcontractor or independent contractor, or a legal beneficiary of the employee, may not seek damages from a third party who is a premises owner or general contractor engaged in building or construction for an injury or death compensable under the workers' compensation system if workers' compensation insurance coverage is provided.

79th Legislature

House Bill 1626 (Nixon) was very similar to House Bill 2982, Acts of the 78th Legislature, Regular Session, 2003. This bill allowed a premises owner to qualify for the exclusive-remedy defense. S.B. 1689 was the companion.

¹⁸⁰ Memorandum to the Members of the Legislature, From Legal Division, Texas Legislative Council, RE: Entergy Court Decision; No Substantive Change Made By Enactment of Labor Code, December 11, 2007.

In the Workers' Compensation Act, Article 8307, Sec. 6, the definitions read:

Sec. 6 CONTRACT BY PRIME CONTRACTOR TO PROVIDE BENEFITS FOR SUB-CONTRACTOR

...

(b) The term "sub-contractor" means a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform.

(c) The term "prime contractor" includes "principal contractor," "original contractor," or "general contractor" as those terms are commonly used and means the person who has undertaken to procure the performance of work or services. The prime contractor may engage sub-contractors to perform all or any part of the work or service.

These definitions were changed in S.B. 1, 71st Legislature, 2nd Called Session, 1989. The modified definitions

nonsubstantive changes states that the disclaimer that the changes are nonsubstantive is not sufficient to override the plain meaning of the statute.

Recodification is an ongoing process mandated by the constitution. Recodifications result in large bills, often thousands of pages, that most members do not peruse in detail because the bills are supposed to be nonsubstantive. The Legislative Council goes through an exhaustive review process to make sure that recodifications do not make any substantive changes to the law.

If the court is willing to ignore the clear legislative intent of a nonsubstantive revision, then it may be difficult in future years to continue with recodifications since the legislators will be apprehensive that their clear intent that the bill not change the current law will not be respected by the court.

Legislative Intent

Failed Legislation

Some amici have argued that many bills were filed to allow premises owners to qualify for the exclusive remedy defense and none of those bills passed.¹⁸¹ However, the failure to pass a bill is

were effective January 1, 1991.

SECTION 3.05. APPLICATION TO INDEPENDENT CONTRACTORS.

(a) In this section:

...

(2) "General contractor" means a person who has undertaken to procure the performance of work or services, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or an analogous term. The term does not include motor carriers that make use of owner operators in providing transportation service.

...

(5) "Subcontractor" means a person who has contracted with a general contractor to perform all or any part of the work or services that a general contractor has undertaken to perform.

In 1993, H.B. 752 was passed which incorporated the Workers' Compensation Act into the Labor Code. The definitions are as follows:

SECTION 1. ADOPTION OF CODE. The Labor Code is adopted to read as follows:

LABOR CODE

CONTENTS

TITLE 1. GENERAL PROVISIONS

...

SUBCHAPTER F. COVERAGE OF CERTAIN INDEPENDENT CONTRACTORS

Sec. 406.121. DEFINITIONS. In this subchapter:

(1) "General contractor" means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.

...

(5) "Subcontractor" means a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform.

The definitions in the 1993 bill are those that exist in the Labor Code today.

¹⁸¹ See footnote ___ above; Brief of Amici Curiae the Honorable Senators Rodney Ellis and Jeff Wentworth, and

not considered by the courts to be indicative of legislative intent. There are many reasons a bill is not passed, including running out of time or political issues.¹⁸²

Duty of the Court

The court did not look closely at the legislative history of the case, but rather relied on the plain meaning of the definitions of "general contractor" and "subcontractor" and concluded that those definitions did not forbid a premises owner from being a general contractor. According to rules of statutory construction, the court need not look beyond the plain language if the statutory text is unambiguous, unless that construction would lead to an absurd result.¹⁸³ Determining that the language was clear, the court did not consider legislative history.

Some amici argue that the change in definitions was not sufficient to demonstrate by plain language that the legislature intended to allow premises owners to qualify as general contractors for purposes of the exclusive remedy defense. Contemporaneous and subsequent legislative actions suggested that the legislature did not intend to make this policy change at the time that the definitions were changed - and furthermore showed by subsequent actions that it did not consider the law to have been changed regarding premises owners.

Some may argue that the duty of the court extends to doing as thorough a legislative history analysis as necessary to determine the legislative intent of a given provision, including listening to the committee hearing tapes.¹⁸⁴ However, if the court is forced to second-guess what it believes to be clear language and do a lengthy examination of legislative history, that can create unnecessary delay in the court system. Ordinary citizens should be able to rely on the plain language of a statute.¹⁸⁵

Cost of Workers' Compensation Insurance

This decision will include certain premises owners in the risk pool for Workers' Compensation insurance. The Division of Workers' Compensation, at this point, does not know whether premiums will increase or decrease, and if so by how much.¹⁸⁶ The Texas AFL-CIO claims that there will be an increase in cost of workers' compensation insurance due to large corporations escaping accountability for injuries.¹⁸⁷

the Honorable Representatives Craig Eiland and Bryan Hughes, p. 3; .Supplemental Brief on Rehearing of Amicus Curiae The Texas Trial Lawyers Association, pp. 12-15; Letter to the Texas Lobby by Steve Bresnen, December 18, 2007.

¹⁸² Lee Parsley, Texans for Lawsuit Reform, "Memorandum: Response to Steve Bresnen's Letter," January 23, 2008, p. 5, citing *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983) and *Texas Employment Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex 1969).

¹⁸³ *Entergy v. Summers* citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex 2006) and *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

¹⁸⁴ Brief of Amicus Curiae Steve Bresnen, pp. 25-42

¹⁸⁵ Texans for Lawsuit Reform, Memorandum on *Entergy v. Summers*, presented at the April 29, 2008 joint interim hearing.

¹⁸⁶ Testimony of Commissioner Albert Betts, April 29, 2008.

¹⁸⁷ Amicus Brief by Texas AFL-CIO, *Entergy v. Summers*, pp. 12-14

Recommendations

1. Create legislation to clarify legislative intent regarding liability of premises owners.

INTERIM CHARGE 6: Monitor the agencies and programs under the committee's jurisdiction.

Division of Workers' Compensation, Texas Department of Insurance

See Interim Charge #5, above.

Workers' Compensation Research and Evaluation Group, Texas Department of Insurance

House Bill (HB) 28 (78th Legislature, third called session) created a new workers' compensation research function at the Texas Department of Insurance (TDI) by transferring the research function of the former Research and Oversight Council on Workers' Compensation (ROC) to the agency. Per Chapter 405 of the Texas Labor Code, the Workers' Compensation Research Group is responsible for conducting professional studies and research on various system issues, including:

- the delivery of benefits;
- litigation and controversy;
- insurance rates and rate-making procedures;
- rehabilitation and reemployment of injured workers;
- workplace health and safety issues;
- the quality and cost of medical benefits; and
- other matters relevant to the cost, quality, and operational effectiveness of the workers' compensation system.

House Bill (HB) 7 (79th Legislature, Regular Session, 2005) included a new Section 405.0026, Texas Labor Code, which requires the Commissioner of Insurance to adopt an annual research agenda for the Workers' Compensation Research and Evaluation Group (REG) at the Texas Department of Insurance (TDI). Section 405.0026, Texas Labor Code, also requires TDI to post a proposed research agenda in the Texas Register for public review and comment and requires the Commissioner of Insurance to hold a public hearing on the research agenda if requested by a member of the public.¹⁸⁸

Research Agenda

1. Completion and publication of the second edition of Workers' Compensation Health Care Network Report Card (required under Insurance Code §1305.502 and Labor Code §405.0025); report due in September 2008.

¹⁸⁸ Texas Department of Insurance Website at <http://www.tdi.state.tx.us/wc/regulation/roc/index.html>

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2. An analysis to assess the impact of certified workers' compensation health care networks on both the cost and the quality of medical care provided to injured workers, including a comparison of medical care provided prior to and after the implementation of networks, as well as a comparison of medical care provided to injured workers in and outside of networks (required by Labor Code §405.0025(c)); report due on December 1, 2008.
 3. Continuing examination of the frequency of Workers' Compensation claims for both employers and employees participating in networks.
 4. An annual update of return-to-work outcomes for injured workers using data from the Texas Workforce Commission (TWC) (Sunset Advisory Commission Management Recommendation).
 5. An update of the 2006 study to estimate employer participation in the Texas workers' compensation system (required by Insurance Code Article 5.55(e) and Labor Code §405.0025); report due on December 1, 2008.
 6. An update of the FY 2007 analysis of the frequency, type, and outcome of peer reviews performed on behalf of insurance carriers using the results of the Department's Division of Workers' Compensation's peer review data call (to assess the impact of HB 1006 and HB 2004, 80th Legislature).
 7. Assisting the Department's Division of Workers' Compensation with data analysis support for the development of a closed pharmaceutical formulary and fee guideline required under Labor Code §408.028(b) and (f).
 8. Assisting the Department's Division of Workers' Compensation with an examination whether injured employees have reasonable access to surgically implanted, inserted, or otherwise applied devices or tissues and investigate whether reimbursement rates or any other barriers exist that reduce the ability of an injured employee to access those medical needs (required by Labor Code §413011(i)).
 9. Assisting the State Office of Risk Management (SORM) with its efforts to:
 - a. collect and analyze data from each state agency regarding lost time, including sick and annual leave used by an injured employee (required by Labor Code §412.0126); and
 - b. analyze options to prepare state agencies for catastrophic claims, including a study of whether the state should establish a state employee workers' compensation catastrophe fund outside of the state treasury and/or purchase catastrophe reinsurance (required by Labor Code §412.0129); report due to the Legislature on September 1, 2008).
 10. An analysis of the adequacy of income benefits paid to injured workers as a result of their work-related injuries.

Office of Injured Employee Counsel

The Office of Injured Employee Counsel (OIEC) was created by House Bill 7, 79th Legislature, and began operations in March 2006. OIEC provides free assistance through the dispute resolution process to injured employees. An ombudsman, supervised by a staff attorney in the field office, assists the injured employee in preparing a case and attending any hearings.

Appropriations Requests from the 80th Legislature

The 80th Legislature provided OIEC with additional resources to assist injured employees. 25 employees were transferred from the Division of Workers' Compensation to OIEC to be trained as ombudsmen. Prior to this, these 25 employees were Dispute Resolution Officers at DWC who handled the early stages of a case before a benefit review conference (BRC) was scheduled. OIEC would only be able to get involved once a BRC was scheduled. By transferring those 25 employees to OIEC, OIEC can get involved earlier in the process.

OIEC was also provided with 36 employees for its customer service program. These employees can respond to inquiries from injured employees and proactively contact employees who may need assistance.¹⁸⁹ The Office of Injured Employee Counsel is starting an outreach program to make personal calls to every injured worker who files a claim, so that the workers know their rights.¹⁹⁰

Those two staff additions help OIEC toward its goal of being a "one stop shop" for the injured employee.

State Office of Risk Management

The 75th Legislature created the State Office of Risk Management (SORM) in 1997 to assist state agencies in protecting their employees and the state's physical and financial assets by reducing and controlling risk. The three primary functions of SORM are administering an employee workers' compensation insurance program; providing risk management services to state agencies; and coordinating state agency purchases of property, casualty, and liability insurance.

SORM currently covers all state employees except those at University of Texas, Texas A&M, and Texas Department of Transportation. Texas Tech conducts its own risk management. ERS and TRS contract for program services pursuant to statutory exceptions.¹⁹¹

SORM is funded by general revenue appropriated by the legislature for the majority of claim administration and interagency contracts with covered state agencies. It is estimated that in

¹⁸⁹ Briefing Information Regarding the Office of Injured Employee Counsel, Provided to the House Business & Industry Committee, April 29, 2008.

¹⁹⁰ Testimony of Norman Darwin, Office of Injured Employee Counsel, April 29, 2008.

¹⁹¹ SORM Fact Sheet, April 29, 2008.

Fiscal Year 2008, \$45 million in claims were paid.¹⁹²

SORM has successfully decreased injuries in state agencies and has also decreased workers' compensation expenditures. SORM has also implemented a secure web-based system to collect risk management information, general reports, and collect claims information.

SORM is in the process of contracting with a workers' compensation network. A request for proposals has been issued.

SORM currently has been granted an e-billing waiver due to financial concerns. Money was not appropriated for e-billing. It may save money for the state if SORM implements e-billing when a network is put in place.¹⁹³

Comparison to Other Workers' Compensation Systems

In the last few years, SORM's medical costs have been decreasing. SORM's medical payouts are lower than most commercial workers' compensation carriers, but higher than those of the other state agencies that are not covered by SORM.¹⁹⁴

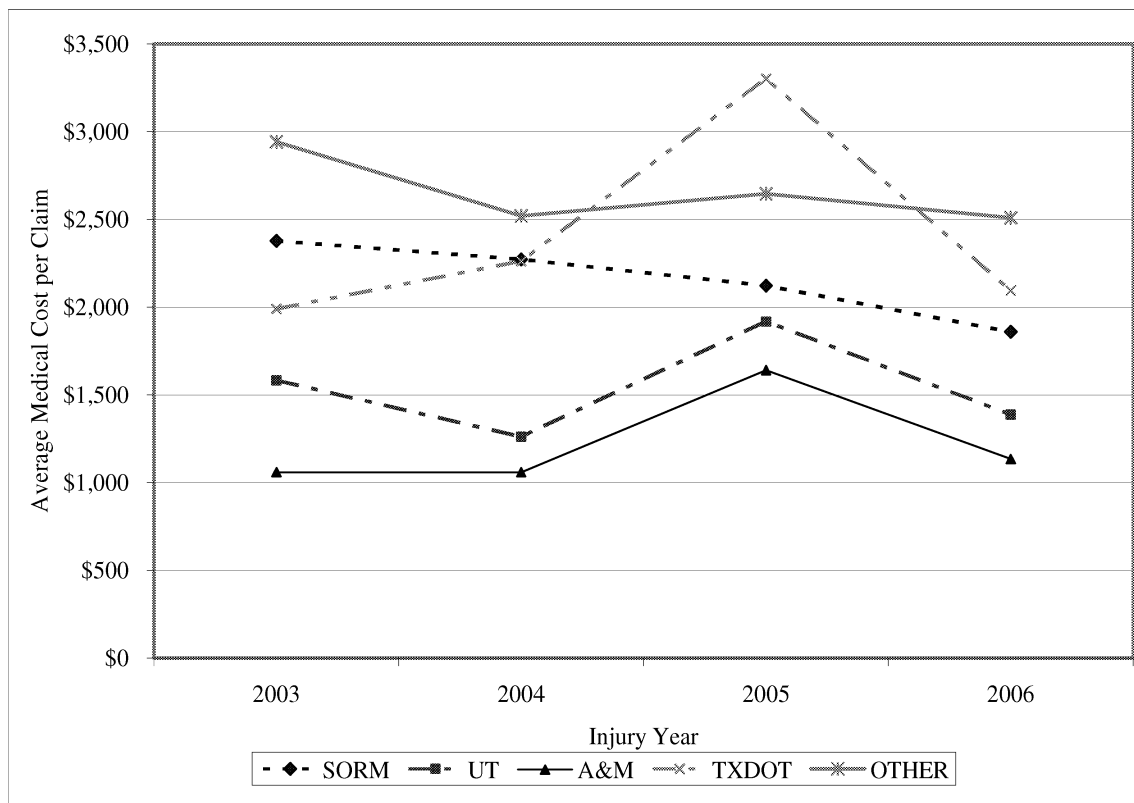


Figure 12: Mean (Average) Workers' Compensation Professional and Hospital Medical Costs per Claim - All Injuries, Injury Years 2003-2006 (12 Months Post-Injury)

¹⁹² SORM Fact Sheet, April 29, 2008.

¹⁹³ Testimony of Jonathan Bow, SORM, April 29, 2008.

¹⁹⁴ Letter by Amy Lee, Director of the Workers' Compensation Research and Evaluation Group, to Rep. Helen Giddings, July 10, 2008.

Sunset Review

SORM is subject to the Sunset Act and would have been abolished on September 1, 2007, unless continued by the legislature. The Sunset Commission found that managing the insurance and risk management needs of state agencies is needed and that SORM is successful in its mission, but some of its processes could be improved to better prepare the agency to handle its responsibilities.

SB 908 continues SORM for 12 years. It also requires SORM to:

- assist all state agencies in developing a business continuity plan to use in case of a disaster;
- provide state agencies with return-to-work coordination services;
- study how to structure its worker's compensation program to prepare for claims resulting from a disaster;
- issue workers' compensation payments in the same manner as an employee receives wages, including electronic funds transfer (direct deposit);
- enter into a memorandum of understanding with the Texas Building and Procurement Commission on exchange of safety related information; and
- keep information in or derived from a workers' compensation claim file regarding an employee confidential.

As of February 2008, benefits have been paid by direct deposit. There are no reserves for a significant catastrophic event, and SORM is looking into alternatives such as insurance.¹⁹⁵

Insurance and other alternatives are discussed in a recent report issued by SORM entitled: Options to Prepare State Agencies For Catastrophic Claims. SORM conducted a national survey in order to get a sense of what other states are doing in terms of preparing for catastrophic claims. The definition of catastrophic claims varies from state to state.¹⁹⁶ Some states, including Texas Association of School Boards and Texas Association of Counties, utilize some form of catastrophic claim indicator for claims identification purposes. These can include: fatalities; severe head injuries; amputations; blindness; loss of hearing; severe burns; electrical shock; smoke inhalation; and occurrences that result in more than one injury at a time, i.e. a car accident involving a state vehicle.¹⁹⁷ Generally, a monetary threshold is not required to claim a "catastrophe." Further, catastrophic claim can include a man-made or a natural force.

In addition to insurance as a possibility for financing coverage of catastrophic claims, SORM also outlines the possibility of purchasing catastrophe reinsurance.¹⁹⁸ Also, SORM outlines the existing appropriations options to pay for catastrophic claims.

¹⁹⁵ Testimony of Jonathan Bow, SORM, April 29, 2008.

¹⁹⁶ SORM, Options to Prepare State Agencies for Catastrophic Claims, September 2008, p. 6.

¹⁹⁷ SORM, Options to Prepare State Agencies for Catastrophic Claims, September 2008, p. 6.

¹⁹⁸ SORM, Options to Prepare State Agencies for Catastrophic Claims, September 2008, p. 15.

Texas Mutual Insurance Company

Texas Mutual Insurance Company (Texas Mutual) is a privately run insurance company, created by HB 3458, 77th Legislature, which is required to provide workers' compensation insurance to any business in Texas, with few exceptions.

Senate Bill 192, 80th Legislature, provides that Texas Mutual is not subject to the Public Information Act (PIA) or the Open Meetings Act (OMA). Texas Mutual operates entirely on premium and investment income from business operations, with no public funds, and with complete financial independence and separation from the State of Texas. Being subject to the PIA and the OMA placed Texas Mutual in a position different from its competitors, forcing it to disclose information not required of its competitors while not allowing the board the flexibility to hold meetings on short notice.

Texas Mutual currently holds a 26.53 percent market share of the workers' compensation insurance market, with the next highest market share held by another company at 7.66 percent.¹⁹⁹

Network

Texas Mutual contracts with one of the first two certified networks under the new workers' compensation system, the TexasStar Network. In March 2006 there were 75 counties in the network. Since then, there have been 4 modifications to the network and it serves 231 counties.

Texas Mutual writes approximately 47,000 policies, and of those policies 28,000 use the network. There have been 37,000 network claims.²⁰⁰

¹⁹⁹ Texas Department of Insurance Website, <http://www.tdi.state.tx.us/company/top40.html>

²⁰⁰ Testimony of Terry Frakes, Texas Mutual, April 29, 2008.