



THE 88TH SESSION

OVERVIEW

By Royce Poinsett

In 2023, Texas lawmakers faced an embarrassment of riches: a historic, almost mind-boggling \$32.7 billion surplus resulting from booming post-pandemic consumer spending and oil and gas production. This surplus was about triple the state's previous highest record and was larger than the entire budgets of most other states. The Republican-dominated Legislature budgeted billions of dollars back into neglected facets of state government, and then made huge “generational investments” in the state's infrastructure, education, and social services needs.

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PHOTOS BY PATRICIA BUSA McCONNICO

However, in the January-to-May regular session, the state's Republican leadership failed to find consensus on their highest fiscal priority: delivering the "largest property tax cut in history" they had promised to voters on the campaign trail. This breakdown led Gov. Greg Abbott to immediately call legislators back into a June special session and to also veto dozens of their recently passed bills. But this "tough love" did not motivate Lt. Gov. Dan Patrick and Speaker of the House Dade Phelan to reach agreement on the issue. Instead, the "Big Three" leaders spent the ensuing weeks in open tax policy warfare, complete with dueling press conferences and tweets. So the governor called the Legislature back for "double overtime," and in July, in a second special session, the leaders were finally able to negotiate and pass a compromise property tax relief package.

In the regular session, the Legislature also failed to pass the "voucher or school choice" legislation pushed by the governor and Texas Senate, allowing parents to use taxpayer dollars to pay private school tuition or home-schooling expenses. The governor had traveled the state championing the concept, but in the House, enough rural Republicans teamed with Democrats to kill the proposal.

The regular session did see Republicans pass another batch of socially conservative priorities, focused on transgender issues, diversity initiatives, and school library books.

For added drama, the House expelled a Republican legislator for sexual misbehavior with an intern and then closed the session with the surprise impeachment of Republican Attorney General Ken Paxton.

The governor has pledged to call the chambers back for additional special sessions on school choice and other unfinished business. And the Senate plans to begin the attorney general's impeachment trial in September. So weary legislators are anticipating a busy summer and fall in Austin.

Major Legislation of the 2023 Regular Session

Texas legislators filed more than 8,000 bills and passed over 1,200. The governor vetoed 76 bills, the second highest count in state history. Some of the most significant legislation is summarized here.

State budget. **HB 1** enacts a balanced two-year state budget with a record \$321.3 billion in overall spending, a 5.95% increase over the prior biennium's budget. **SB 30** provides another \$7 billion in supplemental appropriations. The Legislature left over \$10 billion in projected revenue unspent and left over \$27 billion parked in the state's "rainy day fund." Billions of dollars in spending on "generational investments" in various arenas are contingent on voter approval of constitutional amendments in November (as discussed below).

Property tax relief. It took two special sessions for the Republican leadership to agree on how exactly to direct about

\$18 billion in surplus funds toward property tax relief. **SB 2** and **HJR 2** (second called session) is a compromise package blending Senate and House priorities. If approved by voters, the state's residential homestead exemption will increase from \$40,000 to \$100,000 (at a cost to the state of \$5.3 billion for the biennium). And the state will "buy down" the school property tax rate by 10.7 cents per \$100 valuation for all homeowners and business properties (a 23.8% decrease, at a cost to the state of \$12.6 billion per biennium). Republicans predict these two mechanisms will save Texas homeowners an average of \$1,300 each year. Finally, the state will institute a three-year pilot program that caps property value increases at 20% for commercial properties, second homes, and investment properties valued at \$5 million or less.

Higher education. The state budget includes \$700 million in new funding for public universities and \$650 million for community colleges. The University of Texas and Texas A&M University received nearly \$700 million to research and develop microchips. And under **HB 1595/HJR 3**, voters will have the opportunity to approve a \$3 billion endowment to expand research activities at Texas State University, Texas Tech University, the University of Houston, and the University of North Texas. The budget also includes nearly \$1.5 billion in grants for low-income students.

SB 17 bans diversity, equity, and inclusion, or DEI, offices, programs, and training at publicly funded universities, following the lead of Florida. **SB 18** maintains tenure at public universities but codifies tenure guidelines and requires regular performance reviews.

Public education. The budget provides almost \$6 billion in new public school funding. In response to recent violence **HB 3** allots \$330 million to schools' physical security infrastructure. The Legislature also allocated \$1.1 billion to help schools meet new safety requirements and passed **SB 838** to require schools to install silent panic alert buttons in each classroom. **SB 10** provides \$5.6 billion in cost-of-living adjustments for retired teacher pensions. A proposal to provide an additional \$5 billion in additional public school funding (including raises for teachers) fell victim to the battle over "school choice" but will likely be revisited in an upcoming special session.

HB 900 requires a new rating system for books in public school libraries and bans "sexually explicit material" from school shelves. And **SB 763** allows public schools to employ chaplains.

Infrastructure. Legislators allocated \$5 billion for new highway construction, and voters can approve \$1.5 billion for expanding broadband internet availability (**HB 9/HJR 125**).

Natural Resources. Voters can approve \$1 billion for state parks conservation and acquisition (**SB 1648/SJR 74**) and \$2 billion to increase water supplies, fix failing water

infrastructure, protect the coast, and prevent flooding (**SB 28/SJR 75**).

Electric grid reform. The Legislature continued the reform of the state's electricity market that began when Winter Storm Uri hit Texas during the 2021 session. **SB 2627/SJR 93** and **HB 1500**, the Public Utility Commission's Sunset bill, seek to improve electric grid reliability by allocating up to \$5 billion to incentivize generators to build new "dispatchable" power plants (pending voter approval) and by setting new standards for generation reliability and responsiveness. The bills also included provisions aimed at reducing the grid's reliance on renewable energy.

Preemption. **HB 2127** is a sweeping "field preemption" law that could fundamentally shift the contours of business regulation in Texas. The measure bars cities and counties from issuing local ordinances that go further than what is permitted under state law in various arenas, including labor, agriculture, natural resources, and finance. Litigation to determine the exact scope of the new law is expected.

Judicial Reform. **HB 19** establishes new specialized business courts with jurisdiction over large, complex business disputes, following the lead of Delaware and 28 other states. **SB 1045** establishes a new statewide 15th Court of Appeals based in Austin. The new court will have exclusive intermediate appellate jurisdiction over a wide array of civil matters, including cases from the new business courts, most suits against state agencies, and all suits challenging the constitutionality or validity of a state statute or rule.

Legislators have criticized district attorneys who elect to not prosecute certain classes of crimes (typically those involving abortion, marijuana, or theft), and **HB 17** subjects those district attorneys to removal petitions.

Economic development. **HB 5** replaces the expired "Chapter 313" incentive with a new (less generous) "Chapter 403" property tax abatement program to help lure projects to the state. The new program excludes renewable energy projects. The Legislature also appropriated \$200 million for the state's film, television, and video game incentive program, more than quadrupling last session's funding.

Human services. The budget provides \$3 billion for new mental health facilities and services. **HB 12** extends Medicaid coverage for low-income Texans for a full year after childbirth.

Transgender issues. With **SB 14**, Texas joins 17 other states in prohibiting minors from accessing gender transition-related surgeries, puberty blockers, or hormone therapies. **SB 15** requires intercollegiate athletes at Texas public institutions to compete on the teams that align with their sex at birth, regardless of their gender identity. **SB 12** began as legislation specifically criminalizing "drag show performances" in front of minors, but the enacted version is a broader, vaguer bill

criminalizing any "sexually explicit performances" in public or in front of minors.

New Laws That Affect Everyday Life

Savings on Aisle 9. **SB 379** nixes the sales tax on menstrual products, diapers for adults and children, baby wipes, breast milk pumping products, baby bottles, maternity clothes, and wound care dressings, effective September 1, 2023.

Shorter Wait Times at Jiffy Lube. **HB 3297** eliminates annual safety inspections for non-commercial vehicles, effective January 1, 2025. Emissions tests will still be required in 17 highly populated counties.

Good Hair Day. **HB 567** prohibits discrimination in education, employment, or housing on the basis of a person's "hair texture or protective hairstyle commonly or historically associated with race," such as braids, locks, and twists, effective September 1, 2023.



ROYCE POINSETT

is a government relations attorney, registered lobbyist, and principal in Poinsett PLLC. He represents businesses and associations at the Texas Capitol.

PUBLIC NOTICE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON, TEXAS

APPOINTMENT OF FULL-TIME UNITED STATES MAGISTRATE JUDGE

The United States District Court for the Southern District of Texas is soliciting qualified applicants in order to appoint a full-time United States Magistrate Judge for its Houston Division, pending approval of the position by the Fifth Circuit Judicial Council and the Judicial Conference of the United States Courts. The current annual salary of the position is \$213,992. The term of office is 8 years.

A full public notice for the position, which includes information concerning background and IRS tax checks as well as financial disclosure requirements, and the application form are available in the office of the United States District Clerk at Brownsville, Corpus Christi, Galveston, Houston, Laredo, McAllen and Victoria. The notice is also available on the Court's website at www.txs.uscourts.gov.

Applications may be submitted electronically, in person, or by mail and must be received by 5:00 p.m. on September 22, 2023. Details are provided on the Court's website.

Applications will be kept confidential, unless the applicant consents to disclosure, and will be examined only by members of the merit selection panel and judges of the district court. The panel's deliberations are confidential.



ACCESS TO JUSTICE

By Bruce P. Bower

Access to justice relies on funds appropriated by the Texas Legislature. The 88th Texas Legislature convened on January 10, 2023, and concluded its regular session on May 29, 2023. The Legislature passed the biennial state budget as **HB 1**, effective September 1, 2023. The Texas Senate voted in favor of HB 1, 29-2, on May 26, 2023. The Texas House of Representatives voted in favor of HB 1, 124-22, on May 27, 2023.¹

For fiscal years 2024-2025, appropriations for basic civil legal services are part of the HB 1 appropriations for the Supreme Court of Texas. In other words, it is the Supreme Court of Texas that, through its legislative appropriations request, sets the amount of state funds that the Legislature is requested to appropriate for basic civil legal services. Article IV of HB 1 is the article in which appropriations to the judiciary are found.

For the biennium that starts September 1, 2023, the Legislature appropriated \$45,134,392 for FY 2024 for basic

civil legal services, and \$35,134,392 for FY 2025 (which starts September 1, 2024).² The goal that the Legislature set for this strategy—the output—is that, each year, 28 grantees will receive state funding for basic civil legal services.³ The Legislature stated, “It is the intent of the Legislature that appropriations made by this Act [HB 1] be utilized in the most efficient and effective manner possible to achieve the intended mission of the Supreme Court of Texas.”⁴

The Supreme Court of Texas is required to report semi-annually each year to the Legislative Budget Board and the governor, “showing disbursements from all funding sources for Basic Civil Legal Services, the purpose for each disbursement, and compliance with grant conditions.”⁵

The \$10 million difference between the FY 2024 appropriation and the smaller FY 2025 appropriation results from that \$10 million being included in FY 2024 “for basic civil legal services to victims of sexual assault that may only be used for purposes established for the Supreme Court of Texas in Government Code §420.008.”⁶ Texas Government Code §420.008 (c)(11) specifies this appropriation to “the supreme court, to be transferred to the Texas Access to Justice Foundation, or a similar entity, to provide victim-related legal services to sexual assault victims, including legal assistance with protective orders, relocation-related matters, victim compensation, and actions to secure privacy protections available to victims under law[;]”⁷ thus, for the biennium, \$10 million is specifically for services to victims of sexual assault.

Of the amount appropriated for basic civil legal services for FY 2024 and FY 2025, “\$3,500,000 each fiscal year in General Revenue [is] for the purpose of providing basic civil legal services to veterans and their families.”⁸ Thus, over the biennium, \$7 million is specifically for basic civil legal services for low-income veterans.

SB 658 may provide an additional, modest amount of funding for basic civil legal services. SB 658 amends the Texas Property Code, adding section 74.604. As stated in the bill analysis, SB 658 “allows unclaimed IOLTA funds to be transferred from the comptroller to the Supreme Court of Texas’ judicial fund to help support basic civil legal services.”⁹

The fiscal note for SB 658 states that approximately \$48,000 of such unclaimed IOLTA funds is received annually by the comptroller.¹⁰ SB 658, signed by the governor on June 18, 2023, is effective September 1, 2023.

Readers who are interested in the grant conditions for basic civil legal services appropriations in HB 1 can visit the website of the Texas Access to Justice Foundation.¹¹ At that site one can read about the renewed statewide legal clinic initiative for Texas veterans. (Remember that the 88th Texas Legislature specified that \$3.5 million in FY 2024 and \$3.5 million in FY 2025 is to be used to provide basic civil legal services to low-

income Texas veterans.) One can also read about a very recent initiative, the statewide virtual court kiosk project, as well as the income and resource criteria that limit eligibility for basic civil legal services funded by the Texas Legislature.

The Supreme Court of Texas created the Texas Access to Justice Commission in 2001 in Misc. Docket No. 01-9065 to “develop and implement policy initiatives designed to expand access to and enhance the quality of justice in civil legal matters for low-income Texas residents.”¹² Readers interested in the work of the Texas Access to Justice Commission can visit the “In the News” section of the TAJC’s website¹³ and read about the commission’s current activities.

Readers interested in the ongoing work of the Supreme Court of Texas regarding access to justice can visit its website.¹⁴ The Supreme Court has numerous forms for self-represented individuals.¹⁵ One can locate a county-by-county directory of referral programs, as well as links to TexasLawHelp.org and to three Legal Services Corporation “field programs” in Texas, which are among the 28 grantees of the basic civil legal funding from the 88th Legislature.¹⁶

The roles that the governor, the chief justice and the entire Supreme Court of Texas, the lieutenant governor, and the speaker of the house carry out in support of basic civil legal services can be seen in the fact that state funds for basic civil legal services are appropriated by the Legislature to the Supreme Court in a bill that the governor signed. Among the three branches of state government, the Supreme Court begins that process by proposing the amount to be appropriated for basic civil legal services as part of the court’s budget request to the Legislature.

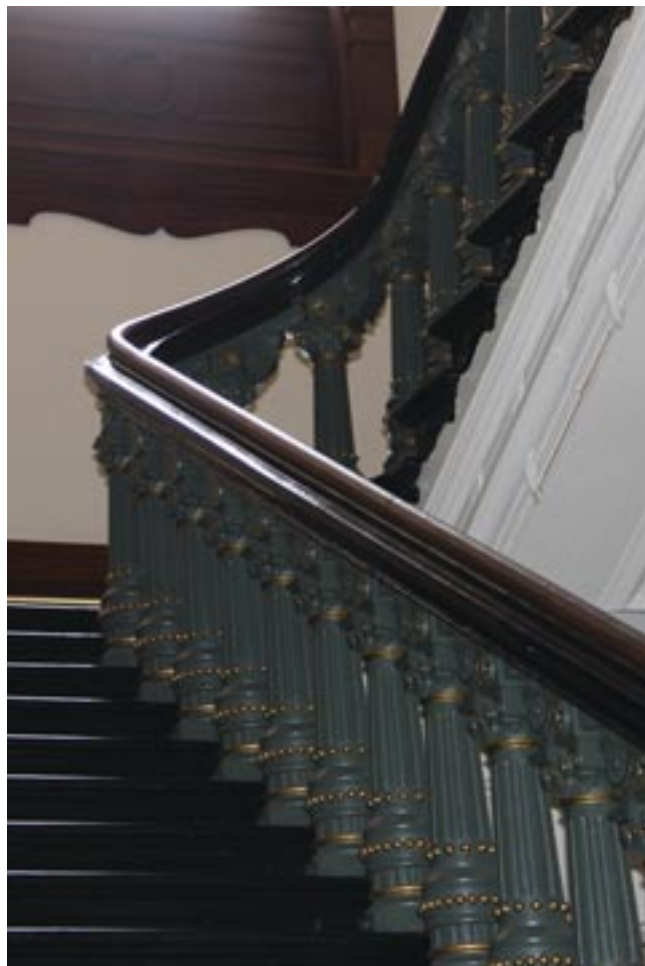
Notes

1. Tex. H.B. 1, 88th Leg., R.S. (2023).
2. *Id.*, Article IV, the Judiciary, page IV-1.
3. *Id.*, Article IV, the Judiciary, page IV-2.
4. *Id.*
5. *Id.*
6. *Id.*
7. Tex. Gov’t Code Sec. 420.008(c)(11).
8. H.B. 1, Article IV, the Judiciary, page IV-2.
9. Bill Analysis, Senate Research Center, Tex. S.B. 658, 88th Leg., R.S. (2023).
10. Legislative Budget Board, Fiscal Note, 88th Leg. R.S.
11. See Texas Access to Justice Foundation, <https://tajf.org>.
12. See https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/01/01-9065.pdf.
13. Texas Access to Justice Commission, <https://texasatj.org>.
14. Supreme Court of Texas, <https://www.txcourts.gov/supreme/>.
15. See <https://www.txcourts.gov/forms>.
16. See <https://www.txcourts.gov/programs-services/legal-aid>.



BRUCE P. BOWER

volunteers for Texas Legal Services Center. He has been a member of the State Bar of Texas since 1989.



ANIMAL LAW

By Shelby Bobosky and Randy Turner

The 88th Texas Legislature made significant changes to existing laws and local ordinances that will change the trajectory of the animal law landscape for years to come.

Dog and Cat Breeder Bill

In 2011, Texas passed a law regulating large-scale cat and dog breeders titled the Dog or Cat Breeders Act, found in Chapter 802 of the Texas Occupations Code. While the 2011 law prevented animal cruelty at licensed facilities, loopholes allowed numerous large-scale breeders to avoid inspections and basic standards of care. **SB 876** was passed this session, requiring breeders with five or more breeding females to be licensed. Previously, only breeders with 11 or more breeding females were regulated. According to a Texas Department of Licensing and Regulation, or TDLR, study, unlicensed breeding facilities are responsible for most cruelty and neglect complaints. SB 876, effective September 1, 2023, also removes the need to prove that a breeder sold 20 or more animals in a calendar year. This legislation will enable the Texas Licensed Breeders Law to oversee the industry as originally intended.

Trap-Neuter-Return Bill

In late 2022, confusion erupted over whether trap-neuter-return, or TNR, of unowned community cats should be considered “abandonment” under Section 42.092 *et. seq.* of the Texas Penal Code. TNR is widely regarded as a humane method of stabilizing the feral cat population by humanely trapping them, transporting them to veterinary clinics for sterilization and vaccination, and then tipping their ear as a sign they have been treated. TNR programs save thousands of Texas cats from euthanasia annually, and the prospect of prosecuting TNR providers for abandonment threatened to end successful programs across the state.

HB 3660, effective June 10, 2023, updates Section 42.092(a) of the Texas Penal Code by defining a “Trap-Neuter-Return Program” as a means of nonlethal population control and adding a defense to prosecution for returning TNR cats to their outdoor homes. As a result, the law now clearly distinguishes between abandoning an owned companion animal versus releasing a TNR cat. However, the unreasonable abandonment of an owned companion animal is still punishable by a fine of up to \$4,000, jail time of up to a year, or both.

Fake Service Animals

In recent years, there has been a sharp increase in the number of non-disabled people misrepresenting their pet dogs as service animals so their pets can accompany them in public spaces. Increased incidents of pet dogs distracting or attacking service animals have diminished the quality of life for disabled people who rely on service animals to navigate daily life. After negative encounters with imposters, some businesses have denied legitimate service animals access to their establishments, and significant numbers of service dog teams have begun avoiding public spaces for fear of being accosted by untrained pets.

HB 4164, effective September 1, 2023, amends Section 121.006 of the Human Resources Code by clarifying the language describing a service animal and strengthening the penalties for misrepresenting an animal as a service animal when they are not specially trained to help a person with a disability. As a result of HB 4164, the fine for asserting an untrained pet is a service animal increases from \$300 to \$1,000, and the offender may be required to perform 30 hours of community service for organizations serving persons with disabilities.

Preemption of City Animal Ordinances

HB 2127, effective September 1, 2023, preempts Texas’ municipalities from regulating activity under several sections of the Texas code unless that authority is expressly granted under another statute. HB 2127 amends Chapter 229 of the Local Government Code by prohibiting municipalities from adopting or enforcing regulations concerning “the breeding,

care, treatment, or sale of animals or animal products, including a veterinary practice, or the business’s transactions if the person operating that business holds a license for the business that is issued by the federal government or a state.” While HB 2127 bars local government from passing future ordinances of this type, pet store ordinances adopted before April 1, 2023, remain enforceable until a statewide law regulating pet store sales is passed.

Animal Abusers Prohibited From Owning Pets

As of May 2023, 39 states have laws commonly called “possession bans” to prohibit persons convicted of animal cruelty from owning companion animals for a fixed period of time. The most common length of time a person is prohibited from possessing animals after conviction is five years. Some states go so far as to limit the ability of offenders to work with or ever own a companion animal again. **HB 598** amends Chapter 42 of the Texas Penal Code by adding Section 42.107, which makes it a crime for a person previously convicted of animal cruelty to possess a non-livestock animal (i.e., companion animals such as a cat or a dog) for a period of five years after conviction. HB 598 also enhances the penalty for repeat violations under Section 42.107 from a Class C misdemeanor to a Class B. HB 598, effective September 1, 2023, disrupts an offender’s access to animals for a significant period of time.

Right-to-Farm Laws

HJR 126, dubbed the “Right-to-Farm Amendment,” amends the Texas Constitution to enshrine a right to engage in commercial agricultural activities on private property inside city limits. HJR 126 includes raising livestock and poultry, harvesting timber, and managing wildlife, and this proposition will be on the November 7, 2023, Texas ballot. If a majority of voters approve the proposition to amend the Texas Constitution, cities will not be able to regain control over agricultural operations in their jurisdictions by amending or repealing state laws.

Even if the amendment falls short of the necessary votes to amend the Texas Constitution by adding a “right-to-farm,” the Legislature codified a “right-to-farm in the city” by passing **HB 1750**. Historically, Texas cities with populations of 5,000 or more could regulate agricultural operations in city limits, such as livestock and poultry operations, so long as those regulations did not contradict state law. If a city annexed territory with preexisting agricultural operations, the city could regulate those operations after demonstrating that the regulation was necessary to protect the public.

HB 1750, effective September 1, 2023, amends the Texas Agriculture Code so that the requirement for cities to prove local regulation is necessary to protect the public is no longer limited to the newly annexed territory. Instead, agricultural operations cannot be regulated locally unless the city health

department issues a report showing the operation poses a dire hazard to people in the immediate vicinity and the city council passes a resolution authorizing the regulation. HB 1750 preempts cities' ability to proactively prevent harm by requiring municipalities to show harm after the fact.

Regarding ordinances regulating the care of animals, HB 1750 preempts cities from passing or enforcing regulations that prohibit "generally accepted agricultural practices" for animals in agricultural operations. Instead, HB 1750 directs the Texas A&M AgriLife Extension Service to detail which practices are generally accepted in a forthcoming manual. Two provisions in HB 1750 are specific to companion animals. First, HB 1750 adds veterinary clinics to the list of businesses protected by the "right-to-farm" because they service agricultural operations. Second, HB 1750 prohibits cities from enforcing local tethering ordinances for dogs guarding livestock. HB 1750 does not invalidate SB 5, the Safe Outdoor Dogs Act passed in 2021. Like all other dogs tethered outdoors in Texas, livestock guard dogs must be provided adequate shelter and drinkable water and cannot be tethered by chains.

HB 2308 works with HB 1750 by limiting the circumstances under which agricultural operations can be sued. In particular, HB 2308, effective September 1, 2023, amends the Texas

Agriculture Code so that parties bringing nuisance lawsuits against agricultural operations must show clear and convincing evidence of harm. If they lose in court, the party that brought the lawsuit must pay the operation's attorneys' fees and court costs. Additionally, a party must file the nuisance lawsuit within one year of the operation's start date. Thus, agricultural operations in cities operating for more than a year cannot be sued for nuisances such as odor and runoff from animal waste or toxic chemicals.



SHELBY BOBOSKY

is an attorney and serves as the executive director of the Texas Humane Legislation Network, a 50-year-old Texas nonprofit whose mission is to promote the humane treatment of animals. She teaches animal law and wildlife law at Southern Methodist University School of Law.



RANDY TURNER

practices animal law in Fort Worth. He represents animal rescue organizations and wildlife sanctuaries and is on the board of directors of the Texas Humane Legislation Network.



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BUSINESS LAW

By Daryl B. Robertson

This article summarizes several bills passed by the 88th Texas Legislature that affect business law and does not purport to describe all passed bills in this area. This article contains summaries only and should not be relied on as a complete description of any bill. All bills are effective September 1, 2023, unless otherwise noted.

Omnibus Package of TBOC Amendments

SB 1514 makes an array of amendments to the Texas Business Organizations Code, or TBOC, covering various topics. Most of these amendments are summarized below.

Omission of Initial Mailing Address in Restated Certificate of Formation. The amendments permit omission of an entity's initial mailing address, which can become inaccurate as time passes, in a restated certificate of formation. The 2021 Texas Legislature added a requirement that the initial certificate of formation of a domestic filing entity must include its initial mailing address.

Delayed Effective Date for Certificate of Merger, Conversion, or Exchange. Several changes enhance the flexibility to file a certificate of merger, exchange, or conversion with a delayed effective date. The changes delete unnecessary language in several TBOC provisions requiring that a certificate of merger, exchange, or conversion must be filed after the approval of the related plan of merger, exchange, or conversion. Similarly, unnecessary language restricting the filing of a certificate of conversion or merger for a series of a limited liability company to after adoption of the related plan of conversion or merger has been deleted.

Dissent and Appraisal Rights Changes. A notice of a meeting of owners who have dissent and appraisal rights must include a copy of the dissent and appraisal provisions of TBOC Chapter 10. As an alternative to a copy, the amendment allows the notice to direct owners to a publicly available electronic resource where those provisions may be accessed without cost. The requirement that dissenting owners must surrender an endorsed certificate representing their ownership interests in order to obtain payment of the appraisal proceeding judgment is replaced by a statement that the judgment must be paid on terms and conditions ordered by the court.

Replacement of LLC's Last Member. Greater flexibility is provided for continuing the existence of a Texas LLC upon the termination of the member status of the last remaining member. Among other things, the default deadline for the replacement of that member is extended from 90 days to one year after the date of termination of the last member to continue the LLC's existence. The company agreement can substitute any other period of time as the applicable deadline.

The concept of a "springing" member is also confirmed by a new provision.

Reinstatement and Continuation of Terminated Entities or LLC Series. The three-year deadline for reinstatement of a voluntarily terminated domestic entity is eliminated. The provisions allowing continued existence for limited purposes of a terminated filing entity are clarified to apply also to a termination under the Tax Code or any chapter of the TBOC. Also, reinstatement of a terminated LLC under the TBOC or the Tax Code automatically reinstates any protected series or registered series that terminated because of the termination.

Availability of Lists of Shareholders and Voting Members at Corporate Meetings. The requirements for a list of shareholders or voting members of a for-profit or nonprofit corporation to be produced and kept available for inspection at meetings of the shareholders or voting members are eliminated. Other provisions continue to require the list to be made available for inspection before the meeting.

Ratification of Void or Voidable Acts by Partnerships or LLCs. New provisions clarify that a limited liability company or partnership can ratify an act or transaction that was void or voidable when taken, or can waive compliance with any requirements of the company agreement or partnership agreement that caused an act or transaction to be void or voidable.

Doctrine of Independent Legal Significance. A new provision clarifies that an action validly taken under a provision of the TBOC may not be considered invalid because it is identical or similar in substance to an action that could have been taken under another provision of the TBOC but fails to satisfy the requirements of that other provision.

Electronic Signatures on Certificated Ownership Interests. An ownership interest certificate can now contain the electronic or digital signatures of authorized managerial officials.

Certificates of Existence for Registered Series. A certificate issued by the secretary of state stating that a domestic registered series is in existence may be relied on as conclusive evidence of the existence of the series.

Issuance of Shares, Rights, and Options. The amendments clarify and harmonize various provisions relating to authorizations by the board of directors for the issuance of shares, and of rights and options to purchase shares, by for-profit corporations and the power to delegate to other persons the authority to determine various matters relating to such issuances.

Inspection Rights of Owners. Various provisions relating to the rights of owners to examine and copy records of for-profit corporations, limited partnerships, and limited liability companies are clarified and harmonized.

Certificate of Registered Series. A change clarifies that a certificate of registered series must be amended if the name of the associated LLC changes.

Company and Partnership Agreements. Amendments clarify what writings constitute a company or partnership agreement and that the entity, its owners, and any assignees are bound by such agreement regardless of whether they sign the agreement.

Divisive Merger of LLC Series. The definition of “merger,” for purposes of series of LLCs, is clarified to include a divisive merger whereby there is a surviving merging series and one or more new protected series or registered series.

Return of Distribution by Limited Partner or LLC Member. A

Many business lawyers are extremely interested in HB 19, which establishes the Texas business court. The court will start taking cases after September 1, 2024. For further details, see the summary under “Texas Judiciary.”

change clarifies that an LLC member or a limited partner can be obligated to return an illegal distribution by the entity under another agreement.

Management of LLC by Governing Authority. An amendment clarifies that the governing authority of an LLC shall direct the management of the business and affairs, and exercise or authorize the

exercise of the powers, of the LLC as provided by the company agreement and the TBOC.

Notices for Written Consents. Changes clarify that owners or members of an entity can take action via a non-unanimous written consent without providing prior notice. For LLCs, such consent does not require prior or subsequent notice.

Assumed Name Certificates. The definition of “assumed name” in the Texas Business & Commerce Code is amended to confirm that a protected series of an LLC does not have an assumed name if its name includes the name of its associated LLC. The definition of “office” is amended to be, for a non-individual, that person’s principal office in Texas or outside Texas, as applicable.

LLC Charging Orders

SB 2314 clarifies that both single-member and multiple-member LLCs are subject to the provisions limiting the remedies of a member’s judgment creditor to a charging order against that member’s membership interest.

Public Inspection of Records of Texas Nonprofit Corporations

HB 1957 amends TBOC Section 22.353 to require only a

Texas nonprofit corporation that is an exempt organization under Internal Revenue Code Section 501(c)(3) to keep each document it is required to make available for public inspection under such code at its registered or principal office in Texas for three years after the close of the fiscal year. The nonprofit corporation must make such documents available to the public for inspection and copying at its registered or principal office during regular business hours. As a result of the amendments, the prior requirement that all Texas nonprofit corporations make available for public inspection their records, books, and annual reports for three years no longer exists.

New Texas Business Court

Many business lawyers are extremely interested in **HB 19**, which establishes the Texas business court. The court will start taking cases after September 1, 2024. For further details, see the summary under “Civil Litigation and Appellate Law” and the summary under “Texas Judiciary.”

Electronic Trading Platforms for Digital Assets

HB 1666 prohibits electronic trading platforms for digital assets from commingling customer funds with funds belonging to the platform, using customer funds to secure a transaction other than a transaction for such customer, or maintaining customer funds in such a manner that the customer is unable to fully withdraw the customer’s funds. The new provisions apply to an electronic platform that holds a money transmission license and either serves more than 500 customers in Texas or has at least \$10 million in customer funds.

Regulatory Bills

SB 1646 makes several minor revisions to Finance Code provisions regulating state trust companies, effective May 19, 2023. **HB 3574** makes several minor revisions to Finance Code provisions regulating state banks, effective June 18, 2023. **SB 895** adds new extensive Finance Code provisions based largely on the Model Money Transmission Modernization Act. New Chapter 152 adds regulatory provisions for money transmission businesses and imposes licensing requirements.



DARYL B. ROBERTSON

has more than 30 years of experience in business and mergers and acquisitions transactions, entity formation and restructuring, REITs and corporate finance, and securities law. He is chair of the Business Code Committee of the State Bar of Texas Business Law Section, which regularly drafts amendments to the Texas Business Organizations Code, and is a former chair of the Business Law Section. He received his J.D. from Harvard Law School and his B.A. from Duke University.

CIVIL LITIGATION AND APPELLATE LAW

By Jerry D. Bullard

The following briefly describes some of the bills passed by the 88th Texas Legislature that will directly affect Texas civil trial and appellate practitioners. Unless otherwise indicated, all bills are effective September 1, 2023. For more detailed and additional background information on the following bills, please visit Texas Legislature Online at capitol.state.tx.us.

Attorneys/Practice of Law

HB 5010¹ amends section 81.073 of the Government Code and requires the Office of Chief Disciplinary Counsel to classify grievances against attorneys as “complaints” if the grievance alleges conduct that, if true, constitutes professional misconduct or disability and the grievance is submitted by a person listed in the statute or who otherwise has a cognizable individual interest in or connection to the legal matter or facts alleged in the grievance. HB 5010 also allows an attorney against whom a grievance is filed to appeal the classification of the grievance as a “complaint.”

Civil Justice System/Judiciary

SB 372² amends the Government Code to make it a Class A misdemeanor for a person, other than a justice or judge, with access to non-public judicial work product to knowingly disclose the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, employee of the Judicial Council or Office of Court Administration, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding. However, it will be a defense to prosecution if the disclosure was authorized either in writing by the justice or judge for whom the work product is prepared or under Supreme Court of Texas rules.

SB 1045³ establishes the 15th Court of Appeals. The court will be based in Austin and composed of an elected chief justice and four justices; however, for the first three years after the court’s creation, the court will consist of a chief justice and two justices.

Under SB 1045, the court will have exclusive immediate appellate jurisdiction over civil matters: (1) brought by or against the state or a board, commission, department or executive state agency, or by or against an officer or employee thereof arising out of the officer’s or employee’s official conduct; (2) in which a party to the proceeding challenges the constitutionality or validity of a state statute or rule and the attorney general is a party; and (3) any other matter as provided by law.

The court will be created on September 1, 2024. The changes in law made under SB 1045 apply to appeals perfected on or after September 1, 2024. On September 1, all cases pending in other courts of appeal that were filed on or after September 1, 2023, and of which the 15th Court of Appeals has exclusive intermediate appellate jurisdiction, will be transferred to the newly created court.

SB 1603⁴ amends section 51.014 of the Civil Practice & Remedies Code, or CPRC, and requires a court of appeals to specify its reasons for finding that a permissive appeal is not warranted under 51.014(d) if the court does not accept the appeal. SB 1603 also provides that the Supreme Court will conduct a *de novo* review of a decision by a court of appeals not to accept a permissive appeal and permits the court to direct the court of appeals to accept the appeal if the Supreme Court determined that the requisites for a permissive appeal have been satisfied.

HB 19⁵ creates a new business trial court system in Texas. More specifically, HB 19 does the following:

- Establishes a statewide business court with concurrent jurisdiction with a district court in three different categories of cases:

Tier 1: Business governance disputes in which the amount in controversy exceeds \$5 million and involve: (1) a derivative proceeding; (2) an action regarding the governance or internal affairs of the organization; (3) an action in which a claim under a state or federal securities or trade regulation law is asserted against an organization, a governing or controlling person or officer of an organization, or an underwriter of securities issued by the organization or its auditor; (4) an action by an organization or an owner or member thereof if the action is brought against an owner, managerial official, or controlling person and alleges an act or omission by that person in the person’s official capacity; (5) an action alleging that an owner, managerial official, or controlling person breached a duty, including a duty of care, loyalty, or good faith; (6) an action seeking to hold an owner, member, or governing person liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and (7) an action arising out of the Business Organizations Code. The amount in controversy requirement will *not* apply to actions in which a publicly traded company is a party.

Tier 2: Commercial disputes in which the amount in controversy exceeds \$10 million and involve: (1) an action arising out of a “qualified transaction” (as defined in the statute); (2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed to that the business court has jurisdiction over the action, except an action arising out of an insurance contract; and (3) an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization, other than a bank, credit union, or savings and loan association; and

Supplemental Jurisdiction: Any other claim related to a case or controversy within the court’s jurisdiction that forms part of the same case or controversy. A claim within the business court’s supplemental jurisdiction may only proceed upon agreement of all parties and the judge.

- Establishes a procedure for removing claims (or parts of claims) not within the jurisdiction of the business court to a county in which the claim could have originally been filed.
- Gives the 15th Court of Appeals exclusive jurisdiction over appeals described by statute.
- Requires a business court judge to be at least 35 years of age, a U.S. citizen, a Texas resident for two years preceding appointment, a Texas licensed attorney with at least 10 years of experience in Texas in practicing complex business litigation or business transaction law, serving as a judge of a Texas civil court, or any combination of the above.
- Provides for the gubernatorial appointment of judges for two-year terms.
- Provides that a party has a right to a jury trial where required by the constitution in the county in which venue is proper under CPRC, section 15.002 and, if the case was removed to the business court, in the county in which the case was originally filed.
- Requires the Supreme Court of Texas to adopt rules relating to written opinions.
- Provides that the business court system will be composed of geographic divisions that correspond to the state's 11 administrative judicial regions. Effective September 1, 2024, judges will be appointed to each business court division, with two judges in five of the divisions (Dallas, Austin, San Antonio, Fort Worth, and Houston). One judge will be appointed in each of the remaining six divisions if a legislative appropriation is made for that purpose. If not funded, the remaining six divisions will be abolished on September 1, 2026.

The business courts will be created September 1, 2024. The changes in the law under HB 19 apply to civil actions commenced on or after September 1, 2024.

HB 367⁶ amends the Government Code to authorize the State Commission on Judicial Conduct, or SCJC, to accept complaints, conduct investigations, and take any other action authorized by statute or the Texas Constitution, with respect to a candidate for judicial office who is subject to the Judicial Campaign Fairness Act, in the same manner SCJC is authorized to take those actions with respect to a judge. [Note: In 2021, the 87th Legislature passed—and Texas voters subsequently approved—a constitutional amendment that provides the constitutional authority for the SCJC to enforce the Code of Judicial Conduct and administer discipline with respect to judicial candidates.]

HB 3474⁷ is an omnibus courts bill that does many things, including the following:

- Creates multiple new district courts, probate courts, and county courts at law in numerous Texas counties.
- Raises the jurisdictional limit for tenant judicial remedies sought in justice courts from \$10,000 to \$20,000 in cases under Tex. Prop. Code §92.056(3).
- Addresses the appointment of official court reporters and interpreters.

- Addresses deposition, transcription, and interpretation services.
- Requires OCA to biennially conduct a district court workload analysis in the 30 most populous counties.
- Adopts a process in which an appealing party can create an appendix in lieu of a clerk's record.
- Requires trial and appellate courts to deliver through the electronic filing system all orders that a court enters in a case to all parties.

HB 3929⁸ repeals CPRC §20.002 and authorizes the Supreme Court to adopt the Uniform Interstate Depositions and Discovery Act, or UIDDA, as rules of civil procedure. It also provides that, if the Supreme Court does not adopt the UIDDA before September 1, 2025, the current law remains in effect.

Texas Citizens Participation Act, or TCPA

HB 527⁹ amends section 27.010(a) of the CPRC and adds a new subsection (13) that expressly exempts “a legal malpractice claim brought by a client or former client” from the scope of the TCPA.

Notes

1. Act of May 26, 2023, 88th Leg., R.S., H.B. 5010 (to be codified as an amendment to Tex. Gov't Code Ann. §§81.073-.074).
2. Act of May 22, 2023, 88th Leg., R.S., S.B. 372 (to be codified at Tex. Gov't Code Ann. §21.013).
3. Act of May 22, 2023, 88th Leg., R.S., S.B. 1045 (to be codified as amendments to Tex. Gov't Code Ann. §§21.013, 22.201, 22.2151-2152, 22.216, 22.220-221, 22.229, 31.001, 73.001, 659.012, 2001.038, 2001.176; Tex. Occ. Code Ann. §2301.751; Tex. Code Crim. Proc. §§4.01, 4.03, 44.25; Tex. Util. Code Ann. §39.001).
4. Act of May 12, 2023, 88th Leg., R.S., S.B. 1603 (to be codified as an amendment to Tex. Civ. Prac. & Rem. Code Ann. §51.014).
5. Act of May 29, 2023, 88th Leg., R.S., H.B. 19 (to be codified at Tex. Gov't Code Ann. §25A.001, et seq. and as an amendment to §837.001).
6. Act of May 27, 2023, 88th Leg., R.S., H.B. 367 (to be codified at Tex. Gov't Code Ann. §33.02105).
7. Act of May 29, 2023, 88th Leg., R.S., H.B. 3474 (to be codified at Tex. Gov't Code Ann. §§22.3015, 24.600201, 24.60031-60034, 24.60038-60043, 24.6009, 24.60095, 25.2491, 25.2703-.2704, 41.013, 45.315, 46.003, 54.2701, et seq., 54.2801, et seq., 54.6585, 54A.219, 54B.001, et seq., 62.115, and as amendments to §§24.392, 24.516-517, 24.541, 24.553, 24.576, 24.591, 24.60030, 24.910-913, 25.0005, 25.0023, 25.0062, 25.0171, 25.0173, 25.0331-0332, 25.0592, 25.0732, 25.0932, 25.1031, 25.1331-1332, 25.1572, 25.1721, 25.1723, 25.2223, 25.2293, 25.2391-.2392, 25.2607, 26.315, 51.3071, 51.403, 51.601, 52.041, 52.047, 52.055-.056, 52.058, 54.2001, 54.2502, 54.651, 54.656, 57.001-.002, 61.001, 61.0015, 61.003, 62.0111, 62.013, 62.0131-.0132, 62.014, 62.0145-.0146, 62.015-.017, 62.0175, 62.106-.109, 62.411-.412, 72.037, 79.012, 80.001-.002, 154.051, 154.101, 154.105, 154.112, 406.016, 602.002, 602.007, and 659.012; codified as Tex. Civ. Prac. & Rem. Code Ann. §§30.0035 and 51.018, and as amendments to §30.012; codified as amendments to Tex. Code of Crim. Proc. Ann. art. 2.09, 4.01, 11.07, 18.0215, 19A.052-.053, 19A.101, 42.15, 49.05, and 55.02; codified at Tex. Est. Code Ann. §33.105 and as amendments to Tex. Est. Code Ann. §33.101-.103, 152.001-.004, 152.051, , 1023.006-.007; codified as amendments to Tex. Fam. Code Ann. §155.207, 201.005, 201.105, 201.113, 201.205, and 201.208; codified as amendments to Tex. Hum. Res. Code Ann. §152.2264; and codified at Tex. Prop. Code Ann. §92.0563).
8. Act of May 26, 2023, 88th Leg., R.S., H.B. 3929 (repealing Tex. Civ. Prac. & Rem. Code Ann. §20.002).
9. Act of May 29, 2023, 88th Leg., R.S., H.B. 527 (to be codified as an amendment to Tex. Civ. Prac. & Rem. Code Ann. §27.010).



JERRY D. BULLARD

is a shareholder in the Grapevine firm of Adams, Lynch & Loftin. He is certified in civil appellate law by the Texas Board of Legal Specialization and is a past chair of the State Bar of Texas Appellate Section. Since 2004, Bullard has monitored legislation impacting the judiciary and the civil justice system and provided updates to interested members of the bench and bar. He is a graduate of Baylor University and the University of Texas School of Law.



COMPUTER AND TECHNOLOGY

By Shelby B. Menard, Jeremy Rucker, and Shawn Tuma

HB 18, also known as the Securing Children Online through Parental Empowerment, or SCOPE, Act, restricts a digital service provider's processing of personal identifying information of a known minor.¹

The law also prohibits the digital service provider from allowing a minor to make purchases, collecting precise geolocation data, or displaying targeted advertisements to the minor.² Digital service providers are also required to implement strategies to prevent a minor's exposure to harmful content.³ The law also provides rights to parents or guardians of known minors, including the right to access, obtain, and delete any personal identifying information of a known minor that is in the possession of the digital service provider.⁴ A violation of this law is a deceptive trade practice actionable by the consumer protection division of the attorney general's office.⁵

HB 18 also amends the Texas Education Code by requiring the Texas Education Agency to adopt a set of standards for permissible electronic device and software applications used by certain charter and public schools.⁶ Specifically, the agency must, among other obligations, require: (1) the minimization of the collection of student data; (2) direct informed parental consent for student use of certain software applications; (3) a prohibition of software applications from conducting certain mental health assessments without direct and informed parental consent; (4) the consideration of appropriate restrictions on student access to social media websites or applications; and (5) the consideration of use of internet filters capable of notifying school administrators if a student accesses inappropriate content.⁷

HB 18 is effective September 1, 2024, with the exception that the provisions which amend the Texas Education Code and relate to the use of electronic devices by students became effective immediately upon passage of the SCOPE Act.⁸

Unlawful Disclosure of Residence Address or Telephone Number

Effective September 1, 2023, **HB 611** makes it a Class B criminal misdemeanor if a person posts the residence address or telephone number of an individual on a publicly accessible website with the intent to cause harm or threat of harm to the individual or a member of the individual's family or household.⁹ The offense becomes a Class A misdemeanor if the offense results in bodily injury.¹⁰

Individual Rights in Commercial Genetic Testing Data

Effective September 1, 2023, **HB 2545** codifies the confidentiality of, and a property right in, an individual's biological material and results of genetic testing that are provided to or used by a direct-to-consumer genetic testing company.¹¹ The new law requires an individual's express consent prior to disclosing genetic testing results.¹² Additionally, the law requires direct-to-consumer genetic testing companies to implement a comprehensive security program to safeguard genetic testing data and provide privacy notices to individuals.¹³ Violators may be liable to the state for a civil penalty up to \$2,500 per violation.¹⁴

Texas Enacts Comprehensive Data Privacy Law

Under **HB 4**, Texas joins the expanding list of states that have passed comprehensive data privacy and security laws regulating the collection, use, processing, and treatment of consumer personal data of a data controller.¹⁵ A data controller means any individual or other person that, alone or jointly with others, determines the purpose and means of processing personal data.¹⁶ The Texas Data Privacy and Security Act provides Texas residents (consumers) with the rights: (1) to know whether a controller processes, and has the right to access, the consumer's personal data; (2) to correct or delete the consumer's personal data; (3) to obtain a copy of the consumer's data collected by the controller; and (4) opt out of the processing of personal data for certain purposes.¹⁷ Additionally, the law imposes notice, transparency, data security, and contracting obligations on controllers. A person in continued violation of this law beyond a 30-day cure period may be subject to a civil penalty up to \$7,500 per violation.¹⁸ The majority of the provisions in the act become effective July 1, 2024.¹⁹

Notification to the Attorney General of a Breach of Security

SB 768 amends the attorney general notification requirements of individuals and businesses in Texas that experience a qualifying security breach. Effective September 1, 2023, an individual or business required to disclose or provide notification of a breach of security system to at least 250 Texas citizens must also notify the attorney general as soon as practicable and not later than 30 days following discovery of the breach.²⁰ This information must be submitted electronically using the form accessed on the attorney general's website.²¹

Disclosure of Customer Information by Government-Operated Utilities

The Texas Utilities Code protects the disclosure of certain customer personal information by government-operated utilities, subject to certain exemptions.²² Effective May 19, 2023, **HB 2664** amends the Texas Utilities Code to add two exemptions to allow disclosure of personal information in a customer's account record to: (1) another entity as necessary to facilitate the transition of customers among retail electric providers under Section 40.053 or to comply with rules, guidelines, and procedures established by an independent organization certified under Section 39.151; and (2) to a retail electric provider, as defined by Section 31.002(17) of the Utilities Code.²³

State Agency and Local Government Security Incident Procedures

SB 271 has amended Section 2054.1125 of the Texas Government Code and redesignated it Section 2054.603, effective September 1, 2023. This amendment now requires local governments and state agencies that own, license, or maintain computerized sensitive, confidential, or regulated information to comply with the notification requirements of Section 521.053 of the Business and Commerce Code within 48 hours of the discovery of the security incident.²⁴ This amendment also expands the notification obligation by imposing obligations in the event of a breach, suspected breach, or upon the introduction of ransomware into a computer environment.²⁵

Confidentiality of Certain Personal Information of Applicant for or a Person Protected by a Protective Order

SB 578 amends Section 82.011 and 85.007(a) of the Family Code to expand the protection of the personal information of an applicant or person protected by a protective order. Effective September 1, 2023, such person may request that the court protect and make confidential the applicant's county of residence.²⁶ An individual or family or household member of a person protected by a protective order may also request exclusion of (1) the address, county of residence, and telephone number of the protected person; or (2) the address and telephone number of the place of employment or business of the protected person, or the child-care facility or school in which a protected child attends or resides.²⁷

Prohibitions in Connection With the Online Sale of Goods

Effective September 1, 2023, **SB 58** amends the Texas Business and Commerce Code to include Chapter 328 governing the online sale of goods.²⁸ Goods as defined under the Texas Deceptive Trade Practices Act means tangible chattels or real property purchased or leased for use.²⁹ This chapter will prohibit a person from selling, using, or causing to be used any technology, device, or software in the sale of goods on an internet website that: (1) functions as a bypass in the purchasing process; (2) disguises the identity of the

purchaser; (3) permits the purchase of goods in a quantity that exceeds the maximum amount that may be sold to one purchaser as specified by the seller or website operator; (4) allows for unauthorized access to or identification of gift card information (including card numbers and PINs); or (5) circumvents a security measure, access a control system, or other methods of control, authorization, or measure in the purchasing process.³⁰ These amendments will not apply to the seller of goods on a website or the operator of the website.³¹ The Texas Attorney General will have the authority to investigate any violation of this chapter.³²

Notes

1. Tex. Bus. & Comm. Code §§ 509.001-509.152.
2. Tex. Bus. & Comm. Code § 509.052(2).
3. Tex. Bus. & Comm. Code § 509.053.
4. Tex. Bus. & Comm. Code § 5509.103(a).
5. Tex. Bus. & Comm. Code § 509.151.
6. Tex. Education Code § 32.1021.
7. Tex. Education Code § 32.1021.
8. See 2023 Texas H.B. 18, Texas 88th Legislature.
9. Tex. Penal Code § 42.074(a).
10. Tex. Penal Code § 42.074(b).
11. Tex. Bus. & Comm. Code §§ 503A.001-503A.008.
12. Tex. Bus. & Comm. Code §§ 503A.006.
13. Tex. Bus. & Comm. Code §§ 503A.005.
14. Tex. Bus. & Comm. Code §§ 503A.008.
15. Tex. Bus. & Comm. Code §§ 541.001-541.205.
16. Tex. Bus. & Comm. Code §§ 541.001(8).
17. Tex. Bus. & Comm. Code §§ 541.051.
18. Tex. Bus. & Comm. Code §§ 541.155.
19. Tex. Bus. & Comm. Code § 509.151.
20. Tex. Bus. & Comm. Code § 521.053(l).
21. Tex. Bus. & Comm. Code § 521.053(a).
22. Tex. Util. Code § 182.054(1)-(8).
23. Tex. Util. Code § 182.054(7)(8).
24. Tex. Gov't Code § 2054.1125(b)(1)-(3).
25. Tex. Gov't Code § 2054.1125(a)(1)(a)(b).
26. Tex. Fam. Code § 82.011.
27. Tex. Fam. Code § 85.007(a)(1)-(2).
28. Tex. Bus. & Comm. Code § 328.
29. Tex. Bus. & Comm. Code § 328.001; Tex. Bus. & Comm. Code § 17.46(1).
30. Tex. Bus. & Comm. Code § 328.002(a)(1)-(5).
31. Tex. Bus. & Comm. Code § 328.002(b).
32. Tex. Bus. & Comm. Code § 328.003(a)-(c).



SHELBY B. MENARD

is an associate of Spencer Fane and member of the Data Privacy and Cybersecurity Practice Group, where she works primarily in the firm's Collin County office.



JEREMY RUCKER

is a certified privacy law specialist by the International Association of Privacy Professionals (CIPP/US, CIPP/E, CIPM) and a member of the Data Privacy and Cybersecurity Practice Group at Spencer Fane, where he is an associate and works primarily in the firm's Collin County office.



SHAWN TUMA

is an attorney widely recognized in data privacy and cybersecurity law, areas in which he has practiced for well over two decades. He is a past chair of the State Bar of Texas Computer & Technology Section and co-chair of the Data Privacy and Cybersecurity Practice Group at Spencer Fane, where he works primarily in the firm's Collin County office.

CONSTRUCTION LAW

By Ben L. Aderholt

The 88th Texas Legislature made modest changes in construction law. **HB 2022** amends Property Code Section 27.001 for cases arising after September 1, 2023, as to procedures and notice concerning settlement and recovery of arbitration fees and costs in residential cases. A late offer by a contractor may be permitted if the contractor was prejudiced without opportunity to inspect, if the owner fails to provide information, or if it is late due to events beyond the contractor's control. It defines "construction defect" as a deficiency in the design, construction, or repair of a residence on a claim against a contractor. Bodily or personal injury damages are not defined as economic damages. It limits a contractor's liability to the extent the defective condition causes any actual physical damage to the residence, an actual failure of a building component to perform its intended function, or verifiable damage to the safety of occupants. A claimant must prove the construction defect existed at the time of the construction. To claim a breach of a warranty of habitability, a claimant must establish that a construction defect was latent at the time the residence was completed or title was conveyed to the original purchaser and has rendered the residence unsuitable for its intended use.

HB 2024 amends Civil Practice and Remedies Code Section 16.009 effective June 9, 2023, as to the statute of repose for residential construction for a claim arising out of the design, construction, or repair that commences after the effective date, unless the contract was entered into before the effective date. A residence means a detached dwelling or townhouse not more than three stories. The statute of repose remains for 10 years unless a contractor has provided a written warranty and then the statute of repose is shortened to six years. A warranty must provide a minimum period of one year for workmanship and materials; two years for plumbing, electrical, heating, and air-conditioning; and six years for major structural components.

HB 2518 significantly amends the law on public work contracts for public property leased by a governmental entity. It applies to leases entered into after September 1, 2023. Leases by a governmental entity must require the contractor to provide payment and performance bonds to all subcontractors not later than the fifth day after the date the subcontract is executed. The lessee also must provide a notice of commencement prior to starting construction so that the government entity can stop the construction if it is not authorized to proceed. If a governmental entity fails to include in a lease these terms, the entity is subject to the same liability that a surety would have if the surety had issued a payment bond. This amendment of Section 2253.021 of the McGregor Act ought to remedy maneuvers by public entities to avoid requiring bonds by claiming they were not contracting with a prime contractor. This maneuver frustrated the intent of the act to protect unpaid subcontractors—especially because subcontractors have no lien

rights on public projects.

HB 2007 removes the certificate of merit for certain design build claims and applies to actions commenced after September 1, 2023, on a design build project in which a governmental entity contracts with a single entity to provide both design and construction services for civil works or a highway project. So, a third-party plaintiff that is a design build group is not required to file a certificate of merit when filing a third-party claim against a professional.

Chapter 2272 of the Government Code requires notice and opportunity to inspect and correct construction defects except: claims for personal injury, survival, or wrongful death; residential construction claims; Texas Department of Transportation contracts; and a project that receives money from a state/federal highway fund and civil works projects. The amendment in **HB 2965** applies to actions accruing after September 1, 2023, and makes any purported waiver void.

HB 679 applies to contracts whose first solicitation was after September 1, 2023. It amends Government Code Chapter 2252 to prohibit use of experience modifiers as a basis for solicitation and selection. A violation makes the contract voidable.

HB 3485 amends Government Code 2251.0521 whereby a vendor or subcontractor may elect not to proceed with additional work directed by an entity without a fully executed change order if the aggregate value exceeds 10% of the subcontractor contract entered into after September 1, 2023.

HB 14 revises the law on third-party review of plats. Local Government Code Chapter 247 requires third-party review or inspection of development documents submitted after September 1, 2023, when a regulatory authority does not approve a development document by the 15th day after date prescribed in the statute and does not conduct required development inspection by the 15th day after date prescribed in the statute. A third-party inspection must provide notice to the regulatory authority of the results of the inspection and must provide notice to the regulatory authority of the results of the inspection not later than the 15th day after completing the inspection. An applicant may appeal the decision not later than the 15th day after the date the decision is made. If the governing body hearing the appeal does not affirm the decision by a majority vote on or before the 60th day, the appeal is considered approved, or the inspection will be considered waived.

Grateful recognition is made to Ben Westcott and Cathy Altman, who keep the State Bar of Texas Construction Law Section current on the law.



BEN L. ADERHOLT

has served for many years as a member of the editorial board of the *Construction Law Journal* and continues to teach construction law at South Texas College of Law Houston. He is a past president of the Houston Bar Association.

CRIMINAL LAW

By Allen D. Place Jr. and Shea Place

The 88th Texas Legislature saw an unusually high number of bills filed in both the House and Senate chambers. Of those filed bills, over 1,000 were related to substantive or procedural changes to criminal law. Following the veto period, over 100 criminal law bills made it through the process to become new law in Texas. All bills are effective September 1, 2023, unless otherwise noted.

The following bills detailed below address procedural changes to Texas criminal law:

- **SB 991** creates a central computerized online laboratory portal to process requests for records and transmits them among the appropriate parties. Implementation of this process will take time, but it is believed that once operational, the current cumbersome procedure to obtain the following will be streamlined: lab notes, testing procedures, proficiency tests, and disciplinary issues.
- **SB 338** makes statements inadmissible as evidence in a criminal trial if made during or after a hypnotic session. The bill does clarify this only applies if the hypnotic session giving rise to the statement was performed to investigate the offense made the subject of the trial. In 1987, the Legislature authorized the Texas Commission on Law Enforcement to establish minimum requirements for investigative hypnosis. In 2021, the Department of Public Safety announced suspension of its hypnosis program. The enactment of this policy follows a similar movement in other states.
- **HB 1710**, effective on September 1, 2024, requires the Texas Department of Criminal Justice, on request of a judge, to notify the judge not later than the 60th day after the date a defendant is received into the custody of a state jail felony facility that the defendant has served 75 days in the facility. This bill was based on an interim report recommendation regarding more effective procedures for community supervision in state jail facilities.
- **HB 2015** raises the age at which one qualifies for an exemption from jury service from 70 to 75. It was suggested this change mirrors the age 75 mandatory requirement for Texas judges and justices to retire.
- **HB 3956** seeks to clarify the process for an individual seeking expunction of records upon notice from the court of an acquittal, dismissal, or a grant of relief. This bill also follows the nationwide trend of expanding DNA collection procedures.
- **HB 4528** recognizes technological advances by removing the requirement for a peace officer to take an individual's driver's license upon refusal to take an intoxication test or upon failing such a test as a means of suspending the license.
- **SB 402** amends the Government Code to include murder and capital murder among the offenses to which trial courts must give preference over other criminal actions when setting hearings and trials.

The following bills detailed below address substantive changes to Texas criminal law:

- **HB 6** seeks to address reports of increased production and smuggling of fentanyl. Testimony elicited on this bill indicated approximately 75,000 Americans died from an overdose of

synthetic opioids, mostly fentanyl. This bill addresses this issue by increasing criminal penalties for manufacture or delivery of fentanyl, and by expanding criminal offenses involving the manufacture or delivery of certain opioids.

- **HB 17** relates to official misconduct by and removal of Texas prosecuting attorneys. The bill amends the definition of official misconduct under the Local Government Code by adding language addressing a prosecuting attorney's adoption or enforcement of a policy or refusing to prosecute a class or type of criminal offense under state law, or instructing law enforcement to refuse to arrest individuals suspected of committing a class or type of offense under state law, with some exceptions. Section 87.015 of the Local Government Code is amended to reflect that a petition for removal of a prosecuting attorney may be filed by any resident of this state who has lived for at least six months in the county in which the petition is filed, so long as the person filing the petition is not currently charged with a criminal offense in that county. The bill further addresses the assignment of judges in these cases.
- **HB 165** defines a mass shooting under Penal Code Section 1.07 as harm to four or more persons during the same criminal transaction or same scheme or course of conduct. The penalty for a mass shooting is increased from a second-degree felony to a first-degree felony.
- **HB 446** updates state law regarding the terminology used for individuals with intellectual disabilities. The bill changes the current language of mental retardation to intellectual disability in numerous state codes and statutes.
- **HB 611** creates the criminal offense of unlawful disclosure of a residence address or telephone number by setting out the elements of unlawful conduct and of prima facie evidence of intent. The punishment is a Class B misdemeanor unless bodily injury occurs, which would raise the punishment to a Class A misdemeanor.
- **HB 1243** increases the penalty for illegal voting from a Class A misdemeanor to a second-degree felony, except an attempt is classified as a state jail felony.
- **HB 1819** was based on a published report indicating juvenile curfew ordinances are an ineffective way to reduce crime and often lead to negative outcomes for school youth. This bill amends the Local Government Code by prohibiting a political subdivision from adopting or enforcing an ordinance imposing a curfew to regulate the movements or actions of persons younger than 18 years of age, except under the Texas Emergency Management Act.
- **HB 2715** seeks to protect individuals from protective orders that would allow the tracking or monitoring of a person without their consent. This bill authorizes a court issuing a protective order to prohibit such conduct and further authorizes a magistrate to require as a condition of release on bond that a person charged with an offense involving family violence refrain from such conduct.
- **HB 4635** amends current law relating to organized crime, racketeering activities, and collection of unlawful debts. The bill provides for civil penalties and criminal offenses. This bill, in a nod to the federal RICO statute, sets out to strengthen the legal tools in gathering evidence and enhances sanctions for those engaged in organized crime.
- **SB 189** creates a Class A misdemeanor for the owner of a building who leases a building to a person operating a boarding home facility, and who has actual knowledge of abuse, neglect, or

exploitation of a facility resident, but who fails to report that conduct.

- **SB 372** was enacted in response to the U.S. Supreme Court draft of the *Dobbs v. Jackson Women's Health Organization* being leaked to the public. This bill creates a Class A misdemeanor offense for a person who knowingly discloses, in whole or in part, the contents of any non-public work product to any person other than court judges or staff.
- **SB 409** amends Chapter 56 of the Code of Criminal Procedure by adding new rights for a victim or close relative of a deceased victim to certain information on a criminal case, such as a decision not to file or dismissal of charges and views regarding plea bargains or pre-trial diversion programs.
- **SB 602** amends Section 2 of the Code of Criminal Procedure by adding to authority currently held by border patrol agents the following powers: the powers of arrest and search and seizure as to any felony offense under the laws of this state if the arrest, search, or seizure occurs on the premises of a port facility operated by U.S. Customs and Border Protection as a port of entry or at a border patrol traffic checkpoint and is incident to a detention under federal law.
- **SB 1004** creates a felony offense for tampering with an electronic monitoring device by knowingly removing or disabling the device. This bill applies to a person under community supervision, parole, or mandatory supervision.
- **SB 1045** amends the Government Code to create the 15th Court of Appeals District composed of all counties in Texas, consisting of a chief justice and four justices. Specifically, this court has exclusive intermediate jurisdiction over matters arising out of civil cases brought by and against the state or state agency or state agency employees with enumerated exceptions. This court will not have appellate criminal law jurisdiction as currently written. Section 73.001 allows the Supreme Court to adopt rules for the transfer into and out of the 15th Court of Appeals.
- **SB 1727** is a 56-page bill continuing the operation of the Texas Juvenile Justice Department, or TJJD, commonly referred to as a Sunset bill. This legislation makes changes and continues the operation of TJJD as a state agency.

As of July 13, 2023, the first two called special sessions of the 88th Texas Legislature have adjourned *sine die*. Neither special session passed any legislation pertaining to criminal law.



ALLEN D. PLACE JR.

has been practicing law for 44 years. He is a former member of the Texas Legislature and was House author of the Texas Penal Code. For the past 13 sessions, Place has represented the Texas Criminal Defense Lawyers Association at the Capitol.



SHEA PLACE

is an attorney for Place Law Office, practicing in Austin and Gatesville since 2016 with a focus on parole law. She has represented the Texas Criminal Defense Lawyers Association as legislative counsel since 2017.



ENVIRONMENTAL AND WATER LAW

By Claudia Russell and Susan M. Maxwell

The 88th Texas Legislature resulted in a variety of enacted bills that affect aspects of environmental, water, and utility law practice. Highlights of key bills are summarized in this article. Unless noted otherwise, these bills are effective September 1, 2023.

Water Infrastructure Funding

SB 28—This headline water infrastructure bill provides for two new funds. The New Water Supply for Texas Fund aims to fund 7 million acre-feet of new water supplies by 2033 through a variety of eligible projects, such as aquifer storage and recovery and desalination. The Texas Water Fund would be established as an umbrella fund allowing the Texas Water Development Board, or TWDB, to disburse funds through other programs and funds it administers. A portion of the latter fund would be required to be used for permit-ready projects, a statewide water public awareness program, water conservation, water loss mitigation projects, and infrastructure projects for small municipalities and rural political subdivisions. TWDB would also establish a technical assistance program for rural communities on water loss audits. SB 28 was written in concert with **SJR 75**, proposing to amend the Texas Constitution to allow these infrastructure investments. Subject to voter approval in November, this dedicated fund would be created with a \$1 billion down payment toward those goals and be effective January 1, 2024.

HB 3582—The Flood Infrastructure Fund, or FIF, is updated to repeal certain existing provisions and designate the FIF for remaining Hurricane Harvey funds in the flood plan implementation account. This bill also revises Water Code provisions governing approved uses of the FIF, including flood projects that are part of the initial state flood plan once adopted. A new definition of “rural political subdivision” is established regarding this funding to include nonprofit water supply or sewer service corporations, municipalities with populations of 10,000 or less, counties without larger urban areas, and other political subdivisions demonstrating their rural nature.

Agency Sunset Legislation

Several major state agencies with jurisdiction over environmental and water matters underwent Sunset review during this cycle. Each agency was continued for an additional term of 12 years, and more complete summaries of

legislation affecting each of them can be found in the agencies' respective final reports on the Sunset Advisory Commission website.

SB 1397—Sunset legislation of the Texas Commission on Environmental Quality, or TCEQ, makes various changes to the Health and Safety Code and the Water Code. The bill expands public notice and outreach requirements related to various types of permits (air, waste, and water), allows for virtual public meetings, and includes other provisions focused on website transparency and alternative forms of electronic notice. TCEQ must establish an enforcement diversion program for small businesses and local governments. A new work plan process is established for re-assessment of adopted environmental flow standards. TCEQ is now required to issue a standard permit to a temporary concrete plant and set out requirements for such batch plants and permits. A new subchapter D is added to Water Code Chapter 28A, requiring TCEQ to develop best management practices, not subject to commission enforcement, for aggregate production operations.

HB 1500—This legislation continues both the Public Utility Commission of Texas, or PUCT, and the Office of Public Utility Counsel. It amends various sections of the Utilities Code and the Water Code and requires various legislative reports for certain generators in the ERCOT power region. Among other things, an owner or operator of an electric generation facility, other than a battery energy storage resource, shall demonstrate to the PUCT the ability of the operator's portfolio to operate or be available to operate when called on for dispatch at or above the seasonal average generation capability during times of highest reliability risk due to low operation reserves.

HB 1565—The TWDB's Sunset legislation makes some notable changes regarding the content of cyclically developed regional water plans. The regional water planning groups, or RWPGs, now must include in their regional plans additional information (expenditures of sponsor money and status updates on permit applications and on construction phases) for large water projects, such as reservoirs, interstate water transfers, innovative technology projects, desalination, and others as determined by the TWDB. The RWPGs will now be allowed to plan for a drought worse than the drought of record.

Groundwater

HB 1971—Effective June 9, 2023, this bill amends and adds various provisions in Chapter 36 of the Texas Water Code governing procedures for action on permit and amendment applications of a groundwater conservation district, or GCD. Clarifications are made regarding potential disqualification of a GCD board member based on conflict of interest and regarding quorum requirements for larger GCD boards. New provisions place time limits within which the board must take final action following a contested case hearing on a permit

application, including a time limit to rule on a motion for rehearing. The board's final decision must be in writing and either adopt or revise the proposed findings and conclusions of the administrative law judge, or ALJ; if not otherwise timely decided, the board is considered to have adopted the ALJ's final proposal for decision, and that adoption is final and not subject to motion for rehearing.

HB 3059—The existing authority of GCDs, both tax-based districts and fee-based districts, to impose export fees under Chapter 36 or under their own enabling legislation is amended to increase the maximum rates allowed. New provisions effective in January 2024 establish the maximum allowable annual increase of such export fees and expressly limit the GCD's use of funds from such an export fee increase for costs related to assessing and addressing impacts associated with groundwater development, including maintaining operability of affected wells, developing alternative water supplies, and aquifer monitoring and data collection.

HB 2443—This bill provides express authority for a person with a real property interest in groundwater to petition a GCD where the property interest is located to adopt or modify a rule. The GCD by rule must prescribe the form for such petitions and procedures for their submission, consideration, and disposition, and the GCD is required within 90 days of receipt to either deny a petition or engage in rulemaking consistent with the petition.

Hydrogen

HB 2847—The Railroad Commission of Texas is granted jurisdiction over pipeline transportation and underground storage of hydrogen. This bill also establishes the Texas Hydrogen Production Policy Council, or THPPC, which is directed to study the development of hydrogen industries in Texas, monitor regional efforts to develop a regional clean hydrogen hub authorized under the federal Infrastructure Investment and Jobs Act, develop a state plan for hydrogen production oversight, and make recommendations to the Legislature about such plan.

HB 4885—This bill calls for TCEQ to establish and administer a grant program as part of the Texas Emissions Reduction Program, with the goal of encouraging adoption of hydrogen infrastructure, vehicles, and equipment.

Reclaimed Wastewater and Waste

SB 1289—This bill, effective June 18, 2023, states that under TCEQ rules to be adopted, a wastewater treatment facility that treats domestic wastewater for reuse may dispose of treated wastewater without a permit if the facility disposes through a collection system and has the consent of the operator of the system and treatment facility.

HB 692—Under rules to be adopted, TCEQ could permit land application of dairy waste and disposal of dairy waste from concentrated animal feeding operations into control or

retention facilities such as lagoons or playas.

HB 1598—This bill, effective June 18, 2023, states that municipal solid waste facilities will now be subject to current provisions regarding hazardous waste management facilities and local governments prohibited from requiring permits for siting such facilities. This new restriction expressly does not impact county authority to designate certain areas for the processing or disposal of municipal solid waste, authority to prohibit disposal that threatens public health and safety, or authority pertaining to flood plains.

Enforcement of Federal Laws

HB 33—This bill adds a new Chapter 82 to the Texas Natural Resources Code, prohibiting a state agency or its employees from contracting with or in any other manner assisting a federal agency or official regarding enforcement of a federal statute, order, rule, or regulation purporting to regulate oil and gas operations if that federal legal authority does not otherwise exist under state law. The Texas attorney general is required to defend any agency that the federal government may attempt to sue for an action or omission consistent with this requirement. The bill does not prohibit a state agency from (1) implementing a federal law by executing authority delegated to the state agency by a federal agency, or (2) entering into a memorandum of understanding with a federal agency to implement a federal law, if otherwise authorized by state law.

Greenhouse Gas Emissions

SB 784—Under this bill, municipalities and other political subdivisions are prohibited from enacting or enforcing an ordinance or other measure that directly regulates greenhouse gas emissions.

Certificate of Convenience and Necessity

SB 893—This bill, effective June 18, 2023, states that the PUCT is allowed in certain situations to correct a certificate of convenience and necessity, or CCN, which sets out service area for water or wastewater service, without observing formal CCN amendment procedures by the commission reissuing the certificate or issuing an endorsement.



CLAUDIA RUSSELL

is a partner in Bickerstaff Heath Delgado Acosta in Austin. She helps clients navigate the legislative process.



SUSAN M. MAXWELL

is a partner in Bickerstaff Heath Delgado Acosta in Austin. She practices in the areas of water rights law, environmental law, and administrative law.



ESTATE, GUARDIANSHIP, AND TRUST LAW

By Lauren Davis Hunt

There were significant and numerous changes made by the 88th Texas Legislature affecting the law of decedents' estates, guardianships, trusts, powers of attorney, and other related areas of the law. This article contains summaries of highlights only and should not be relied on as a complete list of bills affecting these areas or a full description of any bill. See the TexasBarCLE webcast "Legislative Update 2023: Estate and Trust Law" or the *Legislative Update* paper presented at the Advanced Estate Planning and Probate Course. The paper is also available on the REPTL.org website for Real Estate, Probate, and Trust Law Section members. All bills are effective September 1, 2023, unless otherwise noted.

Decedents' Estates

SB 1373 changes references in the Estates Code so that notice that was previously required to be given by certified mail, return receipt requested, will now be given by "qualified delivery method," which is a defined term and expands the types of delivery services that can be used in addition to USPS (i.e., FedEx, DHL, UPS). The chapter of the Estates Code governing multi-party accounts now expressly applies to brokerage accounts. Under certain circumstances, a court can now authorize a person with a felony to serve as executor of an estate. In certain Estates Code proceedings, when serving a minor with citation, the parent/guardian of minors under age 16 can now waive service (previously minors over age 12 had to be served and waiver was not an option). Minors over age

16 can waive their own service. Unsworn declarations can now be used in lieu of sworn oaths for persons to qualify as a personal representative of an estate. In an heirship application, the applicant is only to list the decedent's property located in Texas. **HB 3474** allows a person to apply for an emergency order for *reimbursement* (rather than just payment) of a decedent's funeral/burial expenses and extends the deadline for filing an application for payment/reimbursement to nine months after death. HB 3474 is effective September 1, 2023, except Article 15, which was effective June 13, 2023; Sections 1.011, 2.014, 2.015, 2.018, and 2.019 effective October 1, 2023; Section 1.014 effective September 1, 2024; Section 1.015 effective October 1, 2024; Section 1.009 effective January 1, 2025; and Section 1.016 effective October 1, 2025.

Guardianship and Persons With Disabilities

SB 1457 changes references in the Estates Code from giving notice by "certified mail return receipt requested" to giving notice by "qualified delivery method" and expands the types of delivery services that can be used for giving notice of a proceeding. Attorneys ad litem can now accept service on behalf of proposed wards for pleadings filed after the initial petition is served on the proposed ward. A surviving parent serving as guardian of the estate can now appoint a successor guardian to serve if the parent dies, becomes incapacitated or resigns (prior law only allowed the surviving parent who is serving as guardian of the person or guardian of the person and estate to name a successor, but not a parent solely serving as guardian of the estate, and the statute did not apply if the parent resigned as guardian). A guardian of the person can now control up to \$20,000 of the ward's funds without getting a guardian of the estate appointed, but the guardian of the person must get a bond to cover the funds and must file an annual report of how the funds were used. The value of real property that can be sold on behalf of a minor or ward without the necessity of a guardian of the estate is increased from \$100,000 to \$250,000. Now a court can order a third party (such as a bank) to transfer the ward's interest in a community property account to the guardian of the estate when the ward's spouse refuses to make such transfer to the non-spouse guardian. A guardian of the person is now permitted to receive \$3,000 annually, paid in monthly installments, as compensation. **SB 1624** has a number of changes, including clarity regarding who can serve as guardian ad litem (it can't be an interested person and usually can't be the attorney ad litem), clarity of the role of the attorney ad litem, and what happens when a proposed ward or ward hires their own attorney, allowing a psychologist to perform a capacity exam for certain guardianships, updating the requirements for the guardian of the person's annual report, requiring a court investigator or visitor in counties with statutory probate courts to do a report every three years, and it provides what is required for a restoration proceeding. The bill further increases training requirements for judges and court investigators dealing with guardianships and the ward's bill of rights is updated to permit a

ward to have private communications with a medical professional unless a court, after a hearing, orders such communications limited due to a risk of substantial harm to the ward or unduly burdening the medical professional. **HB 266** requires the applicant in a guardianship to file with the court (not the clerk) basic contact information for the persons entitled to notice of the guardianship proceeding. The contact information is to remain confidential and privileged except that the information is provided to the guardian upon appointment. In **HB 3009**, advanced practice registered nurses acting under a physician's supervision can now prepare a Physician's Certificate of Medical Examination, or PCME, that is signed by a supervising physician. In **SB 944**, procedures for committing an individual with an intellectual disability to a state supported living center are clarified.

Trusts

HB 2196, effective June 9, 2023, clarifies that a revocable trust can qualify for homestead benefits if the trust uses the required language listed in either the Tax Code (where the beneficiary has a right to occupy the property "rent free and without charge") or in the Property Code (where the beneficiary has the right to occupy the property "at no cost"). The bill clarifies that if a trust beneficiary holds a testamentary general power of appointment over trust property and does not exercise the power of appointment, then the trust property is not subject to creditors' claims. The definition of "effective date" in the new rule against perpetuities statutes is modified to provide that the effective date of the trust (for purpose of starting the 300-year period) is the date the governing instrument creating an interest in the trust becomes irrevocable with respect to that interest (i.e. each successive trust governed by one trust instrument does not get a new 300-year vesting period). The bill clarifies that when decanting a trust, the new trust can keep the same name and employer identification number, or EIN, as the old trust. For a court to appoint an attorney ad litem in a trust proceeding, it must first find that representation of the minor or incapacitated beneficiary would otherwise be inadequate. In **HB 2333**, effective June 18, 2023, noncharitable trusts without an ascertainable beneficiary (also known as a "purpose trust") are now permissible in Texas. These trusts can be set up for a special purpose (i.e. to carry on a business for

SB 1457 changes references in the Estates Code from giving notice by "certified mail return receipt requested" to giving notice by "qualified delivery method" and expands the types of delivery services that can be used for giving notice of a proceeding.

employees, maintain a family compound, preserve collections, etc.), do not have beneficiaries, but do have trust enforcers who owe a fiduciary duty to ensure the trust purposes are met. In **SB 801**, a conveyance to a “trust” in a deed is now considered a conveyance to the trustee of the trust. A trust is not a legal entity that can own real property, so in the past, a conveyance to a trust rather than the trustee needed correction.

Durable Powers of Attorney

In **SB 1650**, the court can now provide in an order appointing a permanent guardian that the ward’s durable power of attorney is merely suspended during the pendency of the guardianship rather than automatically revoked. In a Texas Estates Code § 751.251 proceeding where someone questions the actions of an agent under a durable power of attorney, the court can now award reasonable and necessary attorneys’ fees as deemed equitable and just, and the Department of Family Protective Services has standing to bring a Texas Estates Code § 751.251 action. Agents with powers over “business operation transactions” can now act with respect to business interests other than just partnerships (such as LLCs).

Anatomical Gifts and Disposition of Decedents’ Remains

In **SB 2186**, a person executing a statement of anatomical gift who is unable to sign the form themselves but has someone sign for them can now do so either before two witnesses or before a notary (in the past, if a person is signing for someone else, the form could only be signed before two witnesses, but a person signing for themselves could also sign before a notary). In **SB 1300**, the order and identity of persons who must consent to remove a decedent’s remains now conforms to the same list of persons who have the right to control the initial disposition of remains.

Miscellaneous

Statutory probate courts were added in the following counties: Bexar, Cameron, Harris, Montgomery, and Travis. In **HB 1547**, Chapter 3 of the Family Code regarding reimbursement claims (including reimbursement claims in probate proceedings) was substantially modified. See the “Family Law” discussion of HB 1547 for more detail.



LAUREN DAVIS HUNT

is a partner in Osborne, Helman, Scott, Knisely & Stanton, where she practices trust and estate litigation. She serves as the chair of the Estates & Trusts Legislative Affairs Committee with the Texas Real Estate and Probate Institute, or T-REP, as well as for the Real Estate, Probate & Trust Law Section of the State Bar of Texas, or REPTL.



FAMILY LAW

By Kristal C. Thomson

Overall, the 88th Texas Legislature was a good one for the Texas Family Code, or TFC. The following summaries highlight the most important changes. For a thorough and complete analysis, the TexasBarCLE Webcast “Legislative Update 2023: Family Law” is highly recommended.

HB 4183 allows an associate judge to sign a waiver of the 72-hour waiting period after a marriage license is issued. This change in law applies only to a marriage ceremony for which a marriage license application is filed on or after September 1, 2023.

HB 1547 is the most extensive change to Title I of the TFC in over a decade. The statutory claim for reimbursement is amended to conform with the true intent of the equitable principle and the caselaw that has interpreted reimbursement claims for over 100 years.

TFC section 3.401 now includes definitions of “benefited estate” and “conferring estate.” Accordingly, the word “contributing” is replaced with “conferring” throughout the statute.

TFC section 3.402(a) clearly defines a claim for reimbursement. “A claim for reimbursement exists when one or both spouses use property of one marital estate to confer on the property of another marital estate a benefit, which, if not repaid, would result in unjust enrichment to the benefited estate.” This definition is consistent with reimbursement caselaw, including the most prominent Supreme Court of Texas opinion on reimbursement, *Penick v. Penick*.¹

TFC section 3.402(b) contains the elements that must be proved for a successful reimbursement claim. The spouse seeking a reimbursement claim must prove: (1) that one marital estate conferred a benefit to another marital estate; (2) the value of that benefit; and (3) that an unjust enrichment will occur if the benefited estate does not reimburse the conferring estate.

TFC section 3.402(c) lists the three types of statutory reimbursement claims. The first is when property from the conferring estate (i.e., money) is used to pay a debt, liability, or expense that should have been paid by the benefited estate. The second is when property from the conferring estate is used to make improvements on the benefited estate and which results in an enhancement in value of the benefited property. The third type is what is commonly referred to as a “Jensen Claim.” A Jensen Claim happens when a spouse uses time, toil, talent, or effort to enhance the value of their separate property and the community estate did not receive adequate compensation for that expended time, toil, talent, or effort.

TFC section 3.402(d) requires the value of the reimbursement claim to be determined at the time the trial commences. This section also identifies the method of valuing each type of claim. If the reimbursement claim is for a payment of a debt, liability, or expense, then the value of the claim is measured by the dollar amount of the claim or “dollar for dollar.” If the claim is an improvement to property, then the value of the benefit is measured by the enhancement in value of the benefited property. If a party pleads a Jensen claim, the claim’s

The Penal Code now includes an offense if a person has a protective order, bond, etc., issued against them *and* they knowingly or intentionally track or monitor the personal property or motor vehicle of another person without that person’s effective consent.

value is measured by the value of the effort that was used beyond that which was reasonably necessary to manage and preserve the spouse’s separate property.

TFC section 3.402(e) preserves the court’s right to determine whether the reimbursement claim should be granted and used as part of the division of the estate.

TFC section 3.402(g) outlines the offsets that may be plead against the reimbursement claim. The list includes: (1) the value of the use and enjoyment of the property by the conferring estate; (2) income received by the conferring estate; or (3) any reduction in the amount of an income tax obligation of the conferring estate. It is important to note that this is not an exclusive list. An offset may be *any* related benefit received by the conferring estate.

TFC section 3.411 reflects the equitable nature of a reimbursement claim by clearly stating that this subchapter is

not the exclusive remedy for a reimbursement claim. All common law equitable remedies remain available to litigants.

These changes apply to claims for reimbursement pending in a trial court or filed on or after September 1, 2023.

HB 2715 adds a new section to TFC 6.501(a). Now a party can request the court to restrain one or both parties from “tracking or monitoring personal property or a motor vehicle in the possession of a party, without that party’s effective consent.” This includes using a tracking application (i.e., Find My, child tracking apps, etc.) and physically following a party or causing another to physically follow a party. It is unknown whether the later restriction would apply to a private investigator hired for a limited purpose in a divorce or custody action. This language is also included in the list of acts the court can prohibit under Chapter 80 of the Family Code. This change is effective on September 1, 2023.

HB 2715 also includes a corollary criminal violation for the acts described above. The Penal Code now includes an offense if a person has a protective order, bond, etc., issued against them *and* they knowingly or intentionally track or monitor the personal property or motor vehicle of another person without that person’s effective consent. As with the TFC change, this includes using tracking apps or following a person. Unlike the TFC provision, the criminal statute defines effective consent—or rather, what is not effective consent. For the purposes of the criminal statute, it is presumed that a person did not give effective consent to the actor’s conduct if: (1) an application for a protective order has been filed or a protective order has been issued against the actor; or (2) the person is married to the actor and a petition for dissolution of marriage has been filed, or the person was previously married to the actor and the marriage has been dissolved.

HB 2671 adds TFC sections 6.502(a-1) and 105.001(a-1). The new sections prohibit a court from postponing a temporary hearing for more than 30 days when that court has ordered the parties to mediation. This section applies to a suit pending on or filed after September 1, 2023.

SB 2070 clarifies the procedures for continuing spousal maintenance under TFC 8.054(a)(2)(A) and 8.054(a)(2)(C) (related to physical or mental disability or some other compelling impediment).

“The change in law made by this act applies to a motion to continue spousal maintenance under Subchapter B, Chapter 8, that is made on or after September 1, 2023, regardless of whether the original spousal maintenance order was rendered before, on, or after that date.”²

HB 1432 significantly alters the issuance of protective orders. Prior to the passage of this bill, a court could order a protective order on a finding that family violence had occurred and *was*

likely to occur in the future. The second finding is usually the hardest one to prove when the victim has removed themselves from the environment or vicinity of the respondent. HB 1432 removes the second prong throughout Title 4, Subtitle B of the Family Code. This statute is effective on September 1, 2023.

SB 869 amends TFC 102.0091(b) to allow a party executing a waiver to use a digitized signature. This statute is effective on September 1, 2023.

HB 891 adds TFC 104.008(a-1) to clarify that an expert witness can offer an opinion regarding the qualifications of, reliability of the methodology used by, or relevance of the information obtained by a person who has conducted a child custody evaluation. The expert *may not* testify as to conservatorship or possession and access unless that expert has also completed the requirements of a child custody evaluation under TFC Subchapter D, Chapter 107. The new statute supersedes the Austin Court of Appeals memorandum opinion in *In re Gopalan*.³ This change applies only to a suit affecting the parent-child relationship filed on or after September 1, 2023.

HB 4062 requires a child custody evaluator to create an audiovisual recording of each interview the evaluator conducts with a child who is the subject of the suit affecting the parent-child relationship. This applies to an interview conducted on or after September 1, 2023.

HB 2850, effective September 1, 2023, adds a brand-new title to the Family Code, “Title 6. Civil Procedure.” This title will govern discovery in family law cases. The bill prohibits the Supreme Court of Texas from adopting any rules that would modify or repeal the effect of the new title. The new title utilizes the old form of disclosures, including requiring that a party request disclosures (rather than the automatic trigger in the current rules). The title also contains rules regarding production, depositions, and expert witnesses. *Note:* As of the writing of this article, the Supreme Court had not amended the current Texas Rules of Civil Procedure to exclude family law cases from the discovery rules therein.

Notes

1. 783 S.W.2d 194 (1988).
2. 88th Leg., R.S., H.B. 2070.
3. 2021 WL 2964263 (Tex. App.—Austin 2021, pet. denied).



KRISTAL C. THOMSON

is a partner in the family law practice group of the firm Langley & Banack in San Antonio. She is certified in family law by the Texas Board of Legal Specialization and is a fellow in the American Academy of Matrimonial Lawyers. She currently serves as the president-elect of the Texas Academy of Family Law Specialists and is a past chair of the State Bar of Texas Family Law Section.



INSURANCE LAW

By W. Ryan Brannan

Affordability and accessibility continue to be central motifs for insurance-related legislation at the Texas Legislature. The past couple of legislative sessions have also added transparency legislation to the list of central issues, this session included. More health-related bills passed than those related to property and casualty this session. Medicaid is a separate subtopic in this article. Given the number of insurance bills that passed this session, the article below is to be viewed as a summary of the more significant legislation. All bills are effective September 1, 2023, unless otherwise indicated.

Addressing Accessibility, Affordability, and Transparency

HB 711 attempts to address the rising costs of health care due to consolidation in the health care market. HB 711 addresses market competition by prohibiting insurance companies and providers from entering into provider network contracts with anti-competitive clauses. The prohibited clauses include: anti-steering clauses, which restrict insurers from encouraging enrollees to get care from competitors of the provider; anti-tiering clauses, which restrict insurers from having a tiered network plan or placing provider members on different tiers; and gag clauses, which restrict insurers or providers from disclosing price or quality information. HB 711 went into effect immediately on June 12, 2023.

The Legislature again attempted to protect consumers from surprise medical bills, this time by passing **SB 490**, ensuring patients received itemized bills prior to any debt collection activity and requiring health plans to provide real-time data to providers on patient out-of-pocket expenses and coverage information for prescription drugs. The bill must include an itemized list of each medical service provided, the amount the provider will accept as payment in full for that service, and a

plain-language description of the service.

The Legislature also addressed consumer protections by temporarily prohibiting out-of-network ambulance billing in **SB 2476**. This bill expands on SB 1264 (86th R., 2019), the “Surprise Billing Act,” which prohibited providers from billing a patient for the balance of the cost when a carrier refused to pay the total cost, which often resulted in unexpected bills for patients. SB 2476 prohibits ground-ambulance services provided by municipalities from engaging in balance billing. This change would ensure that patients are not charged for urgent trips to the hospital in the manner that others can no longer charge.

HB 3414 allows third-party access to the statewide all-payor claims database, or APCD, allowing for the reporting of information as long as the information is made available to the public at no cost. All payers that are subject to Texas law must submit claims forms to the database. The data that is being collected has been useful to the state, however, researchers have claimed difficulties on what they can publish when accessing the data. HB 3414 allows access to the data, specifies how entities qualify to access the data, and includes what data is shareable in its aggregated form. HB 3414 went into effect on June 11, 2023.

HB 290 allows for sole proprietorships to participate in a multiple employer welfare agreement, or MEWA, and allows businesses to form an MEWA if they can show a commonality of interest. This bill is in response to federal rules on MEWA expansions that were struck down by a court in 2019. HB 3359, mentioned below, also includes MEWAs into the network adequacy provisions in state statute.

HB 3359 strengthens network adequacy requirements and creates additional contracting requirements between carriers and providers, limiting the contractual changes that can be made by a carrier without the express agreement by the provider. Specifically, HB 3359 prevents exclusive provider organizations, or EPOs, and preferred provider organizations, or PPOs, from making any “adverse material changes” to a preferred provider contract during the term of the agreement without both parties’ consent and defines “adverse material change” as well. The bill also codifies federal adequacy requirements for PPOs and EPOs and make several key changes. One part, regarding wait time standards, does not go into effect until September 1, 2025. The rest of the bill becomes law on September 1, 2023, applying to plans that go into effect after January 1, 2024.

HB 1900 extends the amount of time carriers must give their policyholders if they intend to not renew the policy, previously from 30 days, now to 60 days before the policy ends. The Legislature previously passed legislation that allows insurers to use their own forms (with Texas Department of Insurance, or TDI, approval) and not standard forms. The argument for this legislation is that in doing so, it made

shopping for insurance more involved by the consumer and that additional 30-days notice would help ensure continuation of coverage.

HB 1647 prohibits mandatory “white bagging” in physician offices. HB 1647 prohibits commercial insurers from requiring clinician-administered drugs to be dispensed only by certain pharmacies or in-network pharmacies for a patient with a chronic, complex, rare, or life-threatening condition. Health plans also cannot recover any cost differences from the patient. HB 1647 goes into effect on September 1, 2023, and applies to plans beginning on or after January 1, 2024.

HB 755 is the most recent effort to look at pre-authorization by insurance companies for medical procedures or prescriptions. With several key limitations, HB 755 prohibits an insurer from requiring prior authorization for drugs prescribed to treat an autoimmune disease, hemophilia, or Von Willebrand disease more than once annually. The law goes into effect on September 1, 2023, and applies to plans beginning on or after January 1, 2024.

Medicaid

The Legislature passed several provisions having an impact on Medicaid.

HB 12 expands post-partum coverage for new mothers for up to 12 months. It went into effect on June 18, 2023. **HB 1283** extends the Sunset provision and allows for the statewide preferred drug list to continue to be managed by Health and Human Services until August 31, 2033. **HB 2802** will streamline the process for Texans to receive updates regarding changes to their eligibility to align with recent changes to law by the FCC.

HB 2727 expands Medicaid coverage for home telemonitoring services and adds federally qualified health centers, or FQHCs, and rural health clinics to the list of eligible participating providers. HB 2727 changes the determination that triggers reimbursement to one that shows the program is clinically effective and changes several significant requirements including ensuring that data gathered is shared with the patient’s physician. This bill went into effect on June 13, 2023.

HB 4990 attempts to reduce the cost of prescription drugs for taxpayers, employers, and consumers through the establishment of the Texas Pharmaceutical Initiative. Through this initiative, the bill provides for the establishment of a statewide pharmacy benefit manager, or PBM, focused on price transparency and providing savings not only to the state but also ultimately to consumers. HB 4990 went into effect on June 13, 2023.

SB 2193 allows for the direct primary care model of coverage for FQHCs and requires TDI to review all FQHC programs to evaluate success. FQHCs deliver services for participating employers and uninsured or underinsured groups. SB 2193 became effective on May 19, 2023.

Other Bills of Interest

SB 833 prohibits carriers operating in Texas from using an environmental, social, or governance, or ESG, model or score to charge a different rate for businesses in the same class. SB 833 was one of several pieces of legislation targeting ESG scoring in various industries.

Most legislation that attempted to extend or otherwise keep COVID-19 presumptions and rule suspensions failed, signaling that the Legislature is moving beyond COVID in its decision-making. One exception was **SB 1286**, which grants TDI the authority to write rules clarifying and extending the deadlines for prompt payment of claims-handling in a case of a catastrophic event as defined by the Texas Administrative Code. Prompt pay extensions were initially granted as part of the governor's COVID-19 orders and clarified by subsequent TDI bulletins. Those orders were rescinded on September 20, 2021.

SB 14 addresses gender modification. As passed, SB 14 prohibits medical professionals from providing puberty-inhibiting drugs, cross-sex hormones, and surgical interventions to children under 18 for the purpose of altering a child's biological characteristics to align with their perceived gender identity. The bill also requires the Texas Medical Board to revoke the license of a physician who provides these services and prohibits the use of public funds to pay for related medical interventions.

SB 2008 affects where farm mutual insurance companies can write coverage. Since at least the 1970s, Texas statutes dictate in which counties farm mutual insurance companies can operate by stating that a majority of each farm mutual's policies must apply coverage to "rural property." For decades, "rural property" has been defined as property located outside an area of land subject to the taxing authority of a municipality with a population of more than 2,500. The final version signed into law increases that amount from 2,500 to 6,500 and allows for a change of that number based on census changes (every 10 years) going forward.

SB 1659 extends the TDI Sunset review to 2029. This is now at least the third time in as many legislative sessions that the Legislature has pushed reviewing TDI and insurance-related agencies. The Sunset process is essentially a rigorous audit of a state agency for the Legislature to review processes and procedures and make recommendations regarding changing them. SB 1659 went into effect on June 18, 2023.



W. RYAN BRANNAN

is the principal attorney and a registered lobbyist with the Austin firm of W.R. Brannan & Associates. He was previously appointed by Gov. Greg Abbott and Gov. Rick Perry to serve as the commissioner of Workers' Compensation at the Texas Department of Insurance and served as an adviser to Perry. Brannan currently represents businesses, associations, nonprofits, and other entities at the Texas Capitol.



LEGISLATIVE AND CAMPAIGN LAW

By Ross Peavey

The 88th Texas Legislature tackled a number of new policies in the field of legislative and campaign law. This session saw changes to the law regarding campaign finance reporting, the electoral process, and election administration. The session itself kept drafting attorneys in the Texas Legislature busy; the House and Senate filed an unprecedented number of bills and resolutions covering topics from local watermelon festivals to the state budget. A survey of some significant changes in Texas legislative and campaign law in 2023 include the following legislation. All bills are effective September 1, 2023, unless otherwise noted.

HB 87

Amends elector requirements for presidential elections to address "faithless electors" who might cast Texas' president and vice president ballots irreconcilable with their party's nominees and addresses a scenario in which a party's nominee withdraws, dies, or is declared ineligible within a short time of a presidential election. HB 87 is effective June 18, 2023.

SB 477

Seeks to accommodate voters with disabilities in a number of new ways. The bill requires an election officer to give voting order priority to individuals with a mobility problem. Under the legislation, all procedures and accommodations available to voters with disabilities must be posted in an accessible manner on the county clerk's website. Subject to certain requirements under the bill, each polling place is required to reserve a two-space parking area for curbside voting service for a voter who is physically unable to enter the polling place. Moreover, an early voting clerk is required to post the official application form for an early voting ballot on the clerk's website in a format that allows for easy completion directly on the website before printing. The bill also requires the secretary of state to provide such a printable application form to the

early voting clerk, who could use that form or the clerk's own form. SB 477 is effective June 18, 2023.

SB 1070

Amends current law relating to the interstate voter registration crosscheck program. The Texas Election Code requires the secretary of state to maintain a statewide voter registration list and to prevent duplication of registration in more than one state or jurisdiction. Since 2020 Texas had been a member of the Electronic Registration Information Center, also known as ERIC, a multistate program used to prevent duplication of registration in more than one state or jurisdiction. The new law facilitates Texas' withdrawal from ERIC and the replacement of ERIC with a new system to review voter rolls.

The law further authorizes the secretary of state's office to take steps to remove or terminate elections administrators for recurring patterns of problems with election administration.

SB 1124

Changes the law relating to qualifications of a sheriff or a candidate for sheriff. The new requirements include that the candidate must hold an active permanent peace officer license and have at least five years of experience as a full-time paid peace officer or federal special investigator. The bill allows veterans with 10 years combined active duty or national guard service experience, while holding an intermediate, advanced, or master proficiency certificate, the ability to be a candidate for sheriff.

HB 1243

Increases penalties from a Class A misdemeanor to a second-degree felony if a voter knowingly or intentionally does the following: votes or attempts to vote in an election in which the person knows the person is not eligible to vote; votes or attempts to vote more than once in an election; votes or attempts to vote a ballot belonging to another person, or by impersonating another person; marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot; or votes or attempts to vote in an election in this state after voting in another state in an election in which a federal office appears on the ballot and the election day for both states is the same day.

HB 1632

Requires the Texas secretary of state to develop materials for a

standardized curriculum for training in election law and procedure, including a published handbook, made available on the secretary of state's website free of charge. The bill also requires the secretary of state to make the standardized training program available entirely via the internet and at any time, without a requirement for prior registration. The training program must require the passage of an examination at the end and provide an individual who successfully completes the training with a certificate of completion, which expires no later than one year after it was awarded.

SB 1750

Abolishes the position of county elections administrator in a county with a population of more than 3.5 million (such as Harris County) and transfers the administrator's powers and duties to the county tax assessor-collector and county clerk.

SB 1933

Authorizes the Texas secretary of state's office, in a county with a population of more than 4 million (such as Harris County), to order administrative oversight of a county office administering elections or voter registration in the county. In order to do so, the secretary of state would need to receive a complaint, provide notice to the county, conduct an investigation, and determine whether to administer such oversight. The law further authorizes the secretary of state's office to take steps to remove or terminate elections administrators for recurring patterns of problems with election administration. The bill also makes changes regarding required county audits.

HB 2626

Amends current law that only requires certain counties, cities, and school districts to make campaign finance reports publicly accessible on a website and exempts less populous political subdivisions from the accessibility requirement. The law as amended will require any political subdivision that receives campaign finance reports to make the reports publicly available on a website and maintain the reports online for at least five years.



ROSS PEAVEY

has worked with businesses, nonprofits, elected officials, and other entities as an attorney and lobbyist for the better part of two decades. He is past chair of the State Bar of Texas Legislative and Campaign Law Section. Peavey is the editor of *Texas Senate Practice*, which is considered a "core material to supplement current versions of House and Senate Rules" by the Legislative Reference Library of Texas.

OIL, GAS, AND ENERGY LAW

By M. Alejandra Salas

The 88th Texas Legislature passed wide-ranging laws that affect various segments of the Texas oil and gas industry and aim to propel the industry's growth. Below is a high-level summary of these bills.¹ All bills are effective September 1, 2023, unless otherwise noted.

Clarifying and Broadening the Authority of the RRC

HB 33² amends Subtitle A, Title 3 of the Natural Resources Code by adding Chapter 82, prohibiting a state agency, or an employee of a state agency, from assisting a federal agency or official with respect to enforcing federal law that purports to regulate oil and gas operations that is not already in force pursuant to Texas law, thereby emphasizing that the power to regulate oil and gas operations in the state of Texas lies with the Railroad Commission of Texas, or RRC, and Texas Commission on Environmental Quality, or TCEQ, among other state regulators. HB 33 also requires the Texas attorney general to defend a state agency against the federal government for an action or omission taken pursuant to the new law.

HB 2847³ amends Section 81.051(a) of the Natural Resources Code by adding subsection (5), granting the RRC jurisdiction over pipeline transportation and underground storage of hydrogen, and Subchapter C, Chapter 81 of the Natural Resources Code, authorizing the RRC to establish a Texas Hydrogen Production Policy Council to review and advise the RRC regarding hydrogen energy development.

Geothermal Energy

SB 785,⁴ effective June 18, 2023, amends Section 2703.056 of the Insurance Code, allowing title insurance companies to make exceptions from coverage for geothermal energy and associated resources. SB 785 also amends Section 141.003(5) of the Natural Resources Code, which defines “by-product” in the context of geothermal energy and associated resources. Notably, SB 785 clarifies that a mineral, as defined under the Property Code, and oil, gas, or a product of oil or gas are not a “by-product” of “geothermal energy and associated resources.” SB 785 further adds Section 141.004 to the Natural Resources Code, providing that, except as expressly stated, “geothermal energy and associated resources below the surface of land are owned as real property by the landowner,” except that when the mineral and surface estates are severed, the owner of the surface estate owns the geothermal energy and associated resources.

SB 786⁵ amends Subchapter C, Chapter 27 of the Water Code by adding Section 27.037, granting the RRC jurisdiction over the regulation and permitting of closed-loop geothermal injection wells and the authority to adopt rules to regulate such wells, a role previously assigned to the TCEQ. Section 27.037 further defines a “closed-loop geothermal injection well” and classifies such a well as a Class V well under the underground injection control program administered by the RRC. SB 786

will not affect the validity of permits issued by the TCEQ for closed-loop geothermal injection wells prior to the bill's effective date. However, the RRC will have 90 days from the effective date of the bill to issue substitute permits under the RRC to persons who hold a valid permit from the TCEQ for such wells. Likewise, the TCEQ will have 90 days to transfer to the RRC all pending applications for closed-loop geothermal injection wells filed before the bill's effective date.

SB 1210⁶ amends Section 89.047(a) of the Natural Resources Code by adding Subdivisions (1-a) and (1-b), defining “energy conservation well” and “geothermal energy and associated resources.” SB 1210 further amends Section 89.047(f) of the Natural Resources Code, allowing the RRC to designate a geothermal operator as the operator of abandoned oil and gas wells so long as specific requirements are satisfied. As a result, geothermal operators will now be allowed to adopt an orphaned oil and gas well and convert it to generate geothermal electricity.

Injection Wells

SB 1186⁷ amends Section 27.036 of the Water Code, defining “brine mining” to include the production of naturally occurring brine (involving Class V injection wells) and brine extracted by the solution of a subsurface salt formation (involving Class III wells) and clarifying that the RRC has jurisdiction over both types of brine mining. SB 1186, effective May 27, 2023, requires all persons to obtain a permit from the RRC before drilling a Class V brine injection well. Finally, under SB 1186, the RRC must seek primacy over Class V brine injection wells in Texas.

HB 4856,⁸ effective June 18, 2023, amends Section 27.201 of the Water Code by adding Subdivision (1-a), defining “fluid oil and gas waste” consistent with its meaning under the Natural Resources Code, and Section 27.202 of the Water Code, granting the TCEQ “exclusive jurisdiction over the regulation and permitting of recharge injection wells, including recharge injection wells used for the injection of fluid oil and gas waste.” Section 27.202 further prohibits using a recharge injection well to inject fluid oil and gas waste “unless the waste has been treated to meet the standards adopted by the [TCEQ].”

Clean Energy

HB 3837⁹ amends Sections 382.003(1-a) and 391.002(b) of the Health and Safety Code, broadening the designation of advanced clean energy projects under the Texas Clean Air Act by classifying facilities that utilize natural gas to create methanol and covert methanol to zero-sulfur transportation fuels as an “advanced clean energy project.”

Clarifying Liability for Certain Operations

HB 450¹⁰ amends Title 4 of the Property Code by adding Chapter 31, which creates a cause of action for “a bad faith washout” of an individual's “overriding royalty interest in an oil and gas lease.” HB 450 provides for a two-year statute of limitations that begins to run on “the date the person obtained actual knowledge that the washout occurred.” Chapter 31 of the Property Code applies only to washout that occurs after the effective date of HB 450.

HB 591¹¹ amends Subchapter B, Chapter 201 of the Tax Code by adding Section 201.061, exempting from the severance tax gas produced from qualifying wells “that is consumed within 1,000 feet of the qualifying well and would otherwise have been lawfully vented or flared.” The well operator may apply to the RRC for certification that a well is a qualifying well and must reapply for certification annually.

SB 502¹² amends Section 123.001 of the Natural Resources Code, redefining and expanding the meaning of “drill cuttings” to include “any associated sand, silt, drilling fluid, spent completion fluid, workover fluid, debris, water, brine, oil scum, paraffin, or other materials cleaned out of the wellbore.” Additionally, SB 502, effective May 23, 2023, amends Section 123.003 of the Natural Resources Code, explaining liability for the disposal of drill cuttings once transferred by the generator of the drill cuttings to an unaffiliated third party for disposal or beneficial use. Changes made to Sections 123.001 and 123.003 are prospective.

SB 604¹³ amends Chapter 954 of the Occupations Code, in part, broadening the protection of landmen from unauthorized practice of law penalties to encompass all work performed by landmen in Section 954.002. SB 604 further amends Section 171.1011(g-11) of the Tax Code, ensuring that the franchise/margin tax exemption afforded to landmen applies to the breadth of work performed by landmen. SB 604 became effective May 24, 2023, except that amendments to Section 171.1011(g-11) of the Tax Code take effect January 1, 2024.

Notes

1. For more details on the bills discussed herein, please visit Texas Legislature Online at <https://capitol.texas.gov/>.
2. Act of June 14, 2023, 88th Leg., R.S., H.B. 33, §§ 1–2 (to be codified as an amendment to Tex. Nat. Res. Code §§ 82.0101–82.0102).
3. Act of June 12, 2023, 88th Leg., R.S., H.B. 2847, §§ 1–3 (to be codified as an amendment to Tex. Nat. Res. Code §§ 81.051(a), 81.075).
4. Act of June 18, 2023, 88th Leg., R.S., S.B. 785, §§ 1–4 (codified at Tex. Ins. Code § 2703.056; Tex. Nat. Res. Code §§ 141.003(5), 141.004).
5. Act of June 2, 2023, 88th Leg., R.S., S.B. 786, §§ 1–3 (to be codified as an amendment to Tex. Water Code § 27.037).
6. Act of May 19, 2023, 88th Leg., R.S., S.B. 1210, §§ 1–3 (to be codified at Tex. Nat. Res. Code § 89.047(a), (f)).
7. Act of May 27, 2023, 88th Leg., R.S., S.B. 1186, §§ 1–3 (codified at Tex. Water Code § 27.036).
8. Act of June 18, 2023, 88th Leg., R.S., H.B. 4856, §§ 1–3 (codified at Tex. Water Code §§ 27.201, 27.202).
9. Act of June 13, 2023, 88th Leg., R.S., H.B. 3837, §§ 1–3 (to be codified as an amendment to Tex. Health & Safety Code §§ 382.003(1-a), 382.003(1-a)(A)).
10. Act of May 13, 2023, 88th Leg., R.S., H.B. 450, §§ 1–3 (to be codified as an amendment to Tex. Prop. Code §§ 31.001–31.005).
11. Act of June 2, 2023, 88th Leg., R.S., H.B. 591, §§ 1–3 (to be codified as an amendment to Tex. Tax Code § 201.061).
12. Act of May 23, 2023, 88th Leg., R.S., S.B. 502, §§ 1–4 (codified at Tex. Nat. Res. Code §§ 123.001, 123.003).
13. Act of May 24, 2023, 88th Leg., R.S., S.B. 604, §§ 1–5 (to be codified as an amendment to Tex. Occ. Code §§ 954.001, 1702.324(a); Tex. Tax Code § 171.1011(g-11)).



M. ALEJANDRA SALAS

is an associate in the Austin office of McGinnis Lochridge. She represents oil and gas exploration and production companies, royalty owners, and mineral owners in a variety of litigation matters. Prior to joining McGinnis Lochridge, Salas served as a judicial law clerk to the Hon. David Counts, of the U.S. District Court for the Western District of Texas, Midland/Odessa and Pecos divisions.



REAL ESTATE LAW

Compiled by John H. “Jack” Miller III and Michael A. Jacobs

This article contains a summary of bills enacted by the 88th Texas Legislature related to real estate law and should not be relied on as a complete list of bills affecting this area or a full description of any bill. The summaries below are extracted from a report prepared for the State Bar of Texas Real Estate, Probate & Trust Law Section by the Texas Real Estate and Probate Institute; the report was authored by John H. “Jack” Miller and Michael Jacobs and the following other Texas lawyers: James L. Dougherty Jr., Claire M. Barber, Samantha Dyal, Sarah P. Senterfitt, Richard A. Crow, Mark McPherson, John Absher, John P. Barnes, Kacy Cigarroa, Lorin Williams Combs, Stephen A. Cooney, Mark Hines, Jerry Lott Jr., Tom Misteli, Christy Pennington, Lindsey Jandal Postula, Ashlee Ross, Stephen B. “Steve” Schulte, Jason Smith, James I. Wiedemer, and Brenda A. Hard-Wilson.

HB 2127 amends the Agriculture Code, Finance Code, and Property Code among other codes. The bill, effective September 1, 2023, is called the “Death Star” bill by its opponents and properly known as the Texas Regulatory Consistency Act. HB 2127 specifically prohibits municipalities and counties from adopting, maintaining, or enforcing ordinances or rules that are inconsistent with state law by adding preemption language. HB 2127 adds the following preemption language to the Property Code in new Section 1.004(a), which reads as follows:

“Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.”

New subsection 1.004(b) to the Property Code indicates that an ordinance, order, or rule regulating evictions or otherwise prohibiting, restricting, or delaying delivery of a notice to vacate or filing of a suit to recover possession of premises is a field occupied by the Property Code.

HB 2022 amends Property Code Sections 27.001, 27.002(b), 27.003, 27.0042(a), and 27.006; adds Property Code Sections 27.008 and 27.009; and repeals Property Code Sections 27.004(l), 27.0042(b), and 27.007(c). The bill, effective September 1, 2023, revises several definitions concerning residential construction liability and removes cross-references to the Texas Residential Construction Commission Act.

HB 3485 adds Government Code Section 2251.0521 and Property Code Section 28.0091. The bill is effective September 1, 2023. The bill allows contractors and subcontractors under public and private contracts to not proceed with additional work under a contract if they have not received a fully signed change order for the work and the value of all additional work not described in such order plus the value of any previous additional work for which there was no fully signed change order exceeds 10% of the original contract amount. The contractor or subcontractor who doesn't proceed with additional work is not responsible for damages caused by not proceeding.

HB 207 amends Property Code Section 41.0022. The bill is effective September 1, 2023. HB 207 establishes that certain qualified conveyances by individuals to entities, including conveyances by an individual to certain related entities (entities that are partially or wholly owned directly or indirectly by the individual or the individual's spouse) and conveyances of parcels that are not urban homesteads, are not shams or pretended sales. HB 207 clarifies that those transactions, and/or related liens, may not be determined to be void under Texas law including Texas Constitution Article XVI, Section 50(c) and, as a result, individuals are estopped from claiming sham or pretended sale or claiming homestead rights to avoid the conveyance or a related lien. HB 207 *does not apply* to parcels with residences of less than 10 acres that are urban homesteads under Section 41.002(a) of the Texas Property Code. There is not a corresponding constitutional amendment to go with HB 207 that would amend the constitution. To satisfy the definition of the statute, the conveyance must (1) take place at least 30 days prior to granting a lien; (2) not be the individual's residence at the time of the conveyance; (3) not be a parcel contiguous to the individual's residence; (4) not include conditions of defeasance (a provision that the conveyance will be null and void if some condition is occurs); and (5) be accompanied by a recorded "Affidavit Regarding Conveyance To An Entity" that must include several statements by the individual, including evidence that the transaction meets all of the foregoing conditions; that the individual after having reviewed the affidavit and having an opportunity to meet with an attorney,

acknowledges that they are estopped from claiming that the transaction is a sham or pretended sale or that the individual has not abandoned homestead rights; that the individual understands that, if the parcel is specially taxed an open space land, "the entity must reapply in its own name by the applicable filing deadline."

SB 62 amends Property Code Sections 51.002(f) through (1) and adds Tax Code Section 34.015, Subsection (c-1). The bill is effective September 1, 2023. The bill requires counties to post notices of foreclosure sales and the date, time, and location of such sales on their website where they post "other auction information." SB 62 requires the county assessor-collector for each county to post a form to be used (or a link to the comptroller's form if that is allowed) to request the county assessor-collector to state whether there are any delinquent property taxes owed for the applicable property.

SB 1259 amends Property Code Section 92.0563(e). The bill is effective September 1, 2023. The bill increases the maximum judgment amount that a justice court may award a tenant for certain residential rental disputes from \$10,000 to \$20,000, excluding interest and court costs.

HB 3536 amends Property Code, Section 93.013(a). The bill is effective September 1, 2023. The bill adds the operation of a non-compliant massage establishment to the Property Code's list of unlawful activities for which a commercial landlord may terminate a tenant's right of possession and recover possession of the leased premises.

SB 801 adds Property Code Section 114.087 and amends Property Code Section 5.028(a). The bill is effective September 1, 2023. The bill provides that, effective as of the date of the original instrument, unless the trust is a legal entity under state law, the trustee of a trust is the named party to an instrument to which the trust is a party. The trustee is not required to be identified by a correction deed under Section 5.028 of the Property Code, although a correction instrument making a nonmaterial change may be used to correct the identity of a trustee. SB 801 also creates a presumption that a recorded certification of trust under Section 114.086 correctly identifies the trust and the trustee. SB 801 allows a lender and a good faith purchaser for value to rely on the certification of trust and applies to instruments executed on, before, or after September 1, 2023.

HB 886 amends Property Code Section 209.0094. The bill is effective September 1, 2023. The bill requires a property owners' association to provide multiple notices of delinquency to a property owner before filing an assessment lien. The first notice is to be provided by either first class mail or email. The second must be provided by certified mail, return receipt requested at least 30 days after the first notice is given. An assessment lien may be filed 90 days after the second notice is sent. HB 886 applies only to an assessment that becomes

delinquent on or after September 1, 2023.

HB 1558 adds Property Code Chapter 216. The bill, effective June 12, 2023, creates a procedure for older subdivisions to extend and amend restrictions in limited cases where the subdivision has no available process to make such changes, including the removal of discriminatory restrictions. HB 1558 defines “older subdivision” as a subdivision described by a recorded map or plat filed before 1947. HB 1558 applies to an older subdivision that (1) is located partially or fully in a municipality with a population greater than two million; (2) does not have a written procedure to extend or amend restrictions; and (3) has a single, non-mandatory property owners’ association.

SB 1650 amends Estates Code Sections 751.002(5), 751.00201, 751.133, 751.251, 752.001(a), and 752.107; amends Property Code Section 240.008; and repeals Estates Code Sections 751.052 and 751.133(b). The bill, effective September 1, 2023, relates to durable powers of attorney and the construction of certain powers conferred in those durable powers of attorney. SB 1650 changes “person” to “individual” in various definitions. The bill revokes the powers and authority granted in a power of attorney upon the court appointment of a permanent guardian of the estate for a ward; suspends the powers and authority granted in a power of attorney upon the court appointment of a temporary guardian of the estate, unless the court affirms the effectiveness of the power of attorney; and requires the agent whose powers are revoked to deliver the assets of the ward to the guardian of the estate. SB 1650 allows a principal or agent, guardian, conservator, or other fiduciary acting for the principal, a beneficiary, a governmental agency, and a person who demonstrates interest in the principal’s welfare or estate to bring an action requesting a court to construe or determine the validity or enforceability of a durable power of attorney or review an agent’s conduct under a durable power of attorney and award attorneys’ fees and costs. The bill also adds a provision limiting the authority granted in a power of attorney to be subject to the terms of an agreement governing or relating to an entity or entity ownership interest, and to the extent the agent is permitted by law, to act for the principal.



JOHN H. “JACK” MILLER III

is the principal and founder of Jack Miller Law. He is the chair of the Real Estate Legislative Affairs Committee under the Texas Real Estate and Probate Institute and a self-described “real estate geek.”



MICHAEL A. JACOBS

has served on the State Bar of Texas Real Estate, Probate & Trust Law Section Real Estate Legislative Affairs Committee for almost 30 years, including as co-chair. He is certified in both commercial real estate law and residential real estate law by the Texas Board of Legal Specialization.

TEXAS JUDICIARY

By Alfonso Charles and Megan LaVoie

The 88th Texas Legislature made many significant changes to Texas’ justice system that will have lasting impacts on judges, attorneys, and the litigants who appear in Texas courtrooms every day. The following is a brief overview of some of the new laws that will directly affect the judiciary and attorneys who practice in Texas courts. All bills are effective September 1, 2023, unless otherwise indicated.

HB 19: Business Courts

HB 19 establishes specialized trial courts for complex business cases. The new court has jurisdiction over business governance disputes in which the amount in controversy exceeds \$5 million and involves certain enumerated factors. The business courts will also have jurisdiction over commercial disputes in which the amount in controversy exceeds \$10 million and meets certain elements. The courts will also have jurisdiction for suits seeking declaratory or injunctive relief for the above-mentioned types of cases.

The statute clearly states that the business courts do not have the jurisdiction to hear claims arising under Chapter 74 of the Civil Practice and Remedies Code, or CPRC (health care liability cases), claims for monetary damages for bodily injury or death, and legal malpractice claims.

The business courts will be divided into 11 divisions created to correspond with the administrative judicial regions. There will be two judges for the First, Third, Fourth, Eighth, and 11th divisions. There will be one judge each for the Second, Fifth, Sixth, Seventh, Ninth, and 10th divisions. In addition, the business courts for divisions two, five, six, seven, nine, and 10 will be abolished in 2026 unless reauthorized and funded by the Legislature.

The business court judges must be at least 35 years of age, a U.S. citizen, and a resident of a county in the division. They must be a licensed Texas attorney with at least 10 years of experience in: (1) practicing complex business litigation; (2) practicing business transaction law; (3) serving as a judge of a court with civil jurisdiction; or (4) any combination of that experience. The judges for the business courts will not be elected but appointed by the governor for two-year terms and they can be reappointed.

Appeals from cases in the business courts will go to the newly created 15th Court of Appeals. While the effective date of the bill is September 1, 2023, the courts will not be operational until September 1, 2024.

SB 1045: 15th Court of Appeals

SB 1045 creates the 15th Court of Appeals. This appellate court will be a statewide court of appeals with exclusive intermediate appellate jurisdiction for: (1) matters brought by or against the state or a board, commission, department, office or other agency, including the university system; (2) matters challenging the constitutionality of a state statute or rule and the attorney general is a party; and (3) any other matter provided by law, such as business court cases.

The 15th Court of Appeals will be composed of a chief justice

and four associate justices. For the first three years, the court will just have a chief justice and two associate justices. The statute requires the court to be housed in the city of Austin, but it can transact its business in any county in the state. While the effective date for the court is September 1, 2023, the court will not be created until September 1, 2024.

HB 2384: Court Administration, Education, and Transparency

HB 2384 amends several applicable sections of the Election Code and Government Code. A judicial candidate's ballot application will have to include the candidate's bar number, any public sanction or censure as a lawyer or judge, a description of the nature of the candidate's legal practice including specialization, the candidate's professional courtroom experience for the past five years, and any final convictions of a Class A or B misdemeanor in the 10 years preceding the date the candidate would assume office. In addition, a judicial candidate for an appellate bench must include the number of appellate briefs prepared and filed in the past five years, and number of oral arguments presented in the past five years.

HB 2384 also makes changes to judicial education requirements. It orders the Supreme Court, in consultation with the Court of Criminal Appeals, to adopt rules on judicial education.

It requires a judge or justice to take 30 hours of judicial education in the first year of their first term and 16 hours for each year thereafter. In addition, the bill would allow for the State Commission on Judicial Conduct to discipline a judge or justice who does not comply with the judicial education requirements.

The bill requires the Office of Court Administration, or OCA, to develop court performance measures. It further requires the OCA to collect data from courts on clearance rates, the average time for a case from filing to disposition, and the age of the court's active pending caseload. Under the bill, the regional presiding judge is authorized to appoint a mentor to a court identified as needing additional assistance.

Finally, the bill requires the Supreme Court of Texas to adopt rules to create a specialty area of "Judicial Administration." An attorney or judge who obtains this certification must complete 21 hours of judicial education per year to maintain the certification. Further, the bill also allows the Legislature to make appropriations for additional compensation for a judge who holds a specialty certification in judicial administration.

SB 1603: Interlocutory Appeals

SB 1603 requires the intermediate courts of appeals to specify its reasons when deciding that a permissive interlocutory appeal is not warranted. Further, the bill authorizes the Supreme Court of Texas to review an appeals court's decision not to accept an interlocutory appeal under an abuse of discretion standard. The bill is effective for appeals filed on or after September 1, 2023.

SB 372: Unauthorized Disclosure of Judicial Opinions

SB 372 creates a new Class A misdemeanor for a person, other than a justice or judge on the court, to knowingly disclose a non-public work product or judicial opinion to a person not

authorized to have the opinion or work product.

HB 3474: Omnibus Courts Bill

It has long been the tradition that the legislative chairs of the committees with jurisdiction over the judiciary author and sponsor a court omnibus bill. This session it was **HB 3474**. The bill creates 16 new district courts, four new county courts at law, and three new statutory probate courts with various creation dates.

In addition, juror pay is increased from \$6 to \$20 the first day and from \$40 to \$58 for each day thereafter; moreover, the state will reimburse the counties for this cost as well. The bill also provides cross credit for former elected judges who become an elected prosecutor and elected prosecutors who become an elected judge on the judicial pay tier system. In Section 8.020 of this bill, the jury exemption age is raised from 70 to 75. The same provision passed in a stand-alone bill, **HB 2015**.

HB 1, HB 841, HB 1182: Judicial Data Bills

Multiple bills were filed during the 88th Texas Legislature to require courts to report more specific case level data instead of the aggregate data that is currently collected at the state level by the Texas Judicial Council and the OCA. **HB 841** will require the Texas Judicial Council to gather judicial statistics and promulgate rules for the collection of case level data. **HB 1182** requires counties with a population of at least one million to report information by trial court, including clearance rates, cases disposed, jury panels empaneled by the court, and orders of continuance.

The Legislature also provided funding to the OCA in **HB 1**, the state budget, to procure a new technology system to support the collection of this information.

HB 367: Judicial Candidates

HB 367 allows the State Commission on Judicial Conduct to accept complaints, conduct investigations, and take other authorized actions with respect to candidates for judicial office in the same manner the commission is authorized to take those actions with respect to a sitting judge.

HB 1: Court Text Reminder Program

The Legislature provided funding to the OCA in **HB 1** to create a Court Text Reminder Program. The program will provide a system for jurisdictions to use free of charge that will send text messages to individuals reminding them to appear for their court date.



ALFONSO CHARLES

has served as judge of the 124th District Court in Gregg County since December 4, 2009. Prior to that, he served as the first judge of the County Court at Law #2 of Gregg County for almost seven years. Charles was appointed as the first presiding judge of 10th Administrative Judicial Region by Gov. Greg Abbott in 2018 and reappointed on February 22, 2022. He has served as chair of the Legislative Committee for the State Bar of Texas Judicial Section.



MEGAN LAVOIE

is the administrative director of the Office of Court Administration and executive director of the Texas Judicial Council. She previously served as general counsel and communications director for state Sen. Robert Duncan and as senior director of advocacy for the National Multiple Sclerosis Society. LaVoie is a graduate of Texas Tech University and St. Mary's University School of Law.