



# 2011 PROPERTY & CASUALTY INSURANCE LEGISLATION IN TEXAS

## INTRODUCTION AND OVERVIEW

The Texas Legislature began the 82<sup>nd</sup> legislative session in January 2011, but was unable to conclude all of its business and had to continue selected business in the first called session. The first called session ended June 29, 2011.

Thompson Coe attorneys were involved in representing various individual insurance clients and the Association of Fire & Casualty Companies in Texas (AFACT) on a broad spectrum of issues impacting property and casualty insurance.

During the 82<sup>nd</sup> Session and Special Session there were over 5,700 bills that were filed compared with over 7,000 in 2009. Jay Thompson and Albert Betts were directly involved in reviewing and analyzing over 421 bills that were identified to have some impact on the property and casualty insurance industry. Seventy of those bills became law.

This newsletter provides a brief summary of some of the new laws.

The dominant issue facing the 82<sup>nd</sup> Texas Legislature was how to fund state government for the next two years in light of a \$27 billion anticipated budget shortfall. This shortfall had ramifications for education, regulation and business. The Legislature was also confronted with the need to pass legislation to continue certain major state agencies because of the Sunset review process. These agencies included the Texas Department of Insurance, the Texas Department of Transportation and the Texas Railroad Commission.

Finally, an issue that is personal to both elected officials and future politicians is the subject of redistricting. The Legislature passed bills drawing new districts for both the House and the Senate. This could have a major impact on the composition of future legislatures.

Because of changes in the 2010 elections, the House was comprised of 101 Republicans and 49 Democrats compared with 77 Republicans and 73 Democrats in 2009. The composition in the Senate was not materially changed, even though certain key committees were changed, in particular, the Senate Business & Commerce Committee. This session, the Senate Business & Commerce Committee was chaired by Senator John Carona from Dallas. The previous chairman, Senator Troy Fraser, Republican from Horseshoe Bay, took over the chairmanship of the Senate Natural Resources Committee. The result is that there were significantly fewer issues that would have been detrimental to a property casualty insurer and numerous other issues that created a more favorable business climate

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for both property casualty insurers and their customers. Many issues that were front-burner issues in 2009, such as further insurance reform, were back-burner issues in 2011. Texas Windstorm reform was still a hot topic. Voter Identification passed easily.

Traditional Democratic issues such as prior approval for automobile and homeowners insurance rates, standard policy forms for auto and homeowners' insurance, and bills to ban the use of credit scoring and underwriting and rating received little consideration in the 82<sup>nd</sup> Legislature.

This report provides a brief summary of the bills that did pass along with the effective date for each bill. Many bills may have different effective dates for various sections of the bill. Where possible, the summary references any due dates for operational changes applicable under a new law. This report is not intended to give legal advice nor should it be relied upon as a complete representation of the law. Any decision to act or not act should be made only after thorough review of the legislation passed and after consulting with legal counsel. Also, although the Legislature has passed a bill, the state agency responsible for administering the law may still be required to adopt administrative rules to implement a bill that has been passed. We urge you to pay close attention to the rulemaking process that will occur over the next several months at the Texas Department of Insurance and the Division of Workers' Compensation Insurance.

## TCCI SUMMARIES OF 2011 PROPERTY & CASUALTY LEGISLATION

### AGENTS

**HB 2503 INSURANCE AGENT LICENSES FOR FOREIGN CORPORATIONS/PARTNERSHIPS.** Under current law, foreign corporations cannot be licensed under the Texas Insurance Code as agents unless they also register with the Secretary of State. Numerous foreign corporations may need to be licensed to split commissions but do not need to be registered with the Secretary of State because they are not otherwise doing business in Texas. HB 2503 amends the Insurance Code to remove the requirement that certain foreign corporations and partnerships seeking to be licensed as agents in Texas also register with the Secretary of State. This bill is effective September 1, 2011.

### AUTO

**HB 1422 SALVAGE TITLES FOR VEHICLES SUBJECT TO INSURANCE CLAIMS.** This bill amends the Transportation Code to prohibit an insurer from selling a salvage or non-repairable vehicle unless the Texas Department of Transportation (TxDOT) has issued a salvage or non-repairable title. Previously the statute only referred to a motor vehicle. The bill amends Chapter 501 of the Transportation Code to allow an insurer who obtains possession of a vehicle, through claim payment, and is unable to obtain a certificate of title within 30 days to get a salvage or non-repairable title from TxDOT by submitting a TxDOT prescribed application for title form that includes a statement that the insurer has provided at least two written notices attempting to obtain the certificate of title for the vehicle and evidence of payment of the claim. The bill also identifies other means of obtaining an appropriate certificate from TxDOT if the insurer is unable to obtain an assignment of the certificate or if the vehicle is covered by out-of-state ownership document. The bill also amends Chapter 501 regarding a salvage pool operator who, at the request of the insurer, takes possession of the vehicle subject to an insurance claim and the insurer denies coverage or does not take ownership of the vehicle. The bill requires the salvage pool operator to notify the owner and lien holder that they must remove the vehicle within 30 days or the salvage pool operator can sell the motor vehicle and retain actual costs from proceeds. The bill



provides that the salvage pool operator can obtain title to the vehicle if certain notices are provided. This bill is effective June 17, 2011.

**HB 1541 AUTO BURGLARY AND THEFT PREVENTION.** The bill requires the Auto and Burglary Theft Prevention Authority (ABTPA) to develop performance measures for grants distributed by the ABTPA. The ABTPA has to allocate grant funds based on the vehicles stolen in Texas, or the burglary or theft rate, rather than geographically. The ABTPA will be required to update its plan of operation biennially and file it with the Legislature. The Department of Public Safety is required to collect vehicle theft data, recovery rates, and clearance rates. The DPS may administer the ABTPA's statewide vehicle registration program.

The bill changes the fee collected on auto insurance policies from \$1 to \$2. Fifty percent (50%) of this fee is appropriated to the ABTPA for the prevention of auto theft and burglary. This bill is effective September 1, 2011.

**HB 2559 COMMERCIAL MOTOR VEHICLE RETAIL INSTALLMENT FINANCING.** This bill amends the Finance Code by creating a new Chapter 353 for the financing of commercial motor vehicle retail installment contracts which were previously included in Chapter 348, Finance Code, that applied to both commercial and consumer contracts. The new chapter contains similar general provisions to current law regulating contracts; contract holder licensing; contract holder rights, duties, and limitations; and other general provisions. The premium finance laws in Chapter 651, Insurance Code, do not apply to insurance financed in a retail installment contract. Items that can be financed include: warranties; debt cancellation agreements; credit life and disability insurance; and involuntary unemployment insurance. Property and liability insurance can be required and included as a separate charge in the contract. A separate notice is required if liability insurance is not included. A contract holder can charge a buyer for any insurance required but not obtained by the buyer. Debt cancellation is not considered to be the business of insurance. This bill is effective September 1, 2011.



#### CERTIFICATES OF INSURANCE

**SB 425 CERTIFICATES OF INSURANCE.** This bill adds a new Chapter 1811 to the Insurance Code to outline requirements for certificates of insurance for certain property and casualty insurance policies. Insurance agents have long been required to furnish certificates of insurance to owners, general contractors and others, and often are asked to sign voluminous manuscript certificates that contain representations concerning coverage to third parties. A certificate of insurance is a document executed by an insurer or agent to a third person as a statement or summary of property coverage, but does not change or modify the terms of the insurance policy.

This bill sets forth certain prohibited acts and practices relating to the issuance of certificates of insurance. Certificate of insurance forms must be filed with the Department of Insurance for approval. Certain national forms, such as an ACORD or ISO form, shall be deemed approved and can be used. SB 425 makes it clear that a certificate of insurance is not a policy of insurance and does not amend, extend or alter the coverage afforded by a policy referenced in a certificate of insurance.

Further, the legislation clarifies that a certificate does not confer to a certificate holder new or additional rights beyond what the reference policy or any executed endorsement of insurance provides.

This new law provides that persons are entitled to notice of cancellation, non-renewal or material change in a policy of insurance only if the person is named within the policy or endorsement and the policy or endorsement requires notice to be provided. A certificate of insurance cannot mandate this requirement.

In addition to the prohibited acts, the new legislation prohibits altering or modification of approved certificate forms; issuing false or misleading certificates; or requiring an insurer or an agent to issue other documentation that has not previously been filed, approved or has been disapproved.

The new law does not apply to certificates issued under group life credit, accident, health insurance, long-term care or annuity contracts and also does not apply to statements or evidence of insurance required by lender in a real estate lending transaction.

The changes in the law made by SB 425 are effective for certificates issued on or after January 1, 2012.

### CIVIL LIABILITY

**HB 2471 LIABILITY OF PERSONS PROVIDING MEDICAL CARE/TREATMENT FOR CERTAIN ANIMALS.** This bill amends Chapter 92 of the Civil Practice and Remedies Code to establish limitations for civil liability for a person who, in good faith and without compensation, renders or obtains medical care or treatment for a non-livestock animal that is injured or in distress because of an emergency, abandoned, running at large, or stray, that results in an injury to the animal. The bill also provides limitations for civil liability for an animal control agency or an employee of an animal control agency who provides medical care and treatment for certain animals that resulted in an injury to the animal from an act or omission while acting in good faith. This bill is effective September 1, 2011.

**HB 3570 AMUSEMENT RIDES.** This bill amends the Occupations Code to limit the application of provisions aimed at traditional amusement rides by establishing separate liability insurance requirements, set at \$1,000,000, specifically for bounce houses. This bill is effective September 1, 2011.

**SB 321 GUNS AT WORK.** This bill amends the Labor Code by adding a new subchapter G to Chapter 25, Labor Code, placing restrictions on an employer from prohibiting employee transportation or storage of firearms in a locked, privately owned vehicle in a parking lot. The employer cannot prohibit the employee who has a license to carry a concealed handgun or who lawfully possesses ammunition from transporting or storing a firearm in a locked, privately owned vehicle. Exceptions exist for property where the possession of firearm and ammunition is prohibited by state or federal law; vehicles provided by employers; school districts; open enrollment charter schools; private schools; property owned or controlled by a person other than an employer that contains a valid oil and gas mineral lease containing the provision prohibiting the possession of firearms on the property; finally, a property owned or leased by a manufacturer of chemicals or other hazardous substances or materials. This bill is effective September 1, 2011.



**SB 479 LIABILITY FOR FARM ANIMAL ACTIVITIES.** This bill expands Chapter 87 of the Civil Practices and Remedies Code, the "Equine Law," to protect property owners from exposure to liability for injuries caused by non-equine farm animals. This bill is effective June 17, 2011.

**SB 1160 LIABILITY OF LANDOWNERS, INCLUDING HARM TO A TRESPASSER.** This bill amends the Civil Practice and Remedies Code to provide that an owner, lessee, or occupant of land does not owe a duty of care to a trespasser on the land and is not liable for any injury to a trespasser on the land except that an owner, lessee, or occupant owes a duty to refrain from injuring a trespasser willfully, wantonly, or through gross negligence. The bill also provides that an owner, lessee, or occupant of land may be liable for injury to a child under 16 years if caused by a "highly dangerous artificial condition" under certain conditions. This bill is effective May 20, 2011.



### FRAUD/SOLICITATION

**HB 1711 DISASTER REMEDIATION CONTRACTS.** This bill amends the Business and Commerce Code and requires that a disaster remediation contract be in writing and prohibits a disaster contractor from requiring payment prior to beginning work or charging a partial payment in any amount disproportionate to the work which has been performed. This bill is effective June 17, 2011.

**SB 918 REPORTING OF INSURANCE FRAUD.** Under current Texas law, insurers are required to report suspected insurance fraud to the Fraud Division of the Texas Department of Insurance. Insurers can meet that reporting requirement by reporting information to organizations such as the National Insurance Crime Bureau (NICB). The NICB often reports such information on behalf of the insurer. SB 918 adds a specific provision that provides immunity for organizations such as NICB for information it reports to a crime bureau. This bill also clarifies current law by extending the immunity provisions not only to insurers, but to organizations primarily dedicated to the detection, investigation and prosecution of insurance fraud. This bill is effective September 1, 2011.

**SB 1716 CIVIL LIABILITY FOR BARRATRY.** This bill amends the Government Code to allow a client in any contract for legal services to sue to void a legal services contract obtained as a result of a violation of the barratry laws or State Bar Disciplinary Rules. The client can recover fees paid to the lawyer, actual damages, and attorney fees. A person solicited in violation of the barratry laws, but not a party to a legal contract, may file a civil action against the person who committed barratry. Recovery is limited to a \$10,000 penalty, actual damages, and attorney fees. The attorney accused of barratry, and whose contract is voided, can recover fees and expenses if the client fails to prove that the attorney committed barratry or had actual knowledge that the contract was procured as a result of barratry. This bill is effective September 1, 2011.

#### REGULATORY

**HB 2382 NOTICE UPON NON-RENEWAL OF PROPERTY CASUALTY POLICIES.** This bill amends §551.104 of the Insurance Code. Under current law, an insurance company is required to mail notice of non-renewal 30 days before the date on which a policy expires. There were concerns by some companies that, if they failed to send a renewal notice and the insured obtains a new policy from a new company, the old company may also be required to cover the risk and the property could receive double coverage by operation of law. HB 2382 added new language that, notwithstanding the failure of an insurer to comply with the section, the policy will terminate on the effective date of any replacement or succeeding policy. This bill is effective September 1, 2011.

**HB 2655 NOTICE FOR REDUCTION IN COVERAGE.** This bill amends §2002.001 of the Insurance Code and requires an insurer that proposes to reduce coverage on a property or casualty policy to provide at the time of renewal a written explanation of the change not later than the 30<sup>th</sup> day before the policy expires. This bill is necessary because often an insurer may make minor changes in its policy form or may require higher deductibles for renewal of a policy due to claims frequency. Insurers must either non-renew the policy or threaten to non-renew in order to implement a change or higher deductible. As a result there has been confusion over what constitutes a reduction in coverage, and whether an insurer would be required to send a non-renewal notice even though the insurer offers to continue coverage under different terms or conditions. This bill also amends the provisions in Texas law by making it clear that a notice of renewal with a notice of change in coverage can be done without requiring an insurer to send both a non-renewal notice and a renewal notice at the same time. This bill is effective September 1, 2011.

**HB 2699 INSURANCE ADJUSTERS' LICENSING.** This bill amends Chapter 4101 of the Insurance Code relating to insurance adjuster licensing and intended to deal with situations of claims involving portable consumer electronics insurance coverage. These claims are often simple and use very few calculations to determine the claim's outcome. Consumer representatives that take phone calls and input data into an automated electronic claims adjudication system can provide claims approval to policy holders by mail within just a few days. This bill is intended to bring those customer service representatives that are under the supervision of licensed insurance adjusters into the exceptions that would not require licensure. Definitions are added for automated claims adjustment systems and individuals that are employed by licensed independent insurance adjusters who collect and enter data into a automated claims adjudicated system. This bill is effective September 1, 2011.

**HB 2931 DEBT CANCELLATION AGREEMENTS.** This bill amends current law of debt cancellation agreements that are made in connection with certain retail installment contracts. The bill adds subchapter G to Chapter 348 of the Finance Code requiring full disclosure of exclusions of damages that would not be covered under a debt cancellation agreement. In addition, new regulations concerning the terms and conditions in a debt cancellation agreement are set forth, including provisions for requirements of the retail buyers' primary liability insurance; the settlement of an insured total loss of a motor vehicle and the deductible required. A debt cancellation agreement may not be knowingly offered if the retail installment contract is already protected by GAP insurance. This bill is effective September 1, 2011, and applies only to debt cancellation agreements entered into or after September 1, 2011.

**SB 416 TOTAL LIABILITY OF A MORTGAGE GUARANTY INSURER.** This bill amends Article 3502.156 of the Insurance Code to allow the Commissioner of Insurance to waive the 25:1 ratio limit on a mortgage guaranty insurer's outstanding liability upon certain findings after written request from the insurer. The bill requires the request to be made 90 days prior to the date the insurer expects to exceed the limit. The bill outlines factors the Commissioner must consider in reviewing the request, including finding that the company is otherwise adequately capitalized, and, if granted, a waiver cannot exceed two years, subject to a request for extension of up to 90 days. This bill is effective May 10, 2011.

**SB 867 LICENSING EXAM ACCOMMODATIONS.** Amends the Occupations Code and requires state agency licensing exams to provide reasonable accommodations for examinees diagnosed with dyslexia. State agencies must adopt rules no later than December 1, 2011. This bill applies to licensing exams offered on or after January 1, 2012. This bill is effective September 1, 2011.



**SB 1229 REGISTRATION OF CONTRACT EXAMINERS WITH THE TEXAS DEPARTMENT OF INSURANCE.** This bill amends Articles 401.107, 751.052 and 4053.107 of the Insurance Code to provide for the registration of out-of-state independent contract examiners to report to the chief examiner of the Insurance Department and require that they provide additional information, including an estimate of the examination costs, a copy of the contract engaging their services with the public agency, and a list of previous and similar examinations of the same insurer within the last three years. The bill provides a process for the Insurance Department to acknowledge receipt of the registration by written confirmation. This bill is effective May 28, 2011.

**SB 1291 TDI FINANCIAL PROGRAM BUDGET.** This was a TDI legislative recommendation. This bill amends Chapter 401 of the Insurance Code and provides the Texas Department of Insurance with a self-directed budget for the purpose of funding salary, travel, and related personnel expenses incurred by TDI's Financial Examinations and Actuarial Divisions while administering the statutorily required examination function. Fees and assessments associated with examinations and actuarial functions would be used to fund the programs. There is a one year transition period during which the TDI Financial and Actuarial programs would continue to be funded by appropriated funds. This bill is effective September 1, 2011.

**SB 1431 INSURANCE HOLDING COMPANY SYSTEM ACT.** The Texas Department of Insurance sought various changes to the Holding Company Act in order to make changes in Texas law similar to the recently modified NAIC Model Holding Company Act. The most important change was the reporting of enterprise risks. An enterprise risk is any activity involving affiliates of an insurer that could have a material adverse effect on the financial condition or liquidity of an insurer. The ultimate controlling person in an insurance holding company system must file an annual enterprise risk report. Specific provisions are included in the new law to make sure that information included in an enterprise risk report will be deemed confidential and maintained in a confidential manner even when it is reported to the NAIC. The final bill includes a phase-in for the enterprise risk report requirement beginning in January 2014 for insurers that have \$5 billion or more in premiums in the preceding twelve month period of time. Afterwards, there are additional phase-in periods depending on the premium volume in the preceding year. Insurers writing less than \$300 million in annual premium would not be required

to file the enterprise risk report. Insurers writing between \$300 and \$500 million in annual premium can seek a hardship exemption from filing the enterprise risk report. In addition, SB 1431 also adds language relating to supervisory colleges that permits the commissioner to participate in a supervisory college for a domestic insurer that is part of an insurance holding company system with international operations.

The bill sets forth new deemer provisions for disclaimers of control and clarifies that a Form A may be required if a person divests control of a domestic insurer.

The bill is effective September 1, 2011. The provisions for the enterprise risk reporting may not be implemented until 180 days after the commissioner determines the NAIC has completed an enterprise risk form and has a master confidentiality agreement in place. The reporting requirements for enterprise risk reporting will not begin until January 1, 2014.

**SB 1433 EMERGENCY APPOINTMENT OF RECEIVERS.** This bill was a TDI legislative recommendation. The bill amends various sections of Chapter 443 of the Insurance Code and allows the TDI to appoint special deputy receivers without soliciting competitive bids in the event of an emergency. An emergency exists if the federal government has initiated rehabilitation or liquidation action against a parent financial organization, under the federal Dodd-Frank Wall Street Reform Act, or upon the TDI determination that the competitive bid process would delay appointment of a receiver. This bill is effective September 1, 2011.

#### SUNSET LEGISLATION

**HB 1774 SUNSET BILL FOR THE OFFICE OF INJURED EMPLOYEE COUNSEL (OIEC).** The OIEC is continued through 2017. This was the agency's first Sunset review since its creation in 2005. The OIEC has to maintain a system for responding to complaints and maintain information on complaints received. The bill gives OIEC the authority to seek and accept grants to help perform its duties. The OIEC has access to claim information equal to that of the employee or any other party to a workers' compensation claim. The DWC is required to provide OIEC with certain limited information regarding a claimant receiving assistance from the OIEC.



**HB 1951 TDI SUNSET.** The Legislature finally passed, after two sessions, the TDI Sunset bill. The next sunset review of TDI will be in 2023. Unlike 2009, there were few contentious or contested amendments on the sunset bill this session. The important changes impacting property and casualty insurance included:

1. **TDI Duties.** Now include the duty to protect and ensure the fair treatment of consumers and ensure fair competition in the insurance industry in order to foster a competitive market.
2. **Negotiated Rulemaking and Alternative Dispute Resolution Policies.** The TDI is required to implement procedures for negotiated rulemaking and developing ADR policies for both internal and external disputes.
3. **Advisory Board Rules.** The TDI is required to adopt rules on the purpose, size, qualifications, terms and training of advisory boards and periodically evaluate advisory committees to ensure their continued necessity.
4. **File & Use Rate Regulation.** Time limits are imposed on requests for additional information. Before placing insurers in prior approval, the TDI must adopt rules that set forth the financial conditions and rating practices that would subject an insurer to prior approval and the process by which the commissioner would determine if a statewide emergency exists to justify use of prior approval. Orders placing an insurer in prior approval must also include the steps that an insurer must take and conditions an insurer must meet in order to be excused from prior approval.

5. **Confidential Information in Rate Filings.** Information filed as part of a rate filing can now be protected from public disclosure if the information qualifies under one of the exceptions for disclosure in the Texas Open Records Act. This usually would be trade secrets or confidential financial information under the Open Records Act.
6. **Electronic Transactions.** Chapter 35 is added to the Insurance Code to permit insurers and others to operate electronically to the same extent as otherwise allowed by law, if each party agrees to conduct the business electronically.
7. **Data Collection on Personal Lines.** Insurers writing personal automobile and residential property will be required to report certain claims information including the number of claims filed; pending; closed with payment; closed without payment; and carrying over from the reporting period. Claims reports are open records.
8. **Property Insurers Writing in Underserved Areas.** Under current law, there are various designations of underserved areas for various purposes including lesser rate filing requirements under the file and use law. The commissioner is required to conduct a study and report on the impact of increasing the percentages in Subch. F, Chapter 2251 for companies eligible for the lesser filing requirements.
9. **Adjuster Advisory Board.** An adjuster advisory board is created to advise the commissioner regarding: matters relating to the licensing, testing, and continuing education of licensed adjusters; claims handling; ethical guidelines and other professionally relevant issues; and other matters submitted by the commissioner.
10. **Reporting by Insurers to Claims Data Bases.** Chapter 563 is added to the Insurance Code to prohibit insurers from reporting inquiries regarding coverage unless and until an insured files a claim under the policy.




**HB 2605 SUNSET BILL FOR THE DIVISION OF WORKERS' COMPENSATION.** This was the first Sunset review of the DWC since it was created under HB 7 (79th Legislature, 2005). The agency was continued until 2017. The Sunset bill requires the DWC to adopt a policy on complaint processing and develop procedures for analyzing complaints. The bill made numerous changes to DWC regulatory functions including the following:

1. **Medical Disputes.** The bill changes the medical dispute appeal process. Currently, appeals are heard by DWC or the State Office of Administrative Hearings (SOAH) depending upon the issue and the amount in controversy. Under the bill, medical necessity disputes will be heard by the DWC and medical fee disputes proceed to SOAH for review. The non-prevailing party reimburses DWC for the costs of the SOAH hearing; if the non-prevailing party is the injured employee, the insurance carrier reimburses.
2. **Designated Doctors.** Designated doctors are doctors selected by the DWC to resolve certain disputed issues for a claim such as an injured worker's impairment rating or ability to return to work. The bill amends current designated doctor laws, Texas Labor Code Chapter 408, and requires DWC to select designated doctors whose credentials are appropriate for the "area of the body affected by the injury." A late amendment to the bill is similar to other introduced legislation (SB 511) and allows an employee to request an additional medical exam if dissatisfied with the first designated doctor opinion on impairment rating and maximum medical improvement. The commissioner is authorized to adopt rules to allow the order for additional medical exam to include other issues on which that designated doctors may offer an opinion. The bill also requires DWC to develop a certification process for designated doctors and to adopt rules. The adopted





rules must contain certain requirements, including guidelines for certification training programs. DWC is required to adopt designated doctor certification rules no later than January 1, 2013. Amendments to disciplinary acts against designated doctors apply on or after January 1, 2013. Amendments to designated doctor medical exam provisions also apply on or after January 1, 2013. The bill clarifies that DWC has the authority to revoke or deny renewal of a designated doctor's certificate.

3. **Benefit Dispute Resolution.** The bill makes changes to the income benefit informal dispute resolution process and sets new requirements for parties' pre-benefit review conference (BRC) preparation and communication. Establishes that failure to appear at a BRC may result in forfeiture of right to attend a BRC. The DWC Appeals Panel, which reviews appeals from the agency's administrative hearing officers, can affirm a decision of a hearing officer in certain instances—such as cases of first impression, involving a recent change in law, and incorrect conclusions of law, among others.
4. **Medical Quality Review Panel (MQRP).** The most contentious issue during the Sunset review involved allegations regarding the DWC process for reviewing the quality of care provided by doctors, chiropractors, and other health care professionals. Reviews are based upon complaints or after review of medical billing data by the DWC. The Sunset bill makes many changes to the medical quality review program. Under the bill, DWC is required to develop criteria for MQRP selection process, and the process has to be made available on the DWC website. The bill also requires the Medical Advisor to establish a Quality Assurance Panel to assist in the review of medical quality decisions. DWC has to adopt rules for operation of the MQRP panel, including qualifications for panel and composition of the panel among other requirements.
 
5. **Enforcement and Compliance.** Authorizes the Commissioner of Workers' Compensation to review a proposal for decision issued by the SOAH administrative law judge in enforcement cases. The commissioner will then issue the final order. Currently, the SOAH judge issues final decisions in enforcement cases. This authority would be similar to that given the Insurance Commissioner under the Insurance Code. The bill amends sections of the Labor Code regarding administrative violations of workers' compensation provisions to remove references to classes of administrative violations and amends Labor Code §409.021(e) to remove specific penalty amounts for failure to timely initiate benefits or issue notice of denial. Also amends Labor Code §414.005 to authorize DWC to conduct on-site compliance inspections, similar to the authority that the Department of Insurance has under the Insurance Code. Adds Labor Code §415.0211 to give the workers' compensation commissioner ex parte emergency cease and desist authority for violation of statute or rule, or order, if he believes the conduct will result in harm to the health, safety, and welfare of another person. A person who is subject to an emergency cease and desist order is entitled to request a hearing within 30 days of receipt of the order. The hearing has to be held within 10 days of receipt of the request for a hearing unless parties agree to a later hearing date. This is similar to authority of the Insurance Commissioner under the Insurance Code. This bill is effective September 1, 2011.

**SB 647 OFFICE OF PUBLIC INSURANCE COUNSEL SUNSET.** This bill extends the Office of Public Insurance Counsel (OPIC) until 2023. Additionally, OPIC is required to develop and implement alternative dispute resolution procedures.

**SB 652 GOVERNMENTAL ENTITIES SUBJECT TO THE SUNSET REVIEW PROCESS.** This bill amends general laws relating to the timing of the sunset review process for numerous state agencies and governmental entities to balance the workload of the Commission and to better align the reviews of agencies by grouping them based on subject matter. This bill is effective June 17, 2011.

SURPLUS LINES

**HB 3410 SURPLUS LINES PREMIUM TAXES.** This bill clarifies who is responsible for collection and payment of surplus lines taxes as well as providing a definition for managing underwriters.

First, §255.006 of the Insurance Code is amended to provide that the surplus lines agent that places a policy with a managing underwriter shall collect, report and pay the tax.

Second, the term “managing underwriter” is defined in Chapter 981 to mean an agent that exercises underwriting authority for an eligible surplus lines insurer. Managing underwriters are required to maintain records and make them available for inspection by the Department and Comptroller concerning insurance placed through a managing underwriter, including documentation that the managing underwriter has transmitted to the surplus lines agent writing the business that the surplus lines agent will be responsible for all filing, reporting, collection and tax payment requirements. A managing underwriter may hold both a surplus lines agent’s license and a managing general agent license. This bill is effective January 1, 2012.

**SB 1806 TIMELY FILING OF SURPLUS LINES POLICIES.** Texas is somewhat unique in that a surplus lines policy must be filed within 60 days after the policy is issued with the Surplus Lines Stamping Office of Texas. Failure to timely file policies has resulted in the imposition of increasingly severe sanctions against surplus lines agents by the Texas Department of Insurance. SB 1806 sets forth fees for late filing of policies. The new fees or penalties, of \$50, \$100, or \$200 are imposed based on when the policy is late-filed and if the agent late-filed more than 5% of the agent’s policies in the preceding year. The bill is effective September 1, 2011.

TORT REFORM

**HB 274 LOSER PAY LEGISLATION, EARLY DISMISSAL, EXPEDITED TRIALS AND OTHER REFORMS.** HB 274 was dubbed the "Loser Pay" tort reform effort by Governor Perry. After numerous hearings, changes and negotiations, the final version of the bill made the following changes to Texas law:



First, the Texas Supreme Court is required to adopt rules for dismissal of a cause of action that has no basis in law or fact. This is similar to a motion to dismiss procedure that has been used by federal courts for years for the early dismissal of cases that have no basis in law or fact without evidence. The court can award attorneys fees to the prevailing party on a motion to dismiss.

Second, the Supreme Court is required to adopt rules to expedite civil trials. This should help to lower the discovery costs in certain civil cases. These rules would not apply to medical professional liability cases under Chapter 74, TEX. CIV. PRAC. & REM. CODE; or to cases filed under the Family Code, Property Code, or Tax Code.

Third, the bill permits appeals of orders that are otherwise not appealable if the order involves a controlling question of law and may materially advance the ultimate termination of the litigation. Appeals will not stay proceedings unless agreed by the parties or the proceeding is stayed by the appellate court pending appeal.

Fourth, the final bill made changes to Chapter 42, TEX. CIV. PRAC. & REM. CODE, dealing with offers of settlement. Under the current law, an offer of settlement could result in loss of the ability of the plaintiff to recover attorneys fees or costs based on a formula of the offer compared to the final award. The formula in §42.004 is repealed. It should also be easier for defendants to obtain awards of litigation costs if a qualifying offer is rejected and the final award is less than a qualifying offer.

Finally, HB 274 amends §33.004, TEX. CIV. PRAC. & REM. CODE. The designation of responsible third parties was changed to prohibit a designation of a responsible third party by a defendant after the applicable limitations

period on the cause of action has expired with respect to the responsible third party if the defendant has failed to timely disclose that person as a responsible third party. The provision in Texas law, §33,004(e), TEX. CIV. PRAC. & REM. CODE, that permits a Plaintiff to sue responsible third parties 60 days after designation is repealed. This new law is effective on September 1, 2011, and applies only to civil actions commenced on or after the effective date.

**HB 2093 OPERATION OF CONSOLIDATED INSURANCE PROGRAMS AND PROHIBITING CERTAIN INDEMNIFICATION AGREEMENTS IN CONSTRUCTION CONTRACTS.** The bill adds a new Chapter 151 to the Insurance Code and defines a consolidated insurance program (CIP) as a construction project where the principal provides general liability, workers' compensation, or both in an insurance program for the construction project. A construction project is defined to include construction, repair, or maintenance of improvements on real property but would not include construction projects involving single family housing, duplexes or townhomes. The bill requires a consolidated program that provides general liability coverage to also provide completed operations insurance for at least 3 years. The insurance commissioner is authorized to adopt rules to implement and enforce this provision. No timetable for rules has been set.



A Senate amendment to HB 2093 added Subchapter C to Chapter 151 that would render void or unenforceable certain indemnification clauses in construction contracts. New §151.103 would prohibit enforcement of indemnification provisions in a construction contract that require an indemnitor to indemnify a party, including a third party, for claims caused by the negligence of the other party (indemnitee). An indemnification clause is not void and unenforceable if it requires indemnification against a claim for bodily injury or death of an *employee of the indemnitor, its agent, or its subcontractor*. In addition, new

§151.104 prohibits additional coverage provisions in a contract to the extent that it requires or provides coverage for prohibited indemnification. This specific prohibition does not apply to a policy issued under a CIP if it adds or deletes named insureds.

The bill also contains a new §151.105 that lists various types of situations that are not affected by the indemnification prohibitions. These excluded situations include policies issued under an owner controlled insurance program (OCIP); owner sponsored programs; contractor controlled insurance program, or contractor sponsored programs, except for additional insurance provisions that are unenforceable under §105.104. Other situations include causes of action for breach of contract that exist independently of the indemnity obligation; indemnity provisions in loan and financing documents; indemnity required by sureties; the benefits and protection under the workers compensation laws; construction contracts for single family homes; public works; and other listed exclusions.

The changes in the laws for CIPs apply to construction projects beginning on or after January 1, 2012. This bill is effective January 1, 2012.

### TOWING/STORAGE

**HB 3510 TOWING, BOOTING, AND STORAGE OF VEHICLES.** This bill amends the Occupations Code to clarify current law and streamline the regulation of vehicle towing, booting, and storage. The bill requires adoption of rules on requirements for consent towing, private property and incident management tow. The bill requires a towing company to file a fee schedule for non-consent tows with the original application or renewal application for a license and when the company changes a fee on a previously filed schedule and as required by rule. The bill amends §2308.255(d) to include "boot operator." The bill amends provisions regarding signs prohibiting unauthorized vehicles and specific language to be included in signage. The bill exempts a vehicle received as a result of an incident management tow requested by a law enforcement agency. This bill is effective September 1, 2011.

WINDSTORM INSURANCE

**HB 3** After much debate and consternation, a bill amending Texas law for the Texas Windstorm Insurance Association was finally considered in special session. The House and Senate had sharp differences on the claims handling procedure for disputed claims and whether TWIA should be required to pay punitive damages, including treble damages under Chapter 541 and the DTPA, and whether TWIA should be required to pay “penalty interest” under the prompt pay provisions in Chapter 542. The final bill includes the following changes:



- Consumer Protections. Provisions to streamline the renewal process; allow double damages under limited circumstances for knowing and intentional violations by TWIA; provide for alternative certification requirements for certain noncompliant structures; and impose deadlines for TWIA to complete investigation and notice of claims. Consumers building to higher code standards can receive premium discounts.
- Funding and Solvency. Class 1 pre-event bonds can be authorized and a mechanism to issue a combination of Class 1 and Class 2 post-event bonds may be authorized if the full amount of Class 1 bonds cannot be issued. \$2.5 billion is still the maximum aggregate amount of bonds that can be issued in any calendar year. This clarifies provisions of the law passed in 2009. The TWIA board is authorized to purchase reinsurance and if TWIA does not purchase reinsurance, it has to submit an actuarial plan to pay losses in excess of \$2.5 billion.
- Transparent Operations. TWIA is subject to open meeting and open records act. TWIA must publish salary information for certain managers and contractors. A new expert panel is required to recommend how to settle disputed wind v. water claims and where evidence is limited (slab losses).
- Oversight by TDI. TDI is allowed to put TWIA into conservatorship. Random claim audits are required after 1,000 claims have been filed following a storm. TDI has authority to issue cease and desist orders to inspectors. TDI must set agent commissions by rule. A study for a single adjuster program is required.
- Lawsuit Abuse Prevention. The bill eliminates treble damages and 18% penalty interest. Insureds must file a claim within one year of the date of loss with extensions for good cause. Premium discounts are required for insureds electing binding arbitration. Exhaustion of remedies, including appraisal where appropriate, is necessary before a lawsuit can be filed.
- Interim Study. The Legislature will conduct an interim study to determine other alternatives to provide needed coverage along the Texas coast and whether TWIA should be changed or eliminated. One of the issues will be to eliminate TWIA and require insurers to write business in the coast in the same percentage that they write statewide.
- Incentives for Insurers. TDI must approve policy forms for insurers willing to write or continue writing voluntary business in the first tier. This amendment will permit policy forms to have provisions requiring claims to be filed within one year from date of loss except for good cause. Statute of limitations periods in a policy can be the earlier of (1) two years after accepting or rejecting a claim, or (2) three years from the date of loss.

WORKERS' COMPENSATION

**HB 528 DISCOUNT FEE CONTRACTS FOR PHARMACEUTICAL SERVICES.** The bill amends Labor Code Chapter 408 to allow workers' compensation insurers to enter into contracts with pharmacies and pharmacy benefit managers

(PBMs) with reimbursement rates less than the reimbursement rate adopted by the Division of Workers' Compensation (DWC). These contracts have to be through voluntary or informal networks (VIN) in the workers' compensation system. VINs are not certified workers' compensation networks subject to regulation under Texas Insurance Code Chapter 1305, but instead are health care providers who contract with insurers or their agents, outside of a formal certified network. The VINs are subject to regulation under the Texas Labor Code. The bill requires the pharmaceutical VINs to be registered with the DWC and they must report certain contract information to the DWC and provide certain notices to the provider. Copies of network contracts have to be provided to DWC upon request.



This bill is a result of uncertainty among workers' compensation system stakeholders as to whether pharmaceutical services were subject to VIN registration and disclosure requirement. The legislation that required VINs to register and report contract information, HB 473, 80<sup>th</sup> Texas Legislature, 2007 session, required all VINs to register on January 1, 2011.

The House amended the bill to add language regarding pharmacy reimbursement that is intended to remove "usual and customary" as a possible method of reimbursement for pharmaceutical services. The DWC is developing new pharmacy fee reimbursement rules that will incorporate the HB 528 changes. This bill became effective June 17, 2011.

**HB 625 STAFF LEASING SERVICES.** This bill requires staff leasing companies who provide workers' compensation coverage to also provide certain information upon request of a client company. Information that must be provided on request includes claims made against the staff leasing company associated with the client company, payment and reserves for each claim. The information has to be provided within 60 days of request. The staff leasing company does not commit a violation if it has requested its workers' compensation insurance provider to provide the information and the insurance provider has not provided the information in a timely manner. In such case, the staff licensing company is required to notify the Texas Department of Insurance that the information has not been provided. Insurance companies are required to furnish this information when requested under the provisions of §2051.151 of the Insurance Code. This bill is effective September 1, 2011.

**HB 2089 RECOVERY OF WORKERS' COMPENSATION OVERPAYMENT AND UNDERPAYMENTS.** The bill requires the DWC to adopt rules to establish procedures for workers compensation insurers to recoup an overpayment of income benefits from future benefits that may be due the injured worker. The law also requires the agency to develop a rule to establish how an insurer is to pay for any underpayment of income benefits. This includes a process for notice of an overpayment and timeframes and methodology for recovery of an overpayment or payment of an underpayment. The DWC has to adopt rules no later than January 1, 2012. This bill is effective September 1, 2011.

**SB 158 FRAUDULENTLY OBTAINING DRUGS.** The bill amends the Health and Safety Code to make it a criminal offense, ranging from Class A misdemeanor to third-degree felony, to attempt to obtain or obtain certain controlled substances or a prescription for it from a doctor by fraud, misrepresentation, or other forms of deception. The bill is designed to curb the practice of doctor shopping to obtain drugs such as opiates, depressants, and stimulants. Prescription drug abuse and misuse is a concern in the workers' compensation system. This bill is effective September 1, 2011.



**SB 800 WORKERS' COMPENSATION DATA COLLECTION AGENT.** The bill was a legislative recommendation from the DWC. The bill allows the DWC to contract with one or more data collection agents and allows the data agent to collect necessary fees from reporting insurance carriers. These changes in the law give the workers' compensation commissioner authority similar to the insurance commissioner's authority for contracting with data agents. The workers' compensation commissioner can adopt rules. This bill is effective September 1, 2011.

**SB 809 TIME FOR FILING APPEALS IN MEDICAL DISPUTES.** Requires a person seeking judicial review of a SOAH or DWC decision on medical benefits to file an appeal with the district court within 45 days of the SOAH or DWC mailing of the decision to the party. This bill is effective September 1, 2011.

**SB 1714 WAIVER OF CLAIMS AGAINST NON-SUBSCRIBERS.** This bill amends the Labor Code §§406.033 and 406.034 regarding legal actions against non-subscribers. It clarifies that an employee may bring a claim for damages against a non-subscriber if the employee is not covered by workers' compensation and the employee has not waived the coverage as part of an agreement with the employer. This bill is effective September 1, 2011.

#### OTHER

**HB 1168 SMOKE ALARMS AND FIRE EXTINGUISHERS IN RESIDENTIAL RENTAL UNITS.** This bill amends the Property Code to require placement of smoke alarms in bedrooms of certain residential properties to be consistent with international model codes and also clarifies inspection requirements for certain residential fire extinguishers. Requires a landlord with a certificate of occupancy issued before September 1, 2011, to comply with §92.255 (Installation and Location) on or before January 1, 2013. This bill is effective September 1, 2011.



**SB 1 PREMIUM TAX CREDITS FOR EXAMINATION FEES.** The final version of a fiscal matters bill includes a provision that does not allow insurers to take premium tax credits for examination fees paid in 2012 or 2013. This provision will sunset on January 1, 2014, and premium tax credits for examinations fees paid in 2014 and thereafter should continue as it exists in current law.

**SB 323 APPLICABILITY OF CERTAIN LAWS GOVERNING CORPORATIONS TO LIMITED LIABILITY CORPORATIONS.** This bill amends §101.002 of the Business Organizations Code and provides that the limitation of liability for obligations in §221.223; preemption of liability in §221.224; exceptions to limitations contained in §221.225 do not apply to members, owners, assignees or affiliates or subscribers of a limited liability company. It further provides that §221.226 dealing with pledges and trust administrators that hold shares as collateral security are not personally liable as shareholders or members. This bill is effective September 1, 2011.

**SB 602 PUBLIC INFORMATION REQUESTS.** Makes driver license, motor vehicle title or registration exempt from public information requests and allows an agency to redact this information without requesting an Attorney General opinion. The requestor can request an Attorney General opinion. The Attorney General has to adopt rules for such a request. The bill makes similar changes to provisions regarding credit cards, debit or charge cards, and access device numbers. This bill is effective September 1, 2011.



**SB 1353 CLAIMS AGAINST REAL ESTATE BROKERS AND SALES PERSONS.** This bill amends §17.49 of the Business & Commerce Code (the Deceptive Trade Practices Act - DTPA) to provide that a broker or sales person providing professional advice is exempt from the DTPA provisions unless such person makes an express misrepresentation of a material fact that cannot be characterized as advice, judgment or opinion or fails to disclose information required by law to be disclosed or engages in an unconscionable action or course of action. This bill applies to claims arising from an act or omission that occurs on or after the effective date of the act which is September 1, 2011. The bill is intended to reduce frivolous law suits against real estate brokers and agents.

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