SENATE COMMITTEE ON BUSINESS & COMMERCE

REPORT TO THE 85th LEGISLATURE

November 2016

Senate Committee On
Business & Commerce

November 2, 2016

The Honorable Dan Patrick
Lieutenant Governor
Members of the Texas Senate
PO Box 12068
Austin, Texas 78711

Dear Governor Patrick and Fellow Senators:

Thank you for the opportunity to address important issues facing Texas today through your charges for interim study. The Senate Committee on Business & Commerce, having conducted public hearings and received public and invited testimony, is pleased to submit its final report with recommendations for consideration by the 85th Texas Legislature.

Respectfully submitted,

Kelly Hancock, Chairman

Brandon Creighton, Vice-Chair

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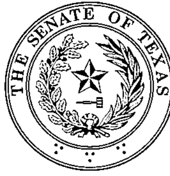

DON HUFFINES
STATE SENATOR • DISTRICT 16

October 31, 2016

The Honorable Kelly Hancock
Chairman, Senate Committee on Business & Commerce
P.O. BOX 12068
Sam Houston Building, Room 370
Austin, Texas 78711

Dear Chairman Hancock,

Thanks to your leadership and the diligent work of the members of the Senate Committee on Business and Commerce during this interim, the 85th Legislature will be well-informed and ready to take action in many key issue areas. I thank Lieutenant Governor Dan Patrick for entrusting our committee to study issues of importance to millions of Texans, and for charging us with developing the research, ideas, and solutions that those Texans deserve from their Texas Senate. This report rises to the challenge exceptionally well, which is a testament to your leadership and the outstanding work of your committee staff.

Economic liberty is a right that is fundamental to our form of government and also to who we are as people. The ability of countless Texans to earn an honest living is negatively impacted by occupational licensing, which broadens state control, forecloses competition, and enriches current license holders, all to the detriment of the free market, workers, and consumers. Ensuring the proper role of government in this area will help protect the liberty and freedom that every Texan is guaranteed through our Constitution.

To that end, I write to complement the Committee report's findings and recommendations in Charge 1:

> Review all occupations licensed under Texas law to determine the extent to which continued state regulation and licensure is required to protect public health and safety. Examine methods to ensure greater legislative oversight of new regulations, scope, and necessity of certain licenses and make recommendations for state licenses that should be repealed or transitioned to private-sector enforcement.

First, we must fully appreciate the Sunset Advisory Commission's authority to review occupational licenses. The report reads: "Sunset, however, lacks statutory direction to examine the continued need for specific licensure programs administered by state agencies under their review." That statement may not be entirely inaccurate, but it could use some clarification.

House Bill 86 "creates a mechanism to critically examine whether existing occupational licensing regulations are still needed, and to phase out those deemed unnecessary." *Patel v. Texas Dep't of Licensing and Regulation,* 469 S.W.3d 69, 117-18 (Tex. 2015) (Willett, J., concurring). Specifically, the law requires the Sunset Advisory Commission, in assessing an agency that licenses an occupation or profession, to "probe whether, and how, existing occupational regulations actually serve the public interest." *Id.* at 118. Based on testimony and the critical importance of economic liberty, this report

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should include a recommendation as follows:

> Build upon the policy enacted by House Bill 86 in the 83rd Legislature by giving the Sunset Advisory Commission additional authority to review occupational licenses and regulations, articulate the options for the "least restrictive form of regulation" factor, and recommend the repeal of those licenses that do not serve the state's interest in preserving public health and safety, and those that are overly burdensome to business formation and job-seekers.

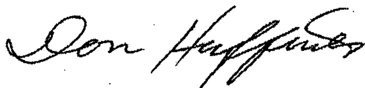
Second, the report's discussion of *North Carolina State Board of Dental Examiners v. FTC* could benefit from some clarification. Specially, many disagree with the assessment that the Texas Department of Licensing & Regulation (TDLR) board structure satisfies the ruling and precedent of the case. There is some debate as to who should actively supervise licensing boards and agencies, particularly those agencies or boards that are outside the jurisdiction of TDLR. This issue warrants additional consideration and discussion.

In closing, the 85th Legislature should view this report as a starting point in our fight to advance economic liberty. By immediately repealing unnecessary occupational licenses and increasing reciprocity, Texas will open up free markets to the mutual benefit of workers and consumers.

I deeply appreciate your leadership of the Senate Committee on Business and Commerce. You and the committee staff have done outstanding work in running an organized and efficient committee and in drafting a report that clearly and directly speaks to key state issues in a way that sets up the Legislature – and more importantly, Texans – for success in 2017. Notwithstanding the above complementary discussion on Charge 1, I am pleased to sign my name to this report.

It is an honor to serve with you in the Texas Senate. Together, we can achieve great things for the state of Texas and the millions of taxpayers who call our great state home.

Sincerely,



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Senate District 16 - Dallas

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October 26, 2016

Chairman Kelly Hancock
Texas Senate Committee on Business & Commerce
P.O. Box 12068
Austin, TX 78711

Dear Chairman Hancock:

Let me begin by thanking you and your staff for creating an interim report that is thorough, well-reasoned, and balanced. I am impressed with the leadership you have shown on all of the issues facing the Business & Commerce Committee.

Although I am impressed with the report and agree with most of its recommendations, I cannot sign it for two reasons. First, I am concerned that a couple of the recommendations under the second charge, which relates to property insurance coverage and litigation, will harm Texas homeowners and small businesses. As the interim report wisely acknowledges, it is paramount that we "[p]reserve the right of policy holders to force insurance companies to pay claims fully and in a timely fashion." I fear some of the prescriptions will actually run counter to this important objective. Consequently, I cannot endorse these recommendations at this time.

Second, I cannot endorse the report's recommendation under subpart (a) of the seventh charge, which relates to E-verify. As you know, I voted against SB 374 last session because various stakeholders assert that requiring state agencies to verify all candidates' eligibility to work through E-verify can have a disproportionate impact on Hispanics and low-income Texans. Because I still have these concerns, I cannot in good faith recommend that we now extend the E-verify requirement to businesses that contract with the State.

Although I cannot sign the report, I want to reiterate my appreciation for the way you have led the Committee's work this interim. I look forward to continuing to work with you and the rest of the Committee to address the issues identified in the report for the good of all Texans.

Sincerely,

Kirk Watson

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1. Review all occupations licensed under Texas law to determine the extent to which continued state regulation and licensure is required to protect public health and safety. Examine methods to ensure greater legislative oversight of new regulations, scope, and necessity of certain licenses and make recommendations for state licenses that should be repealed or transitioned to private-sector enforcement.

BACKGROUND

Today the State of Texas has over 500 occupational license certifications for specific trades and professions that are administered and overseen by various boards and agencies within state government. In 2013, the House Committee on Government Efficiency and Reform issued a report that stated 1 in 3 Texans are subjected to licensing requirements before they are able to work in their desired professions.[1]

The agency responsible for administering the most licensing programs within the state is the Texas Department of Licensing and Regulation (TDLR), which oversees 32 license programs to include 168 individual license types. As of September 1, 2016, TDLR was responsible for licensing 679,280 license holders in occupations ranging from barbers and cosmetologists to speech language pathologists.[2] The core purpose of the agency is to protect the health and safety of Texans and ensure they are served by qualified professionals.[3]

Each licensure requirement has been specifically created by the Texas Legislature, and each requirement can only be eliminated if the Legislature decides it is appropriate to do so. The opportunity for the legislature to address existing licensure programs surfaces through the biennial appropriations process and the periodic Texas Sunset Commission (Sunset) reviews that examine the continued need for most state agencies. Sunset, however, lacks statutory direction to examine the continued need for specific licensure programs administered by state agencies under their review. Traditionally, Sunset simply reports and makes recommendations on whether the agency should be abolished, and if not, how it might operate more efficiently.

[1] Testimony from Arif Panju, Attorney, Institute for Justice, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[2] Written testimony from Brian Francis, Executive Director, Texas Department of Licensing and Regulation, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[3] Ibid.

Since 2005, the Sunset Commission has recommended consolidating many smaller licensing boards and divisions under the overall regulatory umbrella of TDLR. As recently as the 85th Regular Session, the Legislature adopted SB 202, a Sunset Recommendation to consolidate thirteen health related licensure programs previously overseen by the Department of State Health Services (DSHS), and move them under TDLR. As an additional recommendation, the Legislature adopted HB 1786, which moved the Parent Taught Driver Education Program from the Department of Public Safety (DPS) and the Driver and Traffic Safety Education Program from the Texas Education Agency (TEA), both to TDLR.[4]

Because the Legislature has continued to insist on more efficient government regulation of businesses and trades, the policy trend since 1999 has been toward the consolidation of licensure responsibilities under as few agencies as possible, while maintaining the overall mission of protecting the public's health and safety. During this 17-year period, TDLR's responsibilities have increased from regulating 17 programs in 1999 to the 32 programs previously mentioned and 168 license types. During that same period, TDLR's licensee population has increased from 116,000 to over 680,000.[5]

TDLR Scope of Responsibilities as of September 1, 2016:

Business & Occupations (12)	Health Professions (7)	Building & Mechanical (6)
Combative Sports	Athletic Trainers	Air Conditioning and Refrigeration
Driver Education and Safety	Dietitians	Architectural Barriers
For-Profit Legal Services	Dyslexia Therapists & Practitioners	Boiler Safety
Licensed Breeders	Hearing Instrument Fitters & Dispensers	Electrical Safety
Polygraph Examiners	Midwives	Elevators, Escalators & Related Equipment
Professional Employer Organization	Orthotists & Prosthetists	Industrialized Housing and Buildings
Service Contract Providers	Speech-Language Pathologists & Audiologists	
Temporary Common Worker Employers		
Towing Companies	**Professionals (5)**	**Natural Resources (2)**
Used Automotive Parts Recyclers	Auctioneers	Water Well Drillers & Pump Installers
Vehicle Protection Product Warrantors	Barbering	Weather Modification
Vehicle Storage Facilities	Cosmetology	
	Property Tax Consultants	
	Property Tax Professionals	

[6]

As a regulator, TDLR's primary mandate is to determine licensure requirements that protect the health and safety of Texans. It is also charged with ensuring they are served by qualified individuals in each of the regulated programs. This in turn necessitates that the agency evaluate whether licensing requirements are still appropriate or needed. TDLR does this through formulation of the biennial Strategic Plan or "Strat Plan."

Since the "Strat Plan" encompasses a five-year period of review, TDLR asks regulated programs to give guidance on their forward outlook of how they see their regulated industries changing to indicate whether continued regulation would be needed to fulfill the agencies' core mission. This is manpower intensive, but provides a mechanism for the state's continual review

[4] Written testimony from Brian Francis, Executive Director, Texas Department of Licensing and Regulation, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[5] Ibid.
[6] Ibid.

over a large segment of occupational licensure programs.

The Strat Plan Overview includes consideration of the following actions when assessing both the need for and effectiveness of existing licensure programs and license types.

- Deregulation of Programs
- Elimination of Licenses
- Transfer of Programs
- Elimination of License Impediments
- Elimination of Redundancies
- Elimination of Government Interference with Business Practices
- Removal of Inflexible, Rigid, and Excessive Requirements
- Removal of Criminal and Civil Penalties for Administrative Violations.[7]

As an example of this process, the agency has advocated for the repeal and deregulation of four programs and seven license types in its 2016 Strategic Plan.

Program		Recommended Statutory Change	Benefit of Change
1	Temporary Common Worker Employers	Programs have zero to little enforcement activity, and minimal risk of consumer harm. Repeal statewide licensing requirement; preserve municipal authority and retain consumer protection provisions.	Individuals and companies will no longer be required to submit initial license or renewal applications, pay the initial fees and renewal fees, and be subjected to potential disciplinary action in the form of administrative penalties and sanctions.
2	For-Profit Legal Service Contracts		
3	Vehicle Protection Product Warrantors		
4	Vehicle Towing and Booting, Sections relating to Booting	Repeal statewide requirement for booting company and operator licenses. Preserve the authority of municipalities, political subdivisions, and institutions of higher education to regulate these activities.	
5	Threading (Barbers and Cosmetologists) (See House Bill 4069, 84R – 2015)	Repeal statewide licensing requirement for an individual engaging in threading to hold an operator license, esthetician license, Class A barber license, or a barber technician in the barbering and cosmetology statutes.	
6	Shampoo Apprentice Permit (Barbers and Cosmetologists) (See House Bill 2720, 84R – 2015)	Repeal the requirement that an individual must hold a cosmetology or barber student permit to shampoo.	Salons and barber shops will no longer be required to employ a licensed person to shampoo.

[8]

TESTIMONY

Although Texas has a regulatory structure for licensure similar to many other states, reciprocity for license holders moving into Texas is still an obstacle for many new license applicants with comparable certifications from elsewhere in the United States. TDLR for one, has made several

[7] Written testimony from Brian Francis, Executive Director, Texas Department of Licensing and Regulation, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[8] Ibid.

recommendations to enhance or increase reciprocity arrangements for several of its licensure programs.

TDLR Strat Plan Recommendations on Improving Reciprocity:

Program		Recommended Statutory Change	Benefit of Change
1	Hearing Instrument Fitters and Dispensers	Repeal the subsection relating to **out-of-state applicants** and reexamination.	Aligns all TDLR licensing provisions which will result in greater efficiency and cost effectiveness.
		Repeal the subsections relating to a prohibition for a person failing an examination from reapplying for temporary training license.	
		Amend the subsection by removing the requirement for *an* **out-of-state applicant** to hold a license at least three years prior to application.	Allows for *greater reciprocity* and fairness, for qualified out-of-state applicants and remove a barrier to entry for new competition.
2	Orthotists and Prosthetists	Amend the subsection by removing the **residency requirement** for a license.	
3	Athletic Trainers	Repeal/amend by removing the **residency requirement** that unnecessary restriction limits the number of qualified individuals eligible to serve on the advisory board.	Allows for greater participation on advisory boards for qualified out-of-state licensees.
4	Hearing Instruments Fitters and Dispensers		
5	Speech-Language Pathologists and Audiologists		
6	Dietitians	Eliminate the requirement that a person failing the exam three times must complete credit hours in the areas of weakness before reexamination.	Aligns all TDLR licensing provisions which will result in greater efficiency and cost effectiveness.

[9]

As TDLR has incorporated more specialized and complex licensing duties, the agency's governing commission of seven commissioners and the Executive Director act as the final authority on proposed rules that subordinate advisory boards may recommend for specific licensing programs.[10] This structure may in fact act as a benefit for the state given recent federal legal action. The United State Supreme Court recently ruled on what the appropriate industry representation should be on licensure boards in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.[11]

Brian Francis, Executive Director of TDLR, summarized the findings of the case saying that "the ruling said that the Dental Board in North Carolina was composed primarily of dentists, and licensees, when passing rules that impacted their profession." He stated that "there wasn't enough market separation, and potential for conflicts of interest, and that this violated anti-trust and anti-competitive provisions in federal law to ensure that professions are not regulating themselves."[12]

By implication, licensure boards across the country will be assessed to see whether changes

[9] Written testimony from Brian Francis, Executive Director, Texas Department of Licensing and Regulation, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[10] Testimony from Brian Francis, Executive Director, Texas Department of Licensing and Regulation, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[11] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, The Supreme Court of the United States, https://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf, February 25, 2015.
[12] Testimony from Brian Francis, Executive Director, Texas Department of Licensing and Regulation, to Texas Senate Committee on Business & Commerce, October 5, 2016.

need to be made to their board compositions to preserve "sovereign immunity" protections for regulators acting in their official capacity. When pressed by Senator Schwertner on the issue, asking whether TDLR's current structure preserves sovereign immunity, Brian Francis responded in the affirmative.[13]

Although TDLR has taken meaningful steps to enhance its ability to make recommendations that tear down barriers to entry, the Texas Supreme Court Case of *Patel v. Texas Department of Licensing and Regulation* exemplifies how difficult it can be for average people to fight overly burdensome regulations.[14] As Arif Panju with the Institute for Justice testified, "This was a landmark ruling regarding eyebrow threaders." The case cited conditions for licensure that required people seeking a license to undergo a 750 hour program (that would take four and half months to complete at a rate of 40 hours per week) in order to certify as an "esthetician." As Mr. Panju stated, "It took 6 years of litigation to declare the case unconstitutional, but it represents the Texas Supreme Court departing from federal jurisprudence to affirm that economic liberty under the Texas Constitution is more meaningfully protected than under the U.S. Constitution."[15]

Mr. Panju cited recognition by the Obama Administration that licensing, nationally, has become a significant barrier to entry for lower income and minority Americans. The White House recently issued a study capturing its findings on licensure trends observed across the 50 states. The report reflects that "licensing requirements vary substantially by state, creating barriers to workers moving across state lines and inefficiencies for businesses and the economy as a whole."[16]

Recommendations incorporated into the federal report include the following:

- Limiting licensing requirements to those that address legitimate public health and safety concerns to ease the burden of licensing on workers.
- Applying the results of comprehensive cost-benefit assessments of licensing laws to reduce the number of unnecessary or overly-restrictive licenses.
- Within groups of States, harmonizing regulatory requirements as much as possible, and where appropriate entering into inter-State compacts that recognize licenses from other States to increase the mobility of skilled workers.
- Allowing practitioners to offer services to the full extent of their current competency, to ensure that all qualified workers are able to offer services.[17]

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[13] Ibid.
[14] *Ashish Patel, Petitioners/Cross-Respondents v. Texas Department of Licensing and Regulation*, ET AL, The Supreme Court of Texas, http://www.txcourts.gov/media/1008501/120657.pdf, June 26, 2015.
[15] Testimony from Arif Panju, Attorney with the Institute for Justice, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[16] "Occupational Licensing: A Framework for Policy Makers," The White House, https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdfm, July 2015.
[17] "Occupational Licensing: A Framework for Policy Makers," The White House, https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdfm, July 2015

RECOMMENDATIONS

The Committee, after deliberative discussion, finds that state licensure requirements have become so numerous, costly, and elaborate that an unintended consequence is the result: to the very nature of state certification for new professional entrants now acts as a deterrent for business formation and development. The Committee further recognizes that there is most certainly a need for professional licensure in certain critical areas and that the state's mission to preserve the health and safety of Texans through the regulation of trades is warranted. However, many occupational licensure requirements go well beyond this core mission, and on face, pose a barrier to entry for the same Texans seeking a better life.

Therefore, the Committee recommends the following:

- The Legislature should continue the policy of consolidating minor boards and licensure programs under as few agencies as possible. This will enhance the Sunset Commission's ability to review the necessity of continued licensure requirements in specific areas as part of an enhanced evaluation of a major agency's functions. It will also highlight for the Legislature the need to examine licensure requirements as part of the discussion for a major agency's reauthorization and appropriations requests.
- Furthermore, when taking up Sunset Recommendations on agencies administering licensing programs, the Legislature should strongly consider enacting specific sunset dates for individual licensing programs. This would necessitate periodic legislative review and reauthorization as to affirm a continued need for professional certification and government involvement.

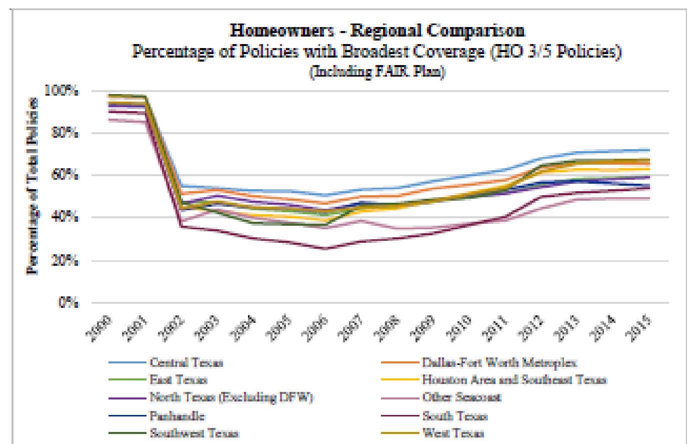
2. Monitor the number of lawsuits related to property claims filed as a result of multiple hail storms and weather related events across Texas. Examine negative consumer trends that may result in market disruption such as higher premiums and deductibles, less coverage, non-renewals, and inability to secure coverage due to insurance carrier withdrawal from the state and make recommendations on legislative action needed.

BACKGROUND

Within the United States property and casualty insurance market, Texas has always stood apart because of its history of inclement weather patterns. As a result, insurers incorporate greater risk into their rate-setting calculations in Texas, resulting in higher rates (or costs) than in other areas of the country. Insurance rates as a whole are susceptible to large events such as hurricanes or widespread litigation such as was seen with the mold crisis of the early 2000s. Either scenario forces the insurance business model to spread the cost of claim payouts, however localized, throughout the rest of their customer base in order to socialize the overall financial impact.

There is consensus among industry experts, consumer advocates, and litigators that widespread, large-scale events, can have a detrimental impact on the affordability and coverage adequacy of insurance products offered within the Texas property and casualty market. That is why the Texas Department of Insurance (TDI) issued a data call in 2016 to all insurance providers in Texas relating to hailstorm claims litigation.

As an example, the following chart demonstrates the reduction in coverage as a result of the mold crisis and consequent reform during the 78th Legislature in 2003:

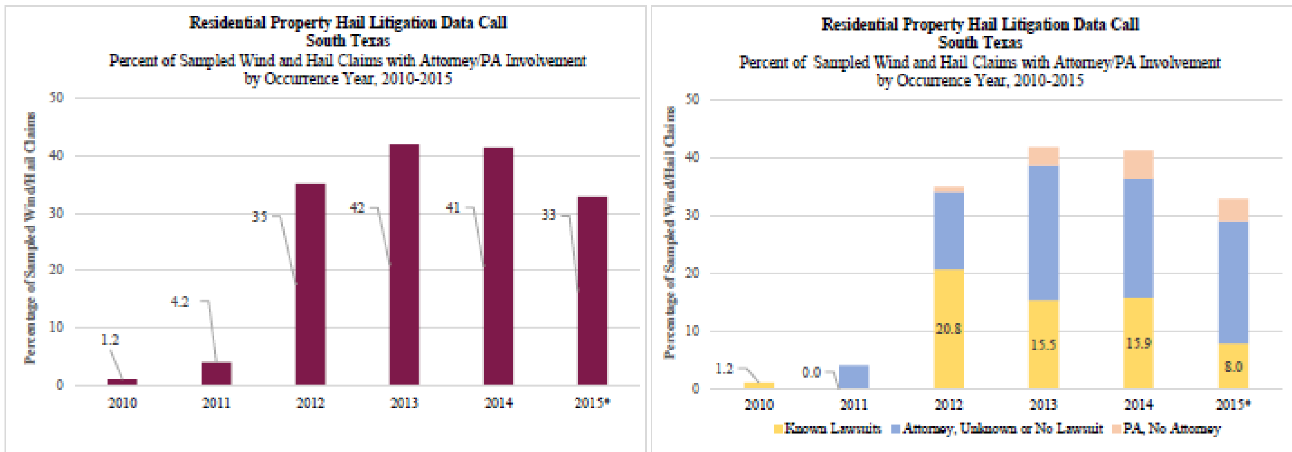


[18]

[18] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.

Many insurers have asserted that over the last five years, various hailstorms have resulted in tens of thousands of claims filed against property and casualty insurers statewide. The net effect has been mass litigation moving through court systems, millions of dollars in extra claim costs that will eventually show up in rates, and the possibility of a reduction in the availability of coverage throughout large areas of the state. TDI's data call was in direct response to the these effects.

During the 84th Legislature and over the interim, this Committee was provided with data on the significant increase in the number of hailstorm related claims involving an attorney since 2012. See the chart provided below. The Committee also received data on settlement requests and the actual amount settled upon for certain cases.



[19]

Past Legislation

In 2003, 78th Regular Session, the Texas Legislature passed SB 14 as a response to the mold crisis of 1999 to 2002. The bill created the "file and use" rate system while eliminating the promulgated forms issued by TDI. Prior to the passage of SB 14 most companies writing policies in Texas were not subject to rate regulation by TDI, whereas after its passage the Department had broad authority to disapprove rates if they were found to be inadequate, excessive, or discriminatory.

In 2015, 84th Regular Session, SB 1060 was passed and signed into law relating to regulation of public insurance adjusters. The bill was in response to the assertion that public adjusters in areas affected by hailstorms were referring potential claimants to attorneys in return for referral fees. As a result, the bill prohibited a public adjuster from acting on behalf of an attorney when the adjuster is working with the policyholder. Additionally, it prohibited a public adjuster from accepting a commission for referring a policyholder to a law firm or construction contractor.

[19] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.

Stakeholders & Costs

The Texas property and casualty insurance market is made up of numerous participants: insurance companies, lawyers, roofing contractors, adjusters, and policyholders. Texans for Lawsuit Reform (TLR) and several insurance companies argue that tort reform is needed in this area because of a perceived surge in the number of lawsuits related to hailstorm claims by select law firms. Insurance companies argue that the attorney fees and legal costs associated with these lawsuits have played a major role in the ever increasing premium cost for consumers, and that in the absence of any tort reform measures, insurance companies will either: continue to increase premiums, write policies that do not cover hail, or cease writing insurance in certain parts of the state.

Trial lawyers and consumer advocates argue that SB 1060 fixed the problem associated with "weather-related" insurance claims. Generally, they believe that anything further would have a devastating impact on a policyholder's ability to fight for a fair claim. They do not believe that insurance companies will leave the state because over the past decade companies have continued to bring in more premium revenue, while also paying less in claims.

State/Federal Regulations

Regulations for property insurance claims are handled primarily by the states; in Texas, this law is found in the Deceptive Trade and Practices Act of the Texas Insurance Code. Additionally, TDI regulates the licensing and conduct of adjusters and the types of insurance policies (or policy "forms"). Forms require TDI's prior approval before the insurance company can use them. With the failure of previous efforts to pass legislation on the issue, some companies have proposed having "endorsements" approved by TDI on their forms to help mitigate the potential of future litigation. For example, the insurance company having an endorsement that requires the policyholder to notify the company that they are going to file suit.

TESTIMONY

The Committee met on October 5, 2016 to discuss issues relating to this charge. Along with testimony from the trial lawyers and insurance companies, the committee received a briefing on TDI's data call. Though the data was still being analyzed and was missing information from two to three companies, TDI presented its findings as requested by the Committee.[20]

Cassie Brown, Deputy Commissioner, Regulatory Policy Division, TDI spoke first. On February 24, 2016, and March 14, 2016, Commissioner Mattax received requests from the Chairs of the Senate Business & Commerce Committee and the House Insurance Committee, respectively, to collect data on hailstorm claims litigation in Texas to assist the committees with their interim charges on the topic. Accordingly, in March 2016, TDI developed a draft data call to gather information about the cost of weather-related residential property claims and the incidence of litigation of these claims. The data call was designed to collect information TDI did not already have in its residential property statistical plan. TDI published the draft data call

[20] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.

on its website, inviting written comments and announcing an April 21, 2016 public meeting, which was led by Commissioner Mattax, to discuss the data call. TDI received written comments from eight interested parties, and six people gave their comments at the April meeting. TDI made several changes to the draft data call in response to comments and issued the data call on May 20, 2016. TDI gave insurers ninety days to complete the data call, with responses due on August 19, 2016. Insurers comprising about 140 separate insurance companies submitted responses to the data call. [21]

The data call was broken into three sections. Section I asked for a five percent random sample of all wind and hail claims for events in 2010-2015. All admitted companies except farm mutual insurers were required to report Section I data. TDI did not require farm mutual insurers to report because they are exempt from reporting data under TDI's Statistical Plan for Residential Risks. [22]

Section II asked for a 100% sample of all wind and hail claims for nine specified events (only the top 15 companies with paid claims for the nine specified events were required to respond, and this was optional for other companies including farm mutual insurers).

Both sections I and II requested:

- Basic information about the policy
- Significant dates in each claim's history
- Insurer costs associated with the claim
- Whether an attorney or public adjuster (PA) represents the claimant
- Attorney, PA, and suit-related information, and
- Information on pre-suit settlement efforts.

Section III required companies to complete an underwriting survey, which asked companies about actions such as non-renewals, reductions in coverage, more restrictive underwriting guidelines, and rate changes, either statewide or in particular regions, in response to increased weather-related litigation. All admitted insurers except farm mutual insurers were required to respond to the survey.[23]

The data call presented many challenges for TDI. Some companies had to manually review claim files to provide the information, while several companies failed to report information requiring manual review. One top-10 insurer informed TDI that its complete data will not be available until November 30, 2016. Another top-10 insurer did not include data from two of its companies. While TDI reviewed the data for reasonability, completeness, and consistency with other data sources, TDI did not audit or verify the data because this is outside the normal practices for data calls and would have required TDI to conduct on-site reviews of insurers' books and records. TDI excluded companies with significant outstanding data questions from the preliminary results. However, TDI is still communicating with some companies to resolve

[21] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[22] Ibid.
[23] Ibid.

outstanding data questions with the goal of including these data points in TDI's final analysis. [24]

Brown made the point that the results of the data call should be considered preliminary. The review and analysis are ongoing as TDI is still receiving corrections from companies and analyzing the data. TDI's results are based on 40,000 randomly sampled windstorm and hail claims. Finally, to identify any regional differences in trends, the state was divided into 10 different geographic regions based generally on the rating territories TDI promulgated before the enactment of SB 14, 78th Legislature, Regular Session. [25]

Brian Ryder, Senior Actuary and Team Lead for the Data Services Team, Regulatory Policy Division, TDI, spoke next. He discussed the reaction to an increase in windstorm and hailstorm claims, saying small insurers have started to react in some parts of South Texas and the Panhandle. Specifically, some have started to reduce writing policies, some have increased the use of specific endorsements, some have increased the wind deductible, and some have increased rates due to concerns over litigation.

Data shows that 2010-2011 claims involving an attorney or public adjuster were less than 1%. In 2012, these claims jumped to 3-5% on a statewide basis. The majority of these claims were in South Texas and the Panhandle. On average, these claims take 175 days from date of loss to process, compared to 59 days for claims without an attorney or public adjuster. On average, these claims result in higher payments to claimants and higher adjusting expenses for the insurer; which was about $25-35,000 when an attorney or public adjuster became involved compared to approximately $8,000 for a claim without an attorney or adjuster. The data also showed, on average, 600 days to close a claim with attorney or public adjuster involvement versus 113 days without a public adjuster or attorney. In review of market data from 2012-2015, out of every dollar collected by insurers on premiums, a 13.6% profit is made on underwriting. Ratemaking adds a provision on hurricane and sever storm losses. [26]

TDI also examined market data to determine if it could identify any impacts of weather-related litigation on the types of policy forms purchased, the amount of deductibles purchased, the level of competition in the market place, average premium per policy, and average premium per $1,000 of coverage purchased.

While average windstorm and hail deductibles have increased throughout the state and increased substantially in some coastal areas (hurricane risk), there is no clear pattern of deductibles increasing in reaction to litigation on claims with weather-related perils. The pattern seen is consistent with insurers increasing deductibles in areas where insurers are concerned with managing hurricane risk exposure.

Statewide, the percentage of policies with the broadest coverage dropped was after the mold crisis of 2002. Since the mid-2000s, this percentage of available coverage has increased, but has remained relatively constant since 2013. While in the last four years the Panhandle has seen a

[24] Ibid.
[25] See Appendix B.
[26] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.

decline in the percentage of policies with broadest coverage, TDI found no clear pattern associated with windstorm and hail. The drawback to this type of analysis is that it only looks at the underlying policy form, it does not consider whether insurers have been adding more (or fewer) restrictive (or broadening) endorsements to the policy.[27]

The Herfindahl-Hirshman Index (HHI) is a measure of market concentration. The higher the HHI value, the more concentrated a market is and the less competition. The Anti-Trust Division of the U.S. Justice Department considers markets with an HHI value between 1,500 and 2,500 to be "moderately concentrated" and markets with HHI values greater than 2,500 to be "highly concentrated." Statewide, the homeowners' insurance market has become less concentrated with more competition over the last sixteen years, with its HHI value decreasing from 1,600 in 2000 to 1,038 in 2015. This downward trend has continued in the last four years.[28]

From January 1, 2011, through August 31, 2016, 20 companies filed withdrawal plans from writing homeowners insurance in Texas. Of these, two companies cited increasing claim and legal costs or catastrophic weather as the reason for withdrawal. Ten of the withdrawals were the result of a merger, acquisition, or the transfer of policies to other companies. A company may reduce or restrict its writing in certain geographic areas without filing a withdrawal plan.

Seven companies intentionally reduced, limited, or stopped writing policies; two of those also non-renewed policies. The counties affected include: Hidalgo, Maverick, Webb, Potter, and Randall. Fourteen companies increased their use of restrictive endorsements, tightened their underwriting guidelines, or did both for new or renewal business. Specific geographic regions include coastal areas of Texas and Cameron, Willacy, and Hidalgo counties. One company increased its minimum wind deductible for new business policies statewide. Twelve companies increased rates for a residential line of insurance.[29]

TDI reviewed data from rate filings made by insurers with significant market share in areas that have reportedly experienced increased levels of hail litigation. For these areas, the data do not show a systematic pattern of rate increases that exceed the statewide increase. Rates follow losses, however, so companies may not have reflected expected costs for hail litigation in their rates yet. There does not appear to be a systematic pattern of rate changes in these counties relative to the overall statewide rate changes.

The second panel to testify before the Committee consisted of two attorneys from opposing sides of hailstorm litigation cases as well as representatives from Texas Trial Lawyers Association (TTLA) and Texans for Lawsuit Reform (TLR)

John Black from Daly & Black, P.C. and Steve Badger from Zelle, LLP, both representing opposing parties in hailstorm claim disputes, testified to real world cases demonstrating the complexity of the current paradigm in Texas insurance litigation. Black, as a primary litigator

[27] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[28] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[29] Ibid.

against insurance companies painted a picture of bad actor insurers failing to pay justifiable claims, as Badger, an attorney with an established career representing insurance companies, spoke to the issue of widespread unenforced barratry cases. Both reached a consensus that barratry laws are in statute, but adequate enforcement remains a problem in the property and casualty insurance space.

Brian Blevins of TTLA discussed TDI's data call saying that, "TDI was correct: large storms bring large losses and losses bring large claims." Blevins also spoke to the fact that this is preliminary data where we cannot draw any conclusions because there is no way to link one even to another. Eight of the nine largest hailstorms in Texas recently were historic storm events, which Blevins believes is what coincides with the increase in legal involvement. Average claims from 2012-2015 are less than the 16-year average preceding it.[30]

Blevins then commented that for the last four years, there was a 2% increase in cost per claim over the 16-year average (not adjusted for inflation). He went on to say "for the same four years, insurance companies are paying fewer claims per hundred (3.5 claims per 100)". Costs increased in 2011, though less than 1% of claims involved litigation, but had the highest associated costs.[31]

Lee Parsely, of TLR, was the last to speak in the first panel. Parsely has been engaged in the legislative process for 22 years. In the upcoming session, TLR expects to support efforts from the Legislature to address abusive litigation following wind and hail events. Parsley said unnecessary litigation against insurance companies is the worst abuse TLR has seen in years and the worst form of lawsuit abuse they have ever seen.

Addressing concerns about whether consumers were treated fairly prior to the 2012 surge in litigation, Parsley commented that according to TDI's data, 0.4% were involved in litigation, until a couple of years ago, when the number jumped to 4.5% becoming involved in a lawsuit. One could argue that all insurance companies across the state began to start underpaying claims all at once, but TLR believes there is something else at work here. [32]

Brian Blevins of TTLA responded that the data is clear. TTLA believes the state has had an exponential increase in claims because of the unique nature of the storms. There necessarily will be aberrational findings with such a spike. In 2012, the Hidalgo claims spiked and now are going back down.[33]

In response to a question about the trend analysis in attorney involvement from 2012-2015, Blevins responded that there is a spike in lawyers and public adjusters involvement in Hidalgo County around 2012, but now the number of lawsuits has decreased. Even though the number

[30] Testimony provided by Brian Blevins, Texas Trial Lawyers Association, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[31] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016. Pgs. 22-24.
[32] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[33] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016. Pg. 28.

of lawyers and Public Adjusters involved has continued to rise, they are involved without lawsuits, getting claims resolved.[34]

The third and final panel consisted of a private adjuster as well as representatives from insurance companies across the state. Tim Molony of Nomad Adjusting, who has spent 23 years in insurance industry as an independent adjuster, was the first to speak. Molony mentioned that the report cites 42% of claims were paid in Amarillo, while only 17% were paid in the Valley because in the Valley there is a higher number of cash value policies. This causes significantly fewer payments as well as more cost replacement policies in Amarillo.[35]

Molony went on to say "this is a pre-Hurricane Ike and a post-Hurricane Ike world. Significant litigation flows from a high volume event. I had never been involved in a lawsuit until Hurricane Ike. Post-Ike, we have adjusters panicking. They have been told that facts don't matter, juries and their opinions matter. This is troubling." Mr. Molony testified that he has been served 400 times post-Ike, saying that "they have even been sued for claims they haven't handled."[36]

Greg Farnik of Republic Insurance, headquartered in Texas, talked about his company's experience. Farnik testified that he has seen all the same things as Molony. He said that "since 2012, the company has been sued 650 times in Texas." Not including the largest storms, Republic has been sued about 300 times. In Louisiana, Mississippi, Oklahoma, and Arkansas together the company has been sued a total of 33 times.[37]

Farnik then addressed questions of whether or not Republic has pulled out of Hidalgo County saying that "we have pulled mostly out." Republic has stopped writing cash value policies, which is a cash saving option for the consumer. Taking away a good option for consumers because these policies were being targeted in litigation.[38]

"Many claims are unsubstantiated," Farnik continued. "There are ones with no damage, which is a common pattern and then, the company hears no complaint from those we insure after payment until they file a suit. The law is favorable to the lawsuits, so every claim is profitable. Everything the company does on its end doesn't seem to matter, creating a feeding frenzy." Farnik believes this will continue until the law is changed. A recommendation Farnik gave would be to institute appraisal awards, similar to what happens in federal court. Require arbitrary and capricious action to be held for penalty or attorney fees.[39]

Next the committee heard from Paul Soloman who represents State Farm Insurance. Soloman

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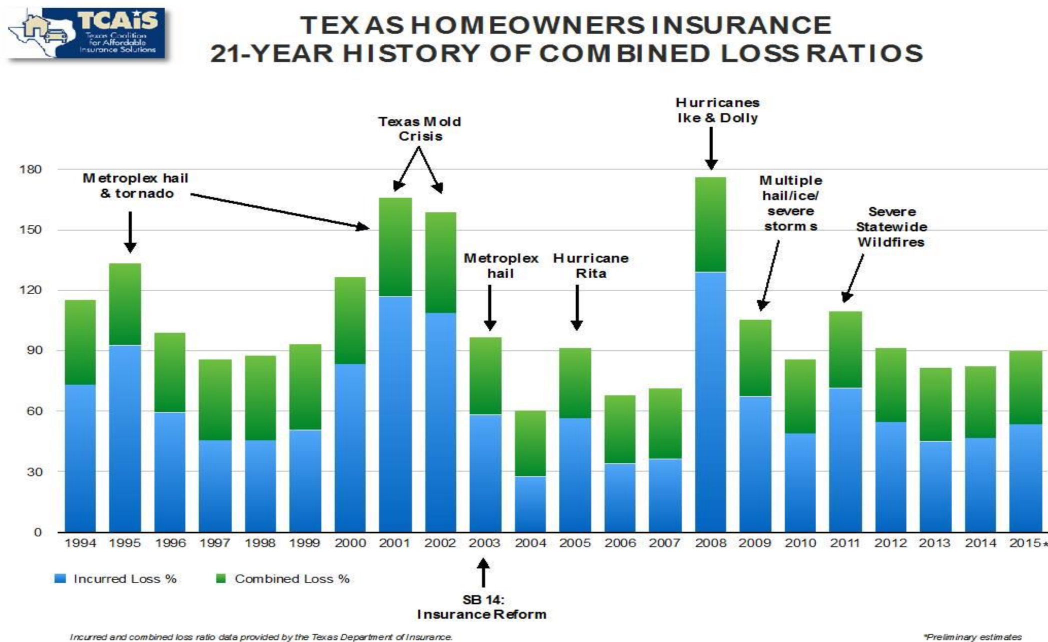
[34] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[35] Written testimony provided by Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[36] Testimony provided by Tim Molony, Nomad Adjusting, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[37] Testimony provided by Greg Farnik, Republic Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[38] Ibid.
[39] Ibid.

has been involved with insurance litigation in Texas his whole career. While laws have been on the books for years, Soloman believes they have only been abused at a high level recently. Saying, "this is not a regional problem, this is a statewide problem." Soloman said that "we have hail/ wind lawsuits against State Farm in 100 separate Texas counties all over the state. The frequency and volume of these lawsuits are increasing. Being a large company, we have been able to allocate resources."[40]

The last person to give testimony to the committee was Beaman Floyd of Texas Coalition for Affordable Insurance Solutions (TCAIS). Floyd stated that the combined loss ratios are a good illustration of the health of the market place and that various events drive loss ratios over time. From 1996-2015, there has been a combined loss ratio of 99.1%, meaning for every dollar the insurance companies have taken in, they pay out 99.1 cents. Floyd goes on to say that there are other ways to make money in insurance, but making money on interest is tough these days because there are modest yields. The 25-year number on return of net worth in Texas is 1.8% on homeowners insurance.[41]

Floyd also referenced the committees' earlier questions about patterns that emerged from certain years. 2011 was driven by the wildfires in Bastrop. When those claims were paid they were at policy limits, which is a total loss. This is a different pattern of loss than for hail. It is a good idea to be studying these trends. The concern is that there have been changes in the way hail claims are being handled and this needs to be looked at carefully. Floyd also provided the committee with a chart that showed the twenty-one year history of combined and incurred loss ratios.[42]



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[40] Testimony provided by Paul Soloman, State Farm Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[41] Written and Oral testimony provided by Beaman Floyd, Texas Coalition for Affordable Insurance Solutions, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[42] Ibid.
[43] Ibid.

Tim Molony of Nomad Adjusting addressed concerns about whether or not he would ever file a complaint or countersuit by responding that he doesn't want a target on his back. He mentioned that of the 400 suits he referenced earlier, over 350 suits, are from one law firm.

Members of the Committee discussed that barratry laws discipline lawyers and if the State Bar is not willing to go after these bad actors, that ought to be addressed.

Farnik responded that he has filed a State Bar grievance against a specific attorney and that the State Bar has done nothing.[44] Soloman suggested that things could be done to strengthen barratry laws and penalties associated and that there were gaps left in the creation of good laws. Negative incentives do exist in this sort of litigation. Soloman went on to say there is only a small group of bad actors who chase storms across the state, suggesting that pre-suit notice needs to be strengthened and for a requirement of notice if there is additional damage.[45]

Molony then addressed a question about how private adjusters get paid by the insurance companies. He said, "Payment is based on a gross claim amount fee schedule. The higher the estimate, the more they get paid. They are incentivized to find damage. Our company is in twenty-two states, 50% of our volume is in Texas, 100% of the lawsuits they are named in are in Texas."[46]

RECOMMENDATIONS

As per the Texas Department of Insurance's data call results, a discernable increase in lawsuits can be observed in the immediate aftermath of significant weather related events since 2012. The Committee recognizes concerns from both the consumer and industry perspectives. The Committee on Business & Commerce seeks to ensure the continued health of the insurance market in Texas while fostering policies that maintain and enhance insurance products and options for Texas consumers. As a result, the Committee recommends the following actions be taken:

- The Legislature should assess strengthening barratry enforcement actions through additional provisions of the state's barratry law.
- Prescribe additional pre-suit notices be given to insurers, so they have the opportunity to comply with their contractual obligations before litigation is entered into by both parties.
- Allow insurance companies to indemnify their agents so that they cannot be personally sued for performing their duties in the course of their employment.
- Preserve the right of policy holders to force insurance companies to pay claims fully and in a timely fashion.

[44] Testimony provided by Greg Farnik, Republic Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[45] Testimony provided by Paul Soloman, State Farm Insurance, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[46] Testimony provided by Tim Molony, Nomad Adjusting, to Texas Senate Committee on Business & Commerce, October 5, 2016.

3. Study the impact of the penalty calculations under the current prompt payment of health care claim laws and regulations, including comparing penalties in other states and late payment penalties in Texas for other lines of insurance. Evaluate whether unregulated billed charges is the appropriate basis for determining penalty amounts and make recommendations for statutory changes, if needed.

BACKGROUND

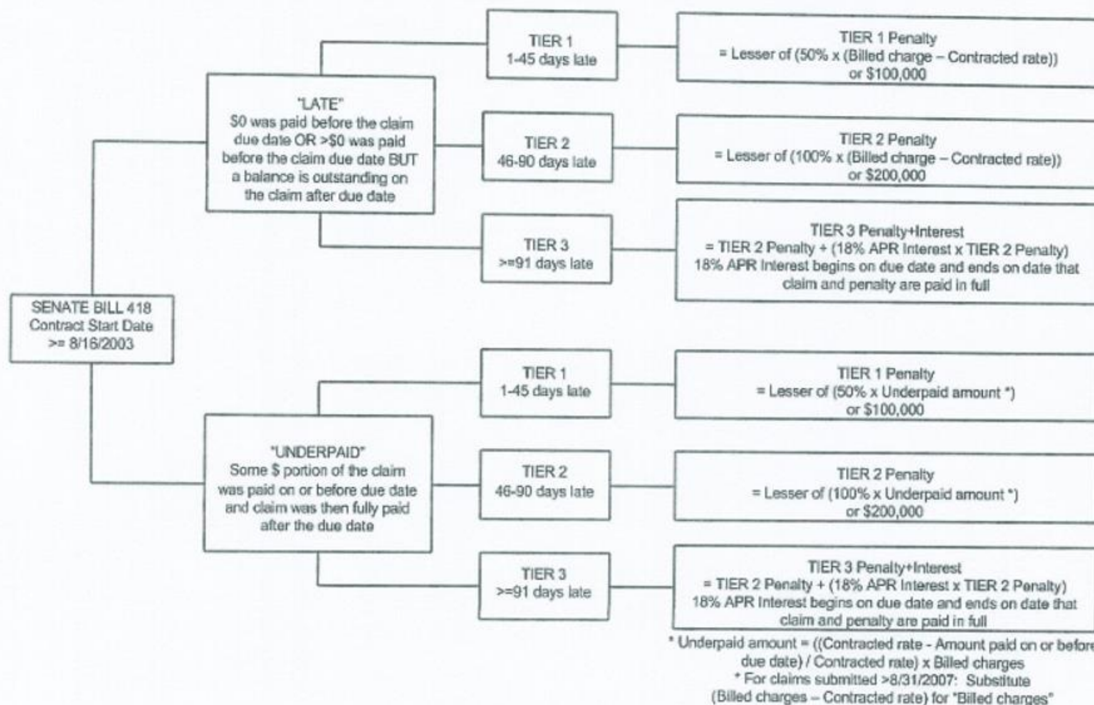
The history of the American healthcare market is defined by an enduring business relationship between healthcare providers and insurers. As these two industries grew in complexity, prompt pay laws have been a direct byproduct of the evolution of their relationship. The catalyst for legislative action in the area of prompt pay began with the healthcare provider community's dissatisfaction with the unpredictable and delayed action associated with payments for services provided to privately insured patients. For some healthcare providers this uncertainty has caused cash flow and operational problems with insurer claim processes.[47]

As a result, as of 2003, 47 states had adopted prompt pay laws to require insurer claim processing to be completed within a defined period of time. In Texas, the 78th Legislature passed SB 418 which provided a basic framework for the Texas Prompt Pay Act (TPPA). SB 418 set in statute the timeframe requirements for payments and the current penalty structure.[48]

Prompt payment requirements apply only to clean claims, as defined by the Texas Department of Insurance (TDI). Penalties assessed are based on the amount of time a claim is late, and the difference between the amount a healthcare provider bills, known as "billed charges," and the contracted rate on which the provider and health plan have agreed. Prompt pay requirements only apply to fully-insured commercial health insurance regulated by TDI.[49]

The current penalty structure begins after the payment for a clean claim is 30 days late. From day 31 to 75 after a claim is received, the penalty is 50% of the difference between the billed charges and the contracted rate. From day 76 to 120 after a clean claim is received, the penalty raises to 100% of the difference. Once a payment has reached 121 days late, there is an 18% annual interest fee added to that amount.[50]

[47] Written testimony from Texans for Lawsuit Reform (TLR), "An Interstate Comparison of Healthcare Prompt-Pay Laws", to Texas Senate Committee on Business & Commerce, May 4, 2016.
[48] Ibid.
[49] Ibid.
[50] Ibid.



[51]

Texas has established a segmented system to determine who receives penalty payments once they are assessed under the TPPA. Non-institutional providers, like doctors for example, submitting clean claims under the law are entitled to receive the full amount of the penalty after the state subtracts its 18% in annual interest. Institutional providers submitting claims, such as hospitals, receive 50% of the total penalty amount, including any interest, while the state keeps the remaining 50%.[52]

TDI also has a mechanism for verifying compliance by requiring preferred provider organizations (PPOs) and health maintenance organizations (HMOs) to submit claims payment information, including claim count data on a quarterly basis. TDI uses this information to determine whether claims are paid in a timely manner.[53]

In instances where an insurer suspects an overpayment or underpayment, several components to the TPPA determine the process for how a balance is reconciled between the healthcare provider and the insurer. The first is a stipulation that when an insurer desires to conduct an audit on a provider to ensure they are not overpaying for a service, they may do so, but under

[51] Written testimony from Brian Blevins, Texas Trial Lawyers Association, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[52] Written testimony from Texans for Lawsuit Reform (TLR), "An Interstate Comparison of Healthcare Prompt-Pay Laws", to Texas Senate Committee on Business & Commerce, May 4, 2016.
[53] Written testimony from the Texas Department of Insurance (TDI), to Texas Senate Committee on Business & Commerce, May 4, 2016.

the TPPA the insurer must still pay the amount of the claim in the intervening time it takes to conduct the audit. If they fail to do so, prompt pay penalties would apply.[54]

When an overpayment is identified, the insurer has 180 days from the provider's receipt of such payment to provide written notice that the recovery is sought. The provider then has the ability to appeal this recovery, and a refund cannot be completed until the appeals process is exhausted in totality. Additionally, the TPPA expressly provides that a "provider may recover reasonable attorney's fees and court costs to recover payment."[55]

As part of the TPPA, the Texas Department of Insurance (TDI) may also impose additional penalties on an insurer should their overall prompt pay compliance rate on pay-or-deny deadlines for clean claims fall below 98%. Compliance is determined by quarterly reports submitted by insurers, where claims are categorized either as institutional or non-institutional. In the event an insurer falls below the 98% compliance threshold, they may be penalized up to $1,000 per day for each claim remaining unpaid in violation of TPPA requirements.[56]

Providers under the law are protected from any type of retaliation by insurers such as network cancellation, refusal to renew a contract, or contract terminations. These protections are required to be written into all network contracts between providers and insurers.

TESTIMONY

On the issue of prompt pay penalty fairness, both proponents of the current system and its detractors seem to agree that there had been a need for the TPPA at the time of its enactment in 2003. Since that time, TDI has collected data on its penalty collections in the area of Administrative Penalties indicating that from 2001 to 2015 over $24,562,000 in penalties were collected solely related to 47 prompt pay violations. A further $3,875,000 in penalties were collected for violations that involved multiple issues, including prompt payment claims, during that same period.[57]

Since 2003, the state's collection of prompt pay penalties and retention of its allocated percentages has created a sizable revenue stream for the state in its efforts to support the Texas Health Insurance Pool (Health Pool). During the 83rd Legislature, Senate Bill 1367 abolished the Health Pool after its closing to TDI's Premium Stabilization Fund. The Premium Stabilization Fund is a state fund used to pay claims resulting from the Healthy Texas program.[58]

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[54] Written testimony from Texans for Lawsuit Reform (TLR), "An Interstate Comparison of Healthcare Prompt-Pay Laws", to Texas Senate Committee on Business & Commerce, May 4, 2016.
[55] Ibid.
[56] Ibid.
[57] Testimony from Debra Diaz-Lara, Director, Managed Care Quality Assurance, Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[58] Written testimony from Debra Diaz-Lara, Director, Managed Care Quality Assurance, Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, May 4, 2016.

Prompt pay penalties collected by TDI under SB 1367 were intended to be repurposed to fulfill any remaining obligations of the Healthy Texas Program, as well funding new initiatives that would improve access to health insurance coverage for currently uninsured Texans. However, during the 84th Legislative Session the fund balance of $47 million in collected penalties was not appropriated back to TDI for its new purpose of enhancing access to coverage and was consequently transferred back to the General Revenue Fund.[59]

Prompt Payment Transferred to or Collected by TDI

Timeframe	Amount	Fund Deposited
Unused balance as of 3/31/2014	$47,083,053	Premium Stabilization Fund 0329
Collections from 4/1/2014 to 8/31/2014	$17,395,542	General Revenue Fund 0001
Collections from 9/1/2014 to 8/31/2015	$49,720,484	General Revenue Fund 0001
Collections from 9/1/2015 to 2/29/2016	$14,721,378	General Revenue Fund 0001

[60]

While state revenues have seen a healthy stream of inflows from penalty collections over the previous thirteen years, the number of reported complaints has declined.

[61]

In fact, the health insurance industry in Texas, as confirmed by TDI, is paying claims "on time" at a rate of 99.5% of the time, while complaints as tracked by the state have dropped by more than 80% over an eight year period. Testimony before the committee indicated that as compliance has risen, insurers in Texas have not seen a corresponding drop in costs associated with overall penalty payments.

[59] Testimony from Debra Diaz-Lara, Director, Managed Care Quality Assurance, Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[60] Written testimony from Debra Diaz-Lara, Director, Managed Care Quality Assurance, Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[61] Written testimony submitted by Jamie Dudensing, Chief Executive Officer, Texas Association of Health Plans, to Texas Senate Committee on Business & Commerce, May 4, 2016.

Increased Health Plan Compliance

Year	Total Claims	Clean Claims	Claims Paid Late	Percent of Statewide Compliance
2005	42,683,164	20,890,192	620,313	97.03%
2006	60,818,504	40,897,211	170,813	99.58%
2007	57,493,234	27,643,578	160,749	99.42%
2008	57,158,284	28,257,174	128,949	99.54%
2009	59,099,158	46,790,174	98,517	99.79%
2010	61,053,595	53,052,511	57,892	99.89%
2011	59,013,295	51,119,534	70,890	99.86%
2012	53,795,651	46,342,525	167,847	99.64%
2013	72,726,643	60,560,541	256,165	99.58%
2014	81,138,659	73,049,474	365,879	99.50%
2015	93,680,373	89,587,242	211,999	99.76%

Health Plans Process Over 90 million Claims a Year

Claims processed by Texas Health Plans have more than doubled in the past 10 years.

42.7 Million Claims Received 2005

93.7 Million Claims Received 2015

99.5% Despite this Texas Health Plans have achieved a better compliance rate at 99.5% or above for the past 8 of those years.

7

Source: Prompt Payment Handout, Texas Department of Insurance, House Committee on Insurance Hearing, March 30, 2016 [62]

The primary criticism of the system as it stands today is directed at the distinction that Texas is the only state in the United States (even amongst other lines of insurance carried in the Texas market) that bases its prompt pay penalty calculation on "billed charges." Under the TPPA, the severity of the penalty is directly tied to the magnitude of the difference between the submitting provider's billed charges and the provider's contracted rate. Additionally, billed charges are set by providers per their discretion without any statutory limits.[63]

Prompt Pay Regulatory Penalties: Billed Charges Are NOT a Common Standard

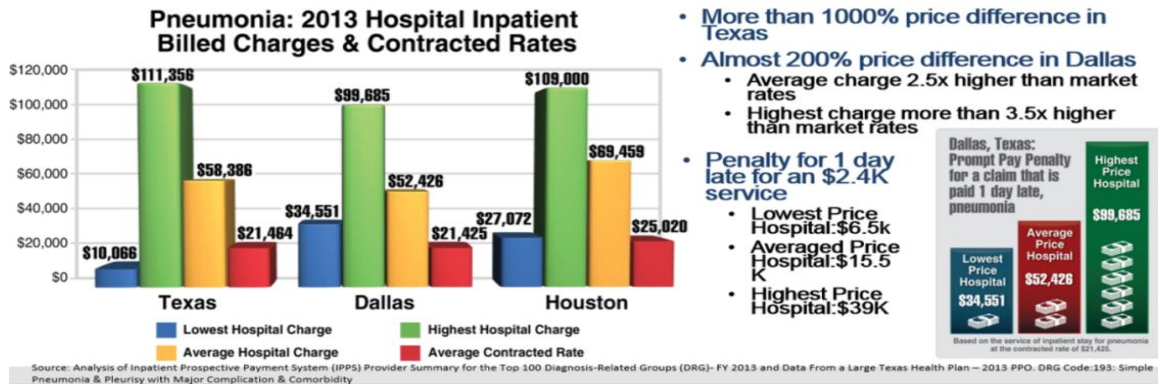
TX Health Insurance	Medicaid	Medicare	TX Workers Comp	Health Insurance In Other States	Other Lines of TX Insurance
Based On Billed Charges	18% Annual Interest Rate	2.5% Annual Interest Rate	4.19% Annual Interest Rate	32 States: 12%-18% Annual Interest 15 states: 10% or Below Annual Interest Rate	18% Annual Interest Rate

15

Source: Medicaid- HHSC Managed Care Manual, Chapter 2, sec. XI Interest Payment, Worker Comp- Texas Labor Code, Sec. 401.023; 28 TAC 134.130, Medicare- 31 U.S.C., sec. 3902, and "An Interstate Comparison of Healthcare Prompt-Pay Laws" Jan. 31, 2016, Texans For Lawsuit Reform Foundation [64]

[62] Written testimony submitted by Jamie Dudensing, Chief Executive Officer, Texas Association of Health Plans, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[63] Written testimony from Texans for Lawsuit Reform (TLR), "An Interstate Comparison of Healthcare Prompt-Pay Laws", to Texas Senate Committee on Business & Commerce, May 4, 2016.
[64] Written testimony submitted by Jamie Dudensing, Chief Executive Officer, Texas Association of Health Plans, to Texas Senate Committee on Business & Commerce, May 4, 2016.

Many healthcare professionals have asserted that the "billed charges" designation resulted in an increased number of lawsuits filed by institutional providers – such as hospitals – against insurers, and thus highlights a widening disparity in what certain institutional providers charge for identical procedures even within the same geographic areas of the state. The following charts demonstrate examples of medical procedures provided in several Texas cities where a large range of prices exist related to billed charges from institutional providers within the same areas.



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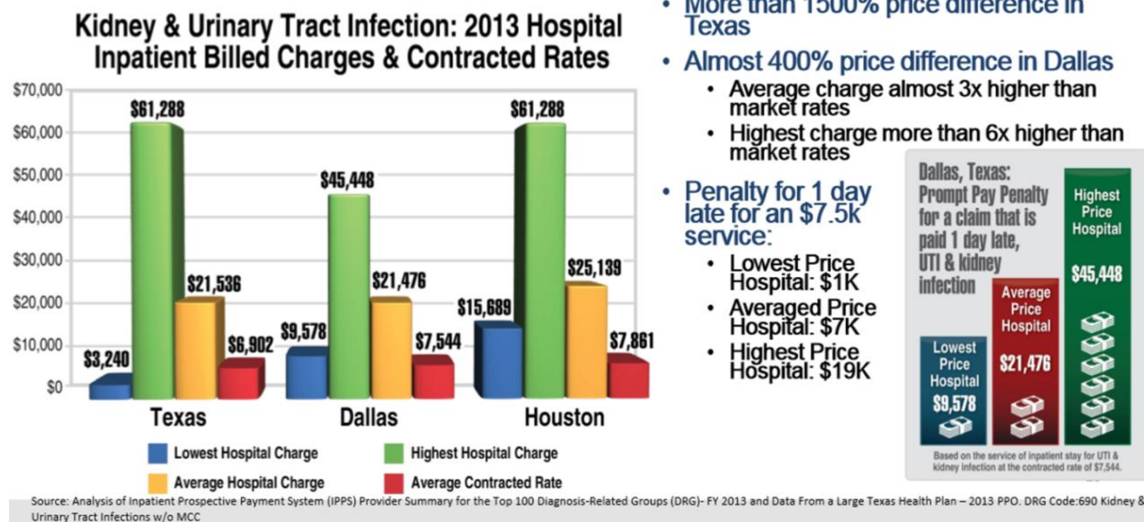

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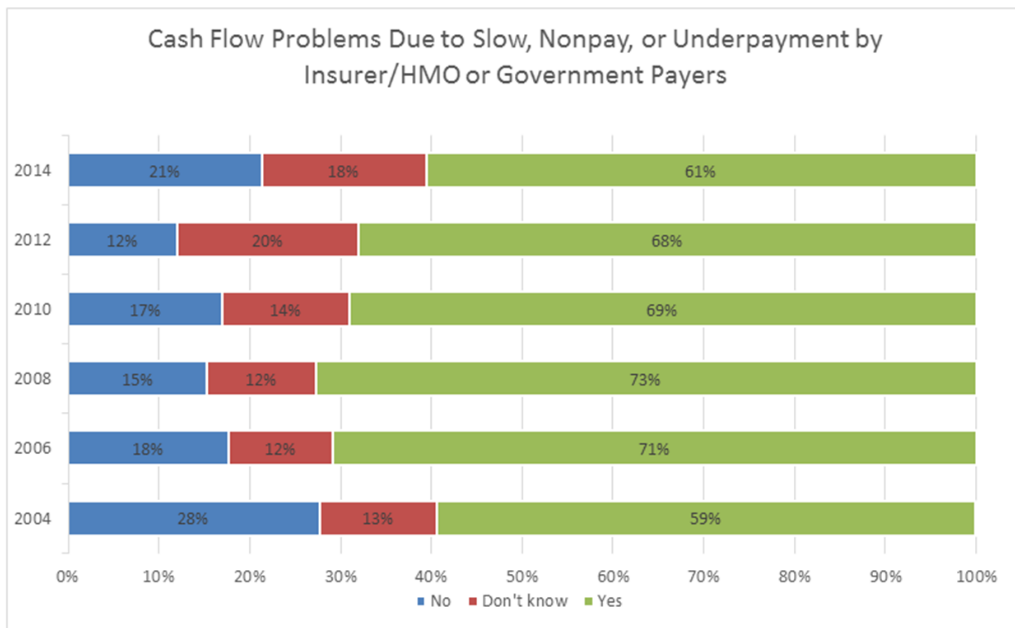
Several witnesses representing segments of the healthcare provider and legal communities expressed concerns with modifying areas of the TPPA given that it has been so successful in encouraging an on-time payment system for services. Dr. Gerald Callas, representing the Texas Medical Association (TMA), testified before the Committee stating that, "billed charges are determined within the full scope of running a practice, which is a business." He continued,

[65] Ibid.
[66] Ibid.

"Health plans can take many steps to avoid penalties and litigation, such as making timely claim payments, limiting the frequency of specific services not being covered in bundled service contracts, raising the dollar threshold for claims that trigger an audit, and proactively making conditional payments."[67]

Dr. Callas also asserted that physicians across the state still find themselves squeezed by late payments or lags in the claims processing system. A TMA survey of Texas physicians conducted as recently as 2014 still shows a relative dissatisfaction with how quickly payments are processed, indicating that 61% still feel a lag in compensation and consequently feel an impact on their businesses.[68]



[69]

Don McBeath, Director of Government Relations for the Texas Organization of Rural and Community Hospitals (TORCH), shared similar concerns from the rural hospital perspective, stating that "the current prompt pay system is effective, as it has been properly designed and implemented." Rural hospital members of TORCH have suffered financially in recent years, and McBeath noted that 14 rural hospitals closed in the past three years. For these institutions, "undisrupted cash flow is crucial".[70]

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[67] Testimony given by Dr. Gerald Callas, Chair of the Texas Medical Association Council on Legislation, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[68] Written Testimony by Dr. Gerald Callas, Chair of the Texas Medical Association Council on Legislation, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[69] Ibid.
[70] Testimony given by Don McBeath, Director of Government Relations, Texas Organization of Rural and Community Hospitals, before the Senate Business and Commerce Committee on May 4, 2016.

RECOMMENDATIONS

The area of prompt pay law represents a complex segment of the health care market design in the State of Texas. The protections offered under the Texas Prompt Pay Act are essential to serving the healthcare needs of millions of Texans.

By studying this issue, it is clear that there are broad concerns with how the price of healthcare service is calculated when applied to prompt pay penalties; how billed charges are established; understanding the variations when applied to those charges; and whether this is an appropriate measurement moving forward.

The complexity of the issue warrants further study as new data becomes available.

4. Examine cyber-security efforts undertaken by state entities and study the legal, policy, and privacy implications of the trend toward storage of personal, private, and business confidential information in network attached storage, cloud storage, and other developing data storage options rather than on local devices. Make recommendations on how to best protect Texans' financial and personal information.

BACKGROUND

Texas state government includes more than 150 agencies and institutions of higher education.[71] The State employs hundreds of thousands of people and safeguards countless numbers of digital records containing vital personal information relating to millions of Texans.

In 2011, the Office of the Comptroller acknowledged that the personal data of several hundred thousand state employees – over 3 million records – were involved in a data security breach. This private data was uploaded to a public server, where it was available, in some cases, for over a year. The records exposed to the breach included: public employees' names, mailing addresses, social security numbers, and, in some cases, also dates of birth and driver license numbers. The incident sparked a policy debate during the 83rd Regular Legislative Session as lawmakers sought to determine which state agency should be tasked with coordinating the state's cybersecurity efforts. The debate also focused on the need to adopt new uniform standards and policies to thwart future cyber breaches of our public institutions.

Ultimately, the Department of Information Resources (DIR) was tasked with these duties as part of SB 1597 in 2013, which requires each state agency to submit a security plan to DIR by October 15th of each even numbered year. Similarly, passage of SB 34 in 2015 required DIR to use the submitted plans to prepare a report concerning the State's information security preparedness posture.[72]

To ensure statewide unity in these efforts, DIR also is responsible for managing the enterprise security program and developing statewide cybersecurity efforts through security services, policy and assurance, risk management, as well as education and training programs.[73]

[71] http://www.texastransparency.org/State_Finance/Spending/, Texas Comptroller of Public Accounts, Texas Transparency website.
[72] Written testimony from Eddie Block, Chief Information Security Officer, Texas Department of Information Resources, to Texas Senate Committee on Business & Commerce, March 30, 2016.
[73] Ibid.

TESTIMONY

As a component of ongoing state information management reforms, DIR has performed security assessments of state agencies using a third party vendor. Approximately 50 agencies were assessed on their overall cybersecurity posture. Based on the assessments, seven trends were identified:

- Information security and cybersecurity staffing challenges
- Absence of secure software development standards
- Ad-hoc performance of security governance and awareness
- Lack of 24x7 event monitoring and analysis
- Network segmentation needed to segregate high-value assets
- Lack of data classification policies

DIR has issued remediation recommendations to address each of the identified issues encountered among the assessed agencies. However, adequate staffing related to cybersecurity still remains the most pressing challenge to a statewide response.[74]

Existing DIR Initiatives:

Security Services

Network Security Monitoring, Alerting, and Analysis Services: Provide early warning for attempted intrusions and cyber-attacks as well as alerts to authorities that facilitate appropriate countermeasures.

Network Intrusion Prevention Service: Proactively identifies and blocks known threats to network security. It not only watches network traffic, but also takes immediate action based on the network administrator's set of rules.

Testing Services: Offered by DIR at no cost, but entities must specifically request them. Includes Controlled Penetration Testing, Web Application Vulnerability Scanning, and Vulnerability Scan.

Education & Training:

Cybersecurity Awareness Month: Each October is national cyber security awareness month, and every year DIR works with the office of the Governor to issue a proclamation showing support for Cybersecurity Awareness.

Texas Infosec Academy: DIR offers security training classes tailored to the needs of

[74] Written testimony from Eddie Block, Chief Information Security Officer, Texas Department of Information Resources, to Texas Senate Committee on Business & Commerce, March 30, 2016.

Information Security Officers (ISO) within state agencies.

Texas Cybersecurity Council: Building on a recommendation from a Texas Cybersecurity, Education and Economic Development Council (TCEEDC) report entitled "Building a More Secure and Prosperous Texas," the TCEEDC brings public and private sector IT leaders together to address cybersecurity education and workforce development issues.

DIR Cybersecurity Newsletters: DIR publishes monthly newsletters covering security topics and outlining ways to improve individual security programs.

Statewide Information Security Advisory Committee (SISAC): The Committee was created by DIR and is made up of ISOs from state and local government and representatives from private industry. It aims to cross-pollinate ideas and best practices among its members and make recommendations to DIR for more effective information security options.

Security Awareness Tools: DIR provides end-user level security awareness training to agencies that request it.

CIAS Monthly Tabletop Exercises: DIR offers monthly tabletop security exercises in partnership with the University of Texas at San Antonio's Center for Infrastructure Assurance and Security (CIAS). These exercises are free for agencies.[75]

State Data Storage:

While DIR promulgates standards and administers voluntary programs for agency cyber security best practices, it also manages the state's in-house data storage programs.

Currently, state entities have two options available to them regarding contracting to procure public and cloud services. The first is DIR's cooperative contracts program for commercial cloud services for all state agencies, institutions of higher education, and local governments seeking to procure cloud services utilizing state-negotiated procurement terms and conditions.[76] The second option is DIR's Data Center Services (DCS) program, which provides state agencies a private community cloud system specifically designed for government users.

DCS was established in 2005 when the 79th Legislature passed HB 1516 directing DIR to consolidate state agencies' IT infrastructure to reduce statewide costs for IT services, modernize aging state infrastructure, and increase overall security and disaster recovery capabilities.[77]

Testimony given before the Committee indicated that state agencies' use of DIR's cooperative cloud contracts has been limited to date. The adoption of cloud services by any state agency would necessitate a detailed design process to effectively integrate the service into agency data

[75] Written testimony from Eddie Block, Chief Information Security Officer, Texas Department of Information Resources, to Texas Senate Committee on Business & Commerce, March 30, 2016.
[76] Testimony given by Dale Richardson, Chief Operations Officer, Texas Department of Information Resources, to Texas Senate Committee on Business & Commerce, March 30, 2016.
[77] Ibid.

storage operations. This process requires the use of cloud architects, business process engineers, and system architects to tailor the service to the agency. State agencies are reluctant to use the cloud contracts, citing security concerns and lack of experience on how to integrate and operate the cloud in the context of their own respective agency's workload.[78]

Conversely, DIR's DCS program was successful in launching a private community cloud in 2012 that now serves 28 state agencies. In 2015, DCS implemented hybrid cloud services with two major public cloud providers, Amazon Web Services and Microsoft Azure, for data storage services. These offerings were limited to certain use cases, data types and security standards to protect the integrity of the state's data.[79]

DIR believes that when balancing the risk and cost considerations, community or hybrid clouds may be the best approach for state government moving forward. Confidential and regulated data can be secured in a private cloud offering while public data can take advantage of less expensive public cloud offerings.[80]

RECOMMENDATIONS

Cyber security is an issue for public sector data storage just as it is for the private sector. The Committee recognizes that private business and enterprise are far ahead of their public counterparts in development of security strategies to manage risk in this area.

DIR has recognized that staffing of cyber security positions within state agencies is still their most critical challenge in combatting cyber threats. The Committee concurs with this assessment, but proposes, in equal importance, that the voluntary nature of cyber programs and policies developed at DIR represent an obstacle to a uniformed statewide response to future threats. The Committee also believes that as long as state agency cyber security policies and programs are voluntary, cyber threat mitigation efforts will continue to be under-prioritized by agency department heads.

The Legislature should enact legislation that requires "technical risk assessments" be conducted on all state agencies based upon the State of Texas risk framework as defined by DIR on a 5 year periodic basis. Most assessments, or those given priority, should occur between now and the next legislative appropriation cycle for the 2019 Legislature. Results from the technical risk assessments should be forwarded to the appropriate Senate or House Committees as defined by the Lieutenant Governor and Speaker of the House, respectively. Due to its sensitive nature, details from the assessments should be protected from open records provisions of the Public Information Act.

In an effort to elevate the status and priority for addressing cyber security management

[78] Written testimony from Dale Richardson, Chief Operations Officer, Texas Department of Information Resources, to Texas Senate Committee on Business & Commerce, March 30, 2016.
[79] Ibid.
[80] Ibid.

programs, agency designated cyber security specialists should report directly to the agency's chief executive and not the administrator of information technology divisions where conflicts of interests may be inherently present.

Additionally, the Legislature should continue to assess and adopt policies oriented toward utilizing private sector solutions such as cloud technologies for state data storage needs with a goal to bring down costs and administrative overhead encumbered by the state.

Finally, if any state entity adopts contract guidelines that restricts the contractual outcome to what could be considered a monopoly, they should be required to report the reasons for such a decision to the Senate Committee on Finance and House Committee on Appropriations.

5. Study elder financial abuse and determine what steps the State of Texas should take to help protect older Texans from financial exploitation.

BACKGROUND

Financial exploitation of the elderly is the theft of their money, property, or other belongings. As Texas' overall population ages, the risk of exploitation has only increased. There are many organizations in the state dedicated to helping protect the aging population from these risks, as well as several banking and financial service institutions that continue to make significant efforts to help protect our aging population. Many other states have taken necessary steps to protect the elderly from financial abuse and, as recently as the 84th Legislature in 2015, the state of Texas has followed suit.

Past Legislation

HB 1454 - 84R (*Representative Raney*)
After three years of inactivity, if an account holder is unable to be contacted, a financial institution must remit the property in question to the Comptroller, a process known as escheatment. Current Texas law does not allow for a financial representative to be contacted in these cases. HB 1454 would have allowed the account holder to designate a representative for escheatment purposes only.

The industry preference was to work on a full package of elderly financial protection instead of addressing a small piece of the problem. Despite their opposition, the bill was signed into law, effective September 1, 2017.

Legislative Action from Other States

Currently, there is a concerted effort being made in many states to protect the elderly from financial abuse. The following were recently passed in their respective states:

- California: Requires a sentencing court to consider issuing an order restraining a defendant from any contact with the victim of elder abuse.
- Connecticut: Adds elder financial abuse to the definition of exploitation and mandates that financial institutions report suspected abuse.
- Missouri: Allows a qualified individual to report suspected abuse with some immunity from liability. Allows the institution to freeze the transaction in question for 10 days.
- Nevada: Mandates training of certain employees to identify suspected elder financial abuse and requires investment advisors to report suspected abuse.
- Delaware: Gives financial institutions the right to hold a proposed transaction if the financial institution suspects the transaction involves financial elder abuse.

- Washington: Gives financial institutions the right to hold a proposed transaction at the request of a governmental agency or if the financial institution suspects the transaction involves financial elder abuse.

Recent Federal Legislation

In June of 2016, the U.S. House Financial Services Committee passed HR 4538, entitled the "Senior Safe Act." As of July 12, 2016, the Financial Services Institute (FSI) was seeking co-sponsors for the Senate version of the bill and in June the FSI met with lawmakers at the U.S. Capitol to discuss the legislation. The bill would protect financial institutions and advisors from legal liability by giving them immunity from such liability if they were to disclose financial exploitation of senior citizens to a regulator, as long as an advisor had received training from their respective firm on the identification and reporting of suspected elderly exploitation.[81]

Best Practices to Consider

Some of the best practices across the country include allowing individuals associated with a broker/dealer licensed to sell insurance, or a representative of an investment advisor, to communicate suspected financial exploitation to the proper agencies without fear of violating privacy requirements. In addition, allow the financial institution to temporarily delay the transaction, so that it may be investigated more thoroughly.

TESTIMONY

The Senate Committee on Business & Commerce held a public hearing on elderly financial abuse on January 26, 2016. The Committee heard testimony on the level of abuse and exploitation that is reported every year across the state as well as steps both public and private organizations are taking to help educate the citizenry and prevent such issues.

Several private organizations and public entities submitted written and oral testimony to the Committee with a focus on best practices to employ to combat elder financial abuses in the state.

The Texas Department of Family and Protective Services (DFPS) - Adult Protective Services' (APS) mission is to protect older adults and people with disabilities from abuse, neglect, and exploitation. APS conducts two types of investigations of abuse, neglect, and exploitation (ANE) of persons age 65+ and persons with disabilities: (1) In-Home, which investigates ANE allegations of vulnerable adults in the community; and, (2) Provider Investigations, which investigates allegations of ANE by certain providers. The focus of APS is to conduct an investigation when the alleged perpetrator has an ongoing relationship with the alleged victim, not in cases where there is not a pre-existing relationship.[82]

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[81] HR 4538, 114th Cong. (2016) (enacted). Print. http://financialservices.house.gov/uploadedfiles/bills-114hr4538ih.pdf
[82] Written testimony provided by Beth Engelking, Assistant Commissioner, Department of Family Protective Services, to Texas Senate Committee on Business & Commerce, January 26, 2016.

Next, the Committee heard from the Texas State Securities Board (SSB), which is charged with administering the provisions of the Texas Securities Act. These provisions include: registration of securities; registration of persons who sell securities or render investment advice; inspection of registered firms to ensure compliance with the Act and Board rules; investigation of offerings and individuals to prevent; and, detection of violations of the law, and administrative, civil, and criminal enforcement actions to protect investors. SSB spoke about the effectiveness of the current efforts to protect elderly people from financial abuse, but believed there is still much more that must be done. SSB told the committee that there are often warning signs in sales literature, or within business plans of fraudulent investment schemes, that would be apparent to persons with expertise in finance or investments, such as registered dealers and investment advisers who manage and monitor their clients' financial assets. If these registered firms and individuals have a reasonable basis to believe that their clients' funds are about to be illegally dissipated, they may be better able to prevent harm if there was a clear mechanism to allow them to hold funds for a brief period of time, contact regulators, and avoid potential liability for doing so.[83]

Organizations like American Association of Retired Persons (AARP) are very active in outreach and education in this area. Since 2013, AARP has mounted a national campaign to fight ID theft and fraud to give our aging population access to information to protect themselves and their families. AARP representatives testified to the Committee about their watchdog efforts as well as the South Dakota Elder Abuse Task Force created by the South Dakota Legislature in 2015 to study the prevalence and impact of elder abuse in their state.[84]

The Committee next heard from Raymond Lynch of Wells Fargo, who testified about the gap that occurs when an elder abuse report is filed. After a report of suspected financial elder abuse is made to designated governmental agencies, there is a gap in time between the filing of the report and when a governmental agency or an elder's family member takes action to prevent further financial elder abuse from occurring or seeking the return of the elder's funds from the person who has defrauded the elder. Wells Fargo representatives also spoke about different legislation across the country that addresses this issue, most notably the legislation from Delaware and Washington referenced above.[85]

Next the Committee heard from Texas-based First Financial Bank, who has been a leader in supporting their senior customers from financial abuse. They laid out to the Committee the initiatives they have undertaken as a financial institution to help prevent elder financial abuse, which included:

- Internal training to recognize the signs of elder exploration
- Education of communities as a whole

[83] Written testimony provided by John Morgan, Texas Securities Commissioner, State Securities Board, to Texas Senate Committee on Business & Commerce, January 26, 2016.
[84] Written testimony provided by Charlene Hunter James, State President, AARP Texas, to Texas Senate Committee on Business & Commerce, January 26, 2016.
[85] Written testimony provided by Ray Lynch, Senior Company Counsel, Wells Fargo Bank, to Texas Senate Committee on Business & Commerce, January 26, 2016.

- Partnerships with local law enforcement, Adult Protective Services, and the Better Business Bureau
- Rewarding employees when they successfully stop elderly financial abuse

The Elder Financial Safety Center, a collaborative partnership of The Senior Source, Dallas County Probate Courts, and Dallas County District Attorney's Office, spoke next. The Elder Financial Safety Center helps older adults avoid the dangers of financial uncertainty and exploitation by offering prevention, protection and prosecution services in a comprehensive and systematic way.[86]

Lastly, the Committee heard from the Securities Industry and Financial Markets Association (SIFMA). SIFMA is a national trade association which represents hundreds of securities firms, banks and asset managers, and many of their members have a strong presence in Texas. They laid out several different types of financial exploitation to the Committee and gave some recommendations they believe could help broker-dealers stop financial abuse of elders. Such as giving broker dealers voluntary reporting pathway that would allow them to report suspect transactions to designated state entities, such as the Texas State Securities Board and the Department of Family and Protective Services, without fear of liability.[87]

The Committee staff also met with several groups and stakeholders to discuss this issue before developing the recommendations below.

RECOMMENDATIONS

The number of baby boomers in or nearing retirement has greatly increased in recent years, with Texas having three of the top ten metro areas in the United States with the fastest growing senior population. Furthermore, proving exploitation in an elder fraud case can be difficult because the transactions usually occur in secret and victims may have cognitive or other impairments. The Committee recognizes concerns raised within the affected population regarding placing holds on suspect transactions related to fraud. In order to help further protect this population, the Committee suggests the following:

- Clarify that APS can share information with or alert law enforcement and other government agencies to potential fraud cases without the need for a subpoena or court order dealing with all accounts for vulnerable adults.
- Work to find an appropriate time frame in which a financial institution can place holds on an account of a vulnerable adult.

[86] Written testimony provided by Julie Krawczyk, Director, Elder Financial Safety Center, to Texas Senate Committee on Business & Commerce, January 26, 2016.
[87] Written testimony provided by Kim Chamberlain, Government Affairs, Securities Industry and Financial Markets Association, to Texas Senate Committee on Business & Commerce, January 26, 2016.

6. Examine and make recommendations for necessary changes regarding the collection process for delinquent ad valorem property taxes, including an inquiry into the role that tax lien transfers play in forestalling foreclosures.

BACKGROUND

Texas Tax Code Sec. 32.06 allows a person to authorize another person to pay property taxes on their behalf. Under such an arrangement, the property owner's tax lien is transferred to the lender. Further limitations and authorizations are located in Texas Finance Code Ch. 351, the Property Tax Lender License Act.

In the 84th Texas Legislature, no major legislation was passed to alter the process. The last major legislation signed into law was Chairman Carona's SB 247 (83R), which expanded the Office of the Consumer Credit Commissioner's (OCCC) powers and duties relating to property tax lending. Major provisions included:

- A prohibition on tax lien transfers for those over 65 and claiming a homestead property tax exemption.
- In addition to the existing registration requirement, property tax lenders were required to adhere to any rules adopted by OCCC.
- The voiding of any contract between a property tax lender and a property owner authorizing payment of taxes not delinquent or due at the time of the agreement.
- Prohibition of tax lien transfers for property owners not delinquent in the current year but having previously transferred a tax lien in one or more prior years, unless no first lien holder exists (the property is owned and not subject to a mortgage.)
- Prohibition of tax lien transfers for property owners financed by a grant or below market rate loan or subject to a lien by a municipality for expenses incurred to mitigate a dangerous building.
- Property tax lenders were required to add notice to their advertisements that a tax office may offer repayment terms for delinquent taxes at a lesser cost, as well as further requirements designed to heighten consumer awareness and prevent false, misleading, or deceptive advertising. Administrative penalties authorized.
- Prohibited property tax lenders from transferring a property tax loan to a property not licensed under the Ch. 351, Finance Code.
- Prohibition of the use of non-judicial foreclosure for a tax lien interest.
- Required property tax lenders to deliver a payoff statement within 7 days of a request by an existing lien holder.

Additionally, purchasers of property tax liens were made to adhere to the same restrictions as

the original lien holder. Finally, contract provisions stipulating that a property owner waive a statutory right were prohibited.

Previous Legislation

In the 84th Texas Legislature, SB 525 by Senator Birdwell was heard by the Senate Committee on Business & Commerce on March 14, 2015 and was not passed out of committee. SB 525 would have required that (1) notice from the property tax lender be sent by certified mail to the mortgage servicer (bank) and to any preexisting lien holder; that (2) the property owner receive the terms of the property tax loan 12 days before the execution of the lien transfer; and, that (3) the property tax lender provide notice of the impending tax lien transfer and its superiority to the mortgage lien 12 days before the transfer to all preexisting lien holders (current law only requires notice to the first lien holder). Property tax lenders assert this would put them out of business. Texas Consumer Credit Commissioner Leslie L. Pettijohn finds this assertion credible and, furthermore, believes the industry is operating well from a consumer perspective: property owners sometimes enjoy reduced interest charges under property tax loans (average: 12-13%) and no major issues are in need of legislative attention.

SB 247, passed by the 83rd Legislature in 2013, imposed new requirements on property tax lenders. The bill's requirements fell mainly into the following categories:

- Judicial foreclosure: The bill repealed language allowing property tax lenders to engage in non-judicial foreclosure. This effectively required the use of judicial foreclosure for any property tax loans closed on or after the bill's effective date, May 29, 2013.
- Advertisements: The bill prohibited deceptive or misleading advertising, and it required property tax lenders to disclose certain additional information if they disclose a rate or charge in an advertisement.
- Payoff statements: The bill imposed new requirements for payoff requests sent by other lienholders and payoff statements provided by the property tax lender. It required the Finance Commission to adopt forms for the payoff statement and the request for a payoff statement.
- New prohibitions: The bill prohibited property tax loans in certain situations (e.g., where the borrower is 65 years old or older and can claim a tax exemption, or where the taxes are neither due nor delinquent).

2011 – The Legislature limited the type and amount of servicing or post-closing fees that a property tax lender could assess, charge, or collect.

2009 – The Legislature required the Finance Commission to promulgate standardized forms for the certified document and sworn statement used with a property tax loan.

2007 – Property tax lenders (PTLs) were required to obtain a license from OCCC. The Finance Commission was required to prescribe the form and content of a pre-transfer disclosure and adopt rules relating to reasonableness of fees. PTLs could authorize the transfer of a tax lien for

current taxes if property owner had executed and recorded a tax lien transfer for one or more years on the same property.

2005 – Tax lien transfers were limited to instances where the taxes were delinquent at the time of payment or, if not delinquent, the property was not subject to a recorded mortgage lien. Modifications were enacted related to the right of redemption of the property by the borrower or the mortgage servicer.

1995 – Tax Code amendments permitted non-judicial foreclosures, increased the maximum interest rate from 10% to 18% per annum, and allowed property tax lien transferees to foreclose within one year if contracted for.

1979 – The Legislature codified the previous law into Section 32.06 of the Texas Tax Code.

1933 – Property tax lien transfers were first permitted.[88]

The Property Tax Collection Process:

- October 1, 2015 Tax Assessor/Collector sends tax bill to property owner.
- Taxes due January 1, 2016.
- January 1, 2016, tax lien attached to property to secure tax obligation.
- February 1, 2016, tax office may begin assessing penalties on unpaid taxes.

Penalty and Interest Schedule (Tax Office)

Month	*Penalty*	*Interest*	*Total P&I*
February	6%	1%	7%
March	7%	2%	9%
April	8%	3%	11%
May	9%	4%	13%
June	10%	5%	15%
July	12%	6%	18%
August	12%	7%	19%
September	12%	8%	20%
October	12%	9%	21%
November	12%	10%	22%
December	12%	11%	23%
January	12%	12%*	24%

*Interest continues to accrue at the rate of 1% per month until taxes are paid in full.

[88] Written testimony provided by Leslie Pettijohn, Commissioner, Office of Consumer Credit Commissioner, to Texas Senate Committee on Business & Commerce, October 5, 2016.

TESTIMONY

On January 26, 2016, the Senate Committee on Business & Commerce held a public hearing on property tax liens. The Committee heard invited testimony from several stakeholders on the subject.

Deborah Hunt, Williamson County Tax Assessor-Collector, testified to the Committee first and laid out the process of what happens when someone is delinquent in paying their taxes. She also provided a chart to the Committee showing the history of collection of 2014 taxes which is reproduced below. She explained that most common instances in which a tax lien transfer company makes a tax loan in Williamson County is when a delinquent property owner desires an installment payment period which exceeds the 36 month maximum allowed by the Tax Code for installment agreements with the tax office or there are unique circumstances surrounding the delinquency. Accordingly, there is a role for tax lien transfer companies in the delinquent tax collection process, but it is limited.[89]

HISTORY OF COLLECTION OF 2014 TAXES						
Date	Amount Unpaid	Percent Unpaid	Number of Accounts Unpaid	Amount Paid	Percent Paid	Number of Accounts Paid
October 1, 2014	$987,007,229	100%	191,000	$0	0%	0
February 1, 2015	$38,666,570	3.9%	11,200	$948,340,659	96.1%	179,800
July 1, 2015	$8,692,592	0.8%	6,045	$978,311,637	99.2%	184,955
December 31, 2015	$3,425,523	0.3%	2,705	$983,581,706	99.7%	188,295

This table reflects that there is not a tax collection problem in Williamson County. [90]

Commissioner Leslie Pettijohn of the Texas Office of Consumer Credit Commissioner (OCCC) spoke next and explained to the Committee what a tax lien is as well as the history of how the laws relating to tax liens have evolved over the years. Commissioner Pettjohn gave the Committee specific data on lien transfers, closing costs and also laid out some public policy issues that were raised to their attention relating to discount points.

Next, the Texas Mortgage Bankers laid out their issues with property tax liens to the Committee. They believe Texas property tax lien transfer loans are being underwritten based on the value of the property and not on an analysis of the borrower's ability to repay the loan. They also believe it to be a violation of the preexisting mortgage. The Committee asked several questions on their recommendations and laid out their concerns with losing a valuable tool for consumers.

The Texas Bankers Association (TBA) spoke to how they believe that state law gives the lien

[89] Written testimony provided by Deborah Hunt, Tax Assessor-Collector, Williamson County, to Texas Senate Committee on Business & Commerce, October 5, 2016.
[90] Ibid.

lenders a large advantage and causes abuse of the system. TBA has concerns that tax lien lending is impairing the contracts of thousands of Texas home and business owners. They spoke to the fact that this issue has increased because the federal government has been mandating escrow requirements.[91]

This led into the Independent Bankers of Texas (IBAT) testimony. IBAT spoke about loan servicing practices and how a lot of small community banks are not able to write escrow for economic reasons. They encouraged promoting robust financial literacy on the issue for consumers, including, most importantly, in educational curriculum in our state's schools.

Finally, the Texas Property Tax Lien Association (TPTLA) gave the final invited testimony to the Committee. With the rising property taxes in the state, the rates for property tax liens have continued to go down. TPTLA testified that their president's company works in twenty-two other states that have regulation on property tax lien companies, and Texas has more regulation than the other twenty-two states combined, which is causing the industry to shrink. Of those states, New Hampshire is the only one that requires any form of notice while in Texas six notices are required to be sent out.

RECOMMENDATIONS

The Committee recognizes that the current system is working. The competitive dynamic has provided a reasonable market-based price. Since the last time the Legislature touched this area of law in 2013, Texas has seen a decline in costs associated with tax liens and stabilization of the market. As it currently stands, the Committee finds that there is a place in the Texas property tax collection system for a variety of products that can assist Texans in retaining their property.

[91] Written testimony provided by John Heasley, Texas Bankers Association, to Texas Senate Committee on Business & Commerce, October 5, 2016.

7. Monitor the implementation of legislation addressed by the Senate Committee on Business and Commerce during the 84th Legislature, Regular Session and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following:

a. State agency participation in the federal electronic verification of employment authorization program;

BACKGROUND

E-Verify is an electronic program through which employers verify the employment eligibility of their employees after hire. The program was authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In short, employers submit information taken from a new hire's Employment Eligibility Verification Form (I-9 Form) through E-Verify to the Social Security Administration (SSA) and U.S. Citizenship and Immigration Services (USCIS) to determine whether the information matches government records and whether the new hire is authorized to work in the United States. E-Verify is administered by the U.S. Department of Homeland Security, USCIS Verification Division, and the SSA.[92]

On December 3rd, 2014, Governor Rick Perry issued Executive Order No. RP-80 which ordered all state agencies under the direction of the Governor to verify the eligibility of current and prospective employees through the federal government's E-Verify system as well as all contractors and subcontractors performing work under a contract for services with executive agencies.[93] By December 14th, 2014, the Texas Workforce Commission implemented E-Verify into the hiring process statewide.[94]

In 2015, SB 374 was signed into law which required state agencies to verify all job candidates' eligibility to work through the E-Verify system. The bill extended the requirement to all state agencies regardless of whether they are governed by gubernatorial appointees.[95] In turn, the Texas Workforce Commission (TWC) developed rules and forms as required by the bill to assist in the administration of the new law and began dissemination of registration information and online forms & procedures for the E-Verify program.[96]

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[92] U.S. Citizenship and Immigration Services, Department of Homeland Security website, https://www.uscis.gov/e-verify/about-program.
[93] Executive Order #RP-80, Governor Rick Perry of the State of Texas, filed in the Office of the Secretary of State December 3, 2014.
[94] Written testimony by Susanna Holt Cutrone, Chief Executive Officer, Texas Workforce Commission, to Texas Senate Committee on Business & Commerce, March 30, 2016.
[95] Ibid.
[96] Ibid.

On March 17th, 2016, Texas Attorney General Ken Paxton issued Opinion No. KP-0070 clarifying that SB 374 supersedes Governor Perry's executive order with respect to the requirement that all state agencies must verify the employment eligibility of new employees and also with respect to who must comply with the requirement of verifying employment eligibility. However, with respect to the verification of employment eligibility of contractors and subcontractors by state agencies under the direction of the Governor, SB 374 does not specifically preempt or supersede the executive order.[97]

TESTIMONY

Testimony given before the Committee indicated that state agencies are complying with the requirements of SB 374 in conjunction with Governor Perry's executive order and have adopted the associated policies and procedures efficiently. However, state agencies currently do not report to TWC directly on the efficacy of instituting these E-Verify requirements, nor do they report applicants who are rejected by the E-Verify system as both such requirements are not codified under law. To the best of the knowledge of the TWC, all state agencis are currently in compliance with SB 374 and the executive order. There is currently no statutory oversight to monitor the implementation of the E-Verify requirement, though monitoring mechanisms, such as standing legislative committees, do exist to serve that purpose.[98]

RECOMMENDATIONS

Since 2014, the State of Texas through executive action recognized a policy of verifying citizenship status for state employees. The Legislature affirmed this policy in 2015 and determined it is in the state's best interest to ensure that public funds are to be used only for programs that are complying with federal immigration laws. The Committee recognizes that a consistent policy approach for state contracts should include a requirement for direct government contractors to comply with similar E-Verify requirements as established under existing law for state agencies.

- The Legislature should expand statutory E-Verify requirements for businesses engaged in direct government contracts with the State of Texas.

[97] Opinion No. KP-0070, Attorney General Ken Paxton of Texas, Issued March 17, 2016.
[98] Written testimony submitted by Susanna Holt Cutrone, Chief Executive Officer, Texas Workforce Commission, to Texas Senate Committee on Business & Commerce, March 30, 2016.

b. Implementation of legislation intended to further protect consumers from the balance billing process;

BACKGROUND

Balance billing is a growing practice occurring in Texas and across the country that has become synonymous with the phrase "surprise medical bills." Balance billing occurs when insured patients receive health care from a provider who is not in the patient's provider network and, subsequently, the non-network doctor, facility, or other health care provider administering treatment bills the patient for fees that exceed the amount covered by their insurance.

Currently, the Texas "usual or customary charge" (set by the Texas Department of Insurance's rulemaking authority) requires payment based on average billed charges for services in a given area. Since billed charges are set by providers without any legal limitations, these charges can range much higher than payments actually accepted in the market, thereby encouraging providers to stay out-of-network and be paid substantially higher reimbursement rates. Last year, the Center for Public Policy Priorities found that up to 56 percent of in-network Texas hospitals have an ER physician group that does not participate in at least one of the health plan networks that include their respective hospital.

In these out-of-network instances, there is no contract between the provider and the health plan, meaning there is no negotiated rate. Therefore, the health plan will pay its out-of-network reimbursement rate to the provider. In most cases, at this point, consumers believe their bill has been paid. But, because there was no negotiated or contract rate, the provider will often send a second bill to the patient for the difference (balance) between what was covered by the health plan and the facility/provider's "billed charges;" this is the surprise "balance bill."

In contrast, network providers agree not to bill patients more than the amount it has agreed with the health plan to accept as payment in full.

Balance billing is a concern for many policy makers because of its direct and sometimes harsh impact on constituents. Balance billing scenarios frequently occur when an enrollee receives health care at an in-network hospital but, often unknown to the patient, the hospital-based physicians do not participate in their plan's network. These hospital-based physicians, such as ER doctors, radiologists, pathologists, anesthesiologists, neonatologists, and assistant surgeons, typically have exclusive privilege and access agreements with the hospitals, leaving patients with no alternative options available within the hospital.

Although Texas has increased its network adequacy standards that insurers are required by law to meet, balance billing by out-of-network providers is still a problem, primarily occurring in situations involving emergency care (both hospital-based ER physicians and free-standing emergency facilities) or out-of-network hospital-based providers practicing at network hospitals.

Statutes and Rules related to Balance Billing in Preferred Provider Benefit (PPO) Plans

Section 1301.005 of the Insurance Code requires that benefits for both in-network and out-of-network services be "reasonably available" to all insureds within a Preferred Provider Organization (PPO) plan's designated service area, and if services are not available through a preferred (network) provider, the insurer must reimburse a non-network provider "at the same percentage level of reimbursement as a preferred provider would have been reimbursed had the insured been treated by a preferred provider." Section 1301.155 requires an insurer to reimburse emergency care at the "preferred level of benefits until the insured can reasonably be expected to transfer to a preferred provider." Section 1301.0046 provides that an insured's coinsurance for non-network providers may not exceed 50%.

The Insurance Code does not prescribe the reimbursement amount applicable to care delivered by out of network providers. 28 Tex. Admin. Code Section 3.3708(b)(1) requires that when a preferred provider is not reasonably available to the insured (including, in the rule, emergency care), the insurer must "pay the claim, at a minimum, at the usual or customary charge for the service..." This rule amendment was adopted by the Texas Department of Insurance (TDI) in 2013.

Statute and Rule relating to Balance Billing in HMOs

Section 1271.055(b) of the Insurance Code provides that if medically necessary covered services are not available through network physicians or providers, a Health Maintenance Organization (HMO), on the request of a network physician or provider and within a reasonable period, shall: (1) allow referral to a non-network physician or provider; and (2) fully reimburse the non-network physician or provider at the *usual and customary rate* or at an agreed rate. Section 1271.155(a) provides that an HMO shall pay for emergency care performed by non-network physicians or providers at the usual and customary rate or at an agreed rate. Although not included in any statute or formally adopted rule, TDI enforces a "hold harmless" requirement on HMOs in these situations, so that they are required to pay out-of-network providers their full billed charges when the providers will not agree to a reduced rate (and providers have little incentive to reduce the rate for services already provided). The Insurance Code includes similar provisions for exclusive provider benefit (EPO) plans. (Sections 1301.0052(a); 1301.0053). TDI Rule 3.3725(a) imposes a "hold harmless" requirement on EPO plans when the enrollee cannot reasonably reach a network provider and for emergency services.

Transparency Requirements related to Balance Billing

Chapter 1456 of the Texas Insurance Code requires health plans to inform consumers about the network status of providers to provide consumers with estimates of payments including any deductibles, copays, co-insurance, or other costs. Health plans' provider directories and web sites must clearly identify network hospitals in which facility-based physicians are not in the network. Plans must also provide notice to consumers regarding the potential for balance billing.

Chapter 324 of the Texas Health & Safety Code requires facilities to provide an estimate of charges (for non-emergencies) upon request. They must also provide notices regarding the network status of providers practicing at the facility and the potential for balance billing. The primary disclosure requirement for physicians, which applies only to non-network services, requires that an estimate of charges be provided upon request, along with a notice for the potential of balance billing. (Texas Occupations Code Section 101.351). Chapter 1456 of the Insurance Code requires non-network facility-based physicians to provide notices about network status and the potential for balance billing.

Mediation (Out-of-Network Claim Dispute Resolution)

HB 2256 (2007) established a new mediation process for consumers who were balance billed more than $1000 by a non-network facility-based physician. Mediation is available to consumers who are covered through a fully-insured PPO or EPO plan, or are covered by the State Employee Retirement System (ERS) plan. Prior to the passage of HB 2256 in 2007 there was no remedy for unexpected balance bills other than the patient attempting to set up a payment plan with the facility-based physician. HB 2256 established a new mediation process for consumers that are balance billed. Physicians are no longer allowed to collect a balance bill from consumers once they have received notice that mediation has been requested.[99]

SB 481 by Senator Hancock, 84th Regular Session, expands options for mediation by reducing the claim threshold from $1000 to $500 and adding assistant surgeons to the list of providers subject to mediation and required to notify consumers about the option of mediation. The bill also strengthened the required notifications to consumers that mediation is an available option to resolve a balance-billing dispute.[100]

Health plans and providers are responsible for informing consumers of the potential of balance billing by hospitals and non-network facility-based physicians on the explanation of benefits (EOB) form. Providers are responsible for notifying consumers that mediation is a protection available to them on the balance bill.

TDI began accepting mediation requests in 2010 and has seen a gradual increase over time as more consumers and providers become aware of the program. Most mediation requests are settled informally prior to actual mediation. According to TDI data, mediation saved Texas consumers over $1 million dollars in balance billing in CY 2015 alone. [101]

Mediation has been very successful in addressing balance billing of consumers. However, the scope of the statute is limited to balance bills over $500 by facility-based non-preferred physicians incurred at preferred (in-network) facilities. New hospital-based providers not listed in the current statute and some facilities, such as free-standing emergency facilities who generally do not contract with any insurance plans, have been generating large numbers of balance bills, some for substantial amounts.

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[99] Written testimony provided by Doug Danzeiser, Director, Life, Accident, and Health Regulatory Initiatives, Texas Department of Insurance, to Texas Senate Business & Commerce Committee, May 4, 2016.
[100] Ibid.
[101] Ibid.

Other States' Experiences

Approaches: All fifty states and DC have a balance billing law; however, there is wide variation in the scope and specific requirements of these statutes and regulations.

Applicability: Fourty-one states (AL, AR, CA, DE, FL, HI, ID, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NV, NH, NJ, NY, NC, ND, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI and WY) and DC apply their balance billing laws and regulations to HMOs or managed care organizations.

Ten states (CO, CT, DE, FL, IL, MD, MA, NY, NE and NH) extend their balance billing laws and regulations generally to insurers, including insurance companies, nonprofit service corporations, HMOs, PPOs, managed care organizations, and other entities.

Five states (AK - Medicaid, CA – Healthy Families and Access for Infants and Mothers programs, NJ - Medicaid, OH- Medicare, and TN – TennCare) apply their balance billing and hold harmless requirements to public programs.

Six states (AZ – health care service organizations, GA – provider-sponsored health care corporations, KS – Medicare-sponsored provider organizations, KY – provider sponsored networks, OH – health insuring corporations and individual market insurer guarantee issue policies and OR – health care service contractors) apply their balance billing requirements to other types of organizations.

Balance Billing by Contracted Providers: Thirty-three states (AZ, AR, CA, CT, FL, HI, IL, IN, LA, ME, MD, MI, MN, MS, MO, MT, NE, NJ, NM, NY, NC, ND, OH, OK, OR, RI, SD, TN, VA, WA, WV, WI, and WY) and DC have explicit prohibitions preventing contracted providers from balance billing enrollees.

Forty-six states (AL, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VA, VT, WA, WV and WY) and DC require provider contracts contain "hold harmless" provisions.

Balance Billing by Non-Contracted Providers: Fourteen states (CO, CT, DE, FL, IL, IN, NJ, NY, OH, TN, and WV) have explicit prohibitions preventing non-contracted providers from balance billing enrollees in certain circumstances.

Other: One state (OH) imposes an annual filing requirement to certify that all provider contracts contain a hold harmless provision. TX establishes a mediation process and allows consumers to initiate mediation if the balance bill from a single out-of-network provider based at a facility exceeds $500.

Five states (AZ, AR, CT, OH, and WA) impose penalties for non-compliance that range from administrative fines (between $150 and $2000) to penalties in the amount of 3 times the

provider's charges.

In 2016, at least twenty states (CA, CO, FL, GA, CT, HI, LA, MD, MA, MN, MS, MO, NH, NJ, NY, OK, PA, RI, SC, and TN) have considered legislation regarding out-of-network reimbursement.[102]

The National Association of Insurance Commissioners (NAIC) has also focused on this issue. In November of 2015, an update to the NAIC model on network adequacy was unanimously adopted. The update, which contains an approach to address balance billing, was developed in coordination with stakeholders across the healthcare industry.

This approach can be found in "Section 7. Requirements for Participating Facility Providers with Out-of-Network Facility-Based Providers" and it includes:

- A notice provision requiring both the participating facility and out -of-network providers working at that facility to disclose that health professional services involved in the care delivered at the facility provided by non-contracted providers;
- A requirement that if an out-of-network facility-based provider bills a patient, that provider must notify the patient of their right to:
- Co-pays and cost-sharing as if in-network,
- Choose to pay the balance bill, or
- (if the amount is over $500) send the bill to their health care plan for processing using the benchmarked payment process, or
- Request a provider mediation process, or
- Exercise their right to appeals available in the state
- A limitation on balance billing the patient in the above scenarios;
- A process where the states establish a benchmark for insurer payments (the NAIC recommends that the benchmark not be based on billed charges);
- A provider mediation process that is established in accordance with one of the national mediation standards; and
- An enforcement provision.[103]

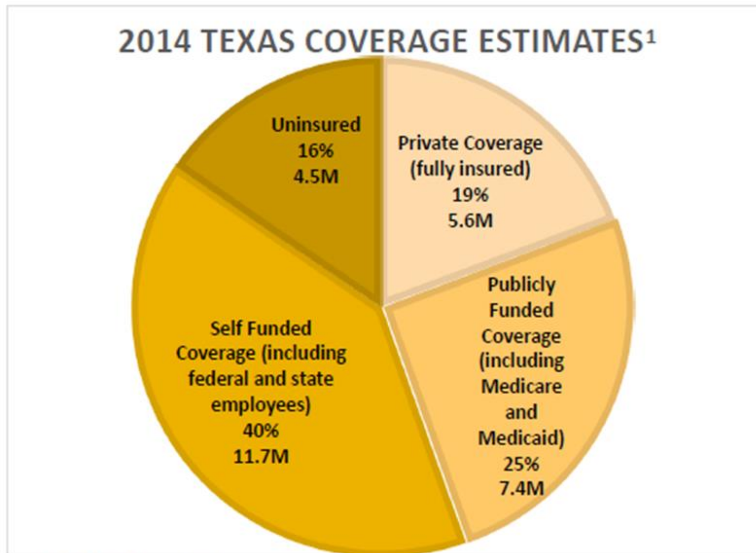
TESTIMONY

The Texas insurance market is made up of five consumer segments which may overlap at any given time. As per TDI, approximately 4.5 million Texans, or 16%, are uninsured, while 7.4 million, or 25%, are on publicly funded insurance, which includes Medicare and Medicaid. As

[102] Taken from the American Health Insurance Plans, "Restrictions on Provider Balance Billing: Summary of State Requirements".
[103] Taken from the National Association of Insurance Commissioners (NAIC) Health Benefit Plan Network Access and Adequacy Model Act, http://www.naic.org/store/free/MDL-74.pd.

a result, TDI can only regulate approximately 19% of the claims in Texas.[104]

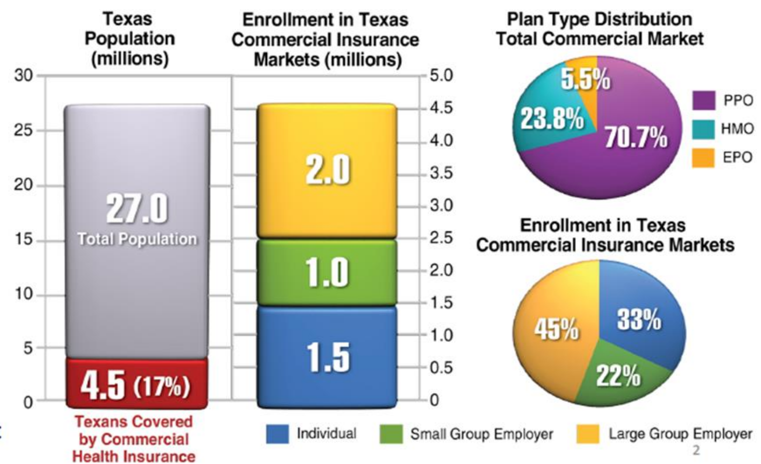
TDI regulates private fully insured coverage, as shown below.



1 Note that some individuals have multiple coverages. [105]

In 2015, the Texas "private coverage" commercial health insurance market could be broken down into the following segments.

- Regulated by TDI
- Mainly Employer- Sponsored
- PPO
  - Most Purchased
  - Higher Premiums
  - Out-of-Network Benefits
  - Referrals not Required
- HMO
  - No Out-of-Network Benefits (Except ER & When Network Provider not Available)
  - May Include PCP Referrals
- EPO
  - No Out-of-Network Benefits (Except ER & When Network Provider not Available)
  - No PCP Referral Requirement



Source: TAHP Enrollment Survey 2015, Milliman Dec. 2015 & TAHP Addendum to 2015 Enrollment Survey, Milliman, April 2016 [106]

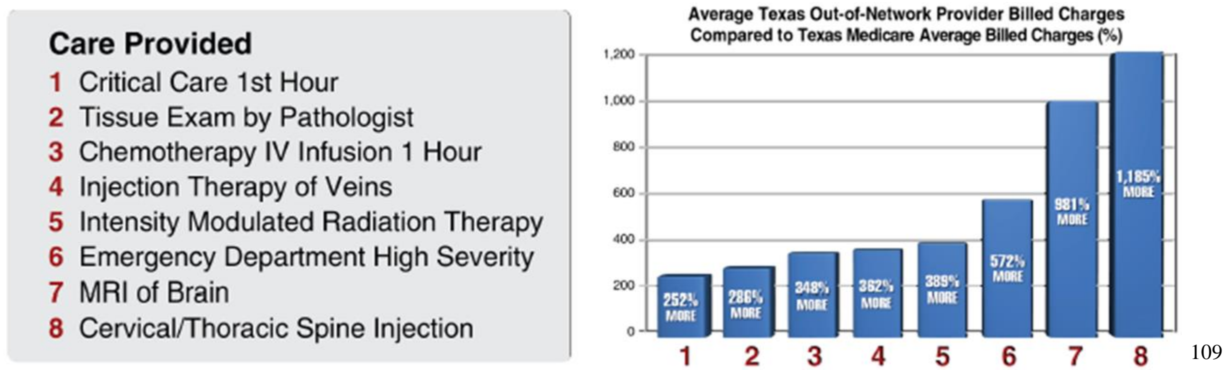
As previously discussed, providers are required to notify consumers participating in PPO, EPO, or ERS plans of mediation protections on the balanced or "surprise bill." However, these

[104] Testimony given by Doug Danzeiser, Director, Life, Accident, and Health Regulatory Initiatives, Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[105] Written testimony from Doug Danzeiser, Director, Life, Accident, and Health Regulatory Initiatives, Texas Department of Insurance, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[106] Written testimony from Jamie Dudensing, Chief Executive Officer, Texas Association of Health Plans, to Texas Senate Committee on Business & Commerce, May 4, 2016.

protections were not extended to members participating the Teachers Retirement System (TRS) plan or out of network services provided by a freestanding ER.[107] This exclusion could over time, with a proliferation of out of network providers, become a significant financial liability for the state.

Jamie Dudensing, CEO for the Texas Association of Health Plans testified that under current law there are no limitations on what a provider can charge for services if they are out of network as they are self-determined by the provider. She asserted that there is very little connection to underlying costs, quality, or market prices demonstrating a large variability in price. Out of network rates are also tied to billed charges, something the health plans believe to be an incentive to inflate the charge itself and to stay out of network as a business model to create higher profits.[108]

The following chart demonstrates the difference in billed charges for out-of-network services versus those same services covered by Medicare.



[109]

Conversely, healthcare providers in their oral and written testimony to the Committee asserted that "network adequacy," as defined by TDI, is essential to formulating payment standards, providing for mediation, and transparency in services. To meet TDI's network adequacy standard insurers must meet qualitative and quantitative network adequacy requirements that are established in Title 28, Part 1, Chapter 3, Subchapter X, Division 1, Rule §3.3704, Subsection (f) of the Texas Administrative Code. Those standards relate solely to a health plan's ability to contract with an adequate number of specialty providers that serve a geographic area. They do not include requirements that would address the density of providers in competition within certain areas to enhance consumer choice and health plan network options.

Rhonda Sandel, Chief Executive Officer, Texas Association of Freestanding Emergency Centers, said that "many freestanding emergency centers request to join networks but are dismissed or offered reimbursement rates that are a fraction of what insurers offer emergency

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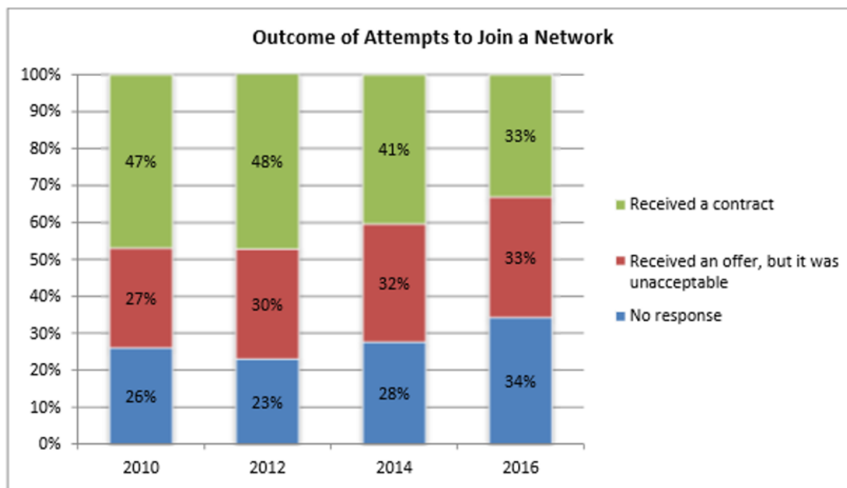
[107] Written testimony from Jamie Dudensing, Chief Executive Officer, Texas Association of Health Plans, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[108] Ibid.
[109] Ibid.

rooms for similar services."[110]

The Texas Medical Association reported similar concerns that their member providers experienced resistance from plans in their attempts to join networks. As evidence they pointed to a 2016 survey that indicated among physicians who approached a plan in an attempt to join their network, 67% of physicians received no response or an unacceptable offer from the plan (up from 60% in 2014).[111]



[112]

Chief among the disputes between the insurers and providers is the question of rate compensation and what qualifies as the definition of "usable and customary", which in practical terms is based upon the average of unregulated billed charges to networks in a given geographical region. As the average of billed charges increases, plans may find it difficult to accept the service rate that providers may demand before joining a network.

Emergency care is an example of this phenomena as Jamie Dudensing of the Texas Association of Health Plans explained that "emergency care services are often costly, especially since networks rarely accept emergency care providers as in-network providers, and that the system is not transparent for consumers." She also said that "in Texas, 20 to 50% of hospitals lack in-network emergency room doctors for the three largest health plans."

The following chart demonstrates the reported out of network claims monitored by insurers for ERs.

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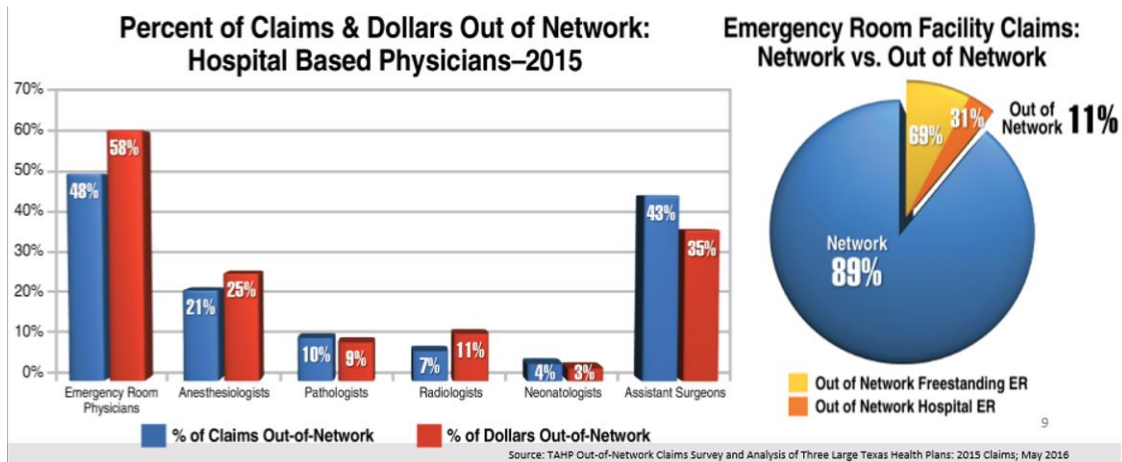
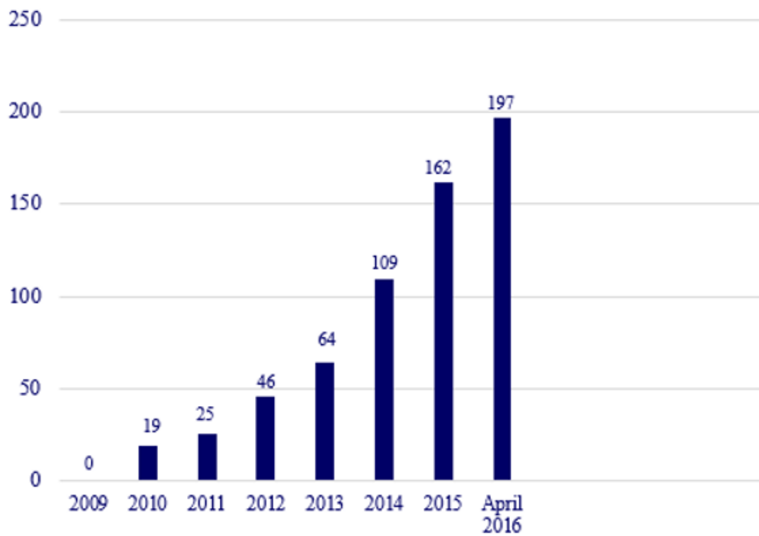
[110] Testimony from Rhonda Sandel, Chief Executive Officer, Texas Association of Freestanding Emergency Centers, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[111] Written testimony given by Dr. Gerald Callas, Chair of the Texas Medical Association Council on Legislation, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[112] Ibid.



[113]

As out of network emergency costs have increased, the Department of State Health Services (DSHS) has monitored a significant increase in the number of freestanding emergency rooms since licensing through DSHS began in 2009 with passage of House Bill 1357 during the 81st Legislative Session. In 2009 there were zero freestanding ERs located in Texas, as of 2016 there are more than 197 facilities now licensed through DSHS located throughout the state.[114]



[115]

The exponential growth in the sheer numbers of freestanding ERs has primarily been concentrated in three urban areas to include: the Houston Metroplex 42%, the Dallas/Fort

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[113] Written testimony from Jamie Dudensing, Chief Executive Officer, Texas Association of Health Plans, to Texas Senate Committee on Business & Commerce, May 4, 2016

[114] Written testimony from Patrick Waldron, Branch Manager, Health Facility Compliance, Patient Quality Care Unit, Division of Regulatory Services, Department of State Health Services, to Texas Senate Committee on Business & Commerce, May 4, 2016.

[115] Ibid.

Worth Metroplex 16%, and Austin/San Antonio 18% of licensed facilities.[116]

Licensed Freestanding Emergency Medical Centers

City	FEMCs	% of state
Houston Metroplex	82	42%
Dallas / Fort Worth Metroplex	32	16%
San Antonio / Austin	36	18%
Rest of State	47	24%

[117]

Freestanding ERs demonstrate another business model that benefits from higher payments based on billed charges, and for many of these facilities there is a greater financial incentive to remain outside of any health plan network. This allows the freestanding ERs to balance bill enrollees up to the full amount of their billed charges, and current state law does not provide an opportunity to mediate these claims, even for balance billing amounts over $1,000.

RECOMMENDATIONS

The long-term vitality of the Texas healthcare market depends on its ability to adequately assure patients that they can expect treatment for a reasonable market based price whether those services are conducted in a private clinical office, or an unaffiliated freestanding emergency room.

The Committee recognizes that the introduction and proliferation of new emergency based businesses and treatment options are changing the way our state's market functions. As such, established protections should be expanded in the following way:

- Expand mediation and surprise billing protections for consumers to all out-of-network emergency care services to include physicians, providers, and facilities.
- Expand mediation protections for consumers who receive services from any out-of-

[116] Written testimony from Patrick Waldron, Branch Manager, Health Facility Compliance, Patient Quality Care Unit, Division of Regulatory Services, Department of State Health Services, to Texas Senate Committee on Business & Commerce, May 4, 2016.
[117] Ibid.

network providers working at an in-network hospital.

- Increase transparency of health care prices (billed charges) and network status.
- Increase consumer awareness of access to the mediation process.

c. Changes made to the operation of the Texas Windstorm Insurance Association;

BACKGROUND

The Texas Windstorm Insurance Association (TWIA) was established in 1971 by the Texas Legislature to provide wind and hail coverage to applicants unable to obtain insurance in the private market. The Legislature's action was a response to market constrictions along the Texas coast after several hurricanes. TWIA is governed by Chapter 2210 of the Insurance Code; however, it is not a state agency and does not receive funds from the general revenue. TWIA policies provide coverage only for wind and hail losses.[118]

TWIA losses and operating expenses are paid from the following funding sources: TWIA premiums and other revenue, the Catastrophe Reserve Trust Fund (CRTF), public securities, company assessments, and reinsurance.[119]

SB 900, passed by the 84th Texas Legislature, took effect on September 1, 2015 and changed TWIA's funding structure. For 2016, TWIA has secured funding of $4.9, the highest level of funding since 2009, sufficient to fund claims associated with over 99% of all modeled hurricane seasons, or a 100 year season.[120]

TWIA's new funding structure is, in order:

TWIA premiums and amounts in the Catastrophic Reserve Trust Fund (CRTF)

- $500 million in pre-event Class 1 public securities
- $500 million in Class 1 company assessments
- $250 million in Class 2 public securities
- $250 million in Class 2 company assessments
- $250 million in Class 3 public securities
- $250 million in Class 3 company assessments
- Sufficient reinsurance, including both traditional reinsurance and catastrophic bonds, so that total funding is at least equal to a hurricane season with a 1% probability.

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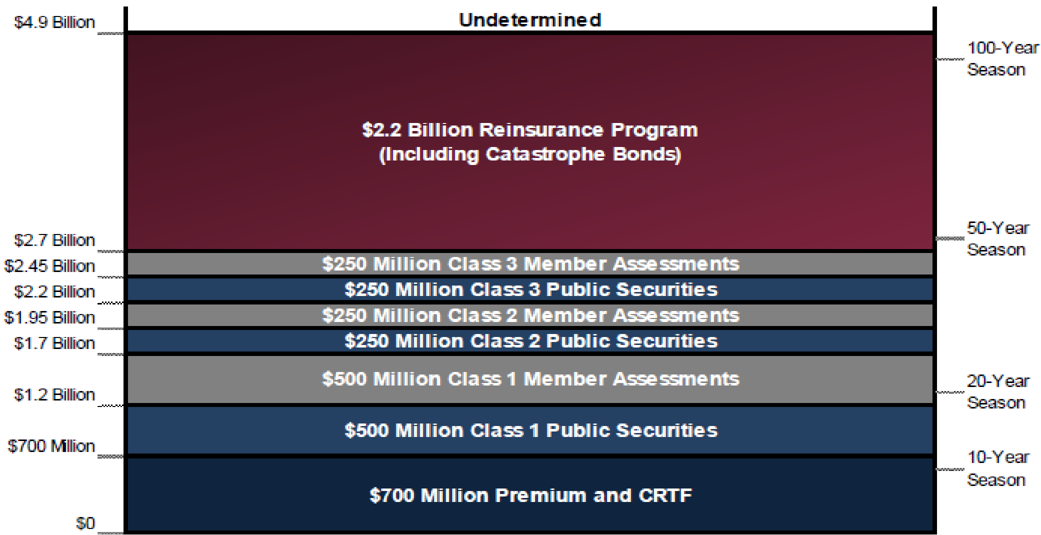
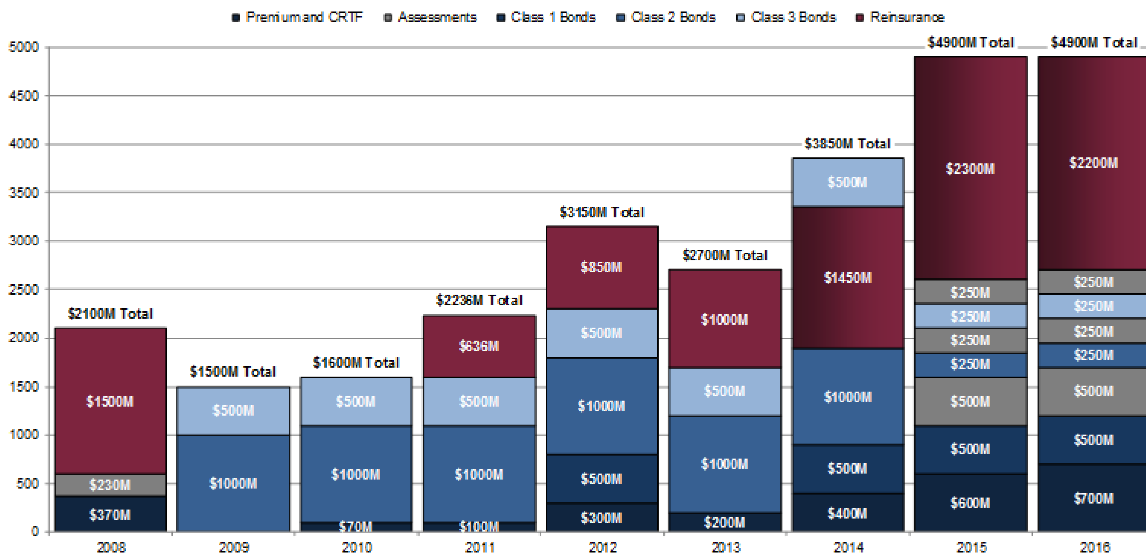
[118] Texas Windstorm Insurance Association - Fact Book, July 27, 2016
[119] Ibid.
[120] Ibid.



Storm frequencies based on modeled losses using TWIA exposures as of 12/31/15 [121]

Historical Funding Comparison



Funding for 2008 shown as it existed for Hurricane Ike, post-Hurricane Dolly; unlimited additional funding available via reimbursable assessments
Funding for 2009-2011, 2013 assumes $0 Class 1 Public Securities issuable; 2012, 2014-2015 include $500 Million pre-event Class 1 Public Securities
Funding for 2015 shown as of September 1, 2015, incorporating SB 900
Funding for 2015-2016 incorporate bond repayments that differ from prior years [122]

[121] Texas Windstorm Insurance Association - Fact Book, July 27, 2016
[122] Ibid.

TESTIMONY

On October 5, 2016, the Senate Committee on Business & Commerce heard testimony from John Polak, TWIA's General Manager, on the changes made to TWIA's operation, namely SB 900, passed by the 84th Texas Legislature in 2015, which impacted TWIA's funding, operations, and governance. The bill:

- Required changes to TWIA's loss funding structure, including provisions relating to reinsurance, requiring TWIA to fund to at least a 100-year storm season. The bill requires this level of funding every year from the following sources: TWIA premiums and the CRTF, a combination of $1 billion in company assessments and $1 billion in bonds repaid first by TWIA policyholders and by all coastal policyholders, if necessary, and sufficient reinsurance or other risk financing to achieve the 100-year storm season;
- Required changes in the Board composition to a 3-3-3 industry/coastal/inland structure from a 4-4-1 industry/coastal/inland structure;
- Authorized a depopulation program that encourages the transfer of Association policies to insurers through the voluntary market or assumption reinsurance. While the voluntary market program allows individual policies to obtain coverage with private insurers as they renew, assumption reinsurance allows large numbers of TWIA policyholders to re-enter the private insurance market at once. Under the assumption reinsurance program, policyholders are guaranteed comparable rates and coverages for the first year and the option to renew for at least three years. All policyholders will maintain their ability to choose their own agent, and may stay with TWIA if they desire;
- Authorized TWIA to issue a policy for temporary coverage (up to 30 days) if a TDI-approved inspection verification form or other inspection form adopted by TDI has been issued for a structure before the WPI-8 is secured; and,
- Allowed TWIA's Commissioner to contract with an administrator (Managing General Agent or Third Party Administrator) to manage the Association and administer the plan of operation if it is in the best interest of policyholders and the public.[123]

RECOMMENDATIONS

The Committee has continued to monitor the progress being made by the Texas Windstorm Insurance Association (TWIA) to implement a policy of depopulation of policy holders through the introduction of competitive private insurance market participants into the coastal areas. The policy on its face appears to be working, and the Committee recommends continued monitoring and updates from TWIA and the Texas Department of Insurance to the Legislature. These updates should include whether the number of policy holders continues to decline and whether new market participants continue to provide meaningful alternatives to the insurer of last resort.

[123] Testimony by John W. Polak, Texas Windstorm Insurance Association General Manager, to Texas Senate Committee on Business & Commerce, October 5, 2016.

d. The regulation of public insurance adjusters; and

BACKGROUND

In the 84th Session, SB 1060 by Senator Hinojosa was signed into law, which prohibits public adjusters from soliciting contracts and selling to attorneys. A public adjuster may not directly or indirectly solicit employment for an attorney in connection with a claim for loss or damage that the license holder negotiates, investigates, or adjusts on behalf of an insured. In addition, under SB 1060 a public adjuster may not accept any form of payment or compensation, other than an amount owed under a contract with the insured, for a claim for loss or damage that the license holder negotiates, investigates, or adjusts on behalf of an insured. [124]

SB 1060 was necessary to address the lawsuits being filed against property insurance companies across Texas alleging underpayment of hail damage claims. Typically these lawsuits originate with a public adjuster knocking on a property owner's door promising a free roof from hailstorm damage.[125] Other public adjusters immediately refer their property owner clients to a lawyer and have the property owner enter into both a legal contract and public adjuster contract simultaneously. That contract provides the lawyer with a 30 to 40% contingency fee payable out of any insurance proceeds obtained.

The enactment of SB 1060 prevents an emerging industry in Texas of public adjusters taking advantage of insurance claims for significant personal financial gain, specifically in hail storm situations. This practice affects homeowners' insurance premiums and coverage, and causes insurance costs to significantly soar for all Texans.[126]

TESTIMONY

On October 5, 2016, the Senate Committee on Business & Commerce heard testimony from from Jim Beneke with the Texas Association of Public Insurance Adjusters. Beneke explained that public adjuster licensing law changes made in SB 1060 cleared up certain property claims practices, especially weather-related catastrophes such as wind, hail and flood.

Now the law clearly states that public adjusters:

- Contract with policy holders must make an attempt to perform the services of a public adjuster.
- Must not contract with an insured with the sole intent of referring the claim to an attorney.
- Must not give or receive a referral fee to or from anyone for any reason or derive any financial benefit from a construction, repair, salvage, or other firm involved in a claim.
- Must be familiar with, and act in accordance with, Texas law as defined in the Penal Code.

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[124] Author's/Sponsor's Statement of Intent, 84(R) Bill Analysis for Senate Bill 1060 by Senator Hinojosa.
[125] Ibid.
[126] Ibid.

These changes have led to positive change in the industry.[127]

RECOMMENDATIONS

Despite the recent enactment of SB 1060, a relatively small group of roofers, contractors, public adjusters and lawyers continue to manipulate the law to produce mass claims and lawsuits. The following recommendations have been suggested to further increase consumer confidence in industry practices:

- Streamline the appraisal process.
- Better enforce existing rules and regulations related to barratry, case run, insurance fraud and the unauthorized practice of public adjusting.
- Increase public information and education for consumers to help them know their insurance rights and how to recognize fraud and abuse.

[127] Testimony by Jim Beneke, Texas Association of Public Insurance Adjusters, to Texas Senate Committee on Business & Commerce, October 6, 2016.

e. The current consent policy for state disclosure of personal data.

BACKGROUND

When a string of government officials began conducting official business on private email in an attempt to circumvent public information laws, SB 1368 by Senator Fraser, 83rd Texas Legislature, passed into law, codifying existing Texas Attorney General opinions that expressly provided it was the content itself, not the device, that determined whether a communication was subject to the Public Information Act (PIA). The Attorney General had consistently ruled that if one is conducting official state business on a private device, that communication is subject to the PIA.

During the interim of the 83rd Texas Legislature, some government agencies responded to the new law, claiming that they could not release documents in which government officials conducted government business on private emails because their respective agency did not have custody and control of the computing device on which the emails are accessed.

SB 1087 and the identical HB 1764, both filed during the 84th Texas Legislature in 2015, sought to address this concern. The legislation sought to make it clear that an officer or employee of a state governmental body does not have a personal property right to the public information that they created or received in the performance of their duties. Further, it required the surrender of that public information and gave a state agency the right and responsibility to compel the surrender of that information. This proposed change in law would not impact personal or private information, it would only affect communication in which one is conducting official business on a private device. Both bills failed to pass.

TESTIMONY

The Committee held an interim hearing on Wednesday, March 30, 2016 to study the charge and coordinated with the Office of the Attorney General to provide testimony. However, representatives from the Office of the Attorney General failed to appear before the Committee on the assigned date.

RECOMMENDATIONS

In the absence of substantive testimony provided to the Committee, we do not have a recommendation on the charge at this time.

Appendix A

TDI Residential Property Hail Litigation Data Call Overview

(Executive Summary as provided to Senate Committee Business and Commerce October 5, 2016)

SENATE BUSINESS AND COMMERCE COMMITTEE INTERIM CHARGE #2

TDI Residential Property Hail Litigation Data Call Overview

On February 24, 2016, and March 14, 2016, Commissioner Mattax received requests from the Chairs of the Senate Business and Commerce Committee and the House Insurance Committee, respectively, to collect data on hailstorm claims litigation in Texas to assist the committees with their interim charges on the topic. Accordingly, in March 2016, the Texas Department of Insurance (TDI) developed a draft data call to gather information about the cost of weather-related residential property claims and the incidence of litigation of these claims. The data call was designed to collect information TDI did not already have from its residential property statistical plan. TDI published the draft data call on its website, inviting written comments and announcing an April 21, 2016, public meeting to discuss the data call, which was led by Commissioner Mattax. TDI received written comments from eight interested parties, and six people commented at the April 21, 2016, meeting. TDI made several changes to the data call in response to comments and issued the data call on May 20, 2016. TDI gave insurers 90 days to complete the data call, with responses due on August 19, 2016. Insurers comprising about 140 separate insurance companies submitted responses to the data call.

Data Call – Three Sections

Section I asked for a 5 percent random sample of all wind and hail claims for events in 2010-2015. All admitted companies except farm mutual insurers were required to report Section I data. TDI did not require farm mutual insurers to report because they are exempt from reporting data under TDI's *Statistical Plan for Residential Risks*.

Section II asked for a 100 percent sample of all wind and hail claims for nine specified events (only the top 15 companies with paid claims for the nine specified events were required to respond, optional for other companies including farm mutual insurers).

Both sections I and II requested

- basic information about the policy
- significant dates in each claim's history
- insurer costs associated with the claim
- whether an attorney or public adjuster (PA) represents the claimant
- attorney, PA, and suit-related information, and
- information on pre-suit settlement efforts.

Section III required companies to complete an underwriting survey, which asked companies about actions such as nonrenewals, reductions in coverage, more restrictive underwriting guidelines, and rate changes, either statewide or in particular regions, in response to increased weather-related litigation (all admitted insurers except farm mutual insurers were required to respond to the survey).

TDI Residential Property Hail Litigation Data Call Overview

Data Call Challenges

- Some companies had to manually review claim files to provide the information. Some companies did not report information requiring manual review.
- One top 10 insurer informed TDI that its complete data will not be available until November 30, 2016. Another top 10 insurer did not include data from two of its companies.
- While TDI reviewed the data for reasonability, completeness, and consistency with other data sources, TDI did not audit or verify the data because this is outside the normal practices for data calls and would have required TDI to conduct on-site reviews of insurers' books and records. TDI excluded companies with significant outstanding data questions from the preliminary results. However, TDI is still communicating with some companies to resolve outstanding data questions with the goal of including that data in TDI's final analysis.

Data Call and Market Information Summary

- The results should be considered **preliminary**. The review and analysis is ongoing as TDI is still receiving corrections from companies and analyzing the data.
- TDI's results are based on 40,000 randomly sampled windstorm and hail claims.
- To identify any regional differences in trends, the state was divided into 10 different geographic regions based generally on the rating territories TDI promulgated before the enactment of SB 14 (2003).

Claims involving attorneys or PAs: The data indicates that claims involving attorneys or PAs involve higher payments to claimants (referred to as "losses") and higher settlement expenses for insurers (referred to as "allocated loss adjustment expense"). The data indicates the cost of an average claim with an attorney or PA involved is 3 to 4 times the cost of a claim without an attorney or PA involved. Because the loss and expense data in the last two years of the Hail Litigation Data Call is immature, TDI cannot come to any definite conclusions on trends in the average cost per claim for claims involving attorneys or litigation. The data is immature because more recent years tend to have a larger number of claims that have not yet been reported or have not been settled by the insurer. (Page 15)

Claim frequency: Overall, in the last four years, the frequency of hail claims has been below the 16-year average. A period of 16 years was selected because 2000 is the first full calendar year where TDI is able to distinguish hail from windstorm claims. Windstorm

claim frequency and costs have been below the longer-term historic average, but windstorm claim frequencies are subject to more variability because of hurricanes, which are infrequent but can be severe. However, the cost of hail claims over the last four years is 10 percent above the 16-year average. (Page 23-24)

Trends: TDI examined trends in windstorm and hail claims by region. The data shows a spike in hail claim frequency in the Panhandle in 2013, and a smaller spike in South Texas in 2012. This means there were large hailstorms in those areas. The data also shows a spike in the average loss per windstorm and hail claim in South Texas, consistent with the data in the Hail Litigation Data Call. There is not an equivalent spike in severity in other parts of Texas. (Page 27)

Claims with lawsuits: Beginning in 2012, there was an increase in the percentage of windstorm and hail claims involving attorneys, lawsuits, or PAs. (Page 6)

Claims with lawsuits in South Texas: The data indicates a majority of claims with attorney or PA involvement are in South Texas. South Texas accounts for 4 percent of all sampled windstorm and hail claims and about 53 percent of claims with known attorney or PA involvement. (Page 7)

South Texas lawsuits: South Texas accounts for about 60 percent of claims involving lawsuits. (Page 8)

Underwriting profits: Insurers have been able to consistently make an underwriting profit for homeowners insurance in Texas in 2012-2015. However, because Texas is a state with exposure to both hurricane and severe thunderstorm events, it is reasonable to expect insurers to make an above average underwriting profit in years with no hurricanes or less than average severe thunderstorm events. Similarly, it is reasonable to expect insurers to make a below average underwriting profit (or sustain an underwriting loss) in years with significant hurricanes or greater than average severe thunderstorm events. (Page 19)

Deductibles: While average windstorm and hail deductibles have increased throughout the state and substantially in some areas, there is no clear pattern of deductibles increasing in reaction to litigation on claims from weather-related perils. The pattern appears to be consistent with insurers increasing deductibles in areas where insurers are concerned with managing hurricane risk exposure. (Page 31)

Coverage changes: Statewide, the percentage of homeowner policies with the broadest coverage dropped after the mold crisis of 2002. Since the mid-2000s, this percentage has been increasing, but has remained relatively constant since 2013. While, in the last

four years, the Panhandle has seen a slight decline in the percent of policies with broadest coverage, no clear pattern associated with windstorm and hail is apparent. Fourteen companies increased their use of restrictive endorsements, tightened their underwriting guidelines, or did both for new or renewal business. Specific geographic regions include coastal areas of Texas and Cameron, Willacy, and Hidalgo counties. (Page 34)

Underwriting actions: In response to the Underwriting Action Survey, seven insurers stated they intentionally reduced, limited, or stopped writing policies in Texas as a direct result of increased claims litigation from weather-related perils; two of those companies also nonrenewed policies. The counties affected include Hidalgo, Maverick, Webb, Potter, and Randall. One company increased its minimum wind deductible for new business policies statewide. Twelve companies stated that they have increased rates for a residential line of insurance as a direct result of claims litigation. (Page 41)

Rates and average premium: TDI reviewed data from rate filings made by insurers with significant market share in areas that have reportedly experienced increased levels of hail litigation. For these areas, the data does not show a systematic pattern of rate increases that exceed the statewide increase. Rates follow losses, however, so companies may not have reflected expected costs for hail litigation in their rates yet. (Page 42)

TDI also reviewed industry aggregate average homeowner premiums statewide and by region. The data did not show a clear pattern of average premiums increasing greater than the statewide average in areas experiencing increased amounts of attorney or PA involvement and litigation.

Appendix B

Map of Rating Territories

(TDI Presentation as provided to Senate Committee Business and Commerce October 5, 2016)