[First half of Tape 103B HB2279 and other bills in discussion]

SPEAKER: Chair lays out on second reading House Bill 668. Clerk, read the Bill.

CLERK: HB668 by Junell relating to civil revenues for deceptive trade practices.

SPEAKER: Chair recognizes Mr. Junell.

JUNELL: Mr. Speaker, Members, the Deceptive Trade Practices Act as originally envisioned was to protect consumers. What has happened over the past several years as a result of expansion by the courts, we now have developed a new remedy in law that actually duplicates other actions. Mr. Speaker, I have a complete floor substitute which was filed, and I would like the opportunity to file that floor substitute at this time.

SPEAKER: Filing the amendment. The Clerk to read the amendment.

CLERK: Amendment by Junell.

SPEAKER: Chair recognizes Mr. Junell.

JUNELL: Mr. Speaker, Members, this is the floor substitute that again, is one of these that we have worked out over several weeks. The floor substitute provides that a parties who contract may have a valid and effective waiver of the DTPA actions. The waiver must be in writing, it must be signed by the consumer, must conform to certain size type. We leave the laundry list under 17.46B of the act in place and actually add one for price gouging in the case of an emergency. We do provide, and I think this is one of the most important things of this bill, is a claim base for the rendering of professional service, which is already covered by medical malpractice or negligence, is exempted if the essence of that claim is the providing of advise, judgment, opinion or for similar professional skill. We also exempt from the DTPA, because it is duplicitous of other causes of action, a cause of action for bodily injury, death, mental anguish or emotional distress. We also provide that a transaction project or set of transactions relating to the same project involving total consideration paid by the consumer of more than $500,000, this is subject to an amendment that will be coming on, and claims arising out of a written contract if the consideration exceeds $100,000 other than a cause of action for economic damages involving a consumer's residence. It authorizes a consumer to maintain an action if any of the following is a producing cause of economic damages. The violation of the laundry list in 17.46, the breach of warranty or a violation of the Texas Insurance Code, Article 2121. We also provide that a prevailing consumer may recover economic damages and the trier may award up to three times economic damage if the conduct committed is knowingly. What I'd like to do at this time, Mr. Speaker, is yield the floor to Mr. Hunter to explain other aspects of the bill, and then we'll all be available to come back and answer any questions if we could. Thank you.

SPEAKER: Chair recognizes Mr. Hunter for further explanation.

HUNTER: Mr. Speaker, Members, in connection with the Deceptive Trade Practices Act, I know a lot of you are interested in this, and I know a lot of people that are here today are interested in this. This is probably one of the tort reform bills that I can tell you that has been worked on, worked on and worked on. And I want you to know there's extreme significant changes being made. And I want you to be aware of these. Because I know there's been a lot of concerned what are in these bills, and I want to at least assure you from my standpoint you're going to see a big change in the way the civil justice system works, especially in connection with Deceptive Trade Practices Act. First, I think one of the biggest significant changes from current law placed in this is a new precedent being set in the state of Texas. The precedence being set is mediation being required in certain areas of the Deceptive Trade Practices Act. For the last few sessions we've been talking about alternative dispute resolution now in the area of deceptive trade and practices. You're going to see resolution of the claim early on. We've reduced the time so that if a small business owner, large business owner, medium business owner and individual is

having a claimed filed against them for deceptive acts, that you can get that resolved early in the litigation so that the expenses of a lawsuit do not incur high. I think you will see this is probably the best method, and maybe a method we can apply to other acts, to reduce what is generally called frivolous litigation. A second is something that was taken out of the Federal rules, and that's the offer of judgment. A lot of times in lawsuits you try to settle or get the parties to resolve early in the litigation. What we've set up is a system now where a settlement can occur, and the failure to comply with the settlement can invoke penalties on either party. What is the point? In this area you're going to see two trends: early resolution, and basically a resolution of litigation. A second area of this act that I think is a big change, is that-- and I want to clear this because you've heard this rumor since day one, and that is the professional language. What we've done in this act is taken-- you don't have exemptions of exempting everybody in the world, but if you are a profession and you provide the advise and the opinion that is a negligent standard and not a deceptive trade practice, and you won't be drug into every suit that is filed in the state of Texas. So you're going to see some pretty heavy changes. You're also going to see some changes in the way that we have the operation of the Deceptive Trade Practices Act, but I will assure you at least from my standpoint, you have a tougher, tighter, leaner, meaner statute, and a statute that does work and brings the pendulum back to where it should be. At this time, Mr. Speaker--

SPEAKER: Mr. Dutton?

DUTTON: I have a question for somebody, I don't know who.

SPEAKER: Mr. Dutton, if you'll wait until we finish the explanation, then all will be available for questions.

DUTTON: Thank you, Mr. Speaker.

SPEAKER: Mr. Duncan for a further explanation.

DUNCAN: Mr. Speaker, Members, we have also amended in this section the venue provisions of the DTPA, and we have allowed that venue under a DTPA cause of action will be brought in a county that would be proper venue under Chapter 15 of the Civil Practice and Remedies Code, which we've just changed through amendments, as well as we have also given the option to bring the lawsuit where the defendant solicited the transaction. In addition, we have made some significant changes here with regard to insurance issues that involve the DTPA and Article 2121. First, we have eliminated the automatic trebling provision that you have heard a lot about where-- and if there is a knowing finding then there would be automatic treble damages without the jury being able to pass on that. Secondly, we have eliminated a private cause of action based upon violations of the rules and regulations of the Texas Department of Insurance. In addition, we have, though, pulled up and added as a private cause of action under Article 2121 those previous orders or provisions similar to those matters that were concluded in the unfair Claims Settlement Practice Act. And we have-- that language has been modified to appropriately apply to a private cause of action, and would be a cause of action under Article 2121 against an insurer. We have preserved the decision in Allstate vs. Watson wherein there will be no direct action against a liability insurance carrier under these rules and under 2121 or the Deceptive Trace Practices Act. We have also included in the insurance disputes the same mediation and offer of settlement language that Todd just laid out for you previous to this. And finally, we have-- causes of action of the insurance code or under the insurance provisions or against an insurer under the DTPA would be brought only under 1746B or the laundry list or the unconscionability provisions, but not 1746A, which would be the general Unfair Trade Practices Act. Mr. Chairman, I would call on Representative Seidlits to explain the other portions-- to close on--

SPEAKER: Seidlits for further explanation.

SEIDLITS: Mr. Speaker and Members, I would like to just bring you somewhat of a history of this, because of the fact that the committee substitute is different from the floor substitute. In the

committee substitute we did some different things on different issues, but after further negotiations with some of the parties and various members in this body and in the Senate, as a part of an overall series of bills that various people could support, the language grew out and came out in this DTPA bill. This is supported by Senator Bivins in the Senate, by the Governors office. I will tell you, it is not everything that everybody wants in this bill. It's not everything that some folks who may call themselves as reformers would want. It's not everything that consumers would want. But I will tell you that it does preserve a consumer protection act for Texans. You will have an amendment that returns the bill to the current language, and that is that it is an act for consumers. One, it does not change the definition of a consumer. A consumer can be an individual, it can be a small business in a dispute with a big company. It preserves that language at it currently appears in the law. It also sets out in the provisions on waivers. It preserves the fact of significantly disparate bargaining position. And I mention those because in the testimony under DTPA we found that various groups, various businesses, may have been using the DTPA for purposes that were not consistent with the initial drafters and the future drafters of this bill. And what we have tried to do is preserve those causes of action for you and I as a consumer of retail goods or any other type of goods in transactions up and to $500,000. $500,000. So if I'm a small business man and I order business equipment that may be $145,000 from a manufacturer and they make a warranty to me and that warranty does not hold true, I still can bring that action under the Deceptive Trade Practice as a small business owner. And that's very important. It's very important because a lot of our small business owners in dealing with large manufacturers or large distributors, don't have the wherewithal to stand up to some of the big companies,. And the Deceptive Trace Practice Act, the Consumer Protection Act, should protect those consumers as a small business just as if it were you or I going into the store and buying a toaster that was defective. It also sets a standard for what I call "Big Boys." If I am in business and I have a lawyer that represents me and I enter into a contract at arms length negotiations with another company and they have their lawyers, we work out all the details of the contract for the project that I'm supposed to do for them, then that should be governed by the contract. And this bill says that you don't use the DTPA, the Consumer Protection Act, in that type of situation to get one-up on somebody in what should be a business deal that is contracted between two people who can hire lawyers, get the right advise and go through a contractual relationship. It's already been explained about the professional advice or opinion, but I want to tell you that it preserves the right of a consumer that if someone makes a misrepresentation to me, a professional, on what they can do, like "I'm the best lawyer; I can get you $200 million dollars in your lawsuit." If I misrepresent a fact to you, if I misrepresent my ability as a professional, then, yes, the DTPA, the Consumer Protection Act, is actionable. I can take advantage of that against a professional. And I think that's very important for the consumers of this state. Let me mention, too, that in this bill that we came to language that most all folks could support, is that the DTPA, the Consumer Protection Act, encompasses economic damages, those economic damages apart from pain and suffering. We had a lot of folks, realtors, other folks that came before the committee and they testified that the unknown of these non-economic damages was causing insurance problems, was causing them to have to settle cases which they would not have otherwise settled, and was basically an abuse of the system. So we have set it at economics. But we also recognize the case that if you or I bought a piece of property, something was wrong with that, it caused anguish, basically to my family to live there, to my kids, to my wife, that that action is preserved that I can get mental anguish damages in that situation. But you also would have to show knowingly that the defendant knowingly took that action, knowingly made that misrepresentation, and basically the definition is actual awareness at the time of the misrepresentation. That is, I think, very important for the consumers of this state to know that yes, if they come in and disrupt my life because of a misrepresentation, that I can still recover for the anguish that it causes myself of my family or others in the household. I think this bill also takes a huge step in doing away with clogging the courtrooms with lawsuits, and that is in the area of the mediation and the offers of settlement. For those of you who are lawyers or those of you who have been litigants or own businesses, you know the high cost of defense as well as the high cost of representation in pursuing these cases. And what this mediation and offers of settlement section attempts to do is to cut down on those litigation costs and bring the parties together early on in the dispute and try to encourage them to settle outside of the litigation process. And I think it goes a long way in this state to encouraging people to get together and resolve their disputes without somebody on both

sides running up the cost and the bill. I will tell you personally I don't like everything in the bill. I may have done some things different. But I think it's a collaborative effort by a lot of members, the Governor's office, Senators, Speaker's office, to come to a resolution of a issue that, in my opinion, probably has gone away from the initial intent, but is still preserves a lot of actions and we can still call it a consumer protection act and take care of those who the act was designed for. And some of those things I talked about, and I'll tell you, Mr. Dutton, are not in this right here, but will come in amendments. And if you don't see them come in the amendments, come grab me by the collar and we'll make it.

SPEAKER: Mr. Dutton, did you have a question of any of the authors?

DUTTON: Yes sir, I do.

SPEAKER: Which one?

DUTTON: Why don't I do a shotgun, Mr. Speaker; anyone I hit.

SPEAKER: Do you yield, Mr. Junell?

JUNELL: If it's an easy question, I yield. Otherwise, one of the other authors is going to be back out there, Harold, so yes, sir.

DUTTON: All right. And I appreciate, Rob, what Curtis just said was that some of the things I guess I was going to ask had to do with some amendments that will follow. But I think it's important first to ask in terms of the economic loss, now, this bill essentially limits the recovery of damages to consumers to economic loss. That's not going to be changed by an amendment.

JUNELL: Yes. We still do treble damages, but it's limited. And as you know, Harold, in every case involving the DTPA, and I can't think of an exception, there is a companion other remedy that's going on. Whether it's products liability, straight breach of warranty, fraud, negligence, something like that. So but the DTPA was designed to remedy economic loss and not particularly pain and suffering and mental anguish and things of that nature.

DUTTON: Well, yes, I understand that. But I'm just saying that the way the bill is currently drafted you're not going to change by amendment the ability of a consumer to recover any of these non-economic damages.

JUNELL: Harold, one of the things there's an amendment that's going to be offered in a minute that we're accepting that provides if it...

[End of Side A]