SUBJECT: Establishing legislative intent for nonsubstantive revisions of statutes

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 9 ayes — Wolens, Bailey, Brimer, Counts, Craddick, Danburg, Longoria, McCall, McClendon

0 nays

6 absent — S. Turner, Hilbert, Hunter, D. Jones, Marchant, Merritt

WITNESSES: For — *Registered but did not testify:* Bob Kamm, Texas Municipal League Intergovernmental Risk Pool

Against — None

On — Steve Collins, Texas Legislative Council

BACKGROUND: Under Government Code, sec. 323.007, the Texas Legislative Council (TLC) periodically must revise Texas statutes to make them more accessible, understandable, and usable without altering the sense, meaning, or effect of the law. As part of this process, the TLC reclassifies and rearranges statutes in a more logical order; employs a numbering system and format that will accommodate future expansion of the law; eliminates repealed, invalid, and duplicative provisions; and improves the draftsmanship of the law.

In *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W. 3d 27 (Tex. 1999), the Texas Supreme Court held that an omission from a 1981 recodification of the Tax Code made a substantive change in the law regarding who may apply for a sales-tax refund. The court held that the codification must be given effect when specific, direct, and unambiguous code provisions cannot be reconciled with the prior statute. The court also ruled that general statements of the Legislature's intent that a recodification is nonsubstantive cannot revive repealed statutes or override the clear meaning of new, more specific statutes.

In rejecting the Legislature's stated intent that the recodification was nonsubstantive, the court in the *Fleming* decision held that "specific, unambiguous statutes are the current law and should not be construed by a

court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word . . . or application of the literal language of a legislative enactment would produce an absurd result."

In *City of La Porte v. Barfield*, 898 S.W. 2nd 288 (Tex. 1995), the Supreme Court ruled in a case involving a waiver of sovereign immunity — the doctrine generally shielding governmental entities from liability unless specifically waived by statute. Certain statutes establish liability when "persons" take certain actions, such as retaliating against a worker for filing a workers' compensation claim. Government Code, sec. 311.005, the Code Construction Act, defines terms in the statutory codes, and the definition of "person" includes a governmental entity. Part of the court's deliberations involved reviewing lower court decisions concerning whether recodifying the anti-retaliation statute into the new Labor Code changed the definition of "person" and thereby constituted a waiver of sovereign immunity for governmental actions, even though the Legislature intended the recodification to be nonsubstantive.

House Speaker Pete Laney appointed a special Interim Committee on Judicial Interpretations of the Law to examine Texas appellate court decisions during the previous five years. The interim committee considered cases in which courts had not implemented legislative purposes or had found statutes to be in conflict, ambiguous, or unconstitutional. The committee identified *Fleming* as an example of a case in which Texas courts had not implemented legislative purposes.

Each session, the Legislature enacts a bill that codifies, without substantive change, various statutes omitted during prior recodifications, conform codifications enacted by the prior legislature to other laws enacted by that legislature that did not amend the new codes, and makes other corrections and changes, such as renumbering statutes that have duplicate numbers.

DIGEST:

Legislative intent. HB 2809 would state that the Texas Supreme Court's *Fleming* decision is inconsistent with the Legislature's "clear and repeatedly expressed intent" in enacting nonsubstantive changes in the Tax Code and other codes and that the absence of subsequent legislative action should not be construed as legislative acceptance of the court's decision.

The bill would instruct courts to accept a nonsubstantive codification as having the same meaning as the statute before the codification. It also would establish that if there was no direct evidence of legislative intent to change the sense, meaning, or effect of a statute, courts or other entities would have to treat the change as if were a typographical or similar error.

A statute could not be construed as a waiver of sovereign immunity unless the waiver was effected by clear and unambiguous language. Use of the word "person" would not indicate legislative intent to waive sovereign immunity unless the context of the statute indicated no other reasonable construction.

Revisor of statutes. HB 2809 also would authorize the TLC executive director or a designated employee to serve as revisor of statutes. This official's editorial powers would be limited to conforming new laws into codifications, making necessary changes in enacted codifications, and renumbering or relettering sections with duplicate or missing numbers. The revisor could make editorial changes such as renumbering sections, combining sections, substituting numerals for written words, and correcting manifest clerical, typographical, grammatical, or punctuation errors and obviously misspelled words.

In making the identified statutory corrections and consolidations, the revisor would have to publish the proposed actions in a form designed to identify clearly each proposed action and its purpose. The revisor would have to file notice of the report for publication in the *Texas Register* at least 60 days before the effective date of the proposed actions and would have to allow for public comment on the proposals.

The final actions by the revisor would take effect when filed with the secretary of state. The changes would take effect on the date designated, but no earlier than the 31st day after being filed. The revisor would communicate any actions taken to each publisher of Texas statutes, which would have to reflect those actions.

The revisor would prepare legislation that would make statutory changes and corrections identified but not made by the revisor, repeal laws made unnecessary by the revisor's actions, and validate the revisor's actions.

HB 2809 also would repeal Government Code, sec. 323.008, establishing a seven-member TLC advisory committee to recommend revisions of statutes.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect August 27, 2001.

SUPPORTERS SAY:

HB 2809 would help guide courts to respect the Legislature's intent in making nonsubstantive recodifications of Texas statutes. The Texas Supreme Court rendered its decision in *Fleming* despite repeated and clear statements in the law and in an *amicus curiae* brief by several legislators that no substantive change was intended by the recodification of the Tax Code. Placing in statute an unambiguous statement of how courts should interpret nonsubstantive recodifications should help avoid future litigation.

The bill also would codify the Legislature's intent as to how courts should read statutes regarding the waiver of sovereign immunity. When the Legislature subjects governmental entities to liability, it should be accomplished clearly and unambiguously, not by accident or indirection due to a recodification.

Under the checks and balances incorporated in the U.S. and Texas constitutions, the Legislature serves as a check on the power of the courts when the courts ignore or misconstrue its intent. HB 2809 properly would establish clear legislative intent for the courts to follow in interpreting nonsubstantive recodifications.

Authorizing the TLC to serve as a revisor would help reduce confusion in the law. With so many bills being enacted simultaneously each session, it is inevitable that some statutes will be amended by two or more different bills or the same article or section number will be used for different new laws. Most statutory revision consists of editorial "housekeeping" changes that could be accomplished by means other than legislation. Many other states, including Minnesota, Wisconsin, Ohio, and Maine, authorize state agencies similar to the TLC to make editorial changes administratively.

The Legislature already delegates rulemaking authority to state agencies and establishes procedures to keep those agencies accountable. As an agency of the Legislature, the TLC would particularly aware of legislative intent and

has long experience in preparing nonsubstantive revisions. Requiring publication of proposed changes in the *Texas Register* and a formal review process would provide public notice and a safeguard against unintended consequences in the revision process.

HB 2809 would save costs and time for the Legislature by not requiring the printing and consideration of 900-page bills, such as HB 2812 this session, that outline the nonsubstantive revisions to existing statutes. The revisor could make these changes and corrections as soon as they are discovered, rather than forcing those who use the statutes to wait until the following session for the Legislature to clean up the statutes, using the work of the TLC.

HB 2809 would make it easier for the state to defend lawsuits concerning disputes about nonsubstantive revisions if the changes were made by the revisor rather than through legislative action. Any change made the revisor by definition would be nonsubstantive because the revisor's authority would be limited to making nonsubstantive changes.

OPPONENTS SAY:

The Texas Supreme Court did not render an unreasonable decision in *Fleming*, because citizens and their attorneys reasonably should be expected to rely on the plain words of a statute rather than to try to divine legislative intent. The law must be clear and unambiguous. Citizens should not have the insurmountable task of searching through volumes of session laws to determine what the law means.

Courts have their place in the Madisonian scheme of checks and balances to constrain the Legislature when it exceeds its authority under the Constitution. An independent judiciary is necessary to protect the liberty of the people. Traditionally, courts have granted great deference to legislative intent, but when a statute is unambiguous, courts should be able to ensure that the law means what it plainly says.

The Texas Constitution specifically vests the Legislature with the lawmaking power. HB 2809 would delegate some of that lawmaking authority to the TLC, a legislative agency that is not directly accountable to the voters. As with other seemingly nonsubstantive revisions, the revisor could inadvertently make a substantive change in the law, which only the Legislature should be able to do.

NOTES:

The companion bill, SB 1363 by Cain, has been referred to the Senate Administration Committee.

HB 2812 by Wolens, which would make nonsubstantive revisions and corrections to state statutes, passed the House on April 26.