SUBJECT: Establishing the Defamation Mitigation Act

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Lewis, Farrar, Farney, Gooden, Hunter, K. King, Raymond, S. Thompson

0 nays

1 absent — Hernandez Luna

WITNESSES: For — Shane Fitzgerald, Freedom of Information Foundation of Texas; Debbie Hiott, Texas Press Association and Austin American-Statesman; Laura Prather, Freedom of Information Foundation of Texas, Texas Press Association and Texas Broadcast Association; Jerry Martin, KPRC-TV/Texas Association of Broadcasters; David Peeples; (*Registered, but did not testify:* George Allen, Texas Apartment Association; Donnis Baggett and Thomas Stephenson, Texas Press Association; Gary Borders and Ashley Chadwick, Freedom of Information Foundation of Texas; Mike Hull, Texans for Lawsuit Reform; Lisa Kaufman, Texas Civil Justice League; Eric Woomer, Daily Court Review & Daily Commercial Record)

Against — None

On — Jason Byrd and Brad Parker, Texas Trial Lawyers Association

DIGEST: CSHB 1759 would add a new subchapter known as the Defamation Mitigation Act to the Civil Practice and Remedies Code. The purpose of the subchapter would be to provide a method for a person who had been defamed by a publication or broadcast to mitigate any perceived damage or injury.

The bill would establish provisions relating to the correction, clarification, or retraction (retraction) of false content by a publisher in a manner similarly prominent to the original information. The subchapter would apply to all publications, including writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information.

The bill would establish a procedure for a publisher to ask a court to abate a lawsuit if the person filing the lawsuit did not request a retraction. The statute of limitations would be stayed during the retraction process.

The bill would define "person" as an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other legal or commercial entity. The term would not include a government or governmental subdivision, agency, or instrumentality.

Exemplary damages. CSHB 1759 would prohibit a person from recovering punitive damages if the person failed to request a retraction within 90 days after receiving knowledge of the publication. The bill also would prohibit a person from recovering punitive damages from a publisher who made a retraction in accordance with the provisions unless the publication was made with actual malice.

Timely and sufficient correction. The bill would not prevent a person from filing a defamation or libel lawsuit but would allow a person to maintain an action only if the person had made a timely and sufficient retraction request or if the defendant had made a retraction.

A retraction request would be sufficient if:

- served on the publisher;
- made in writing, reasonably identified the person making the request, and was signed by the individual claiming to have been defamed or by the person's attorney or agent;
- stated with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;
- alleged the defamatory meaning of the statement; and
- specified the circumstances causing a defamatory meaning of the statement if it arose from something other than the express language of the publication.

A publisher would have 30 days to run the retraction or to request additional information regarding the falsity of the allegedly defamatory statement. The requestor then would have 30 days to provide the information. Failure to do so would prohibit the requestor from recovering exemplary damages, unless the publication was made with

actual malice.

A retraction would be timely if published not later than 30 days after receipt of the request or the information regarding the falsity of the allegedly defamatory statement. It would be sufficient if it was published in the same manner and medium as the original publication or, if that were not possible, with a prominence and in a manner and medium reasonably likely to reach substantially the same audience. This could be accomplished by being published in a later or in the next feasible issue, edition, or broadcast of the original publication.

If the original publication no longer existed, the retraction could be published in the newspaper with the largest general circulation in the region. If the original publication were on the Internet, a retraction could be appended to the original publication.

In addition to being prominently placed, a retraction would:

- acknowledge that the published statement was erroneous;
- disclaim an intent to communicate a defamatory meaning arising from other than the express language of the publication;
- disclaim an intent to assert the truth of a statement attributed to another person identified by the publisher; or
- publish the requestor's statement of facts, exclusive of any portion that is defamatory of another, obscene, or otherwise improper for publication.

A retraction involving two or more statements could deal with the statements individually in the prescribed manner.

A timely and sufficient retraction made by a person responsible for a publication would constitute a retraction made by all persons responsible for that publication but would not extend to an entity that republished the information.

Challenges to retraction or request for retraction. CSHB 1759 would set deadlines for publishers to serve notice that they intended to rely on a retraction as a potential defense or a defense to a lawsuit. A plaintiff or potential plaintiff then would have deadlines to respond to that notice.

A publisher also would be able, within a certain time frame, to challenge

the sufficiency of the retraction request. Unless there was a reasonable dispute regarding the actual contents of the retraction request, a court would rule, as a matter of law, whether the request met the requirements of the subchapter.

Information related to a retraction request would not be admissible evidence at trial. If a retraction were made, its contents would not be admissible in evidence at trial except to mitigate exemplary damages. The fact that a retraction offer was made and refused also would not be admissible trial evidence.

Abatement process. If a retraction request were not made, CSHB 1759 would allow a defendant 30 days after it filed an answer to file a plea in abatement that alleged that the publisher did not receive the written request.

The plaintiff would be able to file a controverting affidavit before the 11th day after the plea in abatement was filed, and the court would consider the matter as soon as practical considering the court's docket.

If there were no controverting affidavit, the lawsuit would be automatically abated for 60 days so the retraction process could take place. All statutory and judicial deadlines under the Texas Rules of Civil Procedure would be stayed during the abatement period.

The bill would take immediate effect if passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2013. It would apply only to information published on or after the effective date.

SUPPORTERS SAY:

CSHB 1759 could prevent libel lawsuits from being filed by offering swift and prominent corrections of mistakes that may have harmed a person's reputation. It would encourage individuals to come forward in a timely manner to request retractions, vindicate their reputation, and avoid becoming involved in costly litigation.

Those who believed their reputations had been damaged by false information would not lose their day in court and publishers still could be punished for committing libel.

The bill would apply to all defamations, whether public or private, media

or non-media, and would establish a clear structure for the prompt resolution of such disputes.

Publishers and broadcasters make mistakes, and the bill would provide them with a quick and cost-effective means of correcting or clarifying them. Publishers want to correct mistakes but cannot do so if the subject of the error fails to complain.

The bill would address digital publishing by requiring a retraction be permanently attached to information published on the Internet.

The bill would provide a "cooling off" period that current Texas libel law lacks. Thirty other states have retraction statutes dating back as far as 1882. The Uniform Law Commission adopted a uniform law in this area in 1993 and CSHB 1759 is patterned after that law.

The bill would encourage corrections to be published as prominently as the initial false information. This could do more to help individuals quickly restore their reputations than waiting for a lawsuit to be resolved long after the statement was published.

Individuals who believed their reputations had been harmed by published information still could immediately file a lawsuit and call a news conference to proclaim that the information was false. However, the lawsuit would be abated to allow for a retraction request and response.

Unlike some physical damages, injuries to an individual's reputation can be undone by early retraction instead of protracted litigation. Avoidance of lawsuits and early closure of lawsuits would be good public policy.

OPPONENTS SAY:

CSHB 1759 could limit the ability of a person whose reputation was damaged by publication of false information to collect monetary damages. It would put the burden on the individual who was the subject of false information to ask in writing for a correction or retraction. A person who failed to meet the bill's requirements to request a timely and sufficient retraction could face procedural hurdles to a libel lawsuit.

Successful libel lawsuits can serve as a deterrent to sloppy reporting and editing practices that make mistakes more likely. Publishers and broadcasters closely follow trends in libel law and could adjust their best practices to avoid being sued.

OTHER OPPONENTS SAY:

It would be better to prevent lawsuits from being filed until a person had requested a retraction and the publisher had time to respond. CSHB 1759 still would allow a person to run to the courthouse before even asking for a correction.

NOTES:

The committee substitute differs from the bill as filed in that it would:

- eliminate a definition of defamatory;
- apply the retraction process to a claim for relief, however characterized;
- allow a person who does not request a retraction to recover exemplary damages if the publication was made with actual malice;
- require retractions to be published in the same manner and medium as the original publication if possible; and
- set up an abatement process when a lawsuit is filed before a retraction is requested.

The Senate companion, SB 1514 by Ellis, was referred to the Senate State Affairs Committee on March 19.