

## **BILL ANALYSIS**

C.S.H.B. 3293  
By: Strama  
Civil Practices  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

CSHB 3293 is intended to clarify existing legislation. The proposed language specifies the duties of a constable when executing under a writ of execution, duties which may include seizing, levying or selling property. It also attempts to address issues that have arisen or may arise regarding the potential liability of constables and the counties. The problem with the potential liability was highlighted by a series of motions filed against various counties and constables across the state of Texas in which the plaintiff sought recovery of the entire amount of the underlying judgment from the county and the constable for failing to properly execute their duties. In these cases, there was no proof offered that the debtor owned enough assets to satisfy the judgment. The bill gives certain procedural rights to constables for these types of actions, including the right to a jury trial. CSHB 3293 codifies case law holding that recovery is limited to actual damages. The proposed legislation would decrease litigation costs for governmental entities through this clarification.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

SECTION 1. Amends Sec. 7.001, Civil Practice and Remedies Code, to state that a clerk, sheriff, or other officer who neglects to perform a duty required under Texas Rules of Civil Procedure or under a provision of this code is liable only for actual damages in a suit brought by an injured party. The officer may be fined for being in contempt of court. If a suit may be brought under this section or Ch. 34, then it must be brought under Ch. 34. The injured party can seek actual damages in a suit or may seek contempt fines, but may not seek both damages and contempt. Actions or motions brought under this section must comply with listed Sections in Ch. 34. Amends reference to Title 42 to reflect pertinent rules that are now in the Texas Rules of Civil Procedure. Allows for conformance with Section 86.024, Local Government Code, in dollar amount and time for contempt motions.

SECTION 2. Amends Section 7.003, Civil Practice and Remedies Code to codify prevailing case law on good faith immunity. States that the officer is not liable if the officer in good faith executes or attempts to execute the writ and defines good faith.

SECTION 3. Amends Section 34.061, Civil Practice and Remedies Code, to state that the officer is only liable for actual damages, meaning the value of property lost or damaged as a result of the officer's negligence. The injured party has the burden to prove that the officer took possession of their property and the actual value of the property lost or damaged.

SECTION 4. Amends Sec. 34.063, Civil Practice and Remedies Code, by limiting the damages for improperly numbering or endorsing a writ of execution to the actual damages. Eliminates 20 percent penalty and notice period, and requires filing of suit. Establishes plaintiff's burden to prove actual damages suffered, that the officer failed to properly number or endorse the writ, that the officer's failure precluded the levy of executable property, and that the property was not exempted from execution.

Amends Sec. 34.064, Civil Practice and Remedies Code, to eliminate liability against officer and surety for full amount of the debt, plus interest and costs. However, liability against officer and surety is not precluded since same improper actions may subject officer to liability under Sec. 34.061 or Sec. 34.067. Liability under this section was removed because it was redundant. Requires plaintiff to file suit as opposed to providing 5 days notice for a hearing in a different county. Allows Officer to amend or correct a writ already returned to the court. Imposes duty to file or amend a return within 30 days following requiring actual notice. Officer is subject to contempt if the officer improperly fails or refuses to amend the writ.

Amends Sec. 34.065, Civil Practice and Remedies Code, to clarify that if officer fails or refuses to levy or sell property subject to execution, the officer and the officer's sureties are liable only for actual damages suffered. The judgment creditor (plaintiff) has burden to prove that they have met all conditions to require the constable to go out and collect, that the property to be collected was subject to execution, that the officer failed to collect as required, and the amount of actual damages suffered. Defines property that is subject to execution as property that is owned by the debtor at the time, accessible to the officer under the law, in the officer's county, and not exempt from execution. Clarifies rules for court finding against an officer by requiring a finding that the judgment creditor expressly designated the property for execution and requested levy on the property. Defines actual damages: Puts general practice into code.

Amends Sec. 34.066, Civil Practice and Remedies Code, to state that if the officer sells property without giving correct notice or in an otherwise improper way, they are liable only for actual damages sustained by injured party. Injured party has the burden to prove that the sale was improper and the damages suffered. Requires filing suit instead of notice of a hearing.

Amends Sec. 34.067, Civil Practice and Remedies Code, to state that if an officer fails or refuses to deliver money collected, the officer and his sureties are liable to the complaining person for the amount collected and for damages at a rate of one (changed from five) percent a month on that amount. Injured party has to prove these damages. Eliminates motions and 5 day notice; requires suit.

SECTION 5. Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.068, which outlines rules governing actions under this chapter. Requires suit to be filed within a year of the original date in which the injury was made. Allows defendant affirmative defenses including mitigation of damages.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.069, which states that a Commissioners Court has the discretion to pay any judgment taken against an officer, unless the actions are found to be criminal under Sec. 39.02 or 39.03, Penal Code.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.070, which gives the party who paid a judgment under delineated sections, either the officer or the county, the right of subrogation against debtor.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.071, which clarifies duties of executing officer. Defines duty of Officer; No duty to search for property of debtor; No duty to determine ownership of property; No duty to determine whether property is exempt; No duty to determine priority of liens; No duty to make multiple levies for cash or multiple levies at the same location.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.072, which states that an officer who attempts to collect may return a writ of execution if the plaintiff is unable to identify any more executable property at the time of this first attempt to collect. Officers do not have to execute writs simultaneously or immediately. Rather, they can work on executing a writ at any time throughout the life of the writ, providing that enough time exists to complete the sale on any property levied under the writ.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.073, which states that an officer may transfer a writ to another officer in a different precinct or department, but within the same county. An officer does not have to collect or sell property that is not within their county, unless it is partially in their county and partially in a contiguous county, for example, a parcel of real property on a county line.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.074, which states that an officer's surety is only liable for the sum of the surety bond minus any amounts already paid out under the bond. Rather than defend the bond, in some circumstances the surety may deposit the unpaid portion of the bond into the court's registry allowing the court to determine the proper disposition of the sum. A surety is not a necessary party under delineated sections. Separate action may be brought against a surety who fails to pay what is due, but must be brought within 180 days.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.075, which states that if a property is claimed by a non-party to the writ (someone who is not the debtor), then the wronged party's exclusive remedy against the officer is a trial of right of property in Part VI, Section 9, Texas Rules of Civil Procedure.

Amends Subchapter D, Chapter 34, Civil Practice and Remedies Code, by adding Section 34.076, which establishes Subchapter D, Chapter 34 as the exclusive remedy for violation of Officer's duties with regard to execution of writs.

SECTION 6. Amends Section 86.024(a), Local Government Code, to provide that Sec. 86.024 is not available as a remedy when an action is also brought under Ch. 34, Civil Practice and Remedies Code.

SECTION 7. Amends Section 604.005(c) to establish that surety cannot be liable for more than amount of surety bond minus any amounts already paid out under bond.

SECTION 8. The Act cannot be applied retroactively.

SECTION 9: Effective date.

### **EFFECTIVE DATE**

September 1, 2007.

### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

In SECTION 5: Subchapter D, Chapter 34, Civil Practice and Remedies Code, the substitute removes subsections (d) and (f), and part of subsection (a) from Section 34.068 of the original bill, regarding limitations on damages that an injured party may recover.