



JOURNAL

News and Information from the Texas Civil Justice League

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Fair Liability Laws Key to Economic Growth

by Todd Staples, Texas Commissioner of Agriculture

Unwarranted government spending, government mandates, and government-allowed frivolous legal actions are all job killers. Most Texans agree that bigger government is not the solution to our economic problems. As a state representative, state senator, and Commissioner of Agriculture, my first priority has always been to find ways to stimulate the Texas economy by lowering the cost of doing business.

One of the main reasons Texas has had more success than other states in weathering tough eco-

nommic times is the strength of our civil justice system. As Vice Chair of the Senate State Affairs Committee in 2003, I joined with the Texas Civil Justice League in supporting the most significant and comprehensive civil justice reforms in our state's history. We placed caps on non-economic damages in medical liability cases, assured that only truly responsible parties pay for the harm they cause, and reduced the filing of lawsuits without merit. Two years later, while still in the Senate I voted to change our laws governing liability for



Honorable Todd Staples

asbestos and silica claims to ensure that those with serious illnesses are compensated rather than claimants who have no injury.

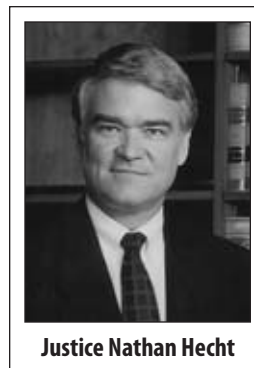
See **Fair**, page 3

Mark your calendar for TCJL's Annual Meeting on November 10, 2011

REGISTER ONLINE AT www.tcjl.com

Please make plans to join us in Austin this year for TCJL's 25th Anniversary Annual Meeting, which will be held on Thursday, November 10. The meeting will be held at the Austin Club, 110 East 9th Street, beginning at 10 a.m. The TCJL Board of Directors will convene at 2 p.m. for a short business meeting following the general membership meeting.

Justice Nathan Hecht, the Texas Supreme Court's senior Justice and liaison with the Supreme Court Rules Advisory Committee,



Justice Nathan Hecht

will give the keynote address at lunch. Justice Hecht will discuss the Court's progress with respect to the implementation of HB 274, the state of the judiciary in light of the present budgetary constraints,

and important issues currently under consideration by the Court. We expect that other members of the Supreme Court will attend the luncheon as well.

In addition to Justice Hecht, a number of prominent public officials will be on hand to talk about the challenges facing Texas businesses. We are particularly honored that Commissioner of Agriculture Todd Staples (whose guest column appears in this edition) has accepted our invitation

See **TCJL Annual Meeting**, page 7

TEXAS CIVIL JUSTICE LEAGUE

Fall 2011

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TCJL Files Amicus Briefs in Key Cases

One of TCJL's primary services to its members is the preparation and filing of amicus curiae briefs in cases of significant importance to our members. This summer we have received requests for three amicus briefs, two in cases on petition for review to the Texas Supreme Court, and one before the Florida Supreme Court.

The first of the Texas cases, *Moncrief Oil International, Inc. v. Gazprom, et al.*, involves the application of Texas' long-arm jurisdiction statute, which requires a defendant to have sufficient contacts with the state to justify the exercise of personal jurisdiction over that defendant by Texas courts. Here a Texas company (Moncrief Oil) alleges that Gazprom entered the state, misappropriated the company's trade secrets, and established a Texas-based subsidiary using those trade secrets to compete directly with Moncrief Oil. The Fort Worth Court of Appeals dismissed the case, holding that Texas courts could not exercise jurisdiction over the foreign entity, Gazprom. TCJL's brief supports the Texas company's position that Gazprom purposefully availed itself of Texas law when it

entered the state seeking access to the company's confidential information and that sufficient contacts exist to extend jurisdiction under these circumstances. The Court is expected to decide whether to hear the case in the next few weeks.

The second Texas case, *U-Haul International, Inc., et al. v. Waldrip*, presents the Court with a potentially significant change in the application of the gross negligence standard adopted by the Court in the 1994 Moriel decision and subsequent legislative codification of the standard in 1995. TCJL's brief in support of U-Haul's petition for review argues that the Dallas Court of Appeals analysis erodes the distinction between negligence and gross negligence and, if allowed to stand, subjects Texas employers of all types and sizes to punitive damages for mere negligent hiring. This potential outcome could have a substantial chilling effect on employment opportunities for Texans, especially in jobs requiring safety training. The Court is likewise expected to consider the petition for review in the coming weeks.

Finally, at the request of the Florida

Hospital Association and others, TCJL recently filed a brief in *Estate of Michelle Evette McCall v. United States of America* supporting the constitutionality of Florida's cap on non-economic damages in health care liability cases. The plaintiff is challenging Florida's health care liability reform package, which closely parallels the Texas reforms enacted in 2003. TCJL's brief addresses the sustained benefits of the Texas law to health care providers and patients alike, both in terms of continuous reductions in liability insurance costs and substantially enhanced access to care in previously underserved or unserved parts of the state. **The Florida Supreme Court's decision could have a major impact on reform efforts in other states.**

If you have an issue before the appellate courts that you believe would benefit from the League's broad-based perspective on liability issues, please contact us. The amicus program is a significant membership benefit. All briefs are prepared in-house and reflect a strong consensus of League members and, consequently, the Texas business community as a whole. ★

Fair Liability Laws Key to Economic Growth

continued from page 1

These and other civil justice reforms have enabled the Texas economy to be the envy of American businesses, entrepreneurs and investors. Doctors and hospitals who stopped delivering desperately needed health care services prior to 2003 because they couldn't afford medical liability insurance are back in business. Medical liability insurance costs have plummeted and more doctors are seeking licenses to practice here than ever before. In the last ten years, more Fortune 500 companies have made their home in Texas than in any other state, bringing tens of thousands of high-paying jobs to our communities. Texas businesses no longer fear frivolous lawsuits, runaway jury

verdicts, or crippling damages and are more confident in the ability of our courts to administer justice fairly and even-handedly.

The burden of proof has been reinforced in Texas and the proof is in the pudding: despite a national recession, Texas continues to produce more jobs than the vast majority of other states. That means Texas businesses are willing to spend money on capital investment and new employees, expanding opportunity for everyone. Of course, civil justice reform isn't the only reason for Texas' success: low taxes, controlled government spending, and common sense regulatory practices put citizens and job-creators in the driver's seat. Not only is Texas government

doing more with less, it is accomplishing more by doing less. This is the lesson we can teach the rest of the nation.

Just as in the past, I will continue to be a proud advocate for civil justice reform. It has helped my own small business grow and prosper, and I am convinced that protecting businesses from unwarranted litigation costs is one of the primary ways government can get out of the way of investment and job creation. Moreover, I will not stand idly by while Texas' immense achievements in civil justice reform are dismantled or undermined. On my watch, Texas will retain its hard-earned distinction as the nation's beacon state. ★

Court of Appeals Strikes Down Section of Asbestos Medical Criteria Law

The 1st District Court of Appeals in Houston has invalidated the retroactive application of Texas' medical criteria for asbestos-related disease under certain circumstances. In *Union Carbide Corp. v. Synatzske, et al.*, No. 01-09-01141-CV (Tex. 1st Dist. Ct. App.) (June 30, 2011), the Court ruled that the statutory requirement that a claimant take a pulmonary function test as a condition to filing suit is unconstitutionally retroactive as applied to a claimant whose death occurred prior to September 1, 2005, the date the statute went into effect.

"As the Texas Constitution clearly forbids the legislature from criminalizing certain past conduct by enacting ex post facto laws, it also clearly forbids the legislature from either cre-

ating or relieving tort liability for certain past conduct by enacting retroactive laws," states Justice Terry Jennings' opinion. "Thus, the ultimate test for determining whether a statutory provision is unconstitutionally retroactive, in regard to tort liability, requires a court to consider whether the provision has the effect of either establishing or eliminating such liability for conduct that occurred before the enactment of the statute."

The Court concluded that the pulmonary function testing requirement found in §90.010(f)(1)(B)(ii), Civil Practice and Remedies Code, retroactively eliminates the claimants' cause of action for asbestos-related injury. The decision may be appealed to the Texas Supreme Court, which has

already struck down on similar grounds a related statute that purported to limit successor liability in asbestos cases. See *Robinson v. Crown Cork & Seal, Inc.* (Tex. 2010).

In addition to the application of the medical criteria to a claimant who died prior to the effective date of the law, the Union Carbide opinion raises the much larger issue of whether the asbestos and silica medical criteria have unconstitutional retroactive application if a claimant whose exposure predates the law is unable for other reasons to take a pulmonary function test. TCJL will closely monitor this case as it moves forward in the appellate process, as well as the emergence of similar arguments in other cases. ★

E-Discovery Rules Under Scrutiny in Federal, State Courts

Both the Federal and Texas Rules of Civil Procedure allow discovery of electronic data under certain circumstances, but the rapidly changing world of data collection, storage, and preservation has sparked interest at both levels in amending the rules to keep up with technological advancement.

Texas has been a national leader in the development of E-discovery standards. The Texas rules allow a party to obtain discovery of electronic data, provided that: (1) the discovery sought is not unreasonably cumulative or duplicative or is obtainable from a source that is more convenient, less burdensome, or less expensive; or (2) the burden or expense of producing the data does not outweigh its likely benefit. The rules also require the requesting party to pay the reasonable costs of producing the data if extraordinary efforts must be used to retrieve the data. The Federal rules are generally modeled after the Texas rule, they do not contain explicit cost-shifting mechanism (although it is often implied in practice).

Last year the federal Civil Rules Advisory

Committee convened a conference to discuss whether the federal E-discovery rules should be modified to include, among other things, specific rules governing the preservation of electronic data and sanctions for failure to preserve or disclose requested electronic data. Subsequent to the conference, the committee met in April and again in September to solicit comments from both experts and interested parties regarding storage, searching, and retrieval of electronic data. The committee's discovery subcommittee is currently in the process of developing a recommendation to the full committee, which is expected by the spring of next year. The current working language for the rules changes is available on the US Courts' website.

TCJL is working with its national partner, the Civil Justice Reform Group, on the E-discovery issue at both the federal and state levels. Like the federal rules, Texas does not have a preservation rule, and significant uncertainty exists regarding the duty to preserve and potential sanctions for failure to preserve. TCJL's Policy Committee on State

and Federal Courts will study this issue as part of its charge, with the possibility of developing a specific rules proposal for the Texas Supreme Court, regardless of the outcome of the federal rules process. Another TCJL national partner, the US Chamber of Commerce, has recommended a number of discovery reforms, including explicit cost-shifting (following the Texas model) and a preservation standard. TCJL will work to achieve a coordinated response to the E-discovery challenge that maintains Texas' leadership position.

One thing is clear: the cost of discovery continues to increase as technological innovation expands the potential universe of discoverable information. Growing uncertainty over the appropriate standards for preserving and producing electronic data, coupled with the expense associated with overbroad discovery requests ("fishing expeditions"), make E-discovery a critical issue for Texas businesses. If you have an interest in this issue, please contact Carol Sims and add your name to TCJL's State and Federal Courts policy committee. ★

2012-13 Policy Committees Up and Running

TCJL takes great pride in the fact that our members directly determine our legislative priorities. The primary vehicle for member involvement at the policy level is participation in our substantive policy committees, which meet periodically both during the interim and legislative sessions to review, discuss, and develop specific legislative proposals. Our policy committees also conduct research on emerging issues, produce reports and briefing materials for policymakers, and serves as an important liaison between Texas business and state government.

For 2012-13, five committees will convene and promulgate TCJL policy for the next legislative cycle and beyond. These committees are as follows:

- **Strategic Planning.** This committee is charged with long-term planning for the next five years. It will consider such issues as organization and governance, tort “fatigue,” defensive efforts, legislative interim charges & studies, and emerging issues in civil justice and business liability.
- **Mass Torts.** This committee will monitor ongoing mass actions in Texas and nationally, craft appropriate legislative and judicial responses, and study emerging trends in mass tort litigation. Its subject matter

includes MDL courts, natural disaster litigation, climate change, bankruptcy trust disclosure, asbestos and silica medical criteria, environmental issues, and class action certification.

The primary vehicle for member involvement at the policy level is participation in our substantive policy committees

- **Indemnity & Risk Management.** This committee has the important task of developing appropriate responses and recommendations with respect to the ability of business entities to allocate risk in a fair and cost-effective manner, particularly with respect to construction law, insurance, and subrogation. The committee will also solicit and compile information relevant to the implementation of the new anti-indemnity law passed during the 2011 session.
- **General Liability.** This committee will study appropriate policies governing the liability of for-profit businesses, state and local government, non-profit entities, and health care providers. Its subject matter

broadly includes business law, eminent domain, contract and employment law, sovereign immunity, premises liability, litigation financing, health care and professional liability.

- **State and Federal Courts.** This committee is charged with monitoring and development recommendations for improvements to the civil justice system. Its issues will include court rulemaking projects (HB 274), state court reorganization, alternative dispute resolution, paid or incurred, E-discovery, qui tam expansion, attorney discipline and judicial selection.

These policy committees are vital to the success of our legislative efforts. Please get involved with one or more of these committees as your interest dictates. You can be assured that your voice will be heard and only policy decisions that are in the best interest of the great majority of TCJL members will be made. Committees usually meet by conference call, with a minimum disruption to your busy schedules. Sign up for one or more committees by contacting Carol Sims. Thank you for your past and future participation in and support of our policy initiatives. ★

RAND Institute for Civil Justice Issues Report on Asbestos Bankruptcy Trusts

A 2011 RAND Institute for Civil Justice study shows that payments from asbestos bankruptcy trusts can have significant effects on total plaintiff compensation in claims for asbestos exposure. These effects differ considerably according to the legal regime for toxic tort and asbestos claims in particular states.

RAND found that Texas law produces mixed results. The law is favorable to defendants in that liability for damages in toxic tort cases is several if the defendant is 50% or less at fault, the trier of fact must allocate a percentage of liability to responsible third parties (including bankrupt entities), and that a plaintiff’s total recovery is limited by

the amount of the verdict. Texas law, however, is favorable to plaintiffs in asbestos actions in that defendants must meet the Borg-Warner causation standard in order to include a responsible third party on the verdict sheet, plaintiffs can wait until after judgment to submit claims to bankruptcy trusts (avoiding disclosure and potential setoff), and judges have discretion whether to admit evidence of trust payments in any event.

The study concludes that Texas law allows a plaintiff to recover more than the amount of the verdict by virtue of post-verdict trust payments. In those cases, solvent defendants end up covering the bankrupt defendant’s liability (to the extent of the

trust payment) and any reduction in the payment percentage of the trust that may occur when the plaintiff seeks post-verdict (as opposed to pre-verdict) payment.

RAND’s study suggests that Texas law requiring a plaintiff to be made whole, but no more than whole, may be better achieved in asbestos cases by changing the procedures by which trust payments are disclosed and offset against the verdict. TCJL proposed such legislation in 2011. TCJL’s Mass Torts Policy Committee will revisit this proposed legislation during the interim and make recommendations whether to pursue it again in 2013, either in its existing or a modified form. ★

TCJL PAC Report:

Judicial, Legislative Races Dominate 2012 Ballot

Next year, an unusually large number of Texas appellate justices will be on the ballot, presenting the TCJL PAC with a tremendous challenge in educating Texas voters about the importance of these races to the state's economic future.

Three incumbent Texas Supreme Court justices — Nathan Hecht, David Medina, and Don Willett — face re-election next year. Judging from the past few election cycles, it will be surprising if all three do not have at least a primary and/or general election opponent. Thus far only former Justice Stephen Wayne Smith (who as a virtual unknown defeated Governor Bush's appointee, federal district judge Xavier Rodriguez, before losing the seat two years later to Justice Paul Green) has filed a campaign treasurer designation with the Ethics Commission announcing his intention to oppose Justice Willett.

The 14 Courts of Appeals total 80 justices, and 45 of them will be on the ballot next year. The usual number is 22 to 25, so you can see that the balance of many of these courts will be up for grabs. Perhaps the most crucial appellate bench is the Third Court in Austin, which decides all administrative and regulatory cases. Four of the Court's six seats will be contested, including

those held by incumbents David Puryear (R), Jeff Rose (R), Bob Pemberton (R), and Diane Henson (D).

In addition to these critically important judicial offices, all 181 members of the Texas Legislature will be on the ballot—and many will be running in substantially modified districts. Numerous experienced House members have announced their retirement from the House, and other incumbents have been paired, leaving several new districts with no incumbents. In the Texas Senate, stalwarts Florence Shapiro (R-Plano), Steve Ogden (R-College Station, Chris Harris (R-Arlington) and Mike Jackson (R-LaPorte) are not running for re-election, and others, such as Jeff Wentworth (R-San Antonio) and Wendy Davis (D-Fort Worth), have drawn tough opponents in redrawn districts. The total picture will not be settled until the filing deadline on December 12, but it is likely that we will see a significant turnover in both the House and Senate.

With this many judicial and legislative races, TCJL PAC's resources will be stretched to the limit. **Please consider contributing to the PAC's efforts to support judicial and legislative candidates who share our commitment to a fair and balanced civil justice system.** The PAC accepts contributions from

individuals and other PACs, and every little bit helps. For those of you who have supported the PAC in the past, we deeply appreciate your continued dedication to preserving and enhancing the progress we



Justice Bob Pemberton



Justice David Puryear



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Austin Attorney to Challenge Justice Diane Henson for Third Court of Appeals Seat

Scott Field, an appellate lawyer in Austin, has announced that he will challenge incumbent Justice Diane Henson for the Third District Court of Appeals. Three other incumbent justices—David Puryear, Jeff Rose, and Bob Pemberton—will likely face contested elections in 2012.

A Houston native, Field holds an undergraduate degree from Texas A&M University and a law degree from the University of Texas School of Law, where he graduated with honors and was named Order of the Coif. Following law school he clerked for Texas Supreme Court Justice Raul Gonzalez and then joined the Austin office of Baker Botts. He practiced civil litigation and appellate law under the tutelage of two former distinguished jurists, Texas Supreme Court Chief Justice Joe Greenhill and Third Court Justice Bob Shannon. Field then founded and managed the firm of York, Keller & Field, and in 2007 formed his present firm, The Field Law Firm. He practices civil trial and appellate law and has argued cases before the U.S. Supreme Court, the U.S. Fifth Circuit Court of Appeals, the Texas Supreme Court, and the Third District Court of Appeals.

Justice Henson was first elected to the Third Court in 2006. A graduate of Drake University School of Law, where she earned honors as Order of the Coif and Order of Barristers, Henson joined the U.S. Department of Justice in Washington as a federal prosecutor in the Criminal Justice Division's Public Integrity Section. In 1983 she accepted an offer from the Austin law firm of Graves, Dougherty, Hearon & Moody, where she practiced civil litigation, becoming the firm's first female litigation partner in 1986. She founded her own litigation firm in 1995. She is board certified in Personal Injury Trial Law and has taught at The University of Texas School of Law and St. Mary's Law School.

This is the first of a series of profiles on judicial candidates for appellate court seats in 2012. ★



Scott Field



Justice Diane Henson

TCJL Annual Meeting Set for November 10

continued from page <None>

to address the state's economic outlook. Other legislative leaders and judicial officers have been invited, so stay tuned for the final schedule in the near future.

The annual meeting would not be complete without a review of the statewide and legislative races in 2012. We will hear the latest news and insight from the campaign trail from Bryan Eppstein, one of the most successful political consultants in the state and a great friend of TCJL. Bryan will also comment on the impact of the 2012 presidential and federal elections on Texas. Please join us for our 25th Anniversary Luncheon. ★

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