TEXAS CIVIL JUSTICE LEAGUE JOURNAL | MORE JOBS, NOT LAWSUITS

FALL 2018

TEXAS CIVIL JUSTICE LEAGUE JOURNAL

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Chairman's Corner

by Richard Jackson

In about 60 days Texans will go to the polls to elect a slate of statewide officeholders and members of the Legislature. But, some of the most important races on the ballot are the ones most voters know the least about: judicial elections.

We say it all the time; a judge has more direct power over the lives of individual Texans than any other elected official. For the past 32 years, TCJL has worked tirelessly to inform voters about the qualifications of the people who make decisions affecting businesses and personal lives in courthouses across the state.

This year the stakes are particularly high. About half of the state's appellate justices are on the ballot. In three court of appeals districts, the Third (Austin), the Fourth (San Antonio), and the Thirteenth (Corpus Christi), this election will determine the balance of the court for years to come.

We urge TCJL members with facilities and employees in these districts to become informed about the candidates for court of appeals seats in their area and encourage everyone to vote all the way down the ballot. One of the biggest problems judges face, especially in urban counties, is ballot fatigue. The problem is worse when voters have never heard of the candidates or only have the party label to go on. The only way to combat this is to educate voters. TCJL can help with that, so please let us know how we can assist you.

Of course, we are also heading into a legislative session year in 2019. With the retirement of House Speaker Joe Straus, this session will be the first since 2009 with a new speaker on the podium. There will undoubtedly will be changes up and down the line in committee assignments and leadership positions. As always, TCJL looks forward to working with the new speaker and the membership in the same bipartisan fashion in which we have always operated. We have achieved legislative success under the four speakers who have served since TCJL's founding in 1986, and this time will be no different. We also continue to enjoy strong relationships with the Lieutenant Governor and members of the Texas Senate.

As in every session, there are difficult issues ahead, particularly with respect to the budget, taxes, and school finance. These issues tend to dominate every session and will probably do so once again.

TCJL will be heavily involved in a number of issues of critical importance to the business community. We will once again lead the Coalition for Critical Infrastructure's work on eminent domain. Last session we worked diligently with interested stakeholders to come up with improvements to the process, but a final deal proved elusive as time ran out. We expect new legislative proposals to emerge in the next few months, and we stand ready to meet with the stakeholders to hammer something out, if possible.

This year the stakes are particularly high. About half of the state's appellate justices are on the ballot. In three court of appeals districts, the Third (Austin), the Fourth (San Antonio), and the Thirteenth (Corpus Christi), this election will determine the balance of the court for years to come.

Another key issue for our members is construction liability. Last session the Legislature considered several bills pertaining to construction law but ultimately did not pass anything. Work has continued during the interim between owners, general contractors, subcontractors, architects, engineers, and others to see if common ground can be found. We look forward to continuing this work as the session approaches and to playing a positive role in the session on these difficult and complex issues.

A third area of concern involves the procedure by which health care expenses are submitted in a civil trial. Without getting too technical (you can read about the details on Page 12 in this publication), a number of problems with the affidavit process have arisen in the past few years that need sorting out by the Legislature. TCJL will work with other interested parties to find a solution that preserves the efficiency of the current process and ensures its fairness to all parties.

There is a lot to do. We thank you for your continued membership in TCJL and your commitment to working with us for all these years to improve the business climate of our state.

Chairman
Texas Civil Justice League


forum non conveniens
LITIGATION
qui tam
CONTESTED
paid or INCURRED
EMINENT DOMAIN
PUNITIVE
MULTI-district LITIGATION
damages
venue
prejudgment
INTEREST
HAIL
damages
Class ACTIONS
PRODUCT liability
RESPONSIBILITY
MEDICAL liabilty caps
case reform
REMEDIATION
good faith
statute
judgments
FOREIGN MONEY
construction

IT´S ALL ABOUT THE JUDGES

Judges wield significant power in the state of Texas. It takes the entire Legislature of 181 members to enact one new law. In the district and appellate court system, it only takes one or two judges to permanently change the course of your business or your life.

In fact, each appellate court district is roughly the size of two state Senate districts. The Fourth Court of Appeals district alone is larger than the state of New Hampshire. The Third Court of Appeals is actually a statewide court because all administrative and regulatory appeals related to state law bypass their respective district court of appeals and go straight to the Third Court in Austin. It is the final word on 95% of all cases related to statewide administrative and regulatory law.

What this means to Texas business is this – for more than 30 years, the League and our allies have worked to reform the legal system and level the playing field for all participants. There is no doubt we have succeeded in passing some of the broadest and most effective legislation in the United States.

Herein also lies the problem. Because Texas is ahead of the game in legal reform, in many instances there is no legal precedent for the courts to follow. To an outsider, it may appear that tort reform is complete because it has endured the legislative process. However, it ain't over 'til it's over. And it is not over until these years of legislation survive litigation and appeals, which can take decades. In large part, that is where we are now. While judicial interpretation seals the deal, defense of our position is an ongoing process. Texas was the leading edge into the legal reform movement and is home to many Fortune 500 companies. Texas is the "holy grail" for the plaintiff's bar simply because the money is here. If they have their way we will be the leading edge back to the dark ages of jackpot justice. We cannot afford to let down our guard.

The laws we fought so long and hard to change are now being judged. Of the 80+ appellate judges in the state, half of them are on the general election ballot on November 6. The TCJL PAC has made endorsements in 49 key races (see Page 37). It's these judges that will decide the future of Texas tort law. They all have opponents, and they all need your help. Twenty five years of hard work now stands to be overturned, one piece at a time.

If you've had a recent conversation with us and we haven't brought up the importance of the judicial races, you haven't been listening. It is critical that we elect competent, fair judges. If you have donated to the PAC, that money has gone directly to candidates we believe in. Please see our website for more information. Texas judges and Texas business needs your help. Every vote and every dollar counts.

PREPARING FOR THE 86TH LEGISLATIVE SESSION

When the Texas Legislature convenes on January 8, 2019, it will face significant challenges in the civil justice arena. Your membership in TCJL has never been more vital to preserving and enhancing the civil justice reforms that have helped fuel the "Texas Miracle."

At the same time, emerging litigation tactics and adverse court rulings have weakened some aspects of the system and opened others to question. Recent Texas Supreme Court decisions, for example, implicate the paid or incurred rule, *forum non conveniens*, construction liability, contract interpretation, and other issues of crucial importance to the business community. Using your membership dues to the maximum possible effect, TCJL has maintained an active legislative and *amicus* program to communicate business' perspective on these issues. We need your support in 2019 to sustain this valuable work on behalf of our members.

We also need your support to continue our efforts over the past 30 years to improve the judiciary. Your membership dues help TCJL make Texans aware of the importance of voting in judicial elections and urge them to compare judicial candidates based on their records and qualifications. We believe that this effort has led to significant improvement in the appellate courts, but more must be done. This election cycle alone could flip the balance in three courts of appeals districts: Austin, San Antonio, and Corpus Christi. Not coincidentally, much of the growth in the energy and technology sectors of the economy comes from these areas of the state. It is imperative that we remain involved in assuring that the appellate courts have justices that meet the highest standards of scholarship and integrity.

Additionally, keep in mind that in the 2020 election voters will no longer be able to cast a straight party vote. For judicial races particularly, this change will make it doubly difficult to inform voters of judicial candidates and persuade them to vote all the way down the ballot. This is the kind of law change that can produce the worst of unintended consequences, and we need to be ready to avoid potentially disastrous effects on the courts, beginning with the Texas Supreme Court. In 2020, Chief Justice Nathan Hecht, Justice Jeff Boyd, and the likely appointee to replace Justice Phil Johnson, who will reach mandatory retirement age prior to the election, will be on the ballot. We will need a sustained and adequately resourced effort to engage voters on these and other judicial races that will have to begin as soon as the 2019 legislative session ends.

Speaking of the legislative session, in 2019 TCJL will once again be called upon to deal with some of the most complex and difficult issues that affect the Texas business community. These include:

1. Eminent Domain. Last session, TCJL spearheaded the Coalition for Critical Infrastructure (CCI), which successfully defended against a proposal to award mandatory attorney's fees to landowners in eminent domain cases. This change would have caused a many-fold increase in the cost of right-of-way acquisition for critical infrastructure projects with no clear offsetting benefits to landowners. While the Legislature did not accept the landowner arguments in favor of this change, we expect a similar proposal in the upcoming session. We look forward to having open and productive dialogue with all stakeholders on issues we can agree on to improve the process.

2. Construction Liability. Last session, construction law issues boiled over, at times pitting premises owners against contractors and design professionals. Although no legislation was passed, these issues continue to fester, partly fueled by a rash of lawsuits against general contractors by some school districts. In the past TCJL has used its credibility to help negotiate a balanced approach to construction liability that protects the rights of parties to contract and ensures that liabilities remain insurable at a reasonable cost. We have already begun conversations with the stakeholders in this arena and need your active support to continue our involvement in this critically important sector of the economy.

3. Paid or Incurred Rule. It appears that the plaintiff's bar has found a way around the paid or incurred rule. Using so-called "letters of protection," plaintiff's attorneys promise to reimburse health care providers for the full list price of medical treatment if they do not file for reimbursement with a third-party payor, such as Medicare, Medicaid, or private insurance. Since there is no negotiated discount—the amount of medical expenses actually "paid or incurred"—the amount of expenses recoverable in litigation is much higher, vastly increasing the settlement value of the claim. Legislation to mitigate this practice was filed in 2017, but ran into to fierce opposition. In a related issue, the operation of the statute that governs the discoverability of medical expense records has become a serious problem in personal injury cases. The statute is intended to provide an efficient mechanism for submitting uncontroverted records into evidence, but under current law a defendant does not have sufficient time to verify the contents of the records and determine whether to hire an expert to contest the reasonableness and necessity of the charges. Moreover, many trial judges strike controverting affidavits altogether and rule that, since the charges are not technically controverted, they are presumed to be reasonable and necessary. It is imperative that some solution be found to these issues before the paid or incurred rule becomes a dead letter. We need your support to make this happen.

4. *forum non conveniens*. In two important recent decisions interpreting §71.051, CPRC, the Texas Supreme Court has found that the Texas resident exception to the doctrine of *forum non conveniens* in wrongful death and personal injury cases applied to anchor cases in Texas for injuries that occurred in another state or nation. In 2015, TCJL responded to one of these cases by proposing and successfully advocating passage of a statute that tightened the exception, but a recent decision involving an accident in Mississippi indicates that *forum* continues to be a problem for manufacturers and other businesses. In light of the history of the issue (TCJL has worked to restore *forum* since the Texas Supreme Court abolished it in 1990 and has passed a number of hard-fought bills on the subject), it may be time to repeal §71.051 and give trial courts the discretion to apply the common law doctrine of *forum non conveniens* in wrongful death and personal injury actions, just like they do in any other case. There does not appear to be any public policy reason for distinguishing only these types of cases and applying special rules to them. If claimants really are Texas residents, then they won't have to worry about having their claims dismissed by Texas courts in any event.

There will undoubtedly be other issues that arise during the session that will demand a share of our attention and resources. Please renew your membership as soon as possible so that we can put the necessary plans and resources in place to meet these challenges.

As always, your TCJL team deeply values your participation in the League and stands ready to assist you in any way that we can. Thank you for everything you have done to keep TCJL in the forefront of Texas business liability concerns for the past three decades.

SPECIAL ISSUE SEGMENTS

Eminent Domain

Preparing For The 86TH Legislative Session

As part of the ongoing debate on the law of eminent domain, a group of students at the Texas A&M University School of Law in Fort Worth published "A Survey of Eminent Domain Law and the Nation" in the spring of 2018. While purporting to "provide a neutral third voice in Texas to strike a more appropriate balance between individual's property rights and the need for increased economic development in Texas," the survey is, in fact, far from "neutral." It advocates for significant changes in the law, including expanding the availability of attorney's fees, ignores the positive impact of landowner protections already contained in Texas law, makes false assumptions about a private condemnor's approach to negotiating the acquisition of right-of-way, and makes numerous methodological, factual, and logical errors.

The survey's evident tilt toward the landowner side is implicit in the assertion that "a more appropriate balance" between property rights and critical infrastructure is necessary. In 2017, legislation promoted by landowner groups failed, most signally a proposal to award attorney's fees to a landowner who "prevails" by at least 20% in a special commissioner's decision. Counterproposals to provide landowners additional information at the initial offer stage, require licensing of right-of-way agents, create a state ombudsman to assist landowners, and other ideas were ultimately rejected by the landowners' negotiators. Perhaps the survey aims to inject new life into the attorney's fees proposal going into next session. Be that as it may, the Coalition for Critical Infrastructure (CCI), a project of TCJL, which engaged the landowner groups in good faith discussions for much of last session, strongly believes that the Texas eminent domain process does strike an appropriate balance between the interests of property owners and public and private condemnors. What we need is additional landowner education about the process, not wholesale changes to the law that will result in substantial new costs to the public purse and delays in constructing vitally needed transportation, water, and energy infrastructure.

In general, the survey makes a number of unfounded and unsubstantiated assumptions and claims. These include:

- **"States that award attorneys' fees when the landowner recovers more than the condemnor originally offered encourage eminent domain entities in those states to make a fair offer to the landowner at the outset."** The survey cites no evidence or data from other states to support this claim, nor does it explain why such a provision actually "encourages" any such thing. Furthermore, while the survey acknowledges that Texas awards attorney's fees when the condemnor lacks eminent domain authority or fails to make a bona fide offer (which must include an appraisal of the property), it neglects to explain why these provisions do not provide sufficient "encouragement" of "fair offers." (Later, the

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report erroneously states that Texas does not have legislation regarding attorney's fees after saying that it did.) As a general matter, Texas law only awards mandatory attorney's fees in limited circumstances where the conduct of the parties warrant the imposition of an additional penalty. Negotiating between opinions of value does not rise nearly to that level and should not be the basis of attorney's fees.

- **"A number of other states also use attorney's fees as an incentive for condemnors to use their eminent domain power judiciously."** Again, the survey presents no evidence to back this assertion nor explains in what particular way attorney's fees "incentivize" rather than punish certain conduct. More importantly, the statement implies that in Texas, condemnors do not use the power of eminent domain "judiciously." There is absolutely no warrant for this statement. All takings in Texas must be for a constitutionally required "public use." More than a century of legal precedent stands behind the courts' role in safeguarding the constitutional requirement. Additionally, the Texas Legislature does not easily dispense the power of eminent domain. If entities were engaged in the "injudicious" use of eminent domain, the Legislature would have acted to shut it down.

- The survey clearly advocates for a so-called "factor-based" approach to determining damages in an eminent domain proceeding. It further states that a **"Factor Based or Specific Rates approach may be advantageous if Texas policy makers wish to ensure uniformity and protect certain property types across the state."** Used in a minority of states, this approach requires the trier of fact to consider aspects of the property subject to condemnation, such as the value of improvements, the goodwill of a business, growing crops, or even "sentimental" or "heritage" value. Like most states, Texas law follows the "fair market value" rule, or the amount a willing buyer would pay a willing seller in an arm's length transaction. The purpose of this rule, as repeatedly stated by the courts, is to put the landowner back in the same position as before the condemnation, not to give the landowner a profit or windfall as a result of the condemnation that he or she would not otherwise have received. The "factor-based" approach would essentially abrogate this longstanding rule and introduce a variety of subjective elements into the determination of "adequate compensation." In fact, by rendering the current process completely subjective, it would have the opposite effect of "ensuring uniformity" and make every eminent domain procedure a lottery. For this reason, Texas courts and the Legislature have repeatedly rejected attempts to introduce additional elements of subjective damages into the civil justice system.

- **"Without comprehensive and legally enforceable pre-suit procedures, landowners are forced to operate without the protection of the law."** This may be true in the abstract, but it is not true in the context of Texas law. Entities that do not follow the comprehensive presuit bona fide offer process not only lose the property they are trying to acquire but pay an additional penalty in the form of attorney's fees.

- **"However, 'negotiation' could technically consist of a single low-ball offer."** This is one of the most overbroad and misleading statements in the document. First, it would be equally accurate (and misleading) to say that "negotiation could technically consist of a single high-ball offer," so the statement has no content. Second, the

see Eminent Domain, Page 34

Construction Law Analysis

Preparing For The 86TH Legislative Session

TCJL has a long history of active engagement with construction law issues on behalf of its members that dates back to the League's earliest years. Risk allocation in construction contracts became a major subject of legislative attention in the late 1980s. The battle over statutory employer and the exclusive remedy during the 1989 workers' compensation reform fight set the table for the legislative enactment of Chapter 95, CPRC, which immunizes a property owner from liability for personal injury, death, or property damage to a contractor, subcontractor, or employee of a contractor or subcontractor unless the owner: (1) controls the manner in which the work is performed; and (2) had actual knowledge of the danger or condition of the property and failed to warn.

Following the passage of Chapter 95, subcontractor groups asked the Legislature to prohibit broad-form indemnity agreements in which owners and general contractors required subcontractors to tender the defense of any action arising from the subcontractor's work, including actions alleging the negligence of the owner or general contractor. Over a period of several legislative sessions, TCJL coordinated and engaged in intensive negotiations with both general contractor and subcontractor groups in an effort to reach a reasonable compromise that preserved the ability of a property owner and general contractor to mount a unified defense of a premises liability claim. At the same time, subcontractor groups sought changes to the regulation of owner and contractor-controlled insurance programs (OCIPs/CCIPs), which are utilized by many TCJL members to provide workers' compensation and liability coverage on construction projects. TCJL worked with these groups to find common ground on OCIP/CCIP legislation that preserved these important risk allocation tools.

TCJL likewise played an important role as *amicus curiae* in the Texas Supreme Court's decision in *Entergy Gulf States Inc. v. Summers* (2009), which determined that a property owner acting as a general contractor or general contractor that provides workers' compensation coverage to the employees of contractors is an "employer" for purposes of the workers' compensation exclusive remedy. TCJL further vehemently (and successfully) opposed legislation overturning the *Entergy* decision during the 2009 session. Subsequently, in 2015 TCJL participated as *amicus curiae* in *TIC Energy* and *Chemical, Inc. v. Kevin Bradford Martin*, which concerned the proper interpretation of the Labor Code provision enabling a property owner contractually to step into the shoes of the employer of a subcontractor's employees for workers' compensation purposes. The Corpus Christi Court of Appeals had invalidated the statute, throwing the enforceability of OCIP and CCIP agreements across the state into uncertainty. TCJL backed legislation to correct the court of appeals' decision in 2017, but the Texas Supreme Court mooted the issue by deciding the case in favor of the property owner.

TCJL has participated as *amicus curiae* in other Supreme Court litigation involving contractual risk allocation in major construction projects, including, for example, *Zachry Construction Corporation v. Port of Houston Authority of Harris County* (2012) (proper construction of no damage for delay clauses); *Occidental Chemical Corporation v. Jason Jenkins* (2013) (application of 10-year statute of repose in construction defect claims); *Lower Colorado River Authority v. City of Boerne, Texas* (2014) (sovereign immunity in contract claims); *Exxon Mobil Corporation v. The Insurance Company of the State of Pennsylvania* (2017) (when does an insurance contract incorporate extrinsic documents).

The MasTec Case & the 2017 Legislative Session

In 2012 the Texas Supreme Court decided *El Paso Field Services, L.P. v. MasTec North America*. The case involved the risk allocation provisions of a pipeline construction contract in which the pipeline owner failed to provide accurate information to the contractor regarding the location of foreign crossings, the existence of which raised the costs of constructing the pipeline. The contractor sued the owner for breach of contract based on the owner's failure to compensate the contractor for the increased construction costs. The owner responded that the due diligence provisions of the contract did not relieve the contractor from the obligation to confirm the location of the crossings and that the contract required the contractor to assume full responsibility for the work and the site of the work.

The Court, following its precedent, held that the contract assigned the risk of the undiscovered crossings to the contractor, and that the owner's due diligence obligation did not limit this risk. In this respect, Texas law runs counter to the federal rule enunciated in *United States v. Spearin* (1918), which places the risk of defective plans and specifications on the party that provides the plans, not on the contractor hired to build according to those plans. Subsequent cases and numerous decisions in other states have ruled that owners impliedly warrant both the accuracy of the specifications in the contract documents and the suitability of the specifications, i.e., that if the contractor follows the specifications it will build a structure suitable for its intended purpose.

During the 2017 legislative session, Senator Bryan Hughes (R-Mineola) filed legislation to overturn *MasTec* and adopt the *Spearin* rule. SB 1215 shielded a contractor from responsibility for defects in plans, specifications, and other design or bid documents provided to the contractor by the person with whom the contractor has entered into the contract. The bill further specified that the contractor may not warrant the adequacy, suitability, accuracy, or sufficiency of the plans and specifications, and that the rule cannot be waived by contract. SB 1215 passed the Texas Senate (29-2) and cleared the House Business & Industry Committee late in the session. Late opposition by major property owners and others derailed the bill on the House floor. Reduced to a study committee, SB 1215 was vetoed by the Governor.

A similar bill, HB 2170 by Rep. Kyle Kacal (R-Bryan) proposed to codify an implied guaranty and warranty of adequacy, accuracy, sufficiency, and suitability for plans, specifications, and related documents for the construction or repair of improvements to real property. This bill did not receive a hearing.

We expect that the MasTec rule will once again take center stage in the legislative debate on these issues in 2019.

Right to Correct and Statute of Repose

In addition to the bills dealing with the *MasTec* rule, HB 2343 by Rep. Paul Workman (R-Austin) introduced legislation requiring a person with an interest in real property with an alleged construction defect to obtain a written report from an independent third-party licensed engineer prior to filing a lawsuit. The bill further required a claimant to notify each party subject to the claim and grant them the right to attend the third-party inspection. If the engineer identified a defect, the contractor would have the right to correct within 150 days, during which period the statute of limitations would be tolled. If the claimant did not follow the inspection requirement, the contractor could abate the lawsuit for up to one year and dismiss with prejudice for failure to comply. The bill excepted several types of claims, including claims asserted by a contractor, subcontractor, supplier, or design professional; claims for personal injury, survival, or wrongful death; claims involving residential property; defect or design claims under the Uniform Condominium Act; claims under TXDOT contracts; or claims involving projects receiving money from the state or federal highway fund. The bill was also amended to exclude claims involving industrial property. HB 2343 was reported from House Business & Industry late in the session and died on the House Calendar. This legislation is likely to reappear in some form in 2019.

HB 1053 by Rep. Morgan Meyer (R-Dallas) proposed to reduce the 10-year statute of repose for construction defect claims against architects, designers, or engineers from 10 years to 5 years. The national average is about 7 years. We expect this legislation to be refiled in 2019 in an effort to bring Texas law closer to the national standard.

Finally, HB 2422 by Rep. Mike Schofield (R-Houston) would have required an affiant who produces a certificate of merit in an action against a licensed architect, engineer, surveyor, or landscape architect to establish the affiant's familiarity or experience with the practice area at issue in the case such that they establish the affiant's qualifications to render an opinion. The bill cleared House Judiciary & Jurisprudence but did not reach the House Calendar.

Paid or Incurred

Preparing For The 86TH Legislative Session

In 2003, the Texas Legislature enacted §41.0105, Texas Civil Practice & Remedies Code, which provides for the recovery of medical or health care expenses "limited to the amount actually paid or incurred on behalf of the claimant." In this provision the Legislature intended to limit the recovery of health care expenses to the discounted amount actually paid by a third party payer, such as an insurance company, Medicare, or Medicaid rather than the full (and never payable) amount of the original bill.

Litigation regarding the scope of the "paid or incurred" provision has blossomed since 2003. In *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011), the Texas Supreme Court addressed charges reduced by Social Security/Medicare in light of §41.0105. The Court held that: (1) only evidence of recoverable expenses is admissible; (2) charges that the health care provider could not legally charge or recover were not "actually incurred"; and (3) only expenses that a provider has a legal right to be "paid" are "actually" incurred.

In an attempt to evade the limits of §41.0105 and the *De Escabedo* decision, plaintiff's lawyers have deployed a variety of different tactics. One of the most common is the assignment of the provider's medical bills at a discount to a third party "factor." The third party, now in possession of the claimant's medical records, has statutory authority to sign the medical expense affidavit testifying to the reasonableness of the original, or so-called "chargemaster," rates. Two courts of appeals have held that those charges constitute the "paid or incurred" amount, not the discounted charges actually collected by the provider. Moreover, a recent Texas Supreme Court decision held that a subrogation agent in Wisconsin could sign an affidavit proving up reasonable and medical expenses in Houston. This is clearly not the way the affidavit process was supposed to work. Allowing recovery of the billed amounts raises the value of the litigation and increases costs to the health insurance system as a whole.

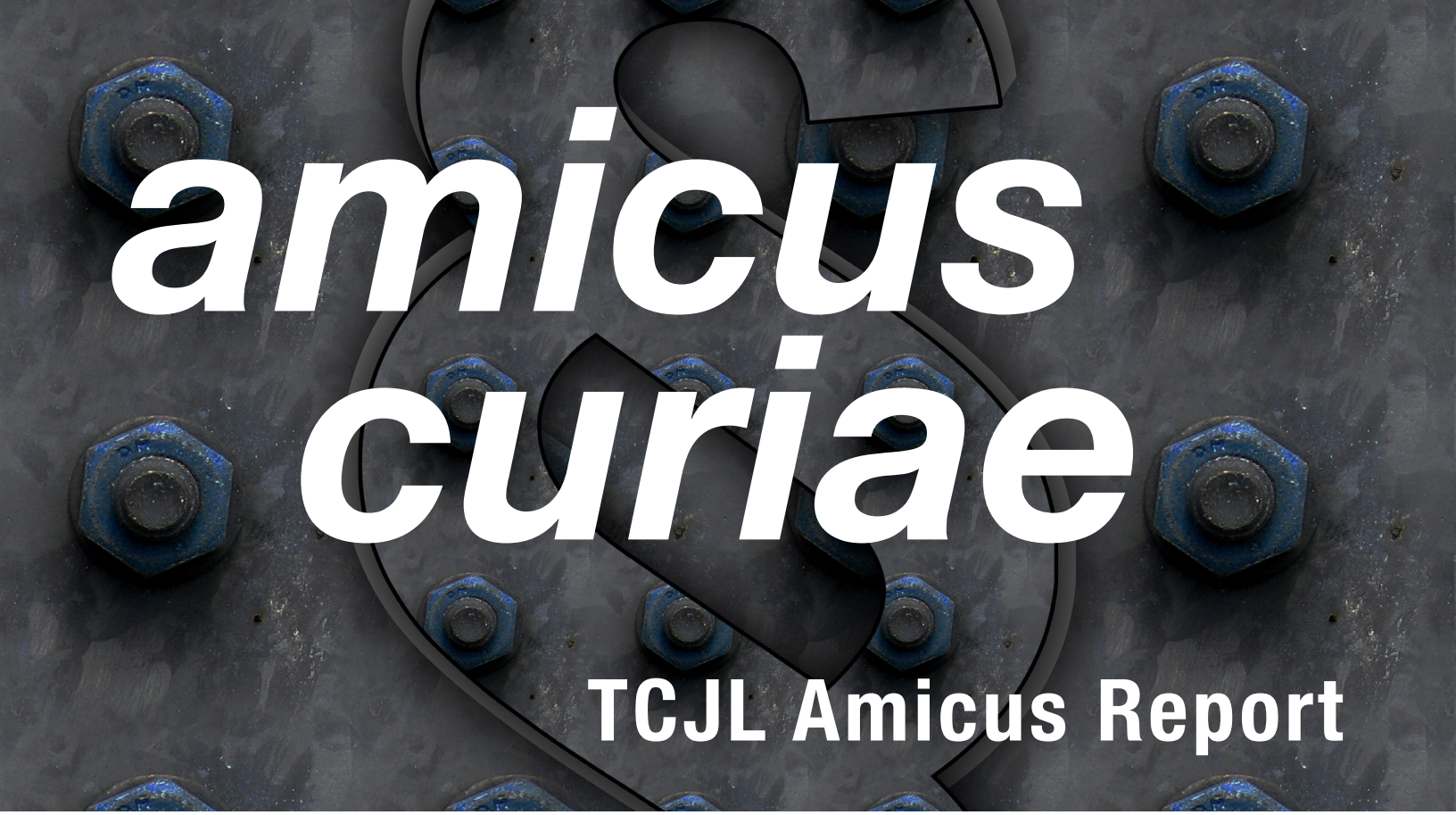
A second tactic involves the execution of so-called "letters of protection" between health care providers and plaintiff's lawyers. These letters represent an agreement between the provider and lawyer that the provider will not submit the medical bills for payment, thus avoiding the discount. The lawyer agrees to cover the provider's full billed amount out of the proceeds of the litigation. This has the same effect as the use of the factor: raising the value of the case, forcing settlements, and increasing costs to insurers and the businesses that pay health insurance premiums.

A third problem involves the pre-trial gamesmanship around medical expense affidavits. These affidavits were originally intended to simplify the discovery process when medical expenses are not in dispute. Now they are being used offensively by plaintiff's lawyers to block

> *The "paid or incurred" problem may seem technical, but the success of the plaintiff's bar in finding ways around the statute have undoubtedly increased litigation in the personal injury realm and significantly watered down the 2003 liability reforms.*

the defendant's efforts to introduce evidence of the actual "paid or incurred" amounts. Trial judges in many jurisdictions allow this practice, which once again makes it far more expensive and difficult for defendants to enforce the statutory "paid or incurred" rule. They are also making it impossible for defendants to controvert the affidavits themselves, striking defense experts on the basis that they are not physicians who provide exactly the same type of care that is the subject of the claimed expense. Once again, this practice increases the value of the lawsuit and cost of litigation, which promotes higher costs for insurers and businesses.

The "paid or incurred" problem may seem technical, but the success of the plaintiff's bar in finding ways around the statute have undoubtedly increased litigation in the personal injury realm and significantly watered down the 2003 liability reforms.



amicus curiae

TCJL Amicus Report

TCJL'S *amicus* program remained in high gear in 2017-18. In filings before the Texas Supreme Court and Courts of Appeals, TCJL addressed issues of broad and vital concern to the Texas business community, including gross negligence, contract interpretation, class actions, and abuse of the appraisal process in windstorm claims. A primary benefit of TCJL membership, the *amicus* program is open to members in good standing with important litigation matters in federal and state courts.

1. The Goodyear Tire & Rubber Company v. Vicki Lynn Rogers, Individually and as Representative of the Estate of Carl Rogers, Natalie Rogers, and Courtney Dugat; No. 18-0056

The Dallas Court of Appeals' decision in this case would subject Texas employers to two distinct threats: (1) the imposition of punitive damages for conduct barely distinguishable from negligence; and (2) the effective abrogation of the exclusive remedy of the workers' compensation system for a potentially significant number of workplace injuries. The decision upsets a well-established body of law stretching back to the Texas Supreme Court's landmark decision in *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994) and raises the unsettling specter of a return to the "some evidence of an entire want of care" standard of *Burk Royalty v. Walls*, 616 S.W.2d 911 (Tex. 1981).

Decisions such as *Burk Royalty* caused untold damage to Texas' business climate in the 1980s and beyond. The 1986 House/Senate Joint Committee on Liability Insurance and Tort Law Procedure denounced this case (and others like it) as "examples of judicial activism" that undermined the stability and predictability of the liability system. In response, the Committee recommended that the Legislature overrule *Burk Royalty*, adopt a clear and convincing evidence standard for punitive damages, and cap punitive damages. At the urging of TCJL, the Legislature adopted the first cap on punitive damages in 1987. In its landmark opinion in *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994), the Court applied a clear and convincing evidence standard and overruled *Burk Royalty*. And in 1995, the Legislature codified *Moriel*. The whole trend of Texas law since 1986 is toward fulfilling Justice Cornyn's admonition that punitive damages are exceptional in nature, and their award can only be justified in situations comparable to criminal punishment.

Moreover, the Court of Appeals decision tears a potentially grievous hole in the workers' compensation system. By diluting the definition of gross negligence and lowering the standard of review, the Court of Appeals seriously weakens the exclusive remedy that underwrites the provision of workers' compensation insurance benefits to begin with. Threatened with increasing numbers of ordinary negligence claims repackaged as "gross negligence" claims for punitive damages, employers might be forgiven for fleeing a system that has ceased to serve the beneficial purposes for which it was created. If decisions like this one go uncorrected, they could return us to the 19th-century condition in which an employee injured at work would have to file a civil lawsuit

to recover his or her health care costs and lost wages. That might be a good outcome for certain legal practitioners, but certainly not for Texas businesses and their employees.

SCOTX requested a response to Goodyear's Petition for Review, which is was due on July 30, 2018.

2. Harris County Hospital District v. Public Utility Commission of Texas and Southwestern Bell Telephone Company d/b/a AT&T Texas; No. 03-17-00811-CV

This case is on appeal to the Austin Court of Appeals from a Travis County district court. The district court's decision allowed the Harris County Hospital District to evade the class action rule that applies equally to everybody else, to re-litigate a matter that was finally resolved almost 20 years ago, and to upset longstanding principles of fairness and finality in aggregate actions. TCJL's brief argues that a decision to change longstanding public policy this dramatically should rest with the legislature, not the courts.

In 2003, the Texas Legislature passed a statute (Chapter 26, TCPRC) directing the Texas Supreme Court to use its rulemaking authority with respect to exhaustion of administrative remedies in class actions, reflecting public concern that such actions only be used in appropriate circumstances when piecemeal litigation would result in the inequitable administration of justice and waste of judicial resources. Nothing in Chapter 26, however, offers a governmental entity, or any other entity or individual, differential treatment as a member of a class. Indeed, the Legislature has in at least one important instance exercised its discretion to treat political subdivisions of the state in a different manner than other litigants. See TEX. CIV. P. & R. CODE §16.061 (exempts a right of action of the state or a political subdivision of the state from enumerated limitations periods). This statute has been on the books since 1985, so we can fairly assume that if the Legislature had wanted to exempt political subdivisions or direct the Supreme Court to adopt a rule treating them differently, it could easily have done so. Moreover, an entity seeking an exemption from the class action rule might have taken the opportunity in 2003 or thereafter to say so. No one did.

Subsequent to the enactment of Chapter 26, the Texas Supreme Court amended Rule 42 to reflect the Legislature's mandates. Of course, the primary basis of Rule 42 is Federal Rule 23, adopted in 1937. Rule 42, like its federal counterpart, establishes standards for the appropriateness and certification of a class action, as well as procedures for the appointment of class counsel and the calculation of the attorney's fees of class counsel. Neither Rule 42 nor its federal progenitor make any distinction between political subdivisions and other class members, and we can locate no state or federal authority that reads such a distinction into the rule.

In this regard, the Texas Supreme Court has opined that because Rule 42 is patterned on FRCP Rule 23, "federal decisions and authorities interpreting current federal class action requirements are persuasive authority." See *Southwestern Refining Co. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000). Moreover, following federal precedent, the

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Supreme Court requires that courts "must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met. Although it may not be an abuse of discretion to certify a class that could later fail, we conclude that a cautious approach to class certification is essential." See *Bernal*, 435. The class action at issue in this case was settled and a final judgment issued in the same year as the *Bernal* decision. That judgment was subsequently upheld twice on appeal. See *Northrup and Wiesen v. Southwestern Bell Tel. Co.*, 72 S.W.3d 1 (Tex. App.— Corpus Christi 2001, no pet.); *Northrup and Wiesen v. Southwestern Bell Tel. Co.*, 72 S.W.3d 16 (Tex. App.— Corpus Christi 2002), petition for review dismissed, 2004 LEXIS 85 (Tex. Jan. 30, 2004). The Texas Supreme Court, having just cautioned trial judges against a too hasty decision in favor of class certification, might well have scrutinized this case for flaws in the trial court's determination to certify the class, the process by which the trial court selected class counsel, or the terms of the settlement. It declined to do so. We can thus assume that this case complied with Rule 42 in all material respects and that the parties to the judgment were justified in their belief that the case was over.

Indeed, "a principal purpose of a class action settlement is to achieve finality. When class members are permitted to bring collateral challenges to a settlement, on ground that were, or could have been, raised during the settlement process, the very integrity of the settlement process is undermined." AMERICAN LAW INSTITUTE, PRINCIPLES LAW AGG. LIT. § 3.14 (2010), Comment a. Federal and state courts across the country have consistently held that collateral attack on a final judgment in a class action undermines the very purpose of class actions and contradicts the policy objectives of finality: to provide certainty, reduce costs, and prevent inconsistent outcomes. See WILLIAM B. RUBENSTEIN, FINALITY IN CLASS ACTION LITIGATION: LESSONS FROM HABEAS, UCLA SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES, RESEARCH PAPER 07-19, 2007, 830-33; AMERICAN LAW INSTITUTE, PRINCIPLES LAW AGG. LIT. § 1.03 (2010) (aggregation should further the pursuit of justice under law by enforcing substantive rights and responsibilities, promoting the efficient use of litigation resources, facilitating binding resolution of civil disputes, and facilitating accurate and just resolution resolutions of civil disputes by trial and settlement). Nothing in the record suggests that the District failed to receive notice and could not in a timely fashion have opted out of the class, objected to the appointment of class counsel or settlement agreement, or at least taken some action to indicate dissatisfaction with the outcome of the litigation. Instead, the District filed a lawsuit a decade after the settlement seeking to re-litigate the same claims. If such an action does not undermine the "very integrity of the settlement process," it is hard to imagine what would.

The District argues that Rule 42 does not apply to it because a statute directs the process by which Appellee retains counsel. See TEX. HEALTH & SAFETY CODE §281.506. This argument fails for two reasons. First, any number of entities may construct a process for the retention or the identity of counsel. A public entity may be constrained by statute, a private entity by its bylaws, and an individual by its determination only to do business with his or her attorney sister-in-law. If every class member that hired a lawyer in a prescribed fashion could claim that a final judgment did not apply to he, she, or it because the legally appointed class counsel did not get hired that way, we might as well abolish class actions altogether. That view, as we have seen, does not represent the position of the Legislature or the Texas Supreme Court.

Second, nothing in §281.506 precluded the District from going through the statutory process that it now claims exempts it from Rule 42. Having received notice of the class action as required by law, the District could have retained counsel or handed over the matter to the county attorney as in any other litigation. To come around ten years after the fact and claim special treatment not afforded to every other member of the class is neither, in the words of §26.01, "fair" nor "efficient."

Even supposing that the District could make a plausible claim for special treatment under Rule 42, its case should fail for the complete lack of substantive grounds for challenging the final judgment. In general, a "judgment embodying a class action settlement may not be challenged, except: (1) before the court in which the settlement occurred on grounds generally applicable under the governing rules of civil procedure for obtaining relief from judgment; or (2) before the same or a different court on the ground that the settlement court lacked personal or subject-matter jurisdiction, failed to make the necessary findings of adequate representation, or failed to afford class members reasonable notice and

an opportunity to be heard as required by applicable law." AMERICAN LAW INSTITUTE, PRINCIPLES LAW AGG. LIT. § 3.14 (2010). None of these grounds exist here. Allowing the District to re-litigate the *Mireles* settlement would violate the public policy promoted by the doctrine of res judicata, undermine Rule 42, and unsettle the law governing post-judgment challenges to settlement. To persuade the courts to do that, the District ought to have much better reasons than the one it argues here.

This case is currently pending before the Austin Court of Appeals.

3. EP Energy E&P Company, L.P. v. Fairfield Industries, Inc.; Re: No. 17-0926.

The Houston [14th] Court of Appeals' decision to enforce a stipulated damages clause gives an uninjured party to a contract a $20 million windfall, violating the plain, common sense meaning of the contract. It also establishes a dangerous precedent that unsettles longstanding Texas law enjoining the enforcement of contract provisions that impose a penalty in the absence of actual damages. The Court of Appeals' decision thus brings into question similar provisions in existing contracts and creates uncertainty in the law and in contracting practices going forward.

A lawsuit in which a party walks away with more than $20 million without having suffered actual damages sets off alarm bells in the business community. Our civil courts adjudicate breaches of legal duties and compensate parties to whom those breaches cause harm. If somebody hails a fellow citizen into court and asks the state to remedy such harm, that somebody should at least have to demonstrate how and to what extent the person has been damaged. We can find no indication in the record or the Court of Appeals' decision that the Respondent did any such thing in this case. Texas law takes a dim view of stipulated damages provisions in contracts because of the risk of "unjust punishment" when stipulated damages far exceed the actual damages from a breach. See §2.718(a), TEX. BUS. & COM. CODE. The Court of Appeals' opinion properly cites §2.718(a), as well as case law, for the proposition that a stipulated-damages clause is unenforceable if, in effect,

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it is a penalty. See Op. at 23; *Dresser-Rand Co. v. Bolick*, 2013 WL 37700950 (Tex. App.—Houston July 18, 2013, pet. abated); *Khan v. Meknojiya*, No. 03-11-00580-CV, 2013 WL 3336874 (Tex. App.—Austin June 28, 2013, no pet.) (mem. op.).

These laws clearly articulate a public policy against "unjust punishment" in the form of penalty imposed in a civil action. The unharmed Respondent's $20 million windfall in this case looks very much like an unjust penalty in this sense, regardless of the words used to describe it. We can find nothing in the record to suggest that the Petitioner's conduct in any way warrants such an outcome or that punishing the Petitioner and its investors, employees, and contractors in this manner serves any overriding public policy interest. We urge the court to accept review to scrutinize whether the Court of Appeals' decision results in "unjust punishment" of the Petitioner.

From a larger perspective, the Court of Appeals' decision raises serious concerns about the construction of commercial contracts and whether similar clauses will permit the award of enormous private windfalls without at least some evidence of actual damages. Further, the decision could incentivize parties to take certain actions under existing contracts in order either to exploit or avoid the effect of similar penalty provisions, resulting in uncertainty, business disruption, and future litigation. We urge the Court to accept review for the purpose of providing guidance regarding the proper interpretation of contract provisions that, as in the present case, result in the imposition of a penalty out of all proportion to economic harm.

The response to the Petition for Review was filed on July 11, 2018.

4. Texas Windstorm Insurance Association v. Dickinson Independent School District; No. 14-16-00474-CV

This case is part of a windstorm insurance crisis that compelled the Texas Legislature to intervene in 2011 to shut down a wide range of litigation abuses threatening the solvency of the Texas Windstorm Insurance Association ("TWIA"). Whereas earlier windstorms had produced relatively few lawsuits arising from contested claims, Hurricane Ike produced thousands, most of which were filed years after the storm and well after the initial claims had been adjusted and settled. It is estimated that TWIA alone will eventually pay about $1.8 billion to settle Hurricane Ike claims, hundreds of millions of which have already gone to attorneys involved in the litigation. In fact, the Texas Supreme Court has previously rejected the method used to calculate attorney's fees in TWIA settlements, which results in a 66.6% fee. See *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 428 (Tex. 1995). Clearly, business was good for someone in the TWIA lawsuit industry, just not for the millions of Texas business and individual consumers and policyholders who paid the freight. The Legislature acted as it did to make sure this particular misuse of the civil justice system never happens again.

The facts here read like a catalogue of abuses specifically addressed in HB 3. While TCJL understands that HB 3 does not control the law of this case, that does not mean that the practices in the trial court should escape this court's scrutiny, particularly in light of the fact that the Legislature acted on the basis of the injustices on display in this case and cases like it. A brief review of the pertinent provisions of HB 3 as applied to the record throws into clear relief the full and appalling extent of the improprieties that occurred below.

The Appraisal Umpire

HB 3 provides that if the claimant and TWIA cannot agree on an appraisal umpire, the commissioner of insurance must appoint the umpire from a list of qualified umpires maintained by the Texas Department of Insurance. This provision is intended to resolve the very problem that occurred here. Rather than going through the appraiser selection process as specified in the policy, in which the claimant and TWIA could request the district court to appoint an umpire in the event they could not agree on one, the claimant filed a pre-emptive motion requesting the court to appoint an umpire. The trial court then appointed a former district judge with no background in construction who did not appear on anybody's standing list of qualified appraisers in the county. TWIA understandably objected to this questionable procedure, but to no avail. Clearly, the Legislature saw situations like this one and determined that the appointment of an objective umpire with the requisite knowledge and experience with no connections to either side in the dispute could only be achieved by removing the decision from the vagaries of local politics and local relationships.

Pre-suit Notice

HB 3 requires the claimant to provide to TWIA a notice of intent to file suit within two years of receiving TWIA's notice of acceptance or denial of all or part of

the claim. If the claimant provides this notice, TWIA has the option to require the claimant, as a prerequisite to filing suit, to submit the dispute to alternative dispute resolution. If the claimant does not provide the notice in a timely fashion, the claimant waives the right to contest TWIA's full or partial denial of coverage and may not bring an action against TWIA for denial of coverage. Here, without giving any notice and without informing TWIA of any unaddressed issues, the claimant filed suit four years after the storm, two years and nine months after the claimant signed the first sworn Proof of Loss, and six months after the claimant provided a second sworn Proof of Loss representing that its total losses had been paid. To make matters worse, the initial post-litigation appraisal inspections did not take place until more than five years after the storm and after repairs had already been made. In hours of public testimony on HB 3, the Legislature heard this scenario repeated over and over again: claim adjusted and apparently amicably settled; lawsuit filed out of the blue; irregular appraisal process conducted years after the damage was done, paid for, and repaired; appraisal award comes back in multiples higher than the original loss. Had the pre-suit notice provision been in effect at the time, there would at least have been an orderly process for identifying the nature and scope of the dispute in advance and avoiding the judicial farce that played out later.

Statute of Repose

HB 3 requires the claimant to file suit within two years of receiving notice from TWIA of its acceptance or denial of all or part of a claim. This limitations period operates as a statute of repose and supersedes all other limitations provisions. TEX. INS. CODE §2210.577. Though it is a little hard to tell from the record, the limitations period would likely have commenced in the spring or early summer of 2009, more than three years prior to the date the suit was filed. The Legislature clearly determined that the civil justice system should not tolerate retrospectively manufactured claims. The courts should not, either.

Limitation on Issues and Recovery

HB 3 limits the issues that may be litigated only to whether TWIA properly denied all or part of a claim and the amount of damages. The statute further defines "damages" as only the covered loss payable under the terms of the policy (less any amount already paid), prejudgment interest from the date TWIA is obligated to pay a claim, and court costs and reasonable and necessary attorney's fees. The Legislature plainly felt the need to clarify in the law that TWIA always has the right to contest whether the alleged loss is covered by the policy, a right of which the trial court deprived TWIA in this case.

Expert Guidelines

HB 3 directs the commissioner of insurance to appoint a panel of experts to advise TWIA "concerning the extent to which a loss to insurable property was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges." The purpose of the panel is to make recommendations for the commissioner to use in publishing guidelines for TWIA's use in settling claims.

TCJL's members, together with millions of property owners across the state, are now being forced to pay for the sins of the past through higher insurance premiums. Until the Legislature shut down these abuses, the civil justice system was being used to achieve a massive transfer of wealth from the many to the few. This case is another outrageous example of the lingering impact of those abuses.

These guidelines are presumed to be "accurate and correct" in any review of the claim or lawsuit against TWIA, "unless clear and convincing evidence supports deviation from the guidelines." This provision addresses one of the core problems in TWIA litigation: the haphazard, inconsistent, and, in this case, non-existent analysis of the extent to which property damage caused by Hurricane Ike was caused by wind or water. If the guidelines had existed for this litigation, neither the claimant's appraisers nor the trial court could so easily have stonewalled or ignored TWIA's attempts to establish the extent to which the claimant's losses were in fact covered by the policy.

TCJL's members, together with millions of property owners across the state, are now being forced to pay for the sins of the past through higher insurance premiums.

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Until the Legislature shut down these abuses, the civil justice system was being used to achieve a massive transfer of wealth from the many to the few. This case is another outrageous example of the lingering impact of those abuses.

Although the law may have changed since this lawsuit was filed, the responsibility of the appellate courts to ensure that trial courts do not engage in practices that undermine the public's faith in the basic fairness and impartiality of the civil justice system has not. Here the trial court refused to inquire into a plainly inappropriate appraisal process and directed TWIA to sit down and shut up. As the Earl of Leicester said to Elizabeth II about the botched execution of Mary, Queen of Scots, things were done there that should not have been done. It is up to this court to set them to right.

The Court of Appeals reversed the trial court's decision and remanded the case for further proceedings.

5. Exxon Mobil Corporation v. The Insurance Company of the State of Pennsylvania; No. 17-0200

This case presents two issues with significant implications for Texas businesses: (1) when does an insurance policy incorporate extrinsic documents; and (2) how does one interpret industrial contracts that require parties to secure insurance and subrogation waivers to begin with? The court of appeals got the answers wrong in both cases and, in doing so, introduced a considerable measure of uncertainty into the customary and longstanding risk allocation practices of Texas businesses. If the court of appeals' decision stands and the answer is yes to these questions, however, Texas businesses that have negotiated and paid for insurance coverage will find themselves without the benefits of that coverage when they need them. The court of appeals' decision also makes a business's—or potentially any property owner's—insurer a silent party in any industrial contract, big or small, that allocates risk between the parties and requires insurance to cover that risk. In other words, the court of appeals' decision, if allowed to stand, could affect virtually every third-party construction-related insurance policy issued in Texas.

In our view, this Court's holding with respect to the appropriate standard for determining incorporation in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015) was not followed here. *Deepwater Horizon* reinforced the Court's long and distinguished record of enforcing contracts according to the clearly expressed intention of the parties, which is found first and foremost in the words on the paper. Nevertheless, courts continue to struggle with how to decide when insurance policies incorporate other contracts. We urged SCOTX to accept review in order to provide additional guidance to the lower courts with respect to these questions.

The broader effects of bolstering this Court's consistently held position to adhere to the policy language should not be underestimated. While contract disputes are part and parcel of doing business in general, Texas businesses have come to rely on a jurisprudence that encourages people to do business without undue fear that courts may later intervene to change the terms of the deal. This jurisprudence, because it is so consistent and predictable, promotes the prompt resolution of disputes and preserves judicial resources for matters involving genuine ambiguities or matters of first impression. In Texas, we do not generally re-litigate the same rule over and over again.

Unfortunately, however, on occasion a bad decision threatens to change the rule and destabilize the system. Here the court of appeals read an extrinsic agreement into an insurance policy. The policy nowhere states that it intended to incorporate such an agreement. To put it bluntly, the court of appeals distorted the underlying contract that required the insurance policy and subrogation waiver to be obtained in the first place. The court concluded that the only way liabilities can be assumed in a contract is through indemnity, but the Supreme Court has said exactly the opposite. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex. 2010). The court of appeals ignored what this Court says it means to assume "liability," and it did not look anywhere but the indemnity provision to decide what liabilities were assumed. In other words, the court of appeals simply read the other operative provisions of the services contract out of the contract in an exercise of extreme tunnel vision.

Just as importantly in an economic sense, the court of appeals' decision deprives the Petitioner of the benefit of its bargain and confers an unsought windfall on the Respondent. This result not only contravenes well-settled Texas law, but it threatens the ability of Texas businesses to manage risk and exposes them to liability they thought they were insured against. This is an intolerable state affairs that we urge the Court to correct.

SCOTX accepted review and set the case for oral argument on September 17, 2018.

JOIN THE LEAGUE

Established in 1986, the Texas Civil Justice League:

- is a non-partisan, member driven, statewide business coalition committed to a fair and equitable business climate.
- cost-effectively extends the benefits of corporate legal departments by monitoring court rulings and legislation and alerting members to challenges that threaten the state's judicial system.
- is the only statewide legal reform coalition governed by a board of directors composed of business and statewide association leaders.
- is the state's oldest and most effective legal reform organization. Business leaders and former legislators founded the Texas Civil Justice League to enact recommendations issued by the 1987 House/Senate Joint Committee on Liability Insurance and Tort Law Procedure.
- works closely with business and professional associations to achieve mutual public policy objectives.
- actively seeks and incorporates members' input into legislative proposals.
- takes fiscal responsibility seriously, leveraging membership dues into meaningful, long-term reform.
- is a national leader in the lawsuit reform movement and has assisted in the organization of similar state groups in many other states.
- is a charter member of the American Tort Reform Association and collaborates with other national groups including the U.S. Chamber of Commerce's Institute for Legal Reform.

For membership, please contact the Texas Civil Justice League by calling 512.320.0474 or by emailing info@tcjl.com

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Court Watch

Interpreting & Applying the Law

Debra C. Gunn, M.D. v. Andre McCoy (No.16-0125; decided June 15, 2018)

By a 7-2 majority, the Texas Supreme Court has upheld a significant plaintiff's verdict against a treating physician in a medical malpractice case. The decision contains a number of important procedural holdings pertaining to the legal sufficiency of the evidence, the exclusion of a defense expert's deposition at trial, and, most importantly, the sufficiency of medical affidavits filed under §18.001, CPRC.

The case arose from injuries sustained by the plaintiff when she suffered complications from a placental abruption, which occurred when she was 37 weeks pregnant. The plaintiff lost a substantial amount of blood and developed hypoxic encephalopathy, or loss of oxygen to the brain. She subsequently required twenty-four-hour-care, suffered another seizure a year following the original injury, and later died, never having recovered significant brain function. The plaintiff's husband, acting as her guardian, sued the treating obstetrician-gynecologist, the treating physician's practice, the hospital, and two on-call physicians at the hospital, an OB-GYN and a cardiologist. The hospital and the on-call OB-GYN settled with the plaintiff, and the plaintiff dropped the cardiologist from the pleadings. At trial the jury found the treating physician liable for the plaintiff's injuries and awarded more than $10.6 million in damages, including more than $7.2 million for future damages. The trial court applied a dollar-for-dollar settlement credit that reduced the verdict by $1.2 million, ruled that the practice was vicariously liable for the treating physician's negligence, and found the two defendants jointly and severally liable. The trial court eventually signed a final judgment that entitled the practice to indemnity from the treating physician. The defendants appealed on multiple grounds. The 14th Court of Appeals [Houston] affirmed the judgment, modified to reflect a voluntary remittitur of about $160,000 in the award of future medical expenses. SCOTX accepted review.

For our purposes, the central issue in the case involves the legal sufficiency of the plaintiff's medical expense affidavits submitted before trial under §18.001, CPRC. This statute permits a plaintiff to provide affidavits of a health care provider or a person in charge of medical records to provide medical expenses actually paid or incurred. These affidavits may constitute sufficient evidence of the reasonableness of the charges and the necessity of the services, though they are not conclusive and may be controverted by the defendant (though, in practice, trial judges often strike the defendant's controverting affidavits, a situation the court's opinion does not acknowledge).

In this case, the plaintiff initially filed 14 affidavits showing amounts billed, but withdrew the affidavits following SCOTX's decision in *Haygood v. Escabedo* (holding that the amounts listed on the affidavits are limited to expenses paid or incurred, not the billed amounts). The plaintiff subsequently refiled affidavits showing about $700,000 in past medical expenses actually paid. The defendants objected to the

plaintiff's §18.001 affidavits on the basis that they were attested not by the person who provided the services or the records custodian of the provider, but by insurance company subrogation agents located in Kentucky, Wisconsin, and Illinois. The defendants argued that the affidavits could not be legally sufficient to show the reasonableness and necessity of the charges because out-of-state subrogation agents are unqualified to render opinions about the cost of services provided in Houston.

Like the trial court and the court of appeals, SCOTX rejected the defendants' argument and held that the affidavits were legally sufficient, regardless of their origin, as long as they were made by a custodian of the records. In the opinion by Justice Green, the Court reasoned that the plain language of §18.001 does not specify that affidavits must be made by a records custodian of the provider or by a person with expert knowledge of the services provided or their costs, just by a person in possession in the records. If the Court disallowed affidavits by subrogation agents, Justice Green argued, it would "frustrate the Legislature's intent" to create a streamlined method of proving medical expenses in §18.001. In his discussion, Justice Green recognized that the complexities of modern health care, "what is 'necessary' is often heavily influenced by insurance companies and by what treatments and procedures they are willing to cover . . . and the reality of our health care system does not mandate" limiting "the proper affiants to medical providers and medical providers' record custodians."

The upshot of the Court's opinion, however, is that virtually anyone who happens to be in possession of medical billing records can attest to the reasonableness and necessity of charges rendered by a Texas medical provider. To make matters worse, §18.001(f) requires a defendant seeking to controvert an affidavit to hire an expert "qualified, by knowledge, skill, experience, training, education, or other expertise to testify in contravention to all or part of any of the matters contained in the initial affidavit." In other words, the statute prescribes a double standard whereby the plaintiff can establish medical expenses by affidavit of a person with no knowledge whatsoever but the defendant has to retain an expert to contest those same charges.

This result cannot be what the Legislature intended when it first enacted §18.001 in 1985. Justice Johnson's dissent, joined by Justice Boyd, points out this discrepancy and reasons that a records custodian must be "sufficiently trained or experienced in medicine to give competent testimony as to the necessity of treatment and sufficiently familiar with reasonableness of charges in the region or locale in which services were rendered to give competent testimony as to the reasonableness of amounts paid by insurance companies." Justice Johnson also contends that the records custodian should have at least some "reasonable" connection to the patient or "first-hand knowledge of the services rendered." The majority clearly felt constrained by the language of the statute in rejecting Justice Johnson's position.

This opinion illustrates the growing necessity of revising §18.001 in the next legislative session. It stands to reason, for example, that if a plaintiff can use a subrogation agent unrelated to and remote from the patient's actual care to prove medical bills, then a defendant should be able to do the same to disprove them. This result would, of course, make a mockery of the system and defeat the purpose of §18.001. Recognizing this possibility, Justice Johnson raised the specter of a constitutional challenge to the statute on the basis that it deprives a defendant of basic due process. Unquestionably, the outcome of *Gunn v. McCoy* ratchets up the stakes in the medical expense affidavit controversy.

City of Laredo, Texas v. Laredo Merchants Association (No. 16-0748; decided June 22, 2018)

In this closely watched case, a unanimous Texas Supreme Court has struck down a number of city ordinances that prohibit merchants from providing single-use plastic and paper bags to customers for point-of-sale purchases. Noting that this case is part of a larger public policy debate over the balance of power between the state and local governments, Chief Justice Nathan Hecht reiterated the Court's duty to apply the law as written and let the policymakers sort it out. "'The wisdom or expediency of the law is the Legislature's prerogative, not ours,'" declared the Chief Justice, citing a 1968 decision of the Court in *Smith v. Davis*. "We must take statutes as they are written, and the one before is written quite clearly."

The Court's decision turns on the interpretation of Section 361.0961, Tex. Health & Safety Code, which prohibits a local government from prohibiting or restricting "the sale or use of a container or package . . . for solid waste management purposes" in a "manner . . . not authorized by state law." The City of Laredo adopted an ordinance barring retailers from providing certain paper or plastic "checkout" bags to customers for the purposes of promoting, among other things, beautification, litter prevention, and flood protection. Following adoption of the ordinance, the Laredo Merchants Association filed suit for declaratory and injunctive relief. The trial court granted the city's motion for summary judgment. The San Antonio Court of Appeals reversed and rendered for the merchants, over a dissenting opinion by Justice Chapa.

Though it could have simply let the 4th Court's opinion stand and leave it at that, SCOTX granted the city's petition for review, as Chief Justice Hecht put it, "in part because similar ordinances have been enacted by other municipalities." Those cities include Eagle Pass, Corpus Christi, Kermit, Sunset Valley, Austin, Freer, Laguna Vista, South Padre Island, Brownsville, and Ft. Stockton. The Court thus determined

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TEXAS CIVIL JUSTICE LEAGUE

TEXAS CIVIL JUSTICE LEAGUE 31ST ANNUAL MEETING

November 9, 2017

Justice Melissa Goodwin
Mike Baselice

Hector Rivero, Justice John Bailey

Justice Jeff Brown, Shane Stolarczyk

Lisa Kaufman
Justice Phil Johnson

Lisa Kaufman

Julia Rathgeber, Justice Phil Johnson

Hector Rivero, Justice Brett Busby
Steve Perry

Justice Jeff Brown
Justice Scott Field

Hon. John Sharp

Luis Saenz

Justice Jeff Brown

Justice Jeff Rose
Justice Cindy Olson Bourland
Justice Dale Wainwright

Justice Melissa Goodwin, Jennifer Freel

Hon. Corbin VanArsdale, Bill Messer
Luis Saenz

Paul Solomon, Carol Sims

Judge Dustin Howell, Andrew Weber
Justice Cindy Olson Bourland
Justice Jeff Rose

Bill Oswald

Julia Rathgeber, Travis Kessler

Jennifer Freel, Justice Jeff Boyd
Lisa Kaufman

Hon. Corbin VanArsdale
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Mike Baselice
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Justice Jeff Brown

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Hon. Jaime Tijerina

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Richard Jackson, Cheryl Coleman
Driver, Melvis Driver

Shane Stolarczyk
Dr. George S. Christian

Hon. Craig Enoch

Hon. Rebecca Simmons

Mike Toth, Lisa Kaufman

Justice Jimmy Blacklock, Lisa Kaufman

Judicial Candidate Forum

January 30, 2018

Hon. Harriet O'Neill

Dr. George S. Christian

Dustin Cox, Melvis Driver
Cheryl Coleman Driver

Jennifer Freel

Hon. Jason Pulliam
Dr. George S. Christian

Donna Garcia Davidson

that rather than hearing piecemeal challenges of ordinances outside of the 4th District Court of Appeals, it would take them all at once, despite differences in detail between them. This move argued for a broad application of the pre-emption provision of §361.0961, and that is exactly what happened.

Premising its decision on the constitutional division of power between the Legislature and home-rule cities, the Court followed a long line of precedent supporting the Legislature's general power to preempt, limit, or otherwise control the exercise of a city's home-rule authority. "The question is not whether the Legislature can preempt a local regulation like the [Laredo] Ordinance," Chief Justice Hecht notes, "but whether it has." Proceeding to an interpretation of the statute, the Court finds that the Legislature has indeed preempted local regulation for the following reasons: (1) the Ordinance was adopted for solid waste management purposes, although it may have other purposes as well; (2) the statutory term "container or package" includes a single-use bag provided at the point of sale; and (3) the Legislature has given no express grant of authority to cities to regulate single-use bags in the manner prescribed by the Ordinance. The Court affirmed the Court of Appeals decision, giving that ruling statewide effect.

In our reading, the Court's decision strikes down all local ordinances prohibiting or restricting the provision of single-use paper and plastic bags. By holding that the Legislature has preempted the field of "regulating the sale or use of a container or package for solid waste management purposes in a manner not authorized by the Legislature," the Court effectively invites the cities to take up the issue with the Legislature next spring. Whether they will do so remains to be seen, but one thing seems clear: the battle lines between the state and local governments have never been so strongly demarcated and bitterly contested. We can expect this struggle to continue into next session and beyond.

In Re: North Cypress Medical Center Operating Co., Ltd. (No. 16-0851; decided April 27, 2018)

By a 6-3 majority, the Texas Supreme Court has ruled that a hospital seeking to enforce a hospital lien for services rendered to an uninsured patient may be compelled to produce information pertaining to reimbursement rates from third-party payers, including private insurers, Medicare, and Medicaid.

In re North Cypress Medical Center Operating Co., Ltd. (No. 16-0851; decided April 27, 2018) arose from hospital treatment received by the uninsured claimant as the result of a traffic accident. The hospital performed X-rays, CT scans, lab tests, and other emergency services, for which it billed the claimant the list, or so-called "chargemaster" prices, amounting to more than $11,000. At the same time, the hospital filed a lien for the amount under §55.002, Property Code, which grants the hospital a lien on a cause of action or claim of an individual who receives services for injuries caused by an accident attributed to another's negligence. In this case, the parties were unable to negotiate an agreement on the hospital's bill. Consequently, the claimant sought a declaratory judgment that the hospital's charges were unreasonable and the lien invalid to the extent it exceeded the reasonable and regular rate for the rendered services.

As part of the declaratory judgment action, the claimant sought discovery of the hospital's contracts with private insurers that provided for reduced or negotiated rates for the services provided to the claimant, the Medicare and Medicaid reimbursement rates for those same services, and the hospital's annual cost reports to the federal Medicare office for several prior years. The hospital objected on the basis that negotiated and reduced reimbursement rates were irrelevant to the amounts charged to an uninsured patient. It also objected that the disclosure of confidential and proprietary information would cause irreparable harm. The trial court denied the objections and ordered discovery of the requested information. The court of appeals denied the hospital's petition for mandamus, and the hospital appealed to the Texas Supreme Court.

Writing for the majority, Justice Debra Lehrmann analyzed the language of the hospital-lien statute and the court's prior opinions, finding that although the hospital is entitled to recover the full amount of its lien, the claimant maintains the right to query the reasonableness of the charges that constitute the lien. Here the claimant argued that the requested discovery would show that the hospital accepts significantly less than the full list prices for the same services, which bears on the reasonableness of the charges. The court agreed, citing the vast difference between billed charges and actual third-party payments (upwards of 255%) and the fact that most hospital revenue is derived from third-party reimbursement, not private pay at full prices. The court acknowledged the existence of other factors involved in rate negotiations, particularly volume discounts and the prospect of prompt payment, and that government rates may in fact be unreasonably low. Still, the court found that "[I]t defies logic to conclude that those payments have nothing to do with the reasonableness of charges to the small number of patients who pay directly."

In dissent, Justice Hecht, joined by Justices Green and Guzman, argued that amounts hospitals negotiate with third parties or the government are not relevant to amounts billed to uninsured patients for the same services. The majority responded by pointing out that in most cases hospitals do not expect to collect the full billed amount in the first place, so the amounts they actually collect are more relevant than those they do not.

A motion for rehearing was filed on June 13. If the original decision stands, it could very well provoke a legislative response, possibly to clarify that the full billed amount is presumptively "reasonable" or that negotiated or government-reimbursed rates are not relevant to the reasonableness of charges billed to uninsured patients. On the other hand, the ruling may strengthen the "paid or incurred" rule by specifically allowing discovery of reimbursement or negotiated rates to determine the reasonableness of billed charges for health care services.

In Re: DePuy Orthopaedics, Incorporated, Pinnacle Hip Implant Product Liability Litigation, No. 16-11051, United States Court of Appeals for the Fifth Circuit (April 25, 2018)

In an important decision, both for its analysis of Texas product liability law and scathing denunciation of unethical lawyer conduct, the Fifth Circuit threw out a $502 million verdict against DePuy and its parent company, Johnson & Johnson, and ordered a new trial.

The case is the second in a series of bellwether trials in the Pinnacle Hip Implant multi-district litigation in the Northern District of Texas, U.S. District Judge Ed Kinkeade presiding. It consolidated for trial the claims of five of the thousands of plaintiffs alleging injuries from metal-on-metal hip implants manufactured by DePuy. The claimants also sued J&J as a nonmanufacturing seller under §82.003, Texas Civil Practice & Remedies Code. The first bellwether trial resulted in a defense verdict after a two-month trial. The second trial lasted 9 weeks and resulted a verdict against DePuy and J&J for $500,000 in economic damages, $141.5 million in non-economic damages, and $360 million in punitive damages (reduced to $9.6 million under the Texas cap on punitive damages).

On appeal, Judge Jerry Smith, writing for a unanimous panel that also included Judges Rhesa Barksdale and Stephen Higginson, found that unethical and deceptive conduct during and after the trial by plaintiff's counsel Mark Lanier tainted the verdict and warranted a new trial. As Judge Smith put it, "This is the rare case in which counsel's deceptions were sufficiently obvious, egregious, and impactful to penetrate the layers of deference that would ordinarily shield against reversal."

Specifically, Lanier, over the objection of the defendants, introduced at trial evidence of alleged bribes paid by non-party subsidiaries of J&J to officials in Saddam Hussein's government in the 1990s and induced the trial court to order a DePuy executive to testify before the jury about a 2011 Deferred Prosecution Agreement (DPA) between the Justice Department and J&J that settled this and other alleged violations of the Foreign Corrupt Practices Act. Lanier argued that DePuy and J&J opened the door to this evidence by presenting evidence of their corporate culture and marketing practices. Observing that J&J owns more than 265 companies in 60 countries and that the Iraqi part of the DPA has nothing to do with the parties in the case, Judge Smith denounced Lanier's repeated statements to the jury linking DePuy and J&J to Saddam Hussein. "Lanier tainted the result by inviting the jury to infer guilt based on no more than prior bad acts, in direct contravention of Rule 404(B)(1) [Federal Rules of Civil Procedure]," Judge Smith wrote. "That alone provides grounds for a new trial."

But there is more. Lanier also waived a resignation statement by a former employee of DePuy alleging racist comments by a DePuy executive. The trial court promptly overruled a defense motion to strike the statement as hearsay and grant a mistrial. Lanier went on in his closing argument to refer to the "filthy . . . racist email" to support his claim that J&J should bear liability for marketing the hip implant. Judge Smith: "In reading the letter to the jury, Lanier refocused its attention on serious, and seriously distracting, claims of racial discrimination that defendants had no meaningful opportunity to rebut via cross-examination. This spectacle fortifies our conviction that a new trial is required."

If these antics were not enough on their own, the Fifth Circuit found that Lanier concealed payments to two experts whom he claimed at trial were testifying pro bono, in contrast to the highly compensated defense experts, which Lanier denounced to the jury as "bought testimony." Lanier made much of this in his closing argument as well, claiming that the surgeon testified "on his own." In one case, Lanier made an undisclosed charitable contribution in anticipation of the testimony at trial of an orthopedic surgeon who had operated on George H.W. Bush and Billy Graham. "Once it was 'formally' decided that [the surgeon] would testify," wrote Judge Smith, "Lanier's failure to disclose the donation, and his repeated insistence that [the surgeon] had absolutely no pecuniary interest in testifying, were unequivocally deceptive." A second surgeon, who happened to be the other one's son, likewise testified, according to Lanier "pro bono" and without expectation of compensation.

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The only problem? At the conclusion of the trial, Lanier cut checks to both of them: Dad got $35,000 and son got $30,000. Son also testified that he had expected to get paid all along and was surprised when he got a check for twice the amount he thought was standard in this type of litigation.

Judge Smith: "Now to the question whether Lanier, knowingly or unknowingly, misled the jury representing repeatedly that the [surgeons] had neither pecuniary interest nor motive in testifying. The facts speak pellucidly: The pre-trial donation check, [the son's] expectation of compensation, and the post-trial payments to both doctors are individually troubling, collectively devastating."

Lanier tried to explain that the donation was a "thank you" for time spent before trial discussing the case, and not a promise to make a contribution in exchange for testimony (even though Lanier at trial designated Dad as a non-retained expert who "might" testify). The Court easily saw through this dodge, even calling it "specious": "Lawyers cannot engage with a favorable expert, pay him 'for his time,' then invite him to testify as a purportedly 'non-retained' neutral party. That is deception, plain and simple. And to follow that up with post-trial 'thank you' check merely compounds the professional indiscretion."

In sending the case back to the district court, the Fifth Circuit admonished the trial court's "serious evidentiary errors" and "counsel's misrepresentations." One wonders what might happen the next time Lanier shows up in the Fifth Circuit. We should also note that when TCJL filed an *amicus curiae* brief in this matter with respect to the nonmanufacturing seller provision in the Texas product liability statute, Lanier objected. In that brief, TCJL urged the Fifth Circuit to rule that §82.003 grants immunity to a nonmanufacturing seller, not a cause of action to the plaintiff. Alternatively, we asked the Court to certify a question to the Texas Supreme Court requesting a clarification of Texas law. We strongly suspect that Lanier did not want that to happen, but the issue lives to fight another day.

Texas Windstorm Insurance Association v. Dickinson Independent School District (No. 14-16-00474-CV; decided May 31, 2018); Published June 13, 2018

In an important case in which TCJL participated as an *amicus*, the Fourteenth Court of Appeals [Houston] has reversed a $10 million judgment against the Texas Windstorm Insurance Association (TWIA) and remanded the case to a Galveston district court for retrial.

TCJL joined the case because of extreme irregularities involving the court-appointed third-party appraiser, the appraisal process in general, and the trial court's evident disinterest in giving TWIA a fair trial. The court of appeals' opinion deals specifically with the issue of whether the trial court erred in granting partial summary judgment for the school district on the basis that the appraisal award conclusively established TWIA's liability. This ruling foreclosed TWIA's affirmative defenses, causation evidence, and evidence of non-coverage, leaving for trial only one issue: whether TWIA failed to comply with the policy (an issue on which TWIA, by virtue of the trial court's evidentiary and summary judgment rulings, could not defend itself). It is also important to note that TWIA also objected at trial to the jury charge because it failed to seek jury determinations of whether the appraisal award actually complied with the policy and whether the school district had provided prompt written notice of loss for each insured structure in accordance with the policy.

The primary question of law in the court of appeals' decision is whether an appraisal award, which determines the amount of damages, also determines that an event covered

Judge Jerry Smith: *"Now to the question whether Lanier, knowingly or unknowingly, misled the jury representing repeatedly that the [surgeons] had neither pecuniary interest nor motive in testifying. The facts speak pellucidly: The pre-trial donation check, [the son's] expectation of compensation, and the post-trial payments to both doctors are individually troubling, collectively devastating."*

by the policy caused the damages. In this case, the school district notified TWIA of windstorm damage to several buildings three days after Hurricane Ike hit Galveston in September, 2008. The TWIA adjuster inspected the buildings and verified the damage. Consequently, in December 2009 TWIA paid the district a little more than $220,000 to settle the claim (for which the district signed a proof of loss). Nearly two years later, in September 2011, the district contacted TWIA claiming damages to the roof of another building, which it had replaced at a cost of about $1.5 million. TWIA likewise settled this supplemental claim, paying about $1 million in October 2011. But in September 2012, four years after the storm, the district (represented by Galveston County plaintiff's lawyer Tony Buzbee) sued TWIA for an additional $829,000, including $225,000 in attorney's and expert fees. Needless to say, this lawsuit is one of thousands filed years after the storm and well after most claims had been settled, a flood of litigation that compelled the Legislature to intervene and eventually pass both TWIA and hailstorm insurance reform.

Both sides designated appraisers, and the trial court picked the third appraiser, a former Galveston County district judge with no background in construction and not on the county's standing list of qualified appraisers. When the three met to compare notes, the TWIA appraiser found that the other two had cooked up an appraisal award of more than $10 million, more than $6 million in excess of the district's claim. Moreover, the new appraisal took place more than five years after the storm, which, as the court of appeals points out, raises "genuine issues of material fact about the cause of the damage to DISD's buildings." Nevertheless, this deeply flawed appraisal award ultimately became the only evidence the jury had to go on, given the trial court's alacrity to exclude all other evidence of causation.

As TCJL's brief detailed, this case presents the classic pattern of abuse in windstorm and hail cases: storm blows through; insured makes claim; claim adjusted and apparently amicably settled; supplemental claim made, adjusted, and settled; lawsuit filed years after the fact claiming substantial damages "caused" by the original storm (not to mention hefty attorney's fees); friendly trial judge appoints friendly "umpire" to determine appraisal award; appraisal award becomes basis for massive settlements and/or jury awards that transfer wealth

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from Texans who pay property and casualty insurance premiums to a small group of plaintiff's attorneys who promise entities such as the school district a budget windfall simply for filing suit. Cases like this one are exactly what the Legislature had in mind when it enacted the reforms. Unfortunately, though, cases like this one had to happen first.

Citing the landmark Texas Supreme Court opinion in *State Farm Lloyds v. Johnson* and a number of lower court decisions, the court of appeals correctly found that the appraisal award determines the cost of repairs, but the courts determine liability. Thus whether the hurricane actually caused the damages cited in the appraisal award in this case should have been considered by the trier of fact, necessitating a new trial. The court of appeals declined TWIA's request to reverse and render judgment on its behalf, reasoning that because the trial court relieved the district of its obligation to present evidence of causation and cut off TWIA's defenses, it should "restore the parties to the status quo at the time of the summary judgment rulings and begin anew." The case now returns to the trial court for a new trial, which we hope will be handled better than the first one. Otherwise, we are likely to see it back in the court of appeals for review in the future.

The case underscores the importance of appealing questionable and perhaps abusive conduct at the trial court level to enforce basic principles of fairness and equity in our court system. To deprive a defendant of the opportunity to make its case, as occurred here, not only debases the judiciary, but disrespects the jury system and discourages citizens wanting to participate in the first place.

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In Re: Mahindra, USA Inc. (No. 17-0019; decided June 8, 2018)

A unanimous Texas Supreme Court has held that a trial court did not abuse its discretion when it denied a motion to dismiss under the *forum non conveniens* statute a Texas resident's wrongful death claim arising from a fatal accident in Mississippi involving a Mississippi resident. The Court further held that the decedent's granddaughter, also a Texas resident, could invoke the Texas residency exception to the statute to maintain her common law bystander claim in Texas.

The decedent, a Mississippi resident, was killed when the front-end loader on the tractor on which he was working fell and crushed him. The decedent's granddaughter, a Texas resident, witnessed the accident. The decedent's son initiated probate proceedings in Mississippi, and then filed negligence and product liability actions in Texas against vendor Mahindra USA, headquartered in Houston, and manufacturer KMW, Ltd., a Kansas resident. In addition, the decedent's granddaughter filed a personal injury action in Texas. Mahindra moved to dismiss the claims on the basis of *forum non conveniens*, arguing that Mississippi was a more appropriate forum. The trial court denied the motion, and the Houston Court of Appeals (1st District) affirmed. Mahindra appealed to the Texas Supreme Court.

Writing for the court, Justice Devine analyzed both the statutory *forum non conveniens* provision (Chapter 71, CPRC), which governs personal injury and wrongful death actions, and the common law doctrine of *forum non conveniens*, which governs other civil actions. As Justice Devine pointed out, the common law doctrine may permit the dismissal of a claim by a Texas resident if the public and private factors a court must consider to determine the appropriate forum weigh in favor of an alternative forum. Since its adoption in 1993, however, Chapter 71 has contained an exception for Texas-resident plaintiffs or derivative claimants of a Texas resident, who can maintain their claims in Texas regardless of the outcome of the balancing test. Mahindra contended that the Texas-residency exception did not apply in this case because the decedent's son, who filed the wrongful death claim, is not a "plaintiff" under the statute because he is a "derivative claimant" of his non-resident father. Consequently, Mahindra argued that they could not invoke the exception, and, consequently, their claims should have been dismissed in favor of a forum in Mississippi.

At issue, then, was the statutory definition of "plaintiff," found in §71.051(h), CPRC. The statute defines a "plaintiff" as a person seeking damages for personal

injury or wrongful death, but excludes so-called "nominal" plaintiffs, such a representative, administrator, guardian, or next friend who is not otherwise a derivative claimant of a legal resident of this state. The Court agreed with Mahindra that the decedent's son is not a "plaintiff" for purposes of the estate's claims, where he filed suit in his capacity as estate administrator and next friend of the granddaughter. He therefore cannot use his own Texas residency to "anchor" either the estate's or his own daughter's claim in Texas. The Court had previously held, in In *re Bridgestone Americas Tire Corp.*, 459 S.W.3d 565 (Tex. 2015), that the next friend's legal residency does not trigger the Texas residency exception, either.

The Court, however, found that the individual wrongful death claims of the decedent's children, as well as the granddaughter's common-law bystander claim, are anchored in Texas because they are personal, as opposed to representative. In response to Mahindra's objection that the trial court should have conducted a choice-of-law analysis and applied Mississippi procedural law governing wrongful death claims, the Court held that the trial court did not need to do so because *forum non conveniens* is a procedural matter governed by the law of the *forum* state, in this case Texas law. Consequently, because Texas law allows beneficiaries to bring suit and recover damages on their own behalf and because the decedent's sons are Texas residents, the trial court did not err in allowing their claims to go forward.

Having determined that the children were Texas resident plaintiffs, however, the Court still had to review whether the trial court abused its discretion in denying Mahindra's motion to dismiss the derivative claims related to the decedent's estate based on the six-factor test in the *forum non conveniens* statute (§71.051(b)). Because the statute does not require the trial court to state its findings of fact and conclusions of law when it denies a *forum non conveniens* motion (only when it grants one), the reviewing court (here SCOTX) can only substitute its own discretion for the trial court's if it finds that the facts and circumstances of the case foreclose the exercise of discretion altogether. Because in this case "all the factors do not conclusively favor the alternative *forum*," the Court declined to find an abuse of discretion and denied mandamus for the estate-derived claims.

This opinion continues a trend in which the Court distinguishes between the direct personal claims of Texas residents and derivative claims filed in Texas on behalf of a non-resident decedent, which the Legislature addressed at TCJL's behest in 2015 in response to the 2012 SCOTX decision *In re Ford Motor Company*. Here, the Court conducted a *forum* review under the six statutory factors of the Mississippi estate's claims and determined that the trial court did not abuse its discretion. It also pointed out that in another case, *In re ENSCO Offshore Int'l Co.*, the Court found abuse of discretion where the trial court stated on the record that each of the statutory factors favored dismissal but nevertheless retained the case. In this situation, the Court reiterated that if each factor weighs in the favor of dismissal, the trial court must dismiss.

EXLP Leasing, LLC and EES Leasing, LLC v. Galveston Central Appraisal District; April 17, 2018

On March 2 the Texas Supreme Court issued an opinion holding that Article VIII, §1(b), Texas Constitution, does not require the Legislature to tax property at market value. The Court held that even though the Legislature designed the Property Tax Code based on market value, nothing in the Constitution compels that result. The Court held further that the Constitution gives the Legislature broad power not only to determine how property should be valued for taxation, but also authorizes the Legislature to devise classes of property for differing tax treatment, provided such classification is not "unreasonable, arbitrary, or capricious." Finally, the Court held that the equal and uniform provision in Article VIII, §1(a), only applies to property within a class, not between classes.

The case arose from 2011 legislation (HB 2476) that prescribed a valuation method for heavy equipment inventory that included leased or rented natural gas compressors and similar equipment. HB 2476 expanded previous legislation that established similar methodology for a dealer's motor vehicle inventory, inventories of boats and outboard motors, manufactured housing, and heavy equipment held for sale. In more than 200 lawsuits across the state, appraisal districts challenged two aspects of the law, the situs provision and the valuation methodology. The districts further alleged that the statute treated compressors owned by the taxpayer differently than leased compressors, producing a dramatically lower value for leased compressors (the statute limits the taxable value of a leased inventory of compressors to 1/12 of the monthly lease amount). Several of the cases were consolidated into the Galveston CAD for purposes of appeal to the Supreme Court.

This opinion is troubling not because it upholds HB 2476 (the court could have done that without ruling that the Constitution does not require market value), but that the language in the opinion is not limited to an inventory of

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Court Watch

Interpreting & Applying the Law (continued from Page 33)

heavy equipment, inventory in general, or any other type or class of real or business personal property. The potential breadth of the opinion opens up the very real possibility that the Legislature could proceed on a classification scheme without a constitutional amendment. In short, the unhappy prospect of a split roll has become much more likely. For example, instead of arguing about appraisal caps, the Legislature could simply require that residential homesteads be valued according to the cost method, rather than market sales. If the Legislature did this, it would dramatically reduce home values at the expense of other property on the roll. Such an approach would be extremely difficult for members to vote against, and groups like the Realtors and homebuilders could see it as a boon for home ownership. The only thing that may hold the Legislature back would be the cost to the school finance system, but lowering home values could become part of a grand bargain to lower taxes on homeowners, reduce recapture, and "fix" school finance. This is definitely something that TCJL members need to pay attention to, especially when candidates from both parties cite rising appraisals as one of the two or three top issues in their districts.

Preparing for the 86th Legislative Session

Eminent Domain Analysis (continued from Page 8)

survey makes no attempt to define "low-ball" (less than CAD value? Less than the landowner thinks the property is worth? Less than my neighbor got for his property?). Third, under Texas law the bona fide offer requirement specifically structures negotiation between a condemnor and a landowner so that it can never consist of a single offer unsupported by a professional appraisal.

- **"Most states either do not possess specific requirements for appraisers or they follow the Texas approach. However, the requirements of Indiana and South Carolina are worth noting."** Why does the survey single out these two states for special mention? It appears that Indiana requires each of the three commissioners to be certified appraisers. South Carolina requires the condemnor to pay the panel a statutory fee and expenses. The survey offers no evidence of why these approaches might improve the current process or that there are any problems with special commissioners (all of whom are the landowner's peers) in Texas.

- **"Texas does not specifically address who has the authority to condemn within the Texas Property Code."** This is technically correct but irrelevant. No entity can exercise the power of eminent domain in Texas without explicit constitutional or statutory authority.

- **"States, including Texas, generally give 'common carriers' the condemnation authority. In Texas, an entity merely checks a box on a form, but other states offer a more strict approach."** The first sentence of this statement is true, but the second most emphatically is not. In probably the most significant decision pertaining to "public use" since *Borden v. Trespalacios Rice & Irrigation Co.* (1905), the Texas Supreme Court ruled in *Denbury* that the statutory process for certifying a carbon dioxide pipeline as a common carrier did not foreclose a "public use" analysis under the Texas Constitution. While the regulatory process creates a *prima facie* basis for the validity of the taking, when a landowner contests such authority, the pipeline must prove that "a reasonable probability exists" that the pipeline "will at some point after construction serve the public." Purely private pipelines that serve only the entity's own facilities do not qualify. The Court remanded the case to the trial court for a determination of fact issues concerning *Denbury's* common carrier status. When the case returned to the Court in 2016, the Court determined that *Denbury's* contracts with unaffiliated entities provided sufficient evidence of common carrier status under the "reasonable probability" test.

- **"Just how effective are the Texas statutory restrictions? That may remain an open question, as somewhere between 1,600 and 6,000 entities (including counties, school districts, etc.) possess or have claimed eminent domain authority in Texas."** To suggest that Texas law is "ineffective" because of the immense size of the state and its constitutional commitment to decentralized government is misleading in the extreme. The number of incorporated cities, counties, and school districts alone amount to more than 2,600, and the number special districts adds another 2,000 to the total. There are gas, electric, and water utilities of all sizes and shapes that deliver basic public services to the state's 28.7 million residents. Texas has the 10th largest economy in the world. To question the effectiveness of a process vital to sustain an economy of this size and complexity should require specific, substantial, and verifiable evidence of deficiency rather than conclusory assertions such as this one.

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BACK THE PAC

WHY YOUR SUPPORT IS VITAL TO THE TEXAS CIVIL JUSTICE LEAGUE PAC

Because the 2018 election cycle poses a stiff challenge, as a group, we must pull together and guarantee the candidates we support have sufficient resources to run competitive campaigns.

For starters, three Texas Supreme Court justices and more than half of the state's courts of appeals justices are on the ballot. If recent election cycles are any indication, we have to prepare for contested GOP primaries with well-funded opposition. Just as importantly, six crucial seats are up for grabs on the San Antonio and Corpus Christi courts of appeals, which are now hotbeds of oil and gas and other business litigation from the Gulf Coast and South Texas. This year voters in these districts have the opportunity to elect more conservative justices and change the balance of these courts, but if we don't get the word out about the qualifications of these candidates, this won't happen.

"...more than half of the state's courts of appeals justices are on the ballot."

To make sure our candidates get the widest possible support, we will print and distribute thousands of slate cards that will go into the hands of voters. In addition, with your help, we will make direct contributions to candidates. None of the money you contribute will be wasted. It will directly fund the candidates we have voted to endorse.

Our staff has spent countless hours researching and interviewing candidates. We've vetted their philosophies and scoured their records. With complete confidence, we have endorsed judicial and legislative incumbents and candidates committed to a fair and balanced civil justice system.

See Page 37 (facing page) of this edition of the TCJL Journal to see our list of endorsements. Note the great number of highly qualified judicial candidates who need our help. Additionally, many legislative candidates who have earned our support through the years have asked us for contributions to their campaigns.

Our effectiveness has always depended in part on our participation in the elective process, and your generous support in the past has enabled us to assist in races in which we are most needed. Please make your TCJL PAC contribution today so that we may once again support meritorious candidates for the Legislature and judiciary.

Sincerely,

Red McCombs
Chair, TCJL PAC

TCJL PAC 2018
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Place 2: Jimmy Blacklock* (R)
Place 4: John Devine* (R)
Place 6: Jeff Brown* (R)

TEXAS COURT OF CRIMINAL APPEALS

Presiding Judge: Sharon Keller* (R)
Place 7: Barbara Parker Hervey* (R)
Place 8: Michelle Slaughter (R)

TEXAS DISTRICT COURTS OF APPEALS

1ST COURT OF APPEALS – HOUSTON
Place 2: Jane Bland* (R)
Place 6: Harvey G. Brown* (R)
Place 7: Terry Wayne Yates (R)
Place 8: Michael C. Massengale* (R)
Place 9: Jennifer V. Caughey* (R)

2ND COURT OF APPEALS – FORT WORTH
Chief Justice: Bonnie Sudderth* (R)
Place 4: Wade Birdwell* (R)
Place 5: Dabney Bassel* (R)
Place 6: Mark T. Pittman* (R)

3RD COURT OF APPEALS - AUSTIN
Place 2: Cindy Bourland* (R)
Place 3: Scott Field* (R)
Place 5: David Puryear* (R)
Place 6: Mike Toth (R)

4TH COURT OF APPEALS – SAN ANTONIO
Place 2: Marialyn Barnard* (R)
Place 3: Jason Pulliam (R)
Place 4: Patrick Ballantyne (R)
Place 5: Rebecca Simmons (R)
Place 7: Shane Stolarczyk (R)

5TH COURT OF APPEALS – DALLAS
Chief Justice: Douglas S. Lang (R)
Place 2: David Evans* (R)
Place 5: Craig Stoddart* (R)
Place 9: Jason Boatright* (R)
Place 10: Molly Francis* (R)
Place 11: John G. Browning (R)
Place 12: Jim Pikl (R)
Place 13: Elizabeth Lang-Miers* (R)

6TH COURT OF APPEALS – TEXARKANA
Place 2: Scott Stevens (R)

7TH COURT OF APPEALS – AMARILLO
Place 2: Judy C. Parker* (R)
Place 3: Patrick A. Pirtle* (R)

9TH COURT OF APPEALS – BEAUMONT
Place 3: Leanne Johnson* (R)
Place 4: Hollis Horton* (R)

10TH COURT OF APPEALS – WACO
Chief Justice: Tom Gray* (R)

11TH COURT OF APPEALS – EASTLAND
Chief Justice: John Bailey (R)

12TH COURT OF APPEALS – TYLER
Place 2: Greg Neeley* (R)

13TH COURT OF APPEALS – CORPUS CHRISTI/EDINBURG
Chief Justice: Ernest Aliseda (R)
Place 2: Greg Perkes (R)
Place 4: Jaime Tijerina (R)
Place 5: Clarissa Silva (R)

14TH COURT OF APPEALS – HOUSTON
Place 3: Brett Busby* (R)
Place 4: Marc Brown* (R)
Place 5: Martha Hill Jamison* (R)
Place 6: William J. Boyce* (R)
Place 8 John Donovan* (R)

*Incumbent

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TEXAS CIVIL JUSTICE LEAGUE TCJL PAC

Voter Registration Deadline	OCT 9
Early Voting	OCT 22
Texas General Election	NOV 6

You Be The Judge
on November 6, 2018

Texas Appellate Courts

2018 Texas General Election Candidates

The 2018 General Election will be held on November 6, 2018. Early Voting begins October 22, 2018. All 150 seats in the Texas House of Representatives appear on the ballot, as well as 15 seats in the Texas Senate, 51 seats in the Texas appellate judiciary and 36 congressional seats.

COURT/PLACE	DEMOCRAT	REPUBLICAN	OTHER
SUPREME COURT (STATEWIDE | BASED IN AUSTIN)			
Place 2	Steven Kirkland	Jimmy Blacklock*	
Place 4	Ravi K. Sandill	John Devine*	
Place 6	Kathy Cheng	Jeff Brown*	
COURT OF CRIMINAL APPEALS (STATEWIDE | BASED IN AUSTIN)			
Presiding Judge	Maria "Terri" Jackson	Sharon Keller*	William Bryan "Bill" Strange III
Place 7	Ramona Franklin	Barbara Pakrer Hervey*	
Place 8 OPEN SEAT		Michelle Slaughter	Mark Ash (L)
FIRST COURT OF APPEALS (10 COUNTIES | BASED IN HOUSTON)			
Place 2	Gordon E. Goodman	Jane Bland*	
Place 6	Sarah Beth Landau	Harvey G.Brown*	
Place 7 OPEN SEAT	Julie Countiss	Terry Yates	
Place 8	Richard F. Hightower	Michael C. Massengale*	
Place 9	Peter Kelly	Jennifer V. Caughey*	

*Incumbent (D) Democrat (R) Republican (I) Independent (L) Libertarian (G) Green Party (WI) Write-in

TEXAS GENERAL ELECTION

NOV 06 18

IMPORTANT 2018 ELECTION DATES

October 9	Last Day to Register to Vote
October 22	First Day of Early Voting by Personal Appearance
Nov 2 2018	Last Day of Early Voting by Personal Appearance
November 6, 2018	Texas General Election
January 8, 2019	First Day of 86th Legislative Session
May 27, 2019	Last Day of 86th Legislative Session

TEXAS GENERAL ELECTION

NOV 06 18

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Texas Appellate Courts

2018 Texas General Election Candidates

COURT/PLACE	DEMOCRAT	REPUBLICAN	OTHER
SECOND COURT OF APPEALS (12 COUNTIES | BASED IN FORT WORTH)			
Chief Justice		Bonnie Sudderth*	
Place 4 OPEN SEAT		Wade Birdwell	
Place 5 OPEN SEAT	Delonia A. Watson	Dabney Bassel	
Place 6		Mark T. Pittman*	
THIRD COURT OF APPEALS (24 COUNTIES | BASED IN AUSTIN)			
Place 2	Edward Smith	Cindy Olson Bourland*	
Place 3	Chari Kelly	Scott Field*	
Place 5	Thomas J. Baker	David Puryear*	
Place 6 OPEN SEAT	Gisela D. Triana	Michael "Mike" Toth	
FOURTH COURT OF APPEALS (32 COUNTIES | BASED IN SAN ANTONIO)			
Place 2	Beth Watkins	Marialyn Barnard*	
Place 3	Patricia O. Alvarez*	Jason Pulliam	
Place 4	Luz Elena D. Chapa*	Patrick Ballantyne	
Place 5 OPEN SEAT	Liza A. Rodriguez	Rebecca Simmons	
Place 7	Rebeca C. Martinez*	Shane Stolarczyk	
FIFTH COURT OF APPEALS (6 COUNTIES | BASED IN DALLAS)			
Chief Justice OPEN SEAT	Robert Burns	Douglas S. Lang	
Place 2	Robbie Partida-Kipness	David Evans*	
Place 5	Erin A. Nowell	Craig Stoddart*	
Place 9	Bill Pedersen	Jason E. Boatright*	
Place 10	Amanda Reichek	Molly Francis*	
Place 11 OPEN SEAT	Cory Carlyle	John Browning	
Place 12 OPEN SEAT	Ken Molberg	Jim Pikl	
Place 13	Leslie Lester Osborne	Elizabeth Lang-Miers*	

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Texas Appellate Courts

2018 Texas General Election Candidates

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COURT/PLACE	DEMOCRAT	REPUBLICAN	OTHER
SIXTH COURT OF APPEALS (19 COUNTIES | BASED IN TEXARKANA)			
Place 2 OPEN SEAT		Scott Stevens	
SEVENTH COURT OF APPEALS (32 COUNTIES | BASED IN AMARILLO)			
Place 2		Judy C. Parker*	
Place 3		Patrick A. Pirtle*	
EIGHTH COURT OF APPEALS (17 COUNTIES | BASED IN EL PASO)			
Place 2	Yvonne T. Rodriguez*		
NINTH COURT OF APPEALS (10 COUNTIES | BASED IN BEAUMONT)			
Place 3		Leanne Johnson*	
Place 4		Hollis Horton*	
TENTH COURT OF APPEALS (18 COUNTIES | BASED ON WACO)			
Chief Justice		Tom Gray*	
ELEVENTH COURT OF APPEALS (28 COUNTIES | BASED IN EASTLAND)			
Chief Justice		John Bailey	
TWELFTH COURT OF APPEALS (17 COUNTIES | BASED IN TYLER)			
Place 2		Greg Neeley*	
THIRTEENTH COURT OF APPEALS (20 COUNTIES | BASED IN CORPUS CHRISTI & EDINBURG)			
Chief Justice OPEN SEAT	Dori Contreras	Ernie Aliseda	
Place 2	Nora Longoria*	Greg Perkes	
Place 4		Jaime Tijerina	
Place 5	Gina M. Benavides*	Clarissa Silva	
FOURTEENTH COURT OF APPEALS (10 COUNTIES | BASED IN HOUSTON)			
Place 3	Jerry Zimmerer	Brett Busby*	
Place 4	Charles Spain	Marc Brown*	
Place 5	Frances Bourliot	Martha Hill Jamison*	
Place 6	Meagan E. Hassan	Bill Boyce*	
Place 8	Margaret "Meg" Poissant	John Donovan*	

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Texas Statewide Offices

2018 Texas General Election Candidates

OFFICE	DEMOCRAT	REPUBLICAN	OTHER
Governor	Lupe Valdez	Greg Abbott*	Mark Tippets (L)
Lieutenant Governor	Mike Collier	Dan Patrick*	Kerry McKennon (L)
Attorney General	Justin Nelson	Ken Paxton*	Michael Ray Harris
Comptroller	Joi Chevalier	Glenn Hegar*	Ben Sanders (L)
Land Commissioner	Miguel Suazo	George P. Bush*	Matt Piña (L)
Agriculture Commissioner	Kim Olson	Sid Miller*	Richard Carpenter (L)

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Texas Senate

2018 Texas General Election Candidates

OFFICE	DEMOCRAT	REPUBLICAN	OTHER
SD 2	Kendall Scudder	Bob Hall*	
SD 3	Shirley Layton	Robert Nichols*	Bruce Quarles (L)
SD 5	Meg Walsh	Charles Schwertner*	Amy Lyons (L)
SD 7	David Romero	Paul Bettencourt*	Tom Glass (L)
SD 8 OPEN SEAT	Mark Phariss	Angela Paxton	
SD 9	Gwenn Burud	Kelly G. Hancock*	
SD 10	Beverly Powell	Konni Burton*	
SD 14	Kirk Watson*	George W. Hindman	Micah Verlander (L)
SD 15	John Whitmire*	Randy Orr	Gilberto Velasquez, Jr. (L)
SD 16	Nathan Johnson	Don Huffines*	
SD 17	Rita Lucido	Joan Huffman*	Lauren LaCount (L)
SD 23	Royce West*		Samuel Todd Russell (L)
SD 25	Steven Kling	Donna Campbell*	
SD 30	Kevin G. Lopez	Pat Fallon	Keely Gilchriest Briggs (I)

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Texas House of Representatives

2018 Texas General Election Candidates

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OFFICE	DEMOCRAT	REPUBLICAN	OTHER
HD 1		Gary VanDeaver*	
HD 2	Bill Brannon	Dan Flynn*	
HD 3	Lisa Seger	Cecil Bell, Jr.*	
HD 4 OPEN SEAT	Eston Williams	Keith Bell	Dennis Allen Miller (L)
HD 5	Bill Liebe	Cole Hefner*	
HD 6		Matt Schaefer*	Neal A. Katz (I)
HD 7		Jay Dean*	
HD 8 OPEN SEAT	Wesley D. Ratcliff	Cody Harris	
HD 9		Chris Paddie*	
HD 10	Kimberly Emery	John Wray*	Matthias J. Savino (L)
HD 11	Alec A. Johnson	Travis Clardy*	
HD 12	Marianne K. Arnold	Kyle Kacal*	
HD 13	Cecil R. Webster, Jr.	Ben Leman*	
HD 14	Josh Wilkinson	John Raney*	
HD 15 OPEN SEAT	Lorena Perez McGill	Steve Toth	
HD 16	Mike Midler	Will Metcalf*	
HD 17	MIchelle Ryan	John Cyrier*	
HD 18	Fred Lemond	Ernest Bailes*	
HD 19	Sherry Williams	James White*	
HD 20	Stephen M. Wyman	Terry Wilson*	
HD 21		Dade Phelan*	
HD 22	Joe Deshotel*		
HD 23	Amanda Jamrok	Mayes Middleton	Lawrence Johnson (L)
HD 24	John Y. Phelps	Greg Bonnen*	Dick Illyes (L)
HD 25		Dennis Bonnen*	

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Texas House of Representatives

2018 Texas General Election Candidates

OFFICE	DEMOCRAT	REPUBLICAN	OTHER
HD 26	Sarah DeMerchant	Rick Miller*	
HD 27	Ron Reynolds*		
HD 28	Meghan Scoggins	John Zerwas*	
HD 29	James Presley	Ed Thompson*	
HD 30	Robin R. Hayter	Geanie W. Morrison*	
HD 31	Ryan Guillen*		
HD 32		Todd Hunter*	
HD 33	Laura Gunn	Justin Holland*	
HD 34	Abel Herrero*	Chris Hale	
HD 35	Oscar Longoria*		
HD 36	Sergio Muñoz, Jr.*		
HD 37	Alex Dominguez		
HD 38	Eddie Lucio III*		
HD 39	Armando Martinez*		
HD 40	Terry Canales*		
HD 41	Bobby Guerra*	Hilda Garza DeShazo	
HD 42	Richard Peña Raymond*	Luis F. De La Garza	
HD 43	Dee Ann Torres Miller	J.M. Lozano*	
HD 44	John D. Rodgers	John Kuempel*	
HD 45 OPEN SEAT	Erin Zwiener	Ken Strange	
HD 46	Sheryl Cole	Gabriel Nila	
HD 47	Vikki Goodwin	Paul Workman*	
HD 48	Donna Howard*		
HD 49	Gina Hinojosa*	Kyle Austin	
HD 50	Celia Israel*		

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Texas House of Representatives

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OFFICE	DEMOCRAT	REPUBLICAN	OTHER
HD 51	Eddie Rodriguez*		
HD 52 OPEN SEAT	James Talarico	Cynthia Flores	
HD 53	Stephanie Lochte Ertel	Andrew Murr*	
HD 54	Kathy Richerson	Brad Buckley	Robert Walden (L)
HD 55		Hugh Shine*	
HD 56	Katherine Turner-Pearson	Charles "Doc" Anderson*	
HD 57	Jason Rogers	Trent Ashby*	
HD 58		DeWayne Burns*	
HD 59		J.D. Sheffield*	
HD 60		Mike Lang*	
HD 61		Phil King*	
HD 62 OPEN SEAT	Valerie Hefner	Reggie Smith	David L. Schaab (L)
HD 63	Laura Haines	Tan Parker*	
HD 64	Andrew D. Morris	Lynn Stucky*	Nick Dietrich
HD 65	Michelle Beckley	Ron Simmons*	
HD 66	Sharon Hirsch	Matt Shaheen*	
HD 67	Sarah Depew	Jeff Leach*	
HD 68		Drew Springer*	
HD 69		James Frank*	
HD 70	Julie Luton	Scott Sanford*	
HD 71	Sam Hatton	Stan Lambert*	
HD 72		Drew Darby*	
HD 73	Stephanie Phillips	Kyle Biedermann*	
HD 74	Poncho Nevárez*		
HD 75	Mary Gonzalez*		

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Texas House of Representatives

2018 Texas General Election Candidates

OFFICE	DEMOCRAT	REPUBLICAN	OTHER
HD 76	César Blanco*		
HD 77	Evelina Ortega*		
HD 78	Joe Moody*	Jeffrey Lane	
HD 79	Joe Pickett*		
HD 80	Tracy O. King*		
HD 81	Armando Gamboa	Brooks Landgraf*	
HD 82	Spencer Bounds	Tom Craddick*	
HD 83	Drew Landry	Dustin Burrows*	
HD 84	Samantha T. Fields	John Frullo*	
HD 85	Jennifer Cantu	Phil Stephenson*	
HD 86	Mike Purcell	John Smithee*	Matthew Flores (L)
HD 87		Four Price*	
HD 88	Ezekiel Barron	Ken King*	
HD 89 OPEN SEAT	Ray Ash	Candace T. Noble	
HD 90	Ramon Romero, Jr.*		
HD 91	Jeromey Sims	Stephanie Klick*	Steve Wallace (L)
HD 92	Steve Riddell	Jonathan Stickland*	Eric Espinoza (L)
HD 93	Nancy Bean	Matt Krause*	
HD 94	Finnigan Jones	Tony Tinderholt*	Jessica Pallett (L)
HD 95	Nicole Collier*	Stephen A. West	Joshua G. Burns (L)
HD 96	Ryan E. Ray	Bill Zedler*	Stephen Parmer (L)
HD 97	Beth L. McLaughlin	Craig Goldman*	Rod Wingo (L)
HD 98	Mica J. Ringo	Giovanni Capriglione*	H. Todd J. Moore (L)
HD 99	Michael Stackhouse	Charlie Geren*	
HD 100	Eric Johnson*		

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Texas House of Representatives

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OFFICE	DEMOCRAT	REPUBLICAN	OTHER
HD 101	Chris Turner*		James Allen (L)
HD 102	Ana-Maria Ramos	Linda Koop*	
HD 103	Rafael Anchia*	Jerry Fortenberry	
HD 104	Jessica Gonzalez		
HD 105	Thresa "Terry" Meza	Rodney Anderson*	
HD 106 OPEN SEAT	Ramona Thompson	Jared L. Patterson	
HD 107	Victoria Neave*	Deanna Maria Metzger	
HD 108	Joanna Cattanach	Morgan Meyer*	
HD 109 OPEN SEAT	Carl Sherman		Casey Littlejohn (WI)
HD 110	Toni Rose*		
HD 111	Yvonne Davis*		
HD 112	Brandy K. Chambers	Angie Chen Button*	
HD 113 OPEN SEAT	Rhetta Bowers	Jonathan M. Boos	
HD 114	John W. "Jim" Turner	Lisa Luby Ryan	
HD 115	Julie Johnson	Matt Rinaldi*	
HD 116	Trey Martinez Fischer	Fernando Padron	
HD 117	Philip Cortez*	Michael Berlanga	Conchita V. "Connie" Prado (I)
HD 118	Leo Pacheco	John Lujan	
HD 119	Roland Gutierrez*		
HD 120	Barbara Gervin-Hawkins*	Ronald Payne	
HD 121 OPEN SEAT	Cecilia D. Montoya	Steve Allison	Mallory Olfers (L)
HD 122	Claire Barnett	Lyle Larson*	
HD 123	Diego Bernal*		
HD 124	Ina Minjarez*	Johnny S. Arredondo	
HD 125	Justin Rodriguez*		Eric S. Piña (L)

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Texas House of Representatives

2018 Texas General Election Candidates

OFFICE	DEMOCRAT	REPUBLICAN	OTHER
HD 126 OPEN SEAT	Natali Hurtado	E. Sam Harless	
HD 127		Dan Huberty*	Ryan Woods (L)
HD 128		Briscoe Cain*	
HD 129	Alexander J. Karjeker	Dennis Paul*	Joseph Majsterski (L)
HD 130	Fred Infortunio	Tom Oliverson*	Roy Eriksen (L)
HD 131	Alma Allen*	Syed S. Ali	
HD 132	Gina N. Calanni	Mike Schofield*	Daniel Arevalo
HD 133	Martin S. Schexnayder	Jim Murphy*	
HD 134	Allison Sawyer	Sarah Davis*	Juan A. Muñoz (?)
HD 135	Jon E. Rosenthal	Gary Elkins*	Paul Bilyeu (L)
HD 136	John H. Bucy III	Tony Dale*	Zachary A. Parks (L)
HD 137	Gene Wu*		Lee Sharp (L)
HD 138	Adam Milasincec	Dwayne Bohac*	Demetrius Walker (WI)
HD 139	Jarvis Johnson*		Richard Shohn Trojacek
HD 140	Armando L. Walle*		
HD 141	Senfronia Thompson*		
HD 142	Harold Dutton, Jr.*		
HD 143	Ana Hernandez*		
HD 144	Mary Ann Perez*	Ruben Villarreal	
HD 145	Carol Alvarado*		Clayton R. Hunt (L)
HD 146	Shawn Thierry*		J. J. Campbell (L)
HD 147	Garnet Coleman*	Thomas Wang	
HD 148	Jessica Farrar*	Ryan T. McConnico	
HD 149	Hubert Vo*		Aaron Close (L)
HD 150	Michael Shawn Kelly	Valoree Swanson*	

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