



January 9, 2021

TCJL Program of Work

The 87th Legislature convenes on January 12 with an overflowing bucket of immediate and urgent challenges triggered by the ongoing pandemic emergency. If it were only the state's shaky fiscal condition, the problem would be bad enough, but in a redistricting session following hard on the heels of a bitter and contentious national election, we can expect some volatility in the months ahead. Simply convening the House and Senate in the same building presents a whole array of logistical issues, not to mention the mechanics of holding committee meetings and voting on legislation. It comes then as no surprise that the legislative leadership has cautioned that the constraints under which the Legislature must operate until a COVID vaccine is widely available (and administered) will likely preclude consideration of the usual number of bills. Only after dealing with the priority items—the budget, redistricting, and perhaps election security and law enforcement issues—will the Legislature have the bandwidth to take up other matters.

But other matters there will be. While recognizing the potential limitations ahead, TCJL nevertheless will put forward an aggressive legislative agenda to address serious policy concerns in the civil justice and judicial arenas. In fact, the scope and pace of the economic recovery we have good reason to anticipate will no doubt be affected in an adverse way if we allow these concerns to lie fallow for another two years. Even if the Legislature cannot get to all of them in the spring, there is tremendous value in starting the process and pushing it forward. This is what we aim to do.

Pandemic Liability Protection TCJL Pandemic Task Force Support/Negotiate

Sen. Kelly Hancock

The TCJL Pandemic Task Force, with the advice and counsel of former Senator Bob Duncan, former Texas Supreme Court Chief Justice Tom Phillips, and longtime TCJL consulting attorney Shannon Ratliff, has developed a proposal to extend broad liability protections to health care providers, businesses, manufacturers and distributors, and non-profit entities, including schools and religious institutions, against lawsuits arising from a declared pandemic emergency. The proposed legislation is retroactive to the Governor's emergency declaration last March and applies to any cause of action alleging damages from exposure to COVID-19 arising on or after that date. It will also apply to any future pandemic emergencies. The legislation will be carried in the Texas Senate by Senator Kelly Hancock (R-North Richland Hills), chair of the Senate Business & Commerce Committee, and is one of Lt. Governor Dan Patrick's legislative priorities. The Governor's Office and House leadership have also responded enthusiastically to this effort. We hope that the legislation will receive early attention in the legislative process and get to the Governor's desk as soon as possible.

Eminent Domain Reform
Coalition for Critical Infrastructure
Negotiate/Support/Monitor

HB 901, HB 902 by Burns

The Coalition for Critical Infrastructure (CCI), a project of TCJL, is proposing legislation to make significant reforms to the eminent domain process in response to landowner concerns about the transparency, fairness, and accountability of the process. CCI determined that after trying to deal with eminent domain in a defensive posture for the past three sessions, the time had come to craft a bill that had the support of public and private infrastructure builders and addressed issues raised by the landowners in past negotiations. As the landowners sought during the last session, the proposed legislation addresses the basis of the initial offer, landowner meetings, and easement terms, as well as simplifying the Landowner's Bill of Rights, creating an ombudsman's office to assist with landowner questions, and establishing a more rigorous certification requirements for right-of-way agents. The CCI proposal is embodied in HB 902, which has been filed by Rep. DeWayne Burns (R-Cleburne). Rep. Burns has also filed HB 901, which reflects the landowner perspective on the point reached by negotiations in the Senate last session. Discussions with Rep. Burns have begun, and we are hopeful that they will produce a mutually agreed bill that can win legislative approval and put this contentious issue to bed.

Trucking Litigation Reform
Keep Texas Trucking Coalition
Support

Litigation against commercial shippers and other commercial vehicle owners has reached a crisis point in terms of the ability of shippers to afford to operate in Texas. Eight or nine-figure jury awards have become increasingly common, partly because of inflammatory and improper trial tactics, evidentiary abuses, and inexperienced trial judges in certain areas of the state. TCJL is working in close support of Texans for Lawsuit Reform's (TLR) proposed legislation to address this crisis. This legislation cannot wait until next session because it directly affects the Texas economy's ability to recover from the pandemic crisis. It also affects virtually every sector of the business community; any entity that runs a fleet of commercial vehicles (or any commercial vehicle, for that matter) can be drawn into this ruinous litigation. In addition to pandemic liability protection and eminent domain, TCJL considers this must-pass legislation this session and will lend our full support to the effort.

Paid or Incurred
Support/Negotiate

SB 207 by Schwertner

The paid or incurred rule assures that claimants can only recover health care expenses actually "paid or incurred," meaning that they do not get windfall based on full bill (chargemaster) rates that are never paid or incurred by anybody with any kind of health care coverage. Unfortunately, the trial bar has a work around for the rule that, in various ways, a claimant or provider does not submit the bill to a third-party payor, but instead takes the fee out of an eventual settlement or award. This practice entirely guts the paid or incurred rule and vastly inflates the real value of claims involving medical expenses. TCJL strongly supports SB 207 by Sen. Charles Schwertner (R-Georgetown), which allows a defendant to introduce evidence of the actual amounts reimbursed for specified services at the time and place of the rendering of the service. This change will give the jury the

information necessary to determine whether billed amounts are reasonable, restoring the purpose and intent of the paid or incurred rule in the first place.

Judicial Reform

Texas Judicial Selection Commission Support

A perennial issue for TCJL and the Legislature, numerous efforts have been made to improve the judicial selection process ever since TCJL's inception in 1986. Recent partisan sweeps in trial and appellate courts, however, have given new urgency to the issue, so much so that the 2019 Legislature authorized the Texas Judicial Selection Commission, a panel of non-legislative and legislative members, to examine the process and recommend changes. The Commission's report, released at the end of last year, split on the issue of whether to adopt an appoint-ratification election system similar to the Texas Plan proposed to the Commission by TCJL and TLR almost a year ago. But the Commission also voted overwhelmingly to enhance the minimum qualifications for judicial office and the influence of political money in judicial elections. Though TCJL, as it historically has, continues to support and will work toward the eventual adoption of the Texas Plan, that plan also includes increasing minimum qualifications *and* strengthens mechanisms for removing judges who consistently misapply or ignore the law. TCJL will work closely with TLR and the Commission members to craft legislation for 2021 that makes progress in this direction. Judicial reform is a long-term project (35 years and counting), but it is a significant and necessary business climate issue that we should never let slip.

Business Courts

Support

Over the past several sessions, legislation creating an appointed "chancery court" similar to the Delaware model has been introduced and discussed. This proposal has been refined over time in the face of substantial opposition. In 2021, however, the time may finally have arrived to make legislative progress on a proposal modeled on the Texas Supreme Court's current multidistrict litigation authority. Under this proposal, a business specialty court could be established under SCOTX's authority to hear certain matters of corporate and business law, with an eye toward developing a stable and predictable body of business law comparable to that of Delaware. With the number corporate and business headquarters already or soon to be located in Texas, the time has come to match our modernized Business Organizations Code with court decisions that interpret business law in a reasonably uniform manner. This would not only make Texas a more desirable place to conduct complex business litigation for business citizens of Texas, but it would add immeasurably to Texas and national jurisprudence in these types of cases. There is simply no point in forcing Texas businesses to go to other states to litigate complex disputes that can and should be heard in our own courts.

Supersedeas Bonds

Support/Negotiate

The last time that the Legislature addressed problems with the statutory provision requiring security for a judgment (i.e., supersedeas bonds) occurred in 2003 as part of the health care liability and general civil justice reforms. As the nature and dollar value of disputes have substantially grown since that time, the current statutory cap of \$25 million or one-half of the judgment debtor's net

worth is no longer sustainable for Texas businesses, particularly small to medium-sized businesses. These businesses simply cannot afford to pull \$25 million or more out of their ongoing operations to post security, leaving them in many cases without the ability to appeal adverse trial court rulings on procedural and substantive law questions. The problem is particularly acute for businesses that have significant real estate assets, such as land, farm and ranch improvements, commercial real estate, or mineral interests, but little cash or cash equivalents on hand to meet the minimum security requirements. TCJL plans to pursue legislation this session to provide alternate means of posting security for judgment that eases the burden on businesses seeking to appeal a trial court decision while still providing the necessary security for a judgment that may be affirmed on appeal. This proposal involves a fundamental issue of due process for *all* Texans who face an adverse civil judgment with legitimate grounds for appeal.

Again, we are conscious of the fact that the Legislature will be hard-pressed to deal with its big priorities and at the same time address other important policy issues, as it does under ordinary circumstances. We believe, however, that all of these issues demand attention sooner rather than later because they have substantial impacts on the Texas economy and the judicial system. TCJL will work diligently with its partners and allies on these items and others that may arise in the weeks ahead. We look forward to working with our membership and advocating for its interests to the limit of our ability.

