TEXAS CIVIL JUSTICE LEAGUE JOURNAL | MORE JOBS, NOT LAWSUITS

Summer 2021

TEXAS CIVIL JUSTICE LEAGUE

JOURNAL

HIGHLIGHTS

- TCJL 2021 Outstanding Legislators
- 87th Legislature Session Report
- 2020-2021 Amicus Report

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 corporate legal department benefits by monitoring court rulings and legislation, 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 civil justice 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

400 W. 15th Street, Suite 1400
Austin, Texas 78701
512-320-0474
info@tcjl.com

TEXAS CIVIL JUSTICE LEAGUE JOURNAL

Summer 2021

TEXAS CIVIL JUSTICE LEAGUE

TEXAS CIVIL JUSTICE LEAGUE
400 W. 15TH Street, Suite 1400
Austin, Texas 78701
P: 512-320-0474
TCJL.com
info@TCJL.com

STAFF

Carol Sims
Executive Director

Lisa Kaufman
General Counsel

George S. Christian
Senior Counsel

Chantal Romo
Director of Executive Services

Alicia Glover
Comptroller

Board Of Directors

EXECUTIVE COMMITTEE

Hector Rivero, Chairman
Texas Chemical Council

Bill Oswald, Vice Chairman
Koch Companies

Leslie Ward, Secretary
AT&T

Jeff Bonham
CenterPoint Energy

Matthew Broaddus
Dow Chemical Company

Jeff Buel
Johnson & Johnson

Michael Darrouzet
Texas Medical Association

Travis Kessler
Texas Association of Realtors

Robert Levy
Civil Justice Reform Group
& Exxon Mobil

Todd Staples
Texas Oil & Gas Association

Tony Bennett
Texas Association of Manufacturers

Sonya Bishop
Phillips 66

Abigail Dodd
Shell Oil Company

Kari Gibson
ConocoPhillips

Richie Jackson

Walt Jordan
ONCOR Electric

Kari King
USAA

Emily Williams Knight
Texas Restaurant Association

H. Lee Loftis, Jr..
Independent Insurance Agents of Texas

Rob Looney

Julie Moore
Occidental Petroleum

Nathan Morris
U.S. Chamber of Commerce

Chris Newton
Texas Apartment Association

Amber Pearce
Pfizer

Julio Reyes
AEP Texas

Grant Ruckel
Energy Transfer Partners

Sherena Shawrieh
Valero Energy Corporation

Tara Snowden
Zachry Corporation

Paul Solomon
State Farm Insurance

Corbin Van Arsdale
AGC – Texas Building Branch

Julie Williams
Chevron

ex officio

Red McCombs
Ralph Wayne

Chairman's Corner
by Hector Rivero

When we popped the champagne corks at midnight on January 1, 2020, the Texas economy was operating at full throttle, thousands of people were flocking to Texas every month for new jobs and opportunities, oil and gas prices were strong, and the state budget was heading for a large surplus.

We all know what happened next. As a consequence of the coronavirus pandemic, the economy came to a virtual full-stop in late Q1 and Q2, the historically low unemployment rate of 3.5% surged to nearly 5%, 1.8 million Texans filed for unemployment benefits between March 15 and May 2, oil prices plunged 200%, and Comptroller Glenn Hegar told state leaders and agency heads to prepare for budget cuts. While different sectors of the economy felt the effects of the pandemic to different degrees, we were all in this boat together, and I am proud to say that TCJL member companies and associations rose to the occasion. Not only did our members keep essential businesses and infrastructure going, we produced and donated tens of millions of dollars in supplies, products, and services that helped prevent and mitigate the spread of the worst public health emergency in a century.

The pandemic also created serious liability concerns for Texas businesses and health care providers. When it became clear that this emergency was going to be a long-term event, and that the Governor would not be able to use his emergency powers to extend liability protections by executive order, TCJL quickly convened a Pandemic Liability Task Force to begin the process of drafting legislation, receiving input from TCJL members, and engaging stakeholders, including the Texas Alliance for Patient Access and Texas Trial Lawyers Association. You know the result. SB 6 passed both chambers by overwhelming margins and was signed into law by Governor Abbott. Thanks to you, hundreds of thousands of health care providers, first responders, business owners, educational institutions, and non-profit organizations won't have to worry about a rash of litigation unless they were grossly negligent.

In addition to putting together the winning effort on SB 6, the Coalition for Critical Infrastructure (CCI), a project organized by TCJL achieved the monumental task of enacting the most significant eminent domain reform legislation in a decade. HB 2730 makes the eminent domain process fairer and more transparent for landowners, while retaining the ability of infrastructure builders to meet the needs of our growing population. Again, CCI sought the path of negotiation and consensus-building, ultimately winning support for the bill from the Texas Farm Bureau and more than 20 other landowner groups. No one thought that would have been possible six years ago, but in this business, credibility, persistence, and consistency pays off. That's exactly what TCJL brings to the table.

TCJL had other notable successes this session as well. After nearly passing last session, TCJL and TXOGA worked together to win passage of legislation clarifying that oil and gas producers can withhold royalty proceeds pending resolution of a title dispute without being liable for breach of contract. TCJL also played a strong supporting role with our friends at Texans for Lawsuit Reform on much-needed commercial trucking litigation reform (HB 19) and paid or incurred reform (SB 207). We also weighed in on a plethora of bills affecting the judicial system, attorney's fees, new causes of action, and other liability issues. You can see for yourself in this journal just how intense the 87th Legislature was for the civil justice arena.

We appreciate your continued membership and involvement in TCJL's efforts to maintain a strong business climate through fair and reasonable civil justice reforms and a well-qualified, impartial, and independent judiciary. The successes of this session have once again demonstrated TCJL's continuing value to the Texas business community. We never know when the next litigation threat will strike or from what direction—all we know is that there will be one. That's why we need TCJL more now than ever.

Hector Rivero
President & CEO
Texas Chemical Council

Recognizing OUTSTANDING LEGISLATORS for 87th Legislature

At the conclusion of each legislative session, the Texas Civil Justice League is honored to recognize legislators for their outstanding service to the Texas civil justice system during the session. We typically honor a unique set of legislators who have not previously received this recognition. This session we are proud to designate the following as TCJL Legislators of the Year for the 2021 regular session:

Sen. Kelly Hancock
(R-North Richland Hills)

As Chair of the Senate Business & Commerce Committee, Sen. Hancock handled some of the most complex and significant legislation of the session with his usual combination of common sense, tenacity, and effectiveness. At the request of TCJL, Sen. Hancock authored and helped to negotiate the most important pro-business piece of legislation this session, the Pandemic Liability Protection Act (SB 6), which passed the Senate by a 29-1 vote. He also authored a series of bills addressing the electricity infrastructure in the wake of Winter Storm Uri.

Sen. Brian Birdwell
(R-Granbury)

Sen. Birdwell chaired the Senate Natural Resources and Economic Development Committee, where he was responsible for a wide array of environmental and economic development legislation. On behalf of TCJL, Sen. Birdwell authored SB 1259, which allows an oil and gas producer to withhold royalty payments pending the determination of a title dispute without fear of being sued for a breach of contract. Sen. Birdwell also carried the two-year extension of the Chapter 313 tax incentive program and passed legislation funding the Texas Emissions Reduction Program, among others.

Sen. Lois W. Kolkhorst
(R-Brenham)

Since 2015, Sen. Kolkhorst has done more to advance eminent domain reform than any other member of the Legislature. When TCJL formed CCI in 2017, we beat a path to Sen. Kolkhorst's office to begin the hard work of fashioning a bill that could get sufficient support on all sides to move forward. Sen. Kolkhorst incorporated several CCI ideas in her 2017 legislation, which passed the Senate before negotiations with landowner groups failed in the House. In 2019, along with Lt. Governor Patrick, she devoted hours of precious legislative time trying to reach an agreement, which proved elusive and ultimately died at the end of the session. This session the strategy shifted to a House-first approach, which produced HB 2730. There is no question that the reform bill finally passed this session bears the stamp of Sen. Kolkhorst and her 2017 and 2019 efforts. We owe her a debt of gratitude for continuing to work with TCJL and CCI throughout a long and arduous process.

Rep. Joe Deshotel (D-Beaumont)

Appointed as Chair of the House Land & Resource Management Committee, Rep. Deshotel inherited a hitherto unsuccessful effort to enact meaningful eminent domain reform that dates back to 2015. Rep. Deshotel filed and subsequently passed HB 2730, representing an agreement between TCJL, the Coalition for Critical Infrastructure (CCI), the Texas Farm Bureau, the Texas Forestry Association, and many other landowner groups. Rep. Deshotel took it upon himself to keep the parties at the table until a deal could be struck. Once it came together, he skillfully brought the legislation to the House floor and kept the agreement unscathed. We simply cannot thank Rep. Deshotel enough for his leadership in resolving one of the most protracted and difficult legislative battles in many years.

Rep. DeWayne Burns
(R-Cleburne)

Rep. Burns joins Rep. Deshotel as co-MVP of eminent domain reform. Rep. Burns likewise filed the CCI version of the bill (HB 901), as well as a bill representing the position of the Farm Bureau and other landowner groups (HB 900). Through skillful and patient negotiations, Rep. Burns proved capable of finishing a job that others could not: achieving significant reforms that benefit landowners and maintain the ability of infrastructure builders to meet the needs of our growing economy. Rep. Burns signed on to HB 2730 as co-author with Rep. Deshotel, and together they got the bill through the Texas House with only a single dissenting vote. For this tremendous achievement, we owe a debt of gratitude to this wonderful public servant.

Rep. Reggie Smith
(R-Van Alstyne)

As a member of the House Judiciary & Civil Jurisprudence Committee, Rep. Smith was a key supporter in committee of both SB 6 and HB 19, the trucking litigation reform legislation. At TCJL's request, he also authored the House version of SB 1259 (HB 3262), which he successfully passed out of the committee and got to the floor. An experienced and knowledgeable attorney, Rep. Smith has become an indispensable member of JCJ. His thoughtful questions and common-sense analysis of the issues make bills better. We are fortunate that Rep. Smith has devoted himself to public service and are grateful for all of his counsel and support on the committee this session.

87TH LEGISLATIVE SESSION REPORT

Even before it began, the 87th Legislature was always going to be unique. Nobody knew how long the pandemic emergency would continue, when vaccines would be readily available, or how fast the economy could mount a comeback. The culture wars that erupted over the pandemic response in the spring of 2020 created divisions between the state and federal governments, state and local governments, Democrats and Republicans, and Republicans and Republicans. On top of the crisis raged perhaps the most bitterly contested presidential election since 1860. Although Texas Democrats hoped to take advantage of voter dissatisfaction with the direction of the country, Texas voters thought otherwise. The Lone Star State remained reliably red, with Democrats netting only a single seat in each of the House and Senate.

Once the dust from the November election settled (at the state level, at least), the first order of business was the election of a new House speaker. While no clear front runner had emerged during the fall, support rapidly coalesced behind Rep. Dade Phelan (R-Beaumont), who had just won re-election to his fourth term in the House. During the 86th Legislature, Rep. Phelan had ably chaired the House State Affairs Committee and was a close ally of former Speaker Dennis Bonnen. Mobilizing bipartisan support from many of the former speaker's leadership team and House Democrats, Rep. Phelan produced a list of supporters shortly after the November election that easily put him over the top in the race to be the 76th Speaker of the Texas House of Representatives.

When presumptive Speaker Phelan, together with the other two-thirds of the leadership troika, viewed the landscape in the aftermath of the November election, the scene looked bleak. There were legitimate fears about the pandemic's economic impact on the state budget. Everyone also anticipated that congressional and legislative redistricting would, along with the budget, dominate the regular session and suck the air out of the room for everything else. Indeed, when the Legislature convened in January, Comptroller Hegar forecasted a $1 billion shortfall in the current 20-21 budget, which would give the Legislature even less to spend in the next budget. Then in early February, Governor Abbott announced his list of emergency items, which included pandemic liability protection, expansion of broadband access, and bail reform. Setting a more partisan tone, the Governor also designated election integrity and penalizing local governments for "defunding" the police as emergency legislation.

COVID-19 protocols significantly slowed the pace of activity in the first phase of the session. Weeks passed with only a few token floor proceedings, and the Capitol remained largely closed to anyone but members, staff, and witnesses testifying in budget hearings. Legislators continued to file plenty of bills, with no guarantee that most of them would ever get a committee hearing, much less make their way to the floor in either chamber. The Speaker issued committee assignments in early February, shaking up the leadership team and setting out broad priorities focused on public education and health care issues.

Just as it appeared that the Legislature was about to get down to real business, however, Winter Storm Uri intervened, shutting down the Legislature (and just about everything else) for a week in mid-February. Uri also dramatically shifted the focus of the session in the weeks following the storm. Angry constituents, stranded in their freezing homes without power and water, understandably blamed public officials at all levels for the catastrophic failure of basic infrastructure, particularly when it became widely known that the Legislature had ignored federal winterization

recommendations made in the wake of the last big winter storm in 2011. Wholesale and retail electricity prices skyrocketed in some areas, leaving consumers with ruinous bills to pay and no prospect of paying them. Supply chains, already weakened by the pandemic emergency, came to a virtual standstill in many parts of the state. Some froze to death in their own homes. Still grappling with the effects of the pandemic emergency, the Legislature now had a full blown human—and political—disaster on its hands.

The ice had hardly melted when the House and Senate convened hearings on the management and operation of ERCOT and the PUC, quickly securing the resignations of ERCOT board members and top executives, as well as all three PUC commissioners. Legislation was introduced and hearings commenced on a range of bills dealing with, among other things, compulsory winterization, market pricing circuit breakers, expanding generation capacity, renewable energy, and market structure. As the weeks passed and the immediate shock of the storm abated, most of the more radical proposals for restructuring the market fell by the wayside. Instead, the Legislature ended up primarily addressing improvements and expansion of the current generation and transmission infrastructure and figuring out how to spread the cost without causing rate shock to individual consumers and businesses.

Even as the Legislature focused on the fallout from the storm, other events similarly altered the complexion of the session in a dramatic fashion. First, the anticipated budget crisis never happened. Two federal stimulus packages pumped billions of dollars into Texas in the form of direct payments, extended unemployment benefits, and direct aid to state and local governments. Instead of a shortfall, Comptroller Hegar revised the revenue estimate to add $1.67 billion to the current budget period, resulting in a $725 million surplus. Funds available for spending in the 22-23 budget also went from negative to a whopping $3.1 billion cushion. The Comptroller further forecast that the Rainy Day Fund can expect to have a robust $12.12 billion on hand at the end of the next biennium. Once the economy gets on track again, these numbers could continue to rise. Second, the Census Bureau delayed the release of data to the states until September, meaning that the earliest opportunity for congressional and legislative redistricting won't present itself until this fall. Though the House and Senate Redistricting Committees have proceeded with public hearings this session, the real battle will take place in a fall special session and beyond. This timeline puts the date of next year's party primaries, currently scheduled for March 1, at risk. Legislation pushing the date of the primary until later in the spring if redistricting bills had not passed by January 3 (SB 1822) cleared the Senate but died in House Redistricting Committee.

The Legislature took advantage of the budget and redistricting reprieve to double down on an aggressive conservative agenda, much of it linked to the ongoing polarization of national politics. Lieutenant Governor Patrick designated 31 top priorities for the session, including red meat issues such as restricting abortion rights, banning gender-affirming care for transgender children, tightening voting laws, local government pre-emption, penalizing cities for "defunding" the police, taxpayer-funded lobbying, gun rights (i.e., constitutional carry), making social media companies liable for "censorship," and punishing corporate businesses for certain types of political expression. Most of these issues, in some form or fashion, made their way to the House floor as well, producing a long series of party line votes that left a deep bruise on the general feeling of goodwill in the body.

As you will read below, TCJL once again had marked success this session, spearheading the passage of SB 6, the Pandemic

Liability Protection Bill, and hard-fought eminent domain reform legislation, HB 2730. We also pushed across the finish line legislation dealing with the suspension of oil and gas royalty payments pending determination of a title dispute. Additionally, after a four-session standoff on contractor liability for a defective design, compromise legislation finally passed along the lines proposed by TCJL, the Texas Chemical Council, and Texas Oil & Gas Association in the past two sessions. TCJL likewise played an active supporting role in support of our friends and colleagues at Texans for Lawsuit Reform on HB 19, which makes much-needed reforms to trial and evidentiary procedures in commercial trucking litigation, and SB 207, which proposed reforms to the paid or incurred rule and medical expense affidavits (see article on pages 33 and 57 for a full explanation of this bill's history).

As always, we are deeply appreciative of the support we received this session from Governor Abbott, Lieutenant Governor Patrick, and Speaker Phelan. We could not have been successful without the assistance of the leadership, especially on complex bills such as SB 6 and HB 2730. Just as importantly, those bills would have gone nowhere without the experienced leadership of their authors and sponsors. For SB 6, special thanks go out to **Senator Kelly Hancock** (R-North Richland Hills) and his staff, particularly **Mattie Heith**, for shepherding the negotiations on the bill between TCJL, Texas Alliance for Patient Access, and the Texas Trial Lawyers Association. When the bill got to the House, **Rep. Jeff Leach** (R-Plano) took over and finished the job. We would also like to thank the members of the House Judiciary & Civil Jurisprudence Committee who gave us a thoughtful and positive reception in committee and supported the bill: Vice Chair **Rep. Yvonne Davis** (D-Dallas), **Rep. Julie Johnson** (D-Dallas), **Rep. Harold Dutton** (D-Houston), **Rep. Joe Moody** (D-El Paso), **Rep. Mike Schofield** (R-Katy), **Rep. Reggie Smith** (R-Sherman), **Rep. Matt Krause** (R-Fort Worth), and **Rep. Mayes Middleton** (R-Galveston). The bipartisan support for SB 6 in both chambers recalls TCJL's long tradition of working with all sides to craft reasonable, sustainable civil justice reform, and we intend to keep doing it that way.

With regard to HB 2730, we owe an enormous debt of gratitude to **Rep. Joe Deshotel** (D-Beaumont), who as Chair of House Land and Resource Management took it upon himself to lead the effort to resolve an issue that has roiled the legislative waters since 2015. That same level of gratitude goes out to **Rep. DeWayne Burns** (R-Cleburne), whose determined efforts to bring landowner groups to the table to work out an agreement never flagged. We are also grateful to the members of the House Land and Resource Management Committee: Vice Chair **Rep. Ben Leman** (R-Iola), **Rep. Kyle Biederman** (R-Fredericksburg), **Rep. Dustin Burrows** (R-Lubbock), **Rep. Tom Craddick** (R-Midland), **Rep. Ramon Romero** (D-Fort Worth), **Rep. Jon Rosenthal** (D-Houston), **Rep. Sean Thierry** (D-Houston), and **Rep. David Spiller** (R-Jacksboro).

Fortunately, for the most part, legislation that would have adversely affected the civil justice system did not pass this session. Nevertheless, as the following report shows, in broad terms the civil justice system remains an extremely active area for legislative intervention. We also note the increasing prevalence in the legislature of utilizing the courts and regulatory agencies to enforce standards of conduct that relate in one way or another to specific social and political issues. For advocates of a predictable, stable, and mainstream liability system that does not pick winners and losers, this troubling trend does not bode well for the future.

Judicial Reform

SJR 47 by Senator Joan Huffman (R-Houston), Rep. Jeff Leach (R-Plano)

Election date 11/2/21.

Raises the eligibility standard for Chief Justice and Justice of the Supreme Court to a Texas resident licensed to practice law in Texas with at least ten years of practice experience in the state or a combined total of at least ten years of Texas law practice or judicial service on a state court or statutory county court. Disqualifies a lawyer whose license has been suspended, revoked, or subject to a probated suspension during that ten-year period for the bench. Requires a candidate for district court to have eight years of practice in Texas, rather than the current four. Disqualifies a district court candidate for any revocation, suspension, or probated suspension of the candidate's Texas law license during the eight-year period.

SB 11 by Sen. Joan Huffman (R-Houston)

Died in House State Affairs.

Court of appeals reorganization was one of Lt. Governor Patrick's top 31 legislative priorities and was backed by the Governor. Rep. Phil King (R-Weatherford) and Sen. Joan Huffman (R-Houston) filed placeholder bills for this purpose. Rep. Andy Murr (R-Junction) also filed a placeholder bill. As it passed the Senate, SB 11:

- Restructures the existing 14 courts of appeals into 7 districts by combining existing districts, eliminating overlapping jurisdiction, and removing split district courts;

- Retains all 80 appellate justices with their chambers at a particular location, keeps all existing courthouses open, and adds courthouses in Midland and Lake Jackson;
- Assigns each justice to one of the 7 new districts effective 1/1/23;
- Designates 5 of the 80 justices to a different courthouse than currently, with their terms expiring in 2022 and filled by a districtwide election in 2022;
- Sitting chief justices remain chiefs through the end of their terms, but if a new COA has two chiefs, they must coordinate their responsibilities with the CJ of SCOTX resolving differences;
- Takes effect 9/1/21;

The new map establishes new districts with the following seats:

- District 1: Amarillo and Lubbock covering the Panhandle region;
- District 2: Combines El Paso and Midland in a huge district running east through the Hill Country;
- District 3: Combines San Antonio, Corpus Christi, and Edinburg;
- District 4: Combines Texarkana, Fort Worth, Eastland, and Waco;
- District 5: Combines Dallas and Austin;
- District 6: Keeps the 2 Houston courts, adds a Lake Jackson court, and expands the district to extend westward right up to Austin and San Antonio;
- District 7: Combines Tyler and Beaumont in a Deep East Texas district.

SB 1529 by Sen. Joan Huffman (R-Houston)

Died in House State Affairs.

A counterpart bill to SB 11, SB 1529, proposed to create a statewide court of appeals for cases of statewide significance, including administrative law, sovereign immunity, and constitutional law. As it passed the Senate, SB 1529:

- Creates the Texas Court of Appeals with exclusive intermediate appellate jurisdiction over civil cases other than:

  (1) brought by or against the state or a state agency, board, or commission, or by or against an officer of the state or a state agency, board, or commission, other than:

  (A) a proceeding brought under Title 5, Family Code;

  (B) a proceeding brought against an elected official of a political subdivision or the judge of a trial court arising from an act or omission made in the official's or judge's official capacity;

  (C) a proceeding relating to a mental health commitment or a civil asset forfeiture;

  (D) a juvenile case;

  (E) a proceeding brought under Chapter 125, Civil Practice and Remedies Code, to enjoin a common nuisance;

  (F) a quo warranto proceeding;

  (G) a proceeding relating to an order of expunction under Chapter 55, Code of Criminal Procedure, or an order of nondisclosure of criminal history record information under Subchapter E-1, Chapter 411; or

  (H) a proceeding relating to the conditions, modification, revocation, or surrendering of a bond, including a surety bond; or

  (2) in which a party to the proceeding files a petition, motion, or other pleading challenging the constitutionality of a statute of this state;
- Provides for 5 justices elected statewide, with first seats filled in the 2022 election;
- Transfers pending litigation within the court's jurisdiction to the court;
- Applies the same administrative procedures as other courts of appeals, binds the court to SCOTX precedent, sites the court in Austin but allows it to hear cases and transact business in any county that the court determines necessary and convenient;
- Excludes cases brought under the Family Code.

HB 1875 by Rep. Brooks Landgraf (R-Odessa)

Died on House Calendar.

A proposal to establish a statewide business court was introduced for the fourth consecutive session. HB 1875 by Rep. Brooks Landgraf (R-Odessa) establishes a business court with concurrent jurisdiction with a district court in: (1) a derivative action on behalf of a busines organization; or (2) an action in which the amount in controversy exceeds $10 million (exclusive of attorney's fees, costs, interest, penalties, statutory damages, or exemplary damages) that arises against, between, or among business organizations, governing authorities, governing persons, members, or owners relating to a contract transaction for business, commercial, investment, agriculture, or similar purposes. The bill:

- Gives the business court statewide jurisdiction of these actions and all matters related to or arising out of them;
- Exempts actions brought against a governmental entity, personal injury or death claims, claims under the DTPA, the Estates Code, the Family Code, or Title 9, Property Code, unless the parties agree to submit to the jurisdiction of the business court;

- Provides that claims within the jurisdiction of the business court may be directly filed there;
- Establishes a procedure for removing claims not within the jurisdiction of the business court to a county in which the claim could have originally been filed;
- Provides a process for removing an action from a district or county court to the business court on motion of a party;
- Provides an interlocutory appeal of a business court order to grant or refuse to remand an action to the court of business appeals;
- Requires a business court judge to be at least 35 years of age, a U.S citizens, a Texas resident for two years preceding appointment, a Texas licensed attorney with at least 10 years of experience in Texas in practicing complex business litigation or business transaction law, teaching complex business litigation or business transaction law at an accredited Texas law school, or serving as a judge of a Texas civil court (or any combination of the above);
- Provides for gubernatorial appointment of seven judges with the advice and consent of the Senate, no more than three of whom may reside in the same county and no more than a majority of which may be affiliated with the same political party;
- Provides for two-year terms with the possibility of reappointment;
- Provides for filling vacancies, compensation, and removal;
- Bars a business court judge from private practice while in office;
- Provides for the appointment of visiting judges by the chief justice of the supreme court;
- Provides for a jury trial in the county in which venue is proper or, if the case was removed to the business court, in the county in which the case was originally filed, as chosen by the plaintiff;
- Provides for assigning cases to a business court judge on a rotating basis;
- Provides for the central administration of the business court in Travis County, with judges maintaining chambers in the county seat of their county of residence
- Provides for remote proceedings;
- Authorizes the business court to set filing fees;
- Establishes the Court of Business Appeals with mandatory jurisdiction over appeals from the business court;
- Provides for gubernatorial appointment of seven justices with the same qualifications as a business court judge for two-year terms, subject to reappointment; governor selects the chief justice; and
- Provides for hearings in randomly selected three-judge panels, with the possibility for en banc review.

Tort Liability

SB 6 by Sen. Kelly Hancock (R-North Richland Hills), Rep. Jeff Leach (R-Plano)

Signed by the Governor 6/14/21. Effective Immediately.

- Amends §51.014, CPRC, to authorize an interlocutory appeal if a trial court overrules an objection to or fails to grant relief to a defendant on account of the plaintiff's failure to file an expert report pursuant to Chapter 148, CPRC, as added by this Act.
- Adds §74.155, CPRC, to exempt a physician, health care provider, or first responder from liability for an injury or death arising from care, treatment, or failure to provide care or treatment related to or impacted by a pandemic disease, except in a case of reckless conduct, intentional, wilful, or wanton misconduct;
- Requires the physician, provider, or first responder to show, by a preponderance of the evidence that a pandemic disease or disaster declaration related to a pandemic disease was a producing cause of the care, treatment, or failure to provide care or treatment that allegedly caused death or injury, or the individual who suffered death or injury was diagnosed or reasonably believed to be infected with the disease at the time of the care, treatment, or failure to provide treatment;
- Bars the physician, provider, or first responder from using the showing above as a defense to a negligence claim if the claimant proves by a preponderance of the evidence that the diagnosis, treatment, or reasonable belief of infection at the time of the care, treatment, or failure to treat was not a producing case of the injury;
- Enumerates nine specific examples of care, treatment, or failure to provide care or treatment;
- Requires a physician, provider, or first responder who intends to raise a defense to provide a claimant with specific facts supporting the defense not later than 60 days after the claimant files the expert report or 120 days after filing of the original answer;
- Applies only to a claim arising from care, treatment, or failure to provide care or treatment that occurred during the period beginning on the date the president or governor declared a pandemic-related disaster (March 13, 2020) and ending on the termination of the declaration.
- Adds Chapter 148, CPRC, to limit the liability of a person who designs, manufactures, labels, sells, or donates enumerated products for personal injury, death, or property damage;

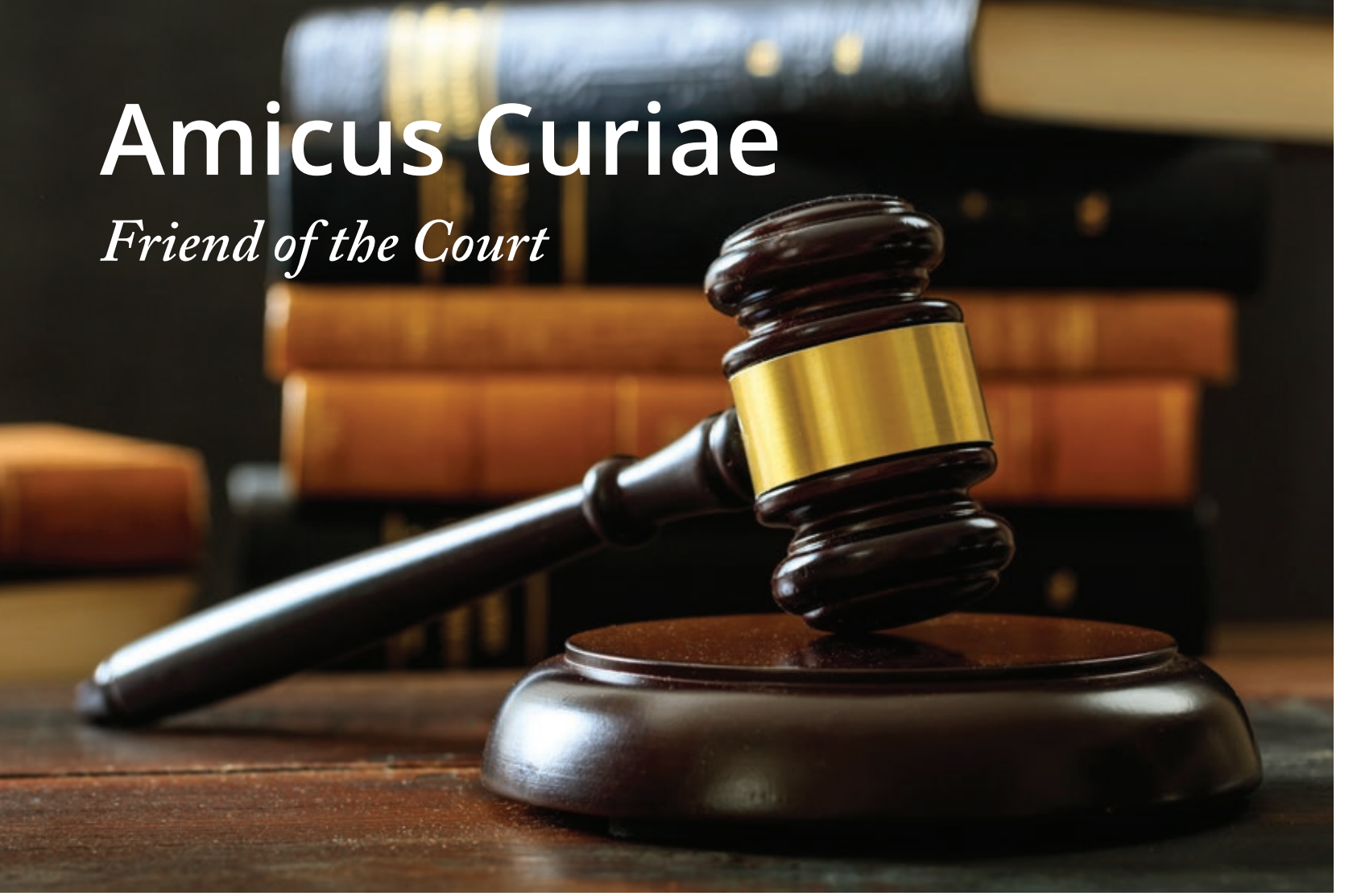
- Imposes liability only if the person had actual knowledge of a product defect when the product left the person's control, acted with actual malice in designing, manufacturing, selling, or donating the product, *and* the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product;
- Provides immunity for a failure to warn or provide adequate instructions unless the person acted with actual malice *and* the failure to warn or provide adequate instructions presents an unreasonable risk of substantial harm;
- Provides immunity for the selection, distribution, or use of a product unless the person had actual knowledge of the defect, acted with actual malice, *and* the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product;
- Provides immunity for injury or death caused by exposing an individual to a pandemic disease during a pandemic emergency unless the claimant proves that the person:
  - knowingly failed to warn the claimant of or failed to remediate a condition that the person knew or should have known was likely to result in the exposure, provided that the person: (1) had actual control over the condition, (2) knew that the claimant was more likely than not to come into contact with the condition, and (3) had a reasonable opportunity and ability to remediate the condition or warn the claimant of the condition; or
  - knowingly failed to implement or comply with applicable government-promulgated standards, guidance, or protocols, provided the person: (1) had a reasonable opportunity or ability to comply with the standards, (2) refused to implement or comply with or acted with flagrant disregard of the standards; and (3) that the government-promulgated standards that the person failed to comply with did not on the date of the exposure conflict with standards the person did comply with;
- Requires the claimant to produce reliable scientific evidence showing that the failure to warn of or remediate the condition, or implement or comply with government-promulgated standards was a cause-in-fact of the claimant contracting the disease;
- Requires the claimant to serve a complying expert report not later than the 120th day after the defendant files an original answer;
- Provides that if, during a declared pandemic emergency, neither a gubernatorial or state agency order nor a local governmental entity has established or applied standards that apply to the person, the person is deemed to be in compliance with government-promulgated standards at the time of the exposure;
- Clarifies that if a person in good faith substantially complies with at least one conflicting government-promulgated order, rule, or declaration;
- Provides immunity for an educational institution (defined as an institution or program that facilitates learning or the acquisition of knowledge, skills, values, beliefs, or habits) for damages or other monetary equitable relief arising from a cancellation or a modification of a course, program, or activity that arose during and was caused in whole or in part by the pandemic emergency;
- Applies only to an action commenced on or after March 13, 2020, for which a judgment has not become final before the effective date.

HB 19 by Rep. Jeff Leach (R-Plano), Sen. Larry Taylor (R-Friendswood)

Signed by the Governor 6/16/21. Effective 9/1/21.

- Adds Subchapter B, Chapter 72, CPRC, to require a court to provide for a bifurcated trial on motion of a defendant in an action involving a commercial vehicle;
- Requires the defendant to move for bifurcation on or before the later of the 120th day after the movant's original answer or the 30th day after the claimant files a pleading adding a claim or cause of action against the movant;
- Directs the trier of fact to determine liability and compensatory damages in the first phase of the trial and liability for and amount of exemplary damages in the second phase;
- Provides that a finding in the first phase that the defendant driver was negligent in operating the vehicle may serve as the basis in the second phase on a claim against the employer defendant, such as negligent entrustment, that requires a predicate finding of the driver's negligence (does not apply to a claimant who has pursued a negligent entrustment claim in the first phase);
- Provides that a defendant's failure to comply with a standard or regulation is *admissible in the first phase* only if: (1) the evidence tends to prove that the failure to comply was a proximate cause of the claimant's injuries; (2) the standard or regulation is specific and governs, or is an element of a duty of care applicable to, the defendant, the defendant's employee, or the defendant's property or equipment when any of those is an issue in the action;
- Provides that if the employer defendant stipulates course and scope, the claimant may not in the first phase of a bifurcated trial present evidence on an ordinary negligence claim against the employer defendant, such as negligent entrustment, that requires a finding that the employee was

See **Session Report** page 38



Amicus Curiae

Friend of the Court

TCJL's amicus program reached record heights in 2020-21. In filings before the Texas Supreme Court and the U.S. Fifth Circuit Court of Appeals, TCJL addressed issues of significant concern to the Texas business community, including the paid or incurred rule, §18.001 medical expense affidavits, cost-shifting under Rule 91a, and mass actions against the energy industry. 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. *In Re Leon Paul Savoy, Texas Curb Cut, LP, and Texas Cutting & Coring, LP*; No. 20-0843

This personal injury lawsuit arises out of a February 2016 traffic accident in Travis County. The plaintiff seeks damages for alleged personal injuries, including medical expenses, in excess of $1,000,000. The plaintiff submitted an affidavit under § 18.001(b), CPRC, attesting to the reasonableness and necessity of the medical charges. Relators presented counter-affidavits contesting the reasonableness of the medical charges, as permitted under § 18.001(e). The plaintiff filed a motion to strike the Relators' counter-affidavits. After a hearing, the trial court signed orders striking Relators' counter-affidavits.

Relators, who are represented by the Chamberlain McHaney firm here in Austin, filed a Petition for Mandamus in the Third Court of Appeals last May. In an opinion authored by Justice Smith and joined by Justice Kelly and Chief Justice Rose, the court of appeals denied Relators' Petition for Writ of Mandamus as to the Chapter 18 counter-affidavits. Additionally, the Court of Appeals judicially embossed a trial expert exclusionary component, conflating Chapter 18

We are now asking this Court to put a stop to an unusually blatant case of legislating from the bench.

practice with Robinson practice and procedure. *See In re Leon Paul Savoy et al*, No. 03-19- 00361-CV, 2020 WL 4726591 (Tex. App. –Austin Jul. 30, 2020). The court of appeals denied Relators' Motion for Rehearing on September 2, 2020. Relators now seek review from the Texas Supreme Court.

TCJL's brief details the legislative history of § 18.001, noting that the Legislature enacted the statute to streamline the submission of medical records by substituting the filing of an affidavit rather than the bills themselves. The statute gives

the defendant the right to file a counter-affidavit challenging the reasonableness of the charges, as it did in this case. As the statute was designed, once a counter-affidavit is filed, the parties return to square one, and the reasonableness of the charges becomes an issue for the trier of fact. In recent years, however, trial courts have begun to strike the defendant's counter-affidavits on the basis that medical billing experts are not physicians and, consequently, cannot give expert testimony. Nothing in § 18.001 says that a counter-affidavit must be given by a physician, only "by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." § 18.001(f).

As TCJL's brief argues with respect to the history and intent of § 18.001:

> *This legislative history plainly shows that § 18.001 has yet to become a bone of legislative contention between the plaintiffs' and defense bars and the business and health care communities. Instead, changes to the statute have been undertaken in the spirit of streamlining the affidavit process and making it easier for parties and courts to manage discovery with a minimum of overhead cost. TCJL began to hear reports a few years ago, however, that some trial courts were improperly using § 18.001 to (1) exclude defense billing experts, (2) bar defendants from contesting the reasonableness of medical charges at trial, and (3) accept expense affidavits as conclusive evidence of the reasonableness and necessity of medical charges. We are now asking this Court to put a stop to an unusually blatant case of legislating from the bench.*
>
> *The Court of Appeals felt that the extraordinary remedy of mandamus should not issue in this case because the defendant has another remedy on appeal. The court thus sidestepped the question that, in view of the undisputed legislative history of this statute, begs an answer: did the trial court—or any trial court acting in the same way—abuse its discretion by reading something into § 18.001 that not only does not exist, but accomplishes precisely the opposite result intended by the Legislature (not to mention those most affected by the statute)? The court of appeals reasoned that the defendant could still contest the reasonableness of the charges, even without the testimony of its billing expert. Perhaps so, but that is beside the point. Rather than emphasizing the waste of judicial resources that would occur if this single case were sent back for trial without the central piece of the defense's case, as the court of appeals decided, we think it makes more sense to consider the immense waste of judicial resources involved in hearing repetitive, piecemeal appeals across the state that raise the same question presented here. There is no other adequate remedy when a trial judge declines or refuses to follow the law as written than recourse to this Court. If we are going to allow trial judges to hold defendants to higher standards for controverting affidavits than we hold claimants, the Legislature should make that call, not trial judges.*

This case carries immense significance because it is the first one to get to SCOTX on the issue of counter-affidavits. Allowing trial judges to circumvent the § 18.001 process undermines the paid or incurred rule and severely weakens the 2003 tort reforms, both in the area of medical malpractice and in other personal injury actions.

The case remains pending before SCOTX. In a companion case handed down on May 7, 2021, *In Re Allstate Indemnity Company* (No. 20-0071), SCOTX squarely rejected the increasing use of §18.001 as an exclusionary rule that allows plaintiffs *carte blanche* to submit chargemaster rates as "reasonable" if the medical provider does not submit its bills to a third-party payer. The decision in *In Re Allstate* may render review in this case unnecessary (See article on page 33). ***TCJL's arguments in In Re Savoy apply equally to In Re Allstate.***

2. *In Re Exxon Mobil Corporation*; No. 20-0849

TCJL filed an amicus curiae brief with the Texas Supreme Court in a second case in which a defendant was denied discovery of relevant evidence of the reasonableness of medical bills. Similar to *In Re K&L Auto Crushers LLC* (No. 19-1022), this case arises from a negligence/premises liability lawsuit brought by nearly 60 plaintiffs subsequent to a fire at Exxon Mobil's Baytown Olefins refinery. Exxon Mobil sent deposition notices and subpoenas duces tecum to various third-party medical providers seeking discovery of the amounts they had accepted as payment for similarly

"[T]rial judges have the grave responsibility of acting as first-line guarantors of every citizen's right to a fair and impartial trial. By refusing relevant discovery, this trial judge has put a very heavy finger on the scale of justice in this case and exposed a civil defendant to potential liability for excessive damages not actually incurred by the claimants... These actions undermine our system of justice and cannot be permitted to stand."

situated patients for the same services over a similar period of time. The discovery is both relevant and necessary for Exxon Mobil to assess the reasonableness of the past medical expenses claimed by the plaintiffs and to comply with §41.0105, CPRC, the "paid or incurred" rule adopted by the Legislature in 2003. As in *K&L Auto Crushers*, however, a Harris County trial court denied Exxon Mobil's motion to

enforce the discovery and granted motions for protection filed by the plaintiffs and certain of the providers. The Fourteenth Court of Appeals in Houston denied Exxon Mobil's petition for writ of mandamus in a per curiam opinion, although one of the justices indicated he would have granted Exxon Mobil's motion and would have requested a response to the petition.

TCJL's brief takes the arguments of our previous brief one step further to question whether the trial court's refusal to grant discovery deprives a defendant of the right to due process of law and a fair and impartial jury trial. As we argue in the brief, "[T]rial judges have the grave responsibility of acting as first-line guarantors of every citizen's right to a fair and impartial trial. By refusing relevant discovery, this trial judge has put a very heavy finger on the scale of justice in this case and exposed a civil defendant to potential liability for excessive damages not actually incurred by the claimants... These actions undermine our system of justice and cannot be permitted to stand."

This case remains pending before SCOTX. It is distinct, however, from In Re Allstate in that it involves a trial court's denial of discovery requests relating to the reasonableness of medical charges.

3. *In Re K&L Auto Crushers LLC and Thomas Gothard, Jr., Relators*; No. 19-1022

This is a personal injury lawsuit arising out of a motor vehicle accident. Similar to the *Exxon Mobil* case described above, the defendant sent subpoenas to the plaintiff's medical providers seeking discovery of the providers' reimbursement rates with private insurers and government payers for the medical services and equipment billed by the providers to the plaintiff. A Dallas trial court quashed the subpoenas, and the Dallas Court of Appeals summarily denied the defendant's petition for writ of mandamus. After asking for and receiving full merits briefing, the Texas Supreme Court set the case for argument on January 5, 2021. The Court also stayed the trial date pending its resolution of the mandamus petition.

TCJL's brief focuses on a growing trend in personal injury litigation in which claimants evade the paid or incurred rule using tactics that include blocking discovery of relevant and appropriate information regarding third-party reimbursement of health care expenses, as the trial court did in this case. Their objective is to get the chargemaster rate in front of the jury, while preventing the defendant from conducting any discovery of and submitting into evidence either the amount actually "paid or incurred" or the reasonable and customary amount paid for the specific service in the area in which the service was provided. In a related case pending before this Court, in which TCJL has participated as amicus curiae, *In re Leon Paul Savoy; Texas Curb Cut, LP, and Texas Cutting & Coring, LP* (No. 20-0843), for example, the trial judge, relying on a gross misreading of § 18.001, Civil Practice & Remedies Code, struck the controverting affidavit of the defense medical billing expert regarding the reasonableness of the charges. In such cases, the defendant can only helplessly look on as chargemaster rates that nobody actually pays flow into evidence and end up in the jury room.

These tactics revive relatively low-dollar claims that otherwise would have been settled expeditiously under a proper application of the paid or incurred rule. But not only low-dollar claims. With the prospect of submitting into evidence significantly inflated expenses back in play, we can expect the frequency and severity of claims to start going up again after a period of relative stability. We can also expect defendants to reconsider whether to litigate claims in which liability is a significant issue in light of the increased costs of discovery and higher exposure to inflated health care expense claims. If this practice continues to spread, it will not take long for the paid or incurred rule to become a dead letter, eliminating a foundational part of the 2003 medical and general liability reforms.

SCOTX reversed the court of appeals, vacated the trial court's denial of the defendant's discovery requests and expert witness, and remanded the case to the trial court to redetermine its discovery order in light of the court's opinion.

4. *In Re Southwestern Energy Company, et al.*; No. 20-0197

This mandamus action arises from HB 274, passed during the 2011 legislative session at the urging of then-Governor Rick Perry, who proposed a "loser pays" rule as part of an early dismissal mechanism similar to Federal Rule 12(b)(6). This rule enables a party to make a motion to dismiss a lawsuit (or counter- or cross-claim) that has no basis in law or fact. As finally passed, HB 274 included a legislative directive to the Texas Supreme Court to adopt such a rule

"the Legislature made it clear that claims with no basis in law or fact should not be entertained by our courts..."

with cost-shifting effect. This directive resulted in Rule 91a, which is one of the central issues in this case.

Unfortunately, the cost-shifting provision had the inadvertent effect of deterring *defendants* from making Rule 91a motions to dismiss (and probably some plaintiffs seeking to dismiss meritless counterclaims and affirmative defenses as well). To correct this unintended consequence, the 2019 Legislature amended §22.004 to drop mandatory cost-shifting and leave it to the court's discretion to award attorney's fees and costs to the prevailing party. The current Rule 91a thus tracks Rule 12(b)(6) even more closely.

In re Southwestern Energy Company, et al. involves a putative class action brought under the Federal Securities Act (FSA) against Southwestern Energy and 28 financial institutions that underwrote Southwestern's preferred-stock offering. After the U.S. Supreme Court ruled that class actions asserting only Securities Act claims were non-removable from state to federal court, the case was remanded to a Harris County district court. Then Southwestern moved to dismiss under Rule 91a, the plaintiffs amended their petition to add new claims, none of which constitute a valid basis of liability under the FSA (those new claims are also time-barred under the 3-year FSA statute of repose). When Southwestern against moved for dismissal, the trial court denied the motion. Southwestern sought a writ of mandamus, which the First Court of Appeals (Houston) denied. Southwestern now seeks mandamus from the Texas Supreme Court.

The appeal puts a question that the Court has not yet considered: how, if at all, does Rule 91a interact with Texas' notice pleading standard? As we write in our brief, TCJL and other advocates of HB 274 "never thought the enactment of H.B. 274 even begged the question." The notice pleading standard requires courts to "assess the sufficiency of pleadings by determining whether an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence that might be relevant to the controversy." *Low v. Henry*, 221 S.W. 609, 612 (Tex. 2007). TCJL contends that "there is no conflict between Rule 91a and notice pleading," and that by directing the Court to adopt the rule, "the Legislature made it clear that claims with no basis in law or fact should not be entertained by our courts. The Legislature did not add: 'except when a pleading gives notice by which the opposing party may ascertain the nature, basic issues, and type of evidence that might be relevant to the controversy.' Such a reading would negate Rule 91a altogether and violate the both the plain language and intent of HB 274.

The Court abated proceedings pending settlement negotiations.

5. *ExxonMobil Corp. The City of San Francisco, et al.*; No. 20-0558

This case arises from a lawsuit filed in a California state court against Exxon Mobil, ConocoPhillips, Shell, and 15 other Texas-based oil and gas producers. The plaintiffs, several California municipalities and counties headed by the City of San Francisco, seek billions of dollars of relief from the industry for future rises in sea levels allegedly caused by climate change, although their bond disclosures state that the future effects of climate change are uncertain.

TCJL's brief calls out this outrageous behavior for what it is: a concerted effort to use the courts to destroy the oil and gas industry wherever it is. At the same time, this litigation is a naked power grab aimed to subverting Texas sovereignty and the right of all Texans—not just the oil and gas defendants themselves—from exercising their freedom of speech and association in connection with ongoing public policy debates surrounding climate change. Consequently, the plaintiffs can reasonably expect to be haled into a Texas court to answer for their conduct.

In response to the lawsuit, Exxon Mobil commenced a proceeding under Rule 202, Texas Rules of Civil Procedure, in a Midland state court seeking limited pre-suit depositions of the individual plaintiffs and document production from the municipal and individual plaintiffs to preserve evidence for potential tort litigation against the plaintiffs for viewpoint discrimination against Exxon Mobil and the other producers. Exxon Mobil contends that the plaintiffs' have engaged in intentional tortious conduct and abuse of process to chill or affect its speech in violation of the U.S. and Texas Constitutions. The trial court found that the defendants were subject to personal jurisdiction in Texas and ordered limited discovery pursuant to Rule 202. The Fort Worth Court of Appeals reversed, holding that the defendants did not

have sufficient minimum contacts with Texas so that Texas courts could exercise personal jurisdiction, though the court of appeals pointedly commented that the defendants have engaged in "lawfare" by attempting to regulate an industry through litigation rather than legislation.

The California lawsuit is part of a national effort to recruit local governments and state attorneys general to sue major energy producers led by Boston-area attorney Matthew F. Pawa, a partner in the Seattle-based firm of Hagens Berman. The firm's website describes Pawa, a former state's attorney in Chittenden County, Vermont, as follows:

> *Prior to joining Hagens Berman, Mr. Pawa was the president of Pawa Law Group P.C. where he was the founder and leader of the litigation firm specializing in major environmental cases. He handled jury trials, bench trials and argued appeals in state and federal courts in Massachusetts and across the nation and collaborated with state attorneys general and non-profit clients on a major global warming case that went to the U.S. Supreme Court. Mr. Pawa forged the small law firm into a nationally known entity with a reputation for successfully litigating against some of the country's largest corporations.*

The court of appeals describes in great detail Pawa's involvement in recruiting plaintiffs for the lawsuit, providing an anatomy of an orchestrated and premeditated lawfare campaign:

> *In June 2012, Pawa, a climate-change litigator, attended the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California. Among the conference organizers was Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists.*
>
> *At the conference, Pawa spoke about one of his pending cases against the energy industry seeking damages for coastal flooding allegedly caused by anthropogenic climate change. According to him, "Exxon and the other defendants [in that case] distorted the truth." Pawa also stated that litigation is not only a remedy for those suffering the effects of climate change but also "a potentially powerful means to change corporate behavior."*
>
> *Conference participants discussed strategies for getting energy companies' internal documents and concluded that law-enforcement powers and civil litigation could be used to pressure the energy industry to support legislative and regulatory responses to climate change. Participants also planned to enlist state attorneys general to launch investigations into climate change that could bring "key internal documents to light."*
>
> *In March 2015, Pawa sent a memorandum to NextGen America—a nonprofit group funded by Tom Steyer, the California billionaire hedge-fund manager, environmental activist, and erstwhile candidate in the 2020 Democratic presidential primary —summarizing Pawa's legal strategy against fossil-fuel companies "for their contributions to California's injuries from global warming." The memo stated that "certain fossil[-]fuel companies (most notoriously Exxon Mobil), have engaged in a campaign and conspiracy of deception and denial on global warming." Pawa further stated that "[a] global warming case would be grounded in the doctrine of public nuisance" and noted that "simply proceeding to the discovery phase would be significant" and that "obtaining industry documents would be a remarkable achievement that would advance the case and the cause."*
>
> *Early the following year, in January 2016, Pawa and others met at the Rockefeller Family Fund offices in New York City to discuss the goals of an "Exxon campaign." According to the meeting's draft agenda, the goals included (1) establishing in the public's mind that "Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (2) delegitimizing Exxon as a political actor; (3) driving divestment from Exxon; and (4) forcing "officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc." As "main avenues for legal actions [and] related campaigns," the participants identified "AGs" and tort suits. The participants planned to use these avenues to obtain discovery and create scandal.*

TCJL's brief calls out this outrageous behavior for what it is: a concerted effort to use the courts to destroy the oil and gas industry wherever it is. At the same time, this litigation is a naked power grab aimed to subverting Texas sovereignty and the right of all Texans—not just the oil and gas defendants themselves—from exercising their freedom of speech and association in connection with ongoing public policy debates surrounding climate change. Consequently, the plaintiffs can reasonably expect to be haled into a Texas court to answer for their conduct. As we state in our brief:

> *The court of appeals wrestled with the question of whether the Respondents' activities rose to the level of potentially tortious conduct in this state. Exxon Mobil argues that the whole point of the litigation is to repress the First Amendment right of the company to engage in a national (and indeed international) policy discussion about the causes and impacts of climate change. TCJL would add that the Respondents' attempt to establish such policy through litigation, as opposed to the ballot box, constitutes a direct attack on the sovereignty of this state. Aiming to use its own courts to regulate the political conduct and business activities of Texas residents, the Respondents seek to chill the speech rights of all Texans in a policy area of existential importance to their personal and community well-being. From TCJL's perspective, Respondents, having acted at the behest of a private lawyer who actively (and presumably*

profitably) orchestrates lawfare campaigns across the country, should fully expect to be haled before a Texas court to answer for their conduct. By endeavoring to legislate for Texas by litigating in California, they have caused and plan to cause injury to Texas residents and have provoked Texas residents to seek the protection of our courts. As Justice Guzman, quoting the United States Supreme Court, observed in Moncrief Oil:

A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776, 104 S.Ct. 1473, 79 L.Ed. 790 (1984). See Moncrief Oil at 152.

Respondents commit wrongful conduct in Texas by conducting a public smear campaign against our residents under the cloak of the judicial process. Their whole purpose is to cause reputational and financial harm to our residents by crippling the energy industry in furtherance of their political agenda. There can be no question that Texas has an "especial interest in exercising judicial jurisdiction" over those who seek to do such widespread and indiscriminate injury to so many.

The petition for review remains pending before the Court. Governor Abbott, among others, has filed an *amicus curiae* brief as well.

6. *Plaquemines Parish v. Riverwood Production Co., Inc., et al.*; No. 19-30492 (United States Court of Appeals for the Fifth Circuit)

Several Louisiana parishes, joined by the State of Louisiana, sued Chevron and dozens of oil and gas producers in Louisiana state courts, claiming that the Companies have violated the Louisiana State and Local Coastal Zone Management Act of 1978 ("SLCRMA") by failing to obtain permits in accordance with the Act. The parishes claim damages relating back to producers' conduct performed at the direction and control of the federal government during World War II.

During the War, Congress suspended antitrust laws, allowing the federal government to gather the producers' predecessors into a consolidated exploration and production engine under the supervision and control of a new agency, the Petroleum Administration for War ("PAW"). The PAW micromanaged oil and gas operations, telling the producers where and how to drill, rationing the use of steel and materials for roads, and setting statewide quotas for the production of oil and gas to produce the high octane fuel necessary for the war effort. The parishes claim that the producers should have followed certain "prudent practices," many of which conflict directly with federal mandates that they were directed to follow during the war. The parishes particularly target pre-1980 dredging activities exclusively governed by federal law prior to the SLCRMA, raising substantial federal issues that the producers are seeking the Fifth Circuit to review.

Chevron and the other producers removed the cases to federal court under 28 U.S.C. § 1442, which permits removal of cases involving a federal officer, or those acting under the direction of a federal officer, and 28 U.S.C. § 1331, which grants federal jurisdiction to cases involving a federal question. Plaintiffs moved to remand. Two district courts took up the remand motions first, one granting remand because it found removal was untimely, and the other denying remand, finding that the allegations in the petition were insufficient to trigger the removal clock. The cases were consolidated on appeal, and, in a cursory opinion, the panel held that the producers' removal based on the expert report was untimely. The panel concluded that a list of serial numbers of wells, attached as an exhibit to the petitions, gave the producers notice that World War II activity was at issue sufficient to trigger the deadline to remove. The panel's opinion does not address the timeliness of the federal question ground for removal, which, as the parishes themselves conceded, raised timeliness issues distinct from the federal officer removal.

TCJL's brief urges the Fifth Circuit to review the panel's decision *en banc* and consider the federal question ground for removal raised by Chevron and the producers. As stated in the brief:

"Remanding this case to state court without careful en banc review raises the ominous prospect of the energy industry—arguably the primary engine of economic growth in these sister states—facing civil liability for damages, fines, abatement or mitigation costs, and administrative penalties up to a maximum of $12,000 per violation. See La. Stat. Ann. § 49:214.36(E), (F), (I). Even if this litigation were confined solely to the approximately 40-year period between the commencement of World War II and the passage of the State and Local Resources Management Act in 1978, the full extent of the potential liability could easily reach the hundreds of billions of dollars, even dwarfing the largest civil litigation settlement in American history, the 1998 Tobacco Master Settlement Agreement involving 46 states. TCJL urges this Court to take another look at this case to make sure that it does not implicate federal law before letting it run its course in state court. The stakes are simply too high not to deal with these issues before the Defendants-Appellants, the rest of the industry, and the American economy are confronted with the potentially catastrophic impact of this litigation.

("No business can operate in a legal and regulatory environment that could have this result.) If one state can use its courts to reach into the past in order to extend its regulation of an essential industry in this fashion, what is to prevent similarly inclined states to do the same? Who will ever trust enough in the stability and predictability of the legal and regulatory environment to invest in this industry? What could this litigation end up costing the people who depend on this industry for their livelihoods? What will it cost the businesses and families who need this industry's products and services to prosper in their own endeavors? While this Court cannot and, indeed, should not address these questions, it can and should address whether the Defendants-Appellants had a fair opportunity to remove this litigation to federal court and resolve the federal questions in the appropriate forum."

This case remains pending before the Fifth Circuit.

7. *Signature Industrial Services, LLC and Jeffry Ogden v. International Paper Company*; No. 20-0396

This contractual damages case arose from a $775,000 construction contract for the installation of machinery at a paper mill in Orange County. The contractor submitted numerous change orders without adequate backup, which the owner disputed. After the contractor rejected the owner's offer to settle the dispute, the contractor filed suit in a Jefferson County district court. The jury awarded the contractor $122 million, including $36 million in emotional distress damages. The owner's appeal was transferred to the Corpus Christi Court of Appeals under the case equalization order. The Corpus Court reduced the damage award, including striking the emotional distress damages altogether, but allowed more than $14 million in consequential damages based on the unrealized book value of the contractor to stand. Both parties petitioned SCOTX for review. The contractor contends that the Corpus Christi court of appeals cut the damages too much, while the owner argues that the consequential damages award contradicts precedent established by SCOTX and every other Texas court of appeals.

In our brief, we argue that the problem with the Court of Appeals' decision is that it recognizes a wildly speculative measure of damages—an *unrealized* decrease in a company's book value (in this case offered by an "expert" with minimal qualifications at best)—that will now be put to use to leverage settlements at a much higher value than the case should have based on the actual losses involved. If any garden variety contract dispute can be converted into a multi-million-dollar lawsuit by alleging that a breach caused an unrealized decline in the paper value of a claimant's business, such a change will incentivize lawsuits with artificially inflated damages claims. TCJL's experience over the past 35 years tells us that creating or expanding the availability of speculative damages inevitably destabilizes the judicial process by making every lawsuit a lottery ticket. Further, court of appeals' decision effects a major expansion of liability for the Texas businesses community by creating a loophole around this Court's precedents and permitting plaintiffs to recover speculative measures of damages. This decision should be closely scrutinized—and promptly rejected—by the Supreme Court. Allowed to stand, the decision threatens to trammel not only the substantial, growing, and dynamic business activity in South Texas but also the fair and efficient civil justice system across the state, which has enabled the remarkable economic growth that Texas has experienced over the last quarter-century.

SCOTX has requested briefing on the merits.

8. *William A. Brewer III v. Lennox Hearth Products, LLC, et al.*; No. 18-0426

In this case a Lubbock law firm, in anticipation of trial, conducted a community-wide push poll with misleading and potentially inflammatory information about the defendant. The survey failed to screen out potential jurors and others involved in the litigation, nor was the defendant notified of the survey. When the defendant discovered the existence of the poll, it asked the trial court for sanctions against the law firm for deliberately tampering with the jury pool. The court awarded sanctions, and the Amarillo Court of Appeals affirmed. SCOTX accepted review and reversed, holding that because there was no evidence of bad faith on the part of the law firm, the trial court exceeded its inherent powers to issue sanctions.

TCJL's brief urged the court to reconsider its decision and either reverse course or provide a more objective bright-line rule for when push polling may be used to talk to a potential jury pool. From a policy perspective, the decision will almost certainly normalize this form of jury manipulation. We can also expect both sides in a lawsuit of significant value to conduct their own surveys, if only to try to neutralize the effect of the one that goes first. Regardless of which party engages in this conduct, the core issue is that the contamination of the venire undermines a person's constitutional right to a fair and impartial trial by jury. Other *amici* in the case include the Texas Association of Defense Counsel, Texas Trial Lawyers Association, and the American Board of Trial Advocates, which, for the first time in their respective histories, filed a joint brief requesting rehearing, and numerous individual lawyers, including the Honorable Kent Hance.

SCOTX declined to grant motion for rehearing, with Justice Boyd dissenting.

9. *Scott Van Dyke v. Builders West, Inc.*; No. 19-0132

This case arose from a construction contract dispute. Although there are many issues in the case, TCJL's brief focuses on the propriety of the fee agreement between Builders West and its counsel. The agreement called for an hourly fee of $350, unless the court ordered fee shifting pursuant to Chapter 38, CPRC, in which case an additional "penalty fee" of $150 per hour would be added to the bill and ultimately paid by Van Dyke. In the event, the trial court did order fee-shifting and Builders West "gifted" the additional $150 to its counsel, enabling him to seek reimbursement from Van Dyke of the $500 rate. The trial court signed off on the deal, and the court of appeals affirmed. SCOTX declined review. TCJL's brief once again requests the Court to take another look, at least at the attorney's fee issue. We argue that the attorney's work is worth *either* $350 or $500 per hour, but not both at the same time depending on who pays the fee. Moreover, if this practice of charging a penalty fee to be paid by the loser in the lawsuit becomes normalized, the effect will be to introduce a form of punitive damages into contract litigation. No party in good faith litigation should be punished just for losing the lawsuit.

SCOTX declined to grant motion for rehearing.

10. *Texas Mutual Insurance Company, et al. v. PHI Air Medical, LLC*; No. 18-0216

This case involved a challenge to the workers' compensation reimbursement rates for ambulance services brought by an air ambulance company. TCJL argued that, contrary to the air ambulance company's claim that the federal Aviation Deregulation Act pre-empted Texas law regarding the amount of reimbursement that may be paid to an ambulance service under the Texas workers' compensation statute, this case is about the fundamental authority of the Texas Legislature to establish a workers' compensation insurance system under which employees injured on the job receive prompt and certain benefits to enable them to return to work. In return for these benefits, an employee gives up the right to file a tort claim against his or her employer, with an uncertain outcome and the prospect of legal expenses. By payment of a premium to a workers' compensation insurer, an employer can assure that an injured employee will receive necessary medical treatment, receive supplemental income benefits for time off the job, and return to employment in the shortest practicable time. Workers' compensation insurance is thus a tripartite relationship between an employer who pays the premium, the employee who accepts coverage and waives the right to sue, and the insurer who pays statutorily defined benefits when the time comes. This is the precise nature of the quid pro quo which vindicates the system against attack on the basis of the Open Courts provision of Article I, §13, Texas Constitution and seriously undermines the proposition that the Airline Deregulation Act preempts the system.

TCJL's brief argued further that PHI disingenuously sought to be treated like other health care service providers by the workers' compensation system in order to take advantage of compulsory payments under the system. However, as to the amount of payment, it claimed that it really cannot be considered the same as every other health care vendor that provided a service to an injured employee because—lo and behold—it is really an air carrier that the State of Texas cannot regulate, thus entitling it to a huge mark-up of its rates, unlimited by workers' compensation regulations. As of the date of our brief, almost 1,100 claims by PHI and others like it were pending at the Workers' Compensation Division or State Office of Administrative Hearings involving more than $45 million in disputed charges—about $37,000 per claim. In short, PHI wanted Texas to return to the days of setting rates for workers' compensation by litigation.

In a 7-2 decision handed down on June 26, 2020, the Texas Supreme Court rejected the air ambulance company's argument that the federal Aviation Deregulation Act pre-empted Texas law regarding the amount of reimbursement that may be paid to an ambulance service under the Texas workers' compensation statute. Justice Busby's majority opinion affirms the 10th Amendment's reservation of authority to the states to legislate in areas not pre-empted by Congress, specifically workers' compensation insurance. In a closely reasoned opinion, Justice Busby picks apart PHI's specious argument that federal deregulation of rates and fares charged by air carriers blocks states from treating air ambulances differently than any other provider of health care services under workers' compensation laws. The opinion notes that that PHI tried to have its cake and eat it too by arguing that Texas Mutual was statutorily obliged to pay its full-bill charges while at the same time availing itself of the statute's prohibition against balance billing the injured worker. Justice Busby pointed out that PHI "cannot have it both ways: it cannot rely on state law requiring reimbursement of air carriers while arguing that a particular state standard for measuring that reimbursement is preempted."

The potential cost of an adverse decision in this case is staggering. As TCJL and Texas Mutual pointed out in

their briefs, Justice Busby observed that "requiring full reimbursement could have serious consequences for the Texas workers' compensation system. According to the insurers, almost $50 million in Texas air ambulance charges were already in dispute by January 2019, and PHI's operating profit margin on its full billed charges ranges from 185% to 282%. In Wyoming, which has held that only limits on reimbursement are preempted, the legislature is considering either expanding Medicaid in order to control such charges or making injured workers responsible for the balance of their bills. The ADA was passed to deregulate the airline industry, not to upend the bargain struck in adopting a workers' compensation scheme. As we have explained, there is no reason to interpret the ADA to have that effect."

11. *Khosrow Sadeghian v. David Jaco*; No. 20-0285

This case arose from a sale of residential real estate. The buyer alleges that the seller committed an "unconscionable action or course of action" to the buyer's detriment under § 17.45(5), Tex. Bus. & Comm. Code (the DTPA). That subsection defines an unconscionable action or course of action as an "act or practice which... takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." The buyer contended at trial that a "gross disparity" between the sales price and the appraisal roll value established an unconscionable action under the statute. The jury agreed and found that the buyer suffered $60,000 in economic damages. Under the DTPA's treble damages provision, the trial court awarded $181,800 in economic damages. Under the DTPA's attorney's fee provision, the trial court awarded $125,000 to the buyer's attorney, as well as an additional $115,000 if the seller appealed the judgment. The trial court also voided the buyer's note, terminated the seller's lien on the property, and terminated the deed of trust securing the note. The Dallas Court of Appeals affirmed the judgment.

TCJL's interest in the case stems from the court of appeals' decision to let stand a jury finding of unconscionability based on the sales price of the property alone. In 1995 TCJL spearheaded the successful legislative effort to overhaul the DTPA, which had become a general tort cause of action pleaded in just about every case, rather than a consumer protection statute as the Legislature intended. As part of this reform, TCJL advocated for the repeal of an independent basis for a DTPA action a "gross disparity between the consideration paid and the value received" in the consumer transaction. We argued that this "gross disparity" standard was wildly subjective and gave buyers who soured on the bargains they previously made an easy issue to litigate. The Legislature agreed and repealed the "gross disparity" basis for a DPTA action, leaving the current "unconscionable action or course of action" in the statute. This change substantially reduced the volume of baseless DTPA claims.

Khosrow, however, revived the discarded "gross disparity" standard by making it sufficient evidence to support a finding of unconscionability under the DTPA. In this particular case, the buyer bought the home at a price that exceeded its appraised value for property tax purposes. It should go without saying that a tax appraisal has very little to do with the sales price of a home because: (1) appraisal districts use mass appraisal techniques to value residential property; (2) appraised values for tax purposes are a snapshot of value at a particular time under particular market conditions; and (3) there are a lot of other aspects of a home that buyers want and are willing to pay for that are not reflected in a tax appraisal. If the court of appeals' decision is not reversed, every home sale in which a buyer paid some amount above the tax appraisal might become the subject of a DTPA lawsuit. Simply put, nobody can define "gross disparity" because it is purely in the eye of the beholder.

As we say in our brief:

> "Basing a claim of unconscionability on a tax appraisal performed using mass appraisal techniques ignores the plain fact that such an appraisal derives not from an individual assessment of the unique characteristics of the property but from a mathematical model that at best represents a broad estimation of value in a particular area at a particular time under particular market conditions. Appraisal roll values thus provide a snapshot of a moment in time, recognizing that those values are only good for that moment. What seller—or seller's real estate agent—ever refers to a tax appraisal when determining the sales price of a property? What buyer makes an offer based on that appraisal? The appropriate measure of value in residential real estate transactions, of course, is comparable sales of similarly situated property, but even sales in an area can vary fairly widely depending on the unique characteristics of the property, the inventory of residential real estate in the area, the specific features a buyer might be looking for, or any of a number of other factors. In any event, finding out the appraised value of a residence merely requires going to the appraisal district's website and entering the address of the property. If a prospective buyer thinks the seller is asking too much for the residence based on the appraised value, he or she can make a suitable counteroffer or walk away."

SCOTX denied review and rehearing.

12. *Eagle Oil & Gas Co. v. TRO-X L.P.*; No. 18-0983

This case came to TCJL's attention while on motion for rehearing before the Texas Supreme Court. It arose from a 2007 contract dispute that was litigated in a Midland district court before winding its way through the Eastland Court of Appeals and then to SCOTX, which declined review. While TRO-X L.P.'s petition for review was pending, it filed an almost identical second lawsuit in a Dallas trial court, which it immediately abated and did not serve for nearly five months. When SCOTX decided, TRO finally served the second lawsuit. The Dallas trial court dismissed the suit under *res judicata* and awarded Eagle costs and attorney's fees for the trouble of defending duplicative litigation. The Dallas Court of Appeals reversed, taking a narrow view of res judicata arguably in violation of SCOTX precedent and reinstating the case. Eagle appealed to SCOTX, which initially declined review. TCJL's brief urges the Court to reconsider and grant review on the basis of the Court of Appeals' dubious application of *res judicata* and its violation of fundamental principles of claim preclusion. TCJL also urged the Court to put a stop to litigation that has already gone on for 14 years and send a message that the abuse of process involved in filing the second lawsuit will not be tolerated.

SCOTX granted the motion for rehearing. On rehearing, SCOTX affirmed the court of appeals' decision.

13. *Hlavinka v. HSC Pipeline Partnership LLP*; No. 01-19-00092-CV

TCJL's brief responds to *amici* Texas Farm Bureau and Texas and Southwest Cattle Raisers' contention that the SCOTX's "reasonable-probability test" should apply to all pipelines, not just carbon dioxide pipelines. In *Tex. Rice Land Partners Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012), the Texas Supreme Court ruled that a T-4 pipeline permit 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, a carbon dioxide pipeline must prove that "a reasonable probability exists" that the pipeline "will at some point after construction serve the public." *Id.* at 202. The Supreme Court limited its decision to carbon dioxide pipelines and, with respect to carbon dioxide pipelines, stated further that an entity that builds a pipeline solely to service its own facility does not qualify for common carrier status. The Court remanded the case to the trial court for a determination of fact issues concerning Denbury's common carrier status under the Court's new reasonable probability test. When the case returned to the Court in 2017, the Court determined as a matter of law that Denbury's contracts with unaffiliated entities provided sufficient evidence of common carrier status under the "reasonable probability" test.

Courts of appeals have repeatedly applied *Denbury* to uphold the exercise of eminent domain authority by common carrier pipelines. For example, in *Rhinoceros Ventures Grp., Inc. v. TransCanada Keystone Pipeline, L.P.*, 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, pet. denied), the appellate court held that the Keystone pipeline was a common carrier because it engaged in the transportation of crude petroleum in Texas and further affirmed that the Texas Supreme Court limited application of the reasonable probability test to carbon dioxide lines. The Texarkana Court of Appeals followed the *Rhinoceros* decision, but went on in dicta to conclude that

Moreover, the Legislature has met twice since the Supreme Court adopted that test and could easily have expanded the application of the rule to all pipelines. It has not, and there is no immediate prospect of it doing so. Such a decision lies squarely within the legislative realm of public policymaking, and we urge this Court to apply the law as written and leave the debate over changes in the law to our elected representatives in Austin.

TransCanada had also satisfied the reasonable probability test by furnishing evidence of third-party shippers. Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908 (Tex.App – Texarkana, 2013). Finally, the Eastland Court of Appeals upheld the exercise of eminent domain by a crude oil pipeline that had received common carrier designation from the Commission and held reserved pipeline capacity for walk-up shippers. The Court found that the pipeline met *Denbury's* reasonable probability test. *Saner v. BridgeTex Pipeline Co.*, 530 S.W.3d 196 (Tex.App. – Eastland 2016, pet. denied). Though some courts of appeals have walked through a *Denbury* analysis in contexts other than CO2, nothing in *Denbury* requires it.

To be unequivocally clear, the Texas Supreme Court and intermediate courts of appeals have expressly rejected the expansion of the reasonable-probability test to all pipelines, as *amici* Texas Farm Bureau and Texas and Southwestern Cattle Raisers urge this Court to do here. *See Tex. Rice*, 363 S.W.3d at 202 n.28; see also *TC&C Real Estate Holdings, Inc. v. ETC Katy Pipeline, Ltd.*, 2017 LEXIS 11893, *6 (Tex. App – Waco December 20, 2017, pet. denied) (holding that the Texas Rice reasonable-probability test does not apply to gas utilities). (Moreover, the Legislature has met twice since the Supreme Court adopted that test and could easily have expanded the application of the rule to all pipelines. It has not, and there is no immediate prospect of it doing so. Such a decision lies squarely within the legislative realm of public policymaking, and we urge this Court to apply the law as written and leave the debate over changes in the law to our elected representatives in Austin.)

The First Court of Appeals (Houston) affirmed in part and reversed in part. While the court determined that §2.105, Business Organizations Code, provides an independent grant of the power of eminent domain to a common carrier pipeline and the propylene is an "oil product" within the meaning of that section, the court held that HSC did not conclusively establish that it was a common carrier because there was evidence showing that HSC's pipeline served only its private interest in selling to a single customer. The court also applied the reasonable-probability test to the pipeline, thus expanding the *Texas Rice II* opinion. HSC has filed a petition for review in the Texas Supreme Court.

14. *In re Academy, Ltd. d/b/a Academy Sports + Outdoors*; No. 19-0497

This case arose from the Sutherland Springs church shooting in 2017. It implicates not only the jurisprudence of this state, but the contours of federal-state relations, the reach of federal immunity for retailers of firearms, and the use of litigation to regulate lawful commerce. Here the Real Parties ask this Court to: (1) interpret federal law to defeat Congress's policy decision to grant immunity to innocent sellers, (2) subject a Texas business to liability for an alleged violation of a Colorado *criminal* statute (requiring a further judicial interpretation of Colorado law); (3) make a Texas business the guarantor of the accuracy of the national system for vetting the background of a purchaser of firearms, and (4) create a cause of action previously unrecognized in Texas law. Deciding any one of these issues would be a tall order for the Court, but for the Real Parties to obtain the relief they have requested, the Court will have to address each of them, as well as step off into one of the most divisive and contentious policy debates of our time.

Should the Court find, however, that federal immunity bars the Real Parties' cause of action against the Relator, it need not reach any of these thorny questions. The Relator has argued this issue thoroughly, so there is no need for us to belabor the point, but suffice it to say that the Real Parties' characterization of PLCAA as providing a "federal affirmative defense" has no basis in federal appellate decisions interpreting PLCAA immunity, cancels out the statutory bar of "causes of action," and defeats the purpose of the statute.

The Real Parties' argument that Colorado law creates an exception to federal immunity is equally unfounded. The question is not whether the buyer acquired a firearm in Texas that he could not get in Colorado, but whether Colorado *magazine* law has anything to do with this case in the first place. Section 922(b)(3) requires compliance with the laws of both Texas and the state of the purchaser's residence in buying a rifle or a shotgun, but not in buying a magazine because a magazine is not a "firearm." See 18 U.S.C. 921(a)(3) (defining "firearm").

We should not expect our businesses to insure against failures of a criminal background check system built and operated by the federal government for just this purpose. The Relator complied with its duty to have the purchaser complete Form 4473 and conduct a background check, but in this instance the U.S. Air Force catastrophically failed to let anybody know that this particular buyer had a criminal record that would have disqualified him from buying a firearm from a licensed seller in the first place. It is reasonable for the Relator to rely on the federal government to do its job. In fact, a former distinguished member of this Court, Senator John Cornyn, last year authored the Fix NICS Act in response to the terrible event that led to this litigation. That law aims to ensure that federal agencies, including the Air Force, upload information to the national background check system in a timely fashion to prevent exactly what occurred here. The Justice Department's position naming Academy as a potentially responsible third party, particularly in light of the specific circumstances in this case, is wrong and destructive, both to Texas (and every other state) businesses and Second Amendment privileges in general. This Court should not validate this disastrous failure by shifting responsibility to a seller that has no choice but to rely on the accuracy of that system.

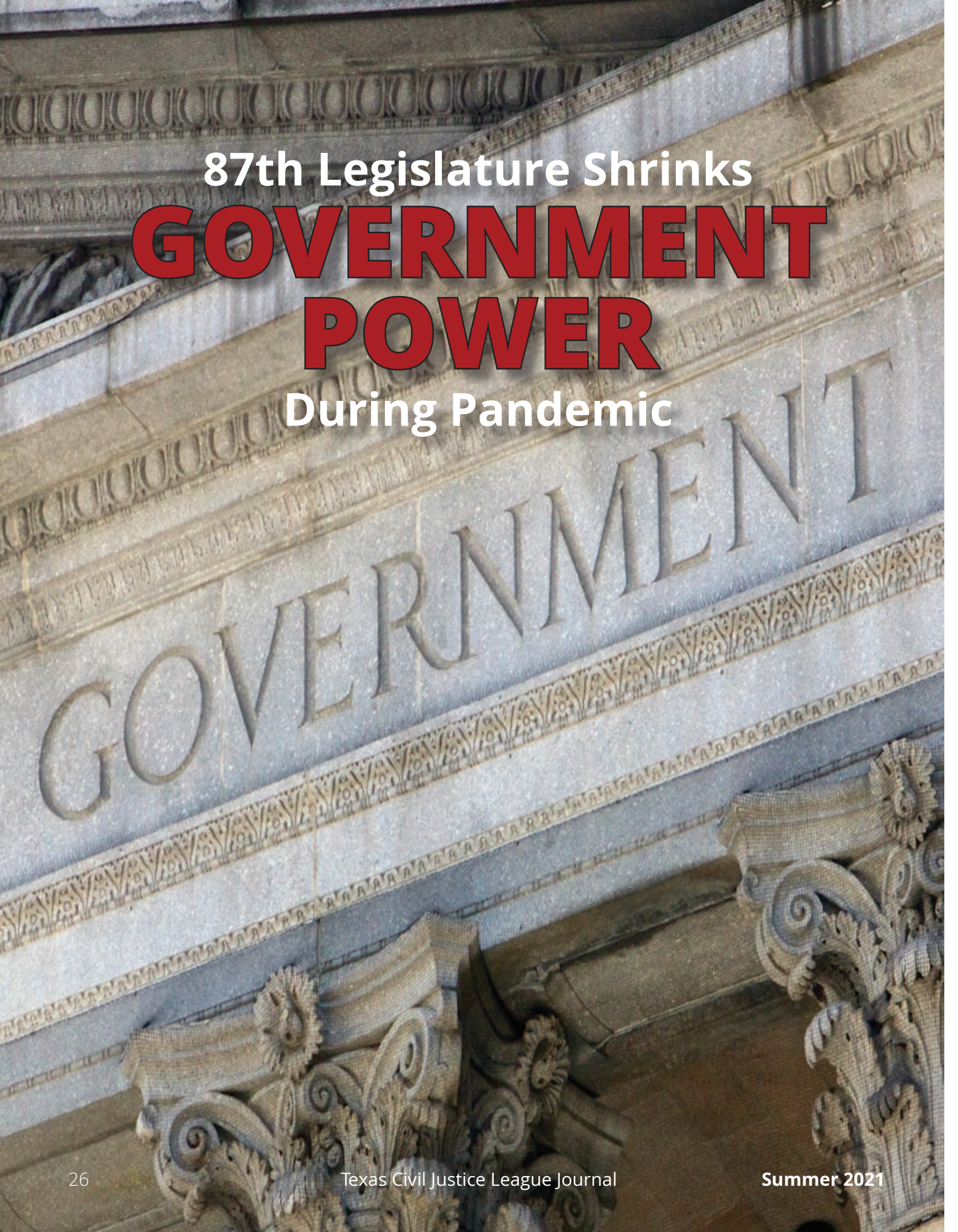
The Real Parties' argument concerning whether a firearm includes the magazine if they come packaged together in the same box defies both statutory construction and common sense. The statute does not say that, nor should it have to.

Texas law, in fact, recognizes that a firearm and ammunition are separate products. Section 82.006, TEX. CIV. P. & R. CODE, governs a products liability action against "the manufacturer or seller of a firearm *or* ammunition" (emphasis added). The statute requires a claimant to prove an actual design defect in the "firearm or ammunition" that is the producing cause of the injury. Similarly, Congress could have specified that for purposes of PLCAA, the definition of "firearm" included "ammunition." This is simply not the case.

Finally, a very long time has passed since this Court created a new common law cause of action out of whole cloth, but that is exactly what the Real Parties propose. Extending a negligent entrustment cause of action to the sale of goods would open up a vast new lawsuit industry in which every sale of a good that ended up involved in criminal activity might be subject to such a claim. If we are going to change public policy that dramatically, the Legislature should do it, not the courts, particularly in the Second Amendment context. Indeed, in the wake of the Midland/Odessa and El Paso shootings late last summer, House Speaker Dennis Bonnen appointed the House Select Committee on Mass Violence Prevention and Community Safety to study, among other things, background checks and "red-flag" laws. The existence of this inquiry emphatically affirms that the policy ramifications of the gun violence issue are of critical importance and must be fought out in public debate in the legislative process.

Academy did not violate federal law, so its conduct could not be the proximate cause of this tragedy. The trial court erred and abused its discretion twice: denying summary judgment, and then denying a permissive interlocutory appeal to get an answer on the underlying issues. Mandamus is the only available avenue to prevent a substantial waste of Texas judicial resources in a policy area best left to the Legislature. The events that led to this case are horrific and tragic in the extreme. There may indeed be a role for the courts, but if so, it lies in the direction of an action against the federal government pursuant to the Federal Tort Claims Act, not here.

SCOTX heard oral arguments on October 6, 2020.



87th Legislature Shrinks GOVERNMENT POWER During Pandemic

The scope of the governor's emergency powers during a pandemic emergency has created considerable controversy since the declaration of a state of disaster on March 13, 2020. Federal, state, and local governments likewise issued a wide array of health and safety protocols, restrictions on business activity, and lockdown orders, which quickly became politically charged during the 2020 national election. Legislators from both ends of the political spectrum called on the Governor to call a special session to allow them to participate in the decision-making, which may well have muddied the waters even more. Still, the scope of the governor's power became a political issue that many legislators came to Austin in January determined to limit in various ways.

After languishing in House committee for two months, **HB 3 by Rep. Dustin Burrows (R-Lubbock)** finally got moving. It reached the Senate late in the session, where Senator Brian Birdwell (R-Granbury) made significant changes (including removing a liability limitation that had been in the original bill and engrossed version). When the bill went back to the House, this is what it did:

- Added "pandemic" to the list of events that constitute a "disaster" for purposes of §418.004(1), Government Code;
- Added §418.0125, Government Code, to give the legislature exclusive authority to restrict or impair the operation or occupancy of a business during a declared disaster, and only upon consultation with the county judge of the affected county;
- Required the governor to call a special session (if the legislature is not in regular session) if the governor finds that the authority of the legislature is required to restrict business;
- Amended §418.014, Government Code, to bar the governor from renewing a disaster declaration to extend for more than 60 days or declare a new state of emergency based on the same or substantially similar conditions as a prior state of disaster that: (1) exists in at least two-fifths of the counties in the state, or (2) affects at least half the population of the state;
- Amended §418.0155, Government Code, to require: (1) the governor to post on the office's website the list of rules and regulations suspended by the governor in response to a disaster declaration, and (2) the affected state agency to publish the list on its website within 24 hours of suspension and in an easily accessible place;
- Added §418.0165, Government Code, to prohibit the governor from suspending a provision of either Chapter 418 (emergency management) or Chapter 433 (disaster declaration), Government Code, or any law or rule the suspension of which results in the continuation of a state agency beyond its sunset date;
- Allowed the governor to suspend a provision of the Code of Criminal Procedure, Election Code, or Penal Code only in the first 30 days of a declared disaster, unless the governor convenes a special session to consider disaster response;
- Prohibited the governor from suspending an Election Code provision related to qualifications or procedures for early voting by mail, except the governor may extend the voting period for early voting by mail to respond to the disaster;
- Added §418.027, Government Code, to provide that the governor's disaster declaration pre-empts a local disaster declaration unless the governor expressly authorizes otherwise;
- Added §433.0025, Government Code, to preclude the governor from issuing an order restricting or impairing the operation or occupancy of a business without calling a special session (if the legislature is not in regular session) requesting the legislature to do so;
- Amended §433.003, Government Code, to bar the governor from proclaiming successive states of disaster to extend for more than 60 days or declare a new state of emergency based on the same or substantially similar conditions as a prior state of disaster that: (1) exists in at least two-fifths of the counties in the state, or (2) affects at least half the population of the state; and
- Repealed §418.019, Government Code, which authorizes the governor during a state of emergency to suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles.

Federal, state, and local governments issued a wide array of health and safety protocols, restrictions on business activity, and lockdown orders, which quickly became politically charged during the 2020 national election.

HB 3 ended up dying in conference committee, so no general response bill passed. That does not mean, though, that the governor's powers during a pandemic emerged unscathed. Other legislation did pass that prohibits the governor or local governments from issuing orders with the effect of closing businesses or places of worship, from issuing vaccine passports, or from restricting the sale or transportation of firearms, ammunition, explosives, and alcoholic beverages. Businesses will likewise now be prohibited from requiring customers to show their vaccination or recovery status as a prerequisite to entering the business. The legislature also passed restrictions on the ability of hospitals and nursing homes to prohibit certain family, caretaker, or clerical visits.

In the end, the legislature took some tools for dealing with the spread of a pandemic disease out of the toolbox, and nowhere did it expand executive powers.

Dallas Court of Appeals Upholds Nuclear Verdict in Product Liability Case

In early June the Fifth District Court of Appeals affirmed a Dallas district court's judgment awarding nearly $200 million in a product liability action in which a rear-end collision left two small children with permanent severe traumatic brain injuries. The majority opinion has serious and far-reaching implications for Texas product liability law, as well as for the use of the "Reptile theory" to demonize a corporate defendant to distract the jury from the lack of evidence of an actual defective product.

Toyota Motor Sales, U.S.A., Inc. and Toyota Motor Corporation v. Reavis (No. 05-19-00075-CV) arose from a 2002 accident on North Central Expressway in Dallas. While stopped in traffic, plaintiffs' Toyota Lexus was struck from behind by a Honda SUV traveling at between 45 and 48 m.p.h. The collision pushed the plaintiff's vehicle into the vehicle in front, before the Honda struck the Lexus again at a slower speed. During the chain reaction, the plaintiffs' seatbacks deformed, causing the plaintiffs to slip up and back into the back seats, a response to a rear-end collision called "ramping." The plaintiffs' heads collided with the heads of their 5 and 3-year-old children, who were secured in car seats. As a result, the children sustained severe traumatic brain injuries, though their parents suffered only minor injuries.

The plaintiffs brought suit on behalf of their minor children against Toyota, the Toyota dealer that sold them the vehicle, and the driver of the Honda SUV. They alleged design and marketing defect claims against Toyota and the dealer, negligence against the driver, and gross negligence against all defendants. After a three-week trial, the jury found Toyota liable on the design and marketing claims, the dealer liable on the marketing claim, and the driver liable for negligence. It awarded more than $98 million in actual damages (including future medical) and apportioned 90% of the fault to Toyota. It also found Toyota and the dealer grossly negligent and awarded punitive damages of nearly $110 million, $95.4 million of which charged to Toyota. Plaintiffs settled with the driver during jury deliberations, so these amounts reflect the application of the settlement credit. The trial court denied Toyota's motions for a directed verdict, a verdict JNOV, and a new trial.

On appeal, Toyota challenged plaintiffs' liability theories, the trial court's evidentiary rulings, the sufficiency of the evidence, and parts of the jury charge. In a lengthy opinion authored by Justice Nowell and joined by Justice Partida-Kipness, the court rejected Toyota's arguments one-by-one. Specifically:

- Toyota invoked §82.008(a), CPRC, which establishes a rebuttable presumption that a product that meets or exceeds applicable federal safety standards, asserting that the seatbacks met or exceeded the Federal Motor Vehicle Safety Standards (FMVSS) and that the plaintiffs did not rebut the adequacy of the standards under §82.008(b). Toyota

further argued, for the first time on appeal, that federal law pre-empts 82.008(b) because the statute allows a jury to supersede a federal agency's determination of uniform standards. The court rejected the first argument, finding that the plaintiffs did offer rebuttal evidence of the inadequacy of the design from which the jury could reasonably have determined overcame the presumption. The court likewise found that the plaintiffs offered rebuttal evidence from which a jury could conclude that Toyota, after marketing the vehicle, withheld or misrepresented information about the safety of the seatbacks. Some of this evidence pertained to Toyota's federal lobbying activities and representations that the company had a strong internal culture of safety. Plaintiffs also submitted evidence of Toyota's 2014 deferred prosecution agreement in which it admitted to having misled US consumers with respect to safety issues involving unintended acceleration problems with Toyota vehicles. With respect to the pre-emption argument, the court found that since Toyota did not raise the argument trial or in its post-trial motions, nor did it object to the relevant jury instruction, it did not preserve appeal.

- Toyota asserted that the plaintiffs cannot prevail on the marketing defect claim because they presented no evidence of what such a warning might have said nor any indication that the plaintiffs would have read a warning if it was provided. The court rejected this argument as well, finding that the jury could conclude that Toyota knew or reasonably should have known about the risk posed by the seatback design but failed to give adequate warning of the risk.
- Perhaps the most significant issue in the case for TCJL members involves the trial court's evidentiary rulings. On appeal, Toyota challenged the trial court's admission of evidence related to the company's lobbying activities, the deferred prosecution agreement the company entered into in 2014 regarding the unintended acceleration, and video clips from a 1992 60 Minutes story about seatback failures. The trial court, according to Toyota, also allowed an insinuation that Toyota destroyed seatback safety test information, although the company did so in accordance with its routine document retention policies. For obvious reasons, Toyota argued that the inflammatory effect of this evidence substantially outweighed its dubious probative value to the actual defect at issue. The court found that the trial court did not abuse its discretion in admitting this evidence, noting that the trial court had issued appropriate limiting instructions to the jury. It determined that evidence of the deferred prosecution agreement was probative as to Toyota's claims about its robust safety culture and relevant to the credibility and bias of the company's witnesses at trial. The video clips, the court found, were admissible on the issue of whether Toyota was aware of the extreme risk of ramping to rear-seat passengers and was consciously indifferent to that risk. Again, it determined that the trial court did not abuse its discretion in admitting this evidence with respect to the plaintiffs' gross negligence claim.

Justice Schenk dissented to the majority opinion in its entirety. He rejected the plaintiffs' design defect claim on the basis that they failed to prove a defect actually existed, relying instead on a weakly supported claim that federal safety standards were inadequate. Further, he found no evidence in the record of "any automobile that has been marketed with both the seatback strength necessary to avoid the injuries here and the proposed seatbelt changes that would protect front seat occupants" from the ramping effect. As Justice Schenk observes:

- The Texas Supreme Court has repeatedly held that proof of a design that would reduce or eliminate risk of a single accident type is insufficient to sustain a design defect claim. Were it otherwise, manufacturers would be unable to settle on any design, much less one that would promote the underlying purposes of the basis of product liability—promoting the safest overall design possible to all consumers, users, and other persons on the road. Cars cannot be designed with the foreknowledge of which type of severe accident they might encounter.

Justice Schenk then conducts a lengthy analysis of §82.008, CPRC, concluding that the majority misapplied the statute by allowing the plaintiffs to rebut the presumption by: (1) using evidence concerning an entirely different issue (unintended acceleration), and (2) by alleging the inadequacy of federal safety standards relating to seatbelts based not on the development of the standards themselves but on the theory that any failure of the restraint system necessarily demonstrates the inadequacy of the standards. Such a reading guts §82.008, CPRC, and arrogates to courts a license to overrule federal safety standards by fiat.

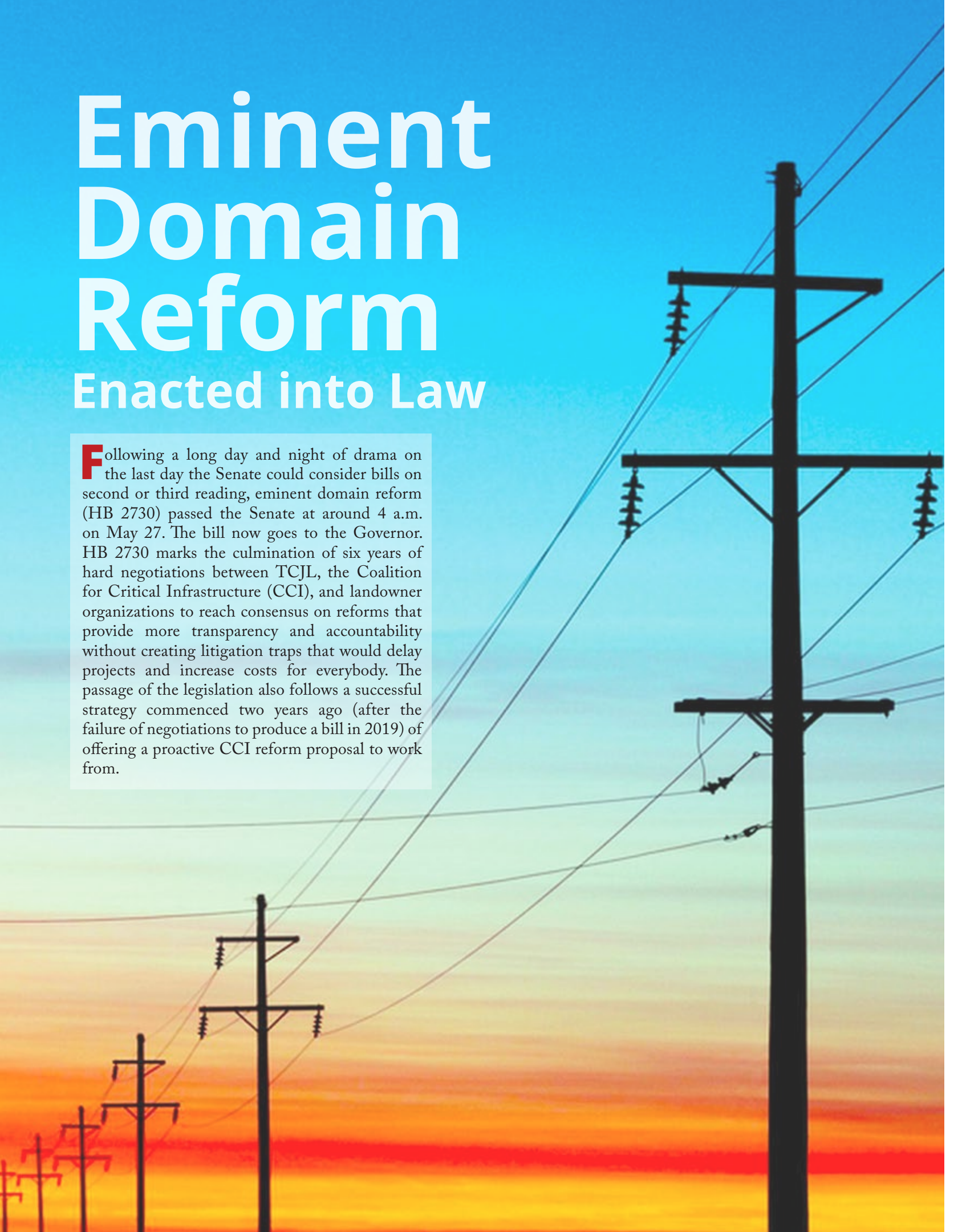
Finally, Justice Schenk finds the admission of evidence attacking Toyota's corporate culture, particularly evidence regarding lobbying activities and paying a fine arising from a different issue, disturbing and inappropriate. "These evidentiary attacks," he notes, "seem more reflective of the English idiom 'first you give a dog a bad name, and then you hang him.'" If every time a corporate representative speaks to a member of the legislature or a government regulator, testifies before a legislative committee or administrative agency, or says anything complimentary of the safety record of the company may be used against it in litigation to imply a nefarious purpose, then we have taken the "reptile theory" to a new level.

Given the size of the award, the scope of the issues, and the court of appeals' split decision, we can expect Toyota to seek SCOTX review in the near future. The majority opinion is troubling on so many fronts that a response from the broader business community may well be warranted. TCJL will keep you informed about the progress of this case as it moves forward.

Eminent Domain Reform

Enacted into Law

Following a long day and night of drama on the last day the Senate could consider bills on second or third reading, eminent domain reform (HB 2730) passed the Senate at around 4 a.m. on May 27. The bill now goes to the Governor. HB 2730 marks the culmination of six years of hard negotiations between TCJL, the Coalition for Critical Infrastructure (CCI), and landowner organizations to reach consensus on reforms that provide more transparency and accountability without creating litigation traps that would delay projects and increase costs for everybody. The passage of the legislation also follows a successful strategy commenced two years ago (after the failure of negotiations to produce a bill in 2019) of offering a proactive CCI reform proposal to work from.

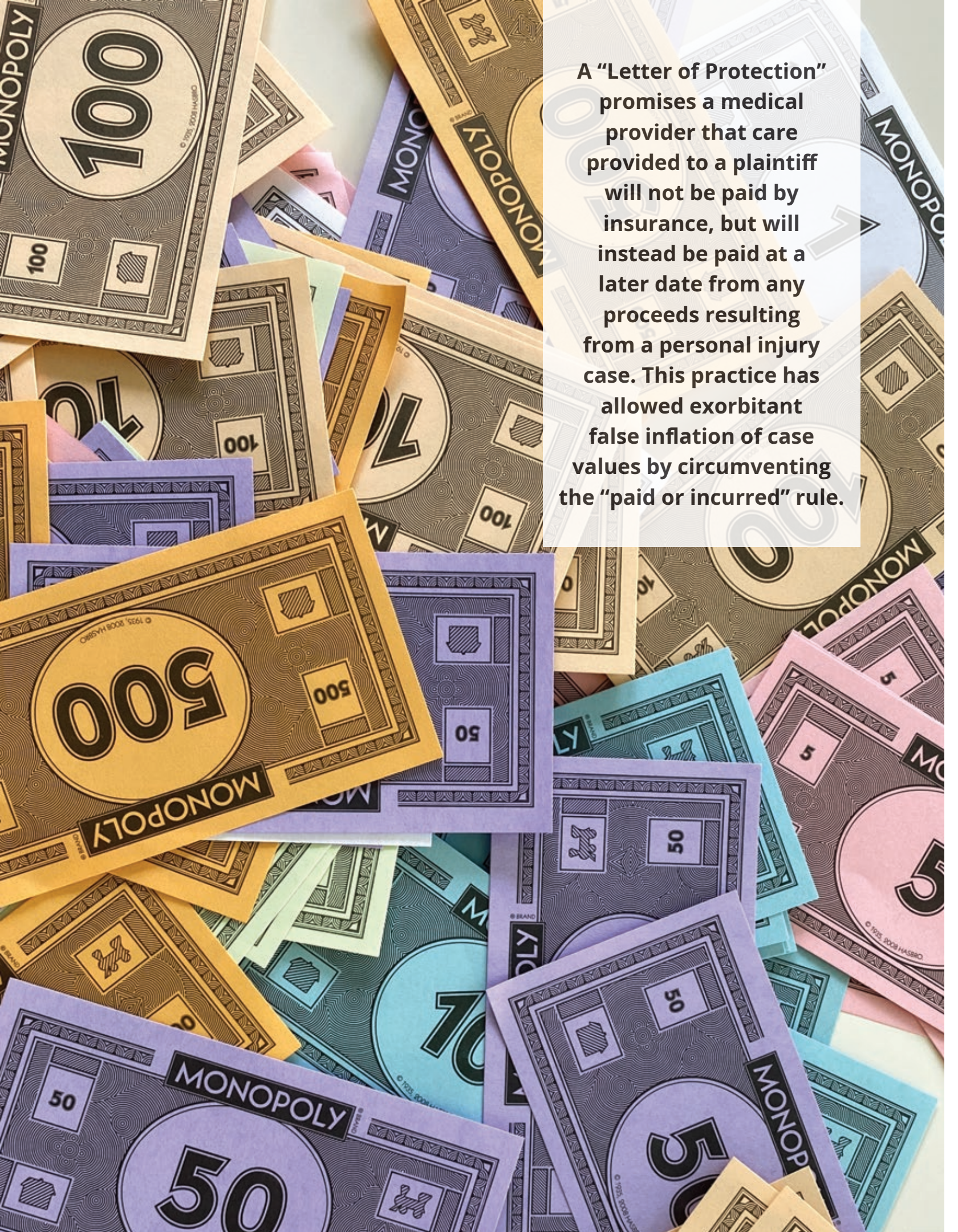


This strategy resulted in House Land & Resource Management **Chair Joe Deshotel** (D-Beaumont) and House Agriculture **Chair DeWayne Burns** (R-Cleburne) coming together as co-authors of HB 2730 and securing a consensus between TCJL, CCI, Texas Farm Bureau, and many other organizations representing landowners. The consensus bill passed the House without amendments by a 143-1 majority, and then cleared the Senate by a 31-0 majority. Sen. Lois Kolkhorst (R-Brenham), the author of eminent domain legislation that passed the Senate in each of the last three sessions, got the bill over the finish line as the clock expired earlier this morning. This effort could never have succeeded without the leadership of these three legislators, nor without the concerted effort of the TCJL, CCI Steering Committee members, TXOGA, the Texas Pipeline Association, and Texas Farm Bureau.

There are many, many plaudits to give out on this bill, which we will do more fully in the coming days and weeks, but the biggest has to go to TCJL General Counsel Lisa Kaufman, who represented TCJL and CCI in very tough and extended negotiations on HB 2730 with Rep. Deshotel, Rep. Burns, and all the interested parties. Lisa kept the train on the tracks despite numerous moments when a derailment looked imminent, including all day and into the early morning hours on the last night (up to and including drafting an amendment to another bill just in case the Senate didn't reach HB 2730 in time). We all owe Lisa an enormous debt for her work on this issue over the past six years. Without it, we could never have hoped for such a positive result.

So, what is actually in HB 2730? A lot of good things for property owners seeking the best terms and compensation from the condemning entity without the necessity of litigation. Here's what the bill does:

- Amends §402.031, Government Code, to add to the LOBOR notice of the property owner's right to file a written complaint with TREC regarding misconduct by easement or right-of-way agents;
- Requires the LOBOR to include an addendum of required terms for the instrument of conveyance of a pipeline or electric utility easement;
- Requires the OAG to conduct a biennial review of the LOBOR with public input;
- Amends Chapter 1101, Occupations Code, to require easement or ROW agents to complete required courses to obtain or renew a certificate of registration (16 hours every two years);
- Prohibits an easement or ROW agent from receiving a financial incentive to make an offer the agent knows or should know is lower than adequate compensation;
- Amends §21.0113, Property Code, to require the written initial offer to include a copy of the LOBOR, an addendum of easement terms, and a prominent notice of whether the offer includes damages to the remainder, if any, or a written appraisal that includes damages to the remainder, if any, prepared by a certified appraiser;
- Requires the initial offer to include an instrument of conveyance with the required terms under §21.0114 unless the entity has previously provided it, the property owner desires a different form, or the property owner provided a form to the entity before the initial offer;
- Requires the offer to include the name and phone number of an entity employee or legal representative;
- Adds §21.0114, Property Code, to establish required easement terms for certain for-profit pipeline and electric transmission entities;
- Requires the entity to notify the property owner of the owner's right to negotiate: (1) to recover damages (or a notice that the consideration for the easement includes damages) for damage to vegetation or income loss from agricultural production or other leases; (2) to require the entity to maintain commercial liability insurance or self-insurance against the entity's negligence;
- Permits the entity and the property owner to agree to different easement terms, including terms different than or not included in the condemnation petition;
- Permits the entity and the property owner to negotiate subsequent amendments to the easement, which must be provided to the property owner 7 days before the date the entity files a condemnation petition (unless otherwise agreed);
- Amends §21.012(c), Property Code, to require the entity to provide the condemnation petition to the property owner's counsel on receipt of written notice that the owner is represented by counsel;
- Amends §21.014, Property Code, to require the trial court to appoint special commissioners not later than the 30thcalendar day after the petition is filed;
- Requires the court to appoint two alternative commissioners and limits the time period in which the entity or property owner may strike a special commissioner to 10 calendar days after the date of the order appointing commissioners or 20 days after the date the petition was filed;
- Permits a party to exercise a strike after the other party has stricken a commissioner, if the party has not already exercised a strike;
- Requires the entity to provide a copy of the court's order appointing special commissioners to the property owner and the owner's counsel, if applicable.
- HB 2730 ensures what we hope are many years of legal certainty as Texas builds the massive infrastructure projects necessary to keep our growing economy on the move.



A "Letter of Protection" promises a medical provider that care provided to a plaintiff will not be paid by insurance, but will instead be paid at a later date from any proceeds resulting from a personal injury case. This practice has allowed exorbitant false inflation of case values by circumventing the "paid or incurred" rule.

SCOTX Addresses Paid or Incurred, Medical Expense Affidavits

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 payor, such as an insurance company, workers' compensation, 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 blossomed after the enactment of the 2003 reforms. 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 held that those charges constitute the "paid or incurred" amount, not the discounted charges actually collected by the provider. Moreover, a 2019 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 up to 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 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.

Efforts to address these problems began in earnest during the 2017 session, in which legislation received a hearing in the House committee but did not advance further. In 2019 limited reform of the medical expense affidavit statute, §18.001, CPRC, addressed the timelines for filing controverting affidavits but did not address the exclusion of defense experts on medical billing. In 2021, however, solving the paid or incurred problem became a centerpiece of the major civil justice reform groups, Texans for Lawsuit Reform and TCJL (with a big assist from the Texas Association of Defense Counsel). For the first time, proposed legislation was filed in both houses, both sponsored physicians. **SB 207 by Sen. Charles Schwertner** (R-Georgetown) and **HB 1617 by Rep. Greg Bonnen** (R-Friendswood), would have amended §41.0105, CPRC, to allow the defendant to introduce evidence of the reasonableness of the amount charged by a medical or health care service provided to a claimant, including:

- the amount actually paid to the provider for the service (unless there is a formal or informal agreement that the provider will wholly or partly refund, rebate, or remit the amount paid to the payer or another person);
- the amount billed by the provider; the amount paid, would have been paid, or likely to be paid for the services by a health benefit plan, workers' compensation insurance, an

employer-provided plan, Medicaid, Medicare, or other similar source;

- the average amount typically paid or allowed by health benefit plans or government payers to providers located in the same geographic area as the provider and who offer the same type of services as provided to the claimant; or
- the average amounts actually accepted in the 12 previous months by the provider for the same services provided to the claimant to patients other than the claimant.

Predictably, SB 207/HB 1617 met with opposition from both the plaintiff's bar and some sectors of the health care industry. By a 19-12 margin, the Texas Senate passed SB 207 in a heavily amended form. The engrossed version created a safe harbor from discovery for a health care provider that submits either the amounts actually paid by third-party payors, such as private insurers, Medicare, or workers' compensation insurance, or, in the absence of actual payments, 150% of the workers' compensation reimbursement rate for the same procedure. SB 207 further addressed the glaring abuse of §18.001, CPRC, by eliminating the controverting affidavit and substituting a notice to controvert in its place. It also provided that if the defendant serves notice to controvert, the plaintiff's affidavit comes in to evidence as a business record, not an opinion of the reasonableness of the charges. As previously noted, if the health care provider submitted actual payments or 150% of workers' comp, a defendant would not have the ability to do any further discovery from the provider.

SB 207 was reported favorably from House Judiciary on May 13 and sent to the House Calendars Committee. At that point, the Texas Supreme Court handed down two decisions that comprehensively addressed both the evidentiary issues under §41.0105 and the controverting affidavits under §18.001, as explained below. Upon consultations with defense practitioners, the House and Senate sponsors agreed not to pursue SB 207 any further this session.

So what did SCOTX do? First, it ruled that a trial court abused its discretion when it struck the defendant's controverting affidavit challenging the reasonableness of medical expenses submitted by the plaintiff under §18.001, CPRC, and prohibited the defendant from challenging the reasonableness of the charges at trial. *In Re Allstate Indemnity Company* (No. 20-0071) squarely rejects the increasing use of §18.001 as an exclusionary rule that allows plaintiffs carte blanche to submit chargemaster rates as "reasonable" if the medical provider does not submit its bills to a third-party payer.

The facts of the case are straightforward. Plaintiff was injured in an auto accident and sued her insurer, Allstate, for breaching its policy by failing to pay UIM benefits. Plaintiff submitted $41,000 in medical expenses supported by §18.001 affidavits from several medical providers, including EMS, the hospital and other clinics that treated plaintiff, radiologists, an orthopedist, two physical-therapy practices, and a pharmacy. Allstate served a controverting affidavit challenging the reasonableness of the charges of the hospital, orthopedist, and one of the physical therapy practices. The controverting affidavit was signed by a registered nurse who is also a Certified Professional Coder and Professional Medical Auditor. The affiant further has 21 years to experience in health care, including 12 years of medical billing review, coding, and auditor certification with a demonstrated knowledge of the CPT coding system. The controverting affidavit goes on to explain the affiant's methodology and conclusion that based her analysis the providers charged excessive rates for the procedures they performed. The controverting affidavit was likewise backed with a seven-page expert report and 10 pages of spreadsheets reflecting the details of the billing data.

As has become far too common in trial courts across the state, a Nueces County trial judge, on the plaintiff's motion, struck the controverting affidavit on the basis that the affiant was not qualified to offer her opinion as to the charges, that her opinion was unreliable, and that the controverting affidavit did not give reasonable notice of the basis of its conclusions. In addition to striking the controverting affidavit, the trial judge further prohibited both the affiant from testifying at trial for any reason and Allstate from questioning witnesses, offering evidence, or arguing to the jury the reasonableness of the plaintiff's medical bills. Again, this type of ruling, which deprives a defendant of the opportunity to contest damages, happens every day in courtrooms across the state. Allstate filed a writ of mandamus, which was rejected by the Corpus Christi Court of Appeals. Allstate then appealed to SCOTX.

****


Justice
Rebeca Huddle

In an opinion by Justice Rebeca Huddle, SCOTX reversed the trial court's order in all respects and issued a conditional writ of mandamus. The Court held the following:

- A person giving a controverting affidavit need only be qualified by knowledge, skill experience, training, or education, not someone who is in the same field of medicine. Given the complexity of and lack of transparency in health care pricing and billing, the Court noted, a medical provider may be the last person who has any idea about the reasonableness of the charges (necessity of the treatment is a separate issue). The Court found that the affiant in this case was amply qualified. Moreover, nothing in §18.001 relieves the plaintiff of the requirement to produce legally sufficient evidence of the reasonableness of medical charges to begin with. §18.001 is only designed to "streamline" proof of reasonableness, not to settle the issue without further inquiry.

- The Court likewise rejected plaintiff's argument that the controverting affidavit failed to give reasonable notice of the basis of Allstate's objection to the charges. The trial court further ruled that the controverting affidavit was conclusory in that it used the median charge for particular services in a geographical area as a "litmus test" for an opinion of reasonableness. SCOTX, however, pointed out that an §18.001 controverting affidavit does not "charge trial courts with determining the admissibility of an affiant's opinions, and a trial court's doubts about admissibility are not a proper basis for striking a section 18.001 controverting affidavit." All that is required of a controverting affidavit is that it provide the opposing party "sufficient information to enable that party to prepare a defense or a response." The Court ruled that the controverting affidavit more than met the fair notice requirement.
- The trial court agreed with the plaintiff's argument that the opinions given by a counteraffiant must meet the standard for admissibility at trial under §18.001(f). SCOTX flatly rejected this argument, pointing out that "whether a witness is qualified to provide expert testimony and whether the expert's testimony is reliable are distinct inquiries." Here the trial court erred by "importing a reliability requirement into its section 18.001 analysis," and that it abused its discretion by importing such a requirement and then striking the controverting affidavit based upon it.
- SCOTX went on to say that even if the trial court's order striking the controverting affadavit had been appropriate, it still abused its discretion by prohibiting the counteraffiant from testifying at trial and Allstate from questioning witnesses, offering evidence, or arguing to the jury the reasonableness of the bills. According to SCOTX, *the only thing §18.001 does* is to provide the plaintiff with a streamlined way to submit evidence of medical charges that, if not challenged, could be *sufficient* to support a finding of fact that the charges were reasonable and necessary. Regardless of whether it serves a controverting affidavit under §18.001, it can still challenge the charges through evidence and testimony at trial. To quote Justice Huddle, "the opposing party's failure to serve a compliant controverting affidavit has *no* impact on its ability to challenge reasonableness or necessity at trial." Consequently, SCOTX expressly overruled several intermediate appellate decisions holding that §18.001 operated as an exclusionary rule or "death penalty on the issue of past medical expenses."
- Finally, SCOTX found mandamus appropriate because the trial court's order denied Allstate the ability to present its own evidence of reasonableness and necessity and prohibited Allstate from challenging the plaintiff's claims through cross-examination or jury argument. Because the order would "preclude Allstate from engaging in meaningful adversarial adjudication of [plaintiff's] claim for payment of medical expenses, vitiating or severely compromising Allstate's defense," no adequate remedy exists and mandamus must issue.

SCOTX's decision goes a long way toward eliminating some of the most egregious abuses of §18.001. Several other cases remain before the Court regarding the appropriate scope of §41.0105, CPRC (the "paid or incurred rule"). Plaintiffs have long argued, and many trial courts have agreed, that "incurred" means *only* the billed amount, regardless of whether the provider sought third-party payment. SCOTX could clarify this within the next few weeks.

Needless to say, TCJL, which has submitted several *amicus* briefs on these issues, is pleased with the Court's decision in *In Re Allstate*. It gets the law right and, we hope, will give trial judges, who don't generally like to be mandamused, clear guidance when faced with plaintiff objections to §18.001 controverting affidavits. Just as importantly, SCOTX has emphatically scotched the idea that §18.001 does anything more than what the Legislature originally intended.

Second, in a much-anticipated decision in which TCJL, TADC, TLR and many other organizations submitted amicus briefs, the Texas Supreme court today decided that a defendant's discovery requests for evidence relevant to the reasonableness of a medical provider's charges for treatment in a personal injury case is not only permitted by §41.0105, CPRC (the "paid or incurred" rule) but imperative under the longstanding common law doctrine that requires medical expenses in such cases to meet the "reasonable and necessary" test. The decision represents a landmark vindication of the Legislature's 2003 reforms and a repudiation of the increasingly common practice in personal injury lawsuits of submitting the provider's chargemaster rates as "reasonable and necessary," sometimes under letters of protection with the plaintiff's attorney, and blocking the defendant from discovering the amounts received by the provider for the same services from third-party payers.

The case, *In Re K&L Auto Crushers, LLC and Thomas Gothard, Jr.* (No. 19-1022), arose from a vehicular accident between a motorist and a commercial truck. The two drivers exchanged information, took photographs, and drove away without reporting any injuries. The plaintiff then filed suit against the truck driver and his employer, K&L Auto Crushers, seeking, among other damages, $1.2 million in medical expenses for multiple surgeries and related treatment, for which the plaintiff neither paid nor sought third-party reimbursement. The plaintiff's attorney entered into a letter of protection with the medical providers under which the attorney promised to protect the providers' interest in the plaintiff's account when the claim was settled, but only for "reasonable and necessary expenses."

The defendants filed controverting affidavits under §18.001, CPRC, contesting the reasonableness of the charges. They also sought discovery of the providers' billing practices and

rates for services and equipment specific to the plaintiff's treatment, relying on SCOTX's decision in *In Re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128, (Tex. 2018) (orig. proceeding). As you recall, in *North Cypress* SCOTX permitted an uninsured patient against whom the hospital sought to enforce a lien for chargemaster rates to obtain discovery of the hospital's reimbursement rates with private insurers, Medicare, and Medicaid, as well as the provider's costs for the equipment and devices used in the patient's treatment. Here, the defendants narrowed their initial discovery request to bring it within the parameters of North Cypress and further expressed a willingness to enter into a protective order to protect the confidentiality of the information. A Dallas district judge, as has become almost standard procedure in trial courts across the state, quashed the defendants/ discovery requests without explanation and, for good measure, struck their §18.001 controverting affidavits. The defendants sought a writ of mandamus, which the Dallas Court of Appeals denied.

Justice Boyd, joined by Chief Justice Hecht and Justices Guzman, Devine, Lehrmann, Blacklock, and Busby, wrote the majority opinion. Justice Huddle filed a concurring opinion, joined by Justice Bland and in part by Justice Guzman. Following a lengthy development of the facts of the discovery dispute at the trial court, the Court squarely faced the legal basis of the plaintiff's argument that §41.0105, CPRC, allows the plaintiff to submit whatever medical charges the plaintiff actually "paid or incurred," without regard to their reasonableness or necessity. The Court rejected this reading of the statute, noting that nothing in §41.0105 limits or pre-empts a century or more of Texas common law that medical expenses claimed as damages must be reasonable and necessary. The plaintiff argued further that *North Cypress* should not apply in a personal injury context because the tortfeasor would receive a "windfall" by reducing the amount the tortfeasor was required to pay while requiring the plaintiff to pay the full billed amount to the provider (conveniently overlooking under letters of protection and similar "arrangements" plaintiffs don't pay anything). The Court likewise rejected this argument, observing that nothing in the record shows that the plaintiff was ever obliged to pay the providers an unreasonable amount for their services. It goes on to say that tortfeasors are responsible only for losses naturally resulting from a wrongful act, not what a claimant may or may not have agreed to pay a medical provider.

The Court found no distinction between the hospital lien context of *North Cypress* and the personal injury context here. As Justice Boyd opined, "while certainly 'not dispositive,' the negotiated rates the providers charged to private insurers and public payors for the medical services and devices provided to [the plaintiff], and the costs the providers incurred to provide those services and devices, are 'at least relevant' to whether the chargemaster rates the providers billed to [the plaintiff] for the same services and devices are reasonable" (Op. at 12). The Court noted that proportionality, overbreadth, and the extent the request burdens a non-party still limit the scope of discovery under its holding, but it left very little doubt that discovery requests narrowly tailored to *North Cypress* cannot be denied by a trial court without abusing its discretion. With respect to the alleged burden on the providers, however, the Court observed that since they made a deal with the plaintiff's attorney to obtain a financial stake in the litigation, they should not object to responding to reasonable discovery requests arising from that litigation.

The bottom line: trial courts must grant reasonable and proportional discovery of "the rates healthcare providers charge to private insurers and public payors and their costs for providing services to a patient constitute relevant facts and data." Trial courts may still limit discovery to mitigate the burden on a non-party, to protect confidential trade secrets, and to assure its proportionality, but to deny discovery of relevant evidence without which the defendant cannot contest the reasonableness of the charges constitutes an abuse of discretion for which no adequate remedy other than mandamus is available. The Court vacated the trial court's order denying reconsideration of the defendants' narrowly tailored discovery request and to consider it in light of the opinion.

When paired with its decision two weeks ago in *In Re Allstate* (20-0071), the Court has now addressed most, if not all, of the litany of abuses of the paid or incurred rule and §18.001 medical expense affidavits. These decisions wholly vindicate the Legislature's wisdom in enacting §41.0105, CPRC, in 2003 and restore Chapter 18, CPRC, to its original purpose of streamlining the submission of medical charges into evidence. As we stated in our brief in this case, the aim of the plaintiff's lawyers tactics has been to "revive relatively low-dollar claims that otherwise would have been settled expeditiously under a proper application of the paid or incurred rule. But not only low-dollar claims. With the prospect of submitting into evidence significantly inflated expenses back in play, we can expect the frequency and severity of claims to start going up again after a period of relative stability. We can also expect defendants to reconsider whether to litigate claims in which liability is a significant issue in light of the increased costs of discovery and higher exposure to inflated health care expense claims. If this practice continues to spread, it will not take long for the paid or incurred rule to become a dead letter, eliminating a foundational part of the 2003 medical and general liability reforms." With *In Re Allstate* and *In Re K&L Auto Crushers* now on the books, we trust that trial courts will follow the law — as they should have been doing all along.

BACK THE PAC

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

The 2022 ballot will include the top six statewide seats, all 181 legislative seats, at least three Supreme Court races, about 20 courts of appeals races, and several other statewide seats including Railroad Commission, Court of Criminal Appeals, and State Board of Education. TCJL PAC plans to participate in all Supreme Court races and several Court of Appeals races, as well as appropriate legislative and statewide races. Campaign fundraising will soon be in full swing. Our effectiveness as an organization 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.

Following the sweeps on the courts in the recent past, we can expect well-funded challengers in almost every seat. We must elect qualified and independent justices, but if we don't help get the word out about the qualifications of these candidates, this can't happen.

TCJL PAC needs your financial assistance for the upcoming campaign cycle. While we are not a large PAC in comparison to others, our contributions are meaningful because we are one of only a few non-attorney PACs that assist judicial candidates across the state (both through direct contributions and in-kind programs such as the TCJL PAC slate card) and supports judicial and legislative incumbents and candidates committed to a fair and balanced civil justice system.

Please make your

TCJL PAC contributions today

so that we may once again support meritorious candidates for the legislature and judiciary.

A mailing panel is available on the back of this publication.

PAC, personal and partnership checks for political activity should be made payable to TCJL PAC.

Corporate contributions should be made payable to TCJL PAC Administrative Fund, and can be used for administrative purposes only.

Political advertising by Texas Civil Justice League PAC, 400 West 15th Street, Suite 1400, Austin, Texas 78701.

continued from page 13

negligent as a predicate to finding the employer negligent in relation to the employee's operation of the vehicle (except for evidence of specific regulatory violations listed below);

- Allows a claimant to introduce evidence in the first phase of a bifurcated trial in regard to an employer defendant who is regulated by the Motor Vehicle Safety Improvement Act of 1999 or Chapter 644, Transportation Code, limited to whether the employee driver at the time of the accident:

  (1) was licensed to drive the vehicle at the time of the accident;

  (2) was disqualified from driving the vehicle under 49 CFR §§383.51, 383.52, or 391.15;

  (3) was subject to an out-of-service order, as defined by 49 CFR §390.5;

  (4) was driving the vehicle in violation of a license restriction imposed under 49 CFR §383.95 or §522.043, Transportation Code;

  (5) had received a certificate of driver's road test from the employer defendant as required by 49 CFR §391.31 or had an equivalent certificate or license as provided by 49 CFR §391.33;

  (6) was medically certified as physically qualified to operate the vehicle under 49 CFR §391.41 (deleted "or corresponding state law");

  (7) was operating the vehicle when prohibited to do so under 49 CFR §§382.201, 383.205, 382.207, or 382.215, 395.3, or 395.5 or 37 TAC §4.12, as applicable, on the day of the accident;

  (8) was texting or using a handheld mobile telephone while driving the vehicle in violation of 49 CFR §392.80;

  (9) provided the employer defendant with an application for employment as required by 49 CFR §391.21(a) if the accident occurred on or before the first anniversary date after the date the employee began employment with the employer defendant; and

  (10) refused to submit to a controlled substance test as required by 49 CFR 383.303, 382.305, 382.307, 382.309, or 383.311 during the two years preceding the date of the accident; **and** whether the employer defendant:

  (1) allowed the employee to operate the employer's commercial vehicle on the day of the accident in violation of 49 CFR §§382.201, 382.205, 382.207, 382.215, 382.701(d), 359.3, or 359.5 or 37 TAC §4.12;

  (2) had complied with 49 CFR §382.301 in regard to controlled-substance testing of the employee driver if the employee driver was impaired because of the use of a controlled substance at the time of the accident, and the accident occurred on or before the 180th day after the date the employee driver began employment with the employer defendant;

  (3) had made the investigations and inquiries as provided by 49 CFR §391.23(a) in regard to the employee driver if the accident occurred on or before the first anniversary date after the date the employee driver began employment with the employer defendant; and

  (4) was subject to an out-of-service order, as defined by 49 CFR §390.5.

- Limits the admissibility of evidence of the above regulatory violations in the first phase to prove only ordinary negligent entrustment by the employer defendant to the employee defendant who was operating the vehicle and specifies that it is the only evidence that may be presented on negligent entrustment claim in the first phase;
- Clarifies that the bill does not preclude the claimant from bringing a negligence claim against the employer, such as negligent maintenance, that does not require a predicate finding of the employee's negligence, or from presenting evidence supporting that claim in the first phase; or a claim for punitive damages arising from the employer's conduct in relation to the accident, or from presenting evidence on that claim in the second phase;
- Bars the court from requiring expert testimony to support the introduction into evidence of a photograph or video of the vehicle or an object involved in the accident;
- Provides that if a photo or video is properly authenticated it is presumed admissible, even if it supports or refutes an assertion about the severity of the damages or injury to an object or person involved in the accident.

HB 365 by Rep. Andrew Murr (R-Junction), Sen. Drew Springer (R-Muenster)

Signed by the Governor 6/4/21. Effective 9/1/21.

Limits civil liability for negligence of a farm animal activity sponsor, farm animal professional, farm owner or lessee livestock producer, livestock show participant, livestock show sponsor, or other persons arising from property damage, death, or injury resulting from dangers or conditions that are an inherent risk of farm animals or farm animal activities. The committee substitute amends Chapter 87, CPRC, relating to liability arising from farm animals, to extend liability protections to a farm owner or lessee. Adds to the definition of "engages in a farm animal activity" to include feeding, vaccinating, exercising, weaning, transporting, producing, herding, corralling, branding, or dehorning of, or assisting in or providing health management activities. Adds to the same definition "engagement in routine or customary activities on

a farm to handle or manage farm animals." Adds a definition of "farm." Adds to the definition of "farm animal activity" owning, raising, or pasturing a farm animal; transporting a farm animal; assisting in or providing animal health management activities, including vaccination; assisting in or conducting customary tasks on a farm concerning farm animals; and transporting or moving a farm animal. Makes similar changes to the definition of "farm animal professional." Adds to the definition of "livestock producer" a person who handles, buys, or sells livestock. Adds to the definition of "participant" an independent contractor or employee. Adds to the limitation of liability the new categories of protected persons and activities, including the raising or handling of livestock on a farm.

HB 2850 by Rep. Kyle Kacal (R-College Station), Sen. Drew Springer (R-Muenster)

Signed by the Governor 6/16/21. Effective 9/1/21.

Adds Chapter 91B, CPRC, to provide immunity from liability for a certified veterinary assistant, licensed veterinary technician, or veterinarian who in good faith and in a volunteer capacity provides veterinary care or treatment to an injured animal providing the care or treatment is provided: (1) during a man-made or natural disaster that injures or endangers the animal, (2) at the request of the owner or an authorized representative of a federal, state, or local agency; and (3) is within the scope of practice of the provider. Does not imply if the provider acted with gross negligence or intentional misconduct. Further waives veterinarian-client privilege to the extent necessary to refute false information published by an owner or client in a public forum, or if a veterinarian provides information to an appropriate governmental entity regarding the prescribing of a controlled substance or cruelty to or an attack of an animal.

HB 1788 by Rep. Cole Hefner (R-Mount Pleasant), Sen. Bryan Hughes (R-Mineola)

Signed by the Governor 6/15/21. Effective 9/1/21.

Adds §37.087, Education Code, to extend immunity from liability to a school district, open-enrollment charter school, or private school for any damages resulting from any reasonable action taken by security personnel to maintain the safety of a school campus, including action relating to the use or possession of a firearm. Extends the same immunity to a school employee who has written permission from the school's governing body to carry a firearm on campus. Extends the same immunity to security personnel. Does not preempt common law doctrine of official and governmental immunity.

HB 3 by Rep. Dustin Burrows (R-Lubbock), Sen. Brian Birdwell (R-Granbury)

Died in Senate.

This bill dealt primarily with the governor's authority during a pandemic but did contain a liability limitation for businesses or entities for exposing or potentially exposing an individual to the disease if the business or entity made a reasonable effort to comply with applicable federal, state, and local laws, rules, regulations, proclamations, or declarations, and the business or entity's act or omission giving rise to the exposure was not wilful, reckless, or grossly negligent. Extends the same protection to the provider of a good or service at the governor's request. Protects an officer or employee of a state or local agency, or a volunteer acting at the direction of such, by deeming them members of the Texas military forces ordered into active service if the person is performing an activity related to sheltering or housing individuals in connection with the evacuation of an area stricken or threatened by a pandemic disease. This provision was removed from the bill in Senate committee.

HB 92 by Rep. Valoree Swanson (R-Spring)

Died in House Judiciary and Civil Jurisprudence.

Imposes civil liability for damages, in addition to civil and criminal penalties, for a violation of restrictions on abortion. Authorizes a next friend to bring an action for damages.

HB 167 by Rep. Evelina Ortega (D-El Paso), Sen. Cesar Blanco (D-El Paso)

Died in Senate.

Adds §125.0451, CPRC, to authorize a trial court to issue a temporary restraining order without a formal hearing in a suit for common or public nuisance if the person seeking the TRO shows in an ex parte hearing that the place is maintained in a manner that is or is about to become a common nuisance.

HB 188 by Rep. Diego Bernal (D-San Antonio)/ SB 233 by Sen. John Whitmire (D-Houston)/ SB 1309 by Sen. Cesar Blanco (D-El Paso)

Died in House State Affairs and Senate State Affairs.

Adds Chapter 100B, CPRC, to create a civil action against a person who commits a discriminatory practice based on the claimant's gender identity or expression. An aggrieved person may bring an action in district court not later than two years after the date of the occurrence of the termination of an alleged discriminatory practice. "Discriminatory practice" occurs if a person denies, on the basis of another person's gender identity or expression, full and equal accommodation in any place of public accommodation (unless the same

treatment applies to everyone) or otherwise discriminates against the person based on gender identity or expression. Does not apply to a religious organization. If the court finds that the defendant has committed a discriminatory practice, it may award actual and punitive damages, reasonable attorney's fees, court costs, and injunctive relief. The bill further requires state agencies to prohibit state contractors from discriminating against a person based on the person's gender identity or expression. Establishes a complaint mechanism and administrative penalties for violations. The bill further makes a discriminatory practice based on gender identity or expression an unlawful employment practice under Chapter 21, Labor Code. Finally, the bill makes a number of conforming changes to add discrimination based on gender identity or expression to other anti-discrimination statutes, primarily in the Property Code.

HB 459 by Rep. Matt Shaheen (R-Plano)

Died in House Judiciary and Civil Jurisprudence.

Bars filing a civil action against a person based on reporting of suspicious activity if the person acted as a reasonable person would in the same or similar circumstances or in reasonable belief that the activity constituted or was in furtherance of a crime.

HB 762 by Rep. Celia Israel (D-Austin)

Died on House Calendar.

Amends Chapter 92A, CPRC, to apply the same liability standard for removal of a domestic animal from a locked motor vehicle as currently applies to the removal of a vulnerable individual.

HB 903 by Rep. Tom Oliverson (R-Cypress)

Died in Senate.

Adds Chapter 150D, CPRC, governing the settlement of claims involving minors. The bill:

- Authorizes a legal custodian of a minor to enter into a settlement agreement with a person against whom the minor has a claim if a guardian/guardian ad litem has not been appointed, the total amount of the claim (excluding medical expenses, liens, and attorney's fees/costs) is $25,000 or less if paid in cash or by the payment of a premium to purchase an annuity, and the legal custodian makes an affidavit stating that the custodian has made a reasonable inquiry and verifies that the minor will be fully compensated by the settlement or there is no practical way to obtain additional amounts from the settling party.
- If the minor or settling party is represented by counsel, requires the cash payment to be paid into the attorney's trust account and then into a federally insured interest-bearing account in the sole name of the minor opened by the legal custodian.
- If no attorney is involved, the cash must be paid directly into a federally insured interest-bearing account in the sole name of the minor opened by the legal custodian (also has a procedure for payment if the minor is under the conservatorship of the Department of Family and Protective Services).
- If the payment is for purchase of an annuity, it must be paid by direct payment to the annuity provider with the minor as sole beneficiary.
- Withdrawal from the account can only be made pursuant to court order, when the minor turns 18, or upon the minor's death.
- Makes the signature of the legal custodian on the settlement binding without further court approval or review.
- Provides liability immunity for the legal custodian and settling party if the claim was settled in good faith.

HB 1078 by Rep. Brooks Landgraf (R-Odessa)

Died in House Judiciary and Civil Jurisprudence (see HB 365)

Amends Chapter 87, CPRC, regarding liability arising from farm animal activities.

- Adds to the definitions "engages in farm animal activities" and "farm animal activities" breeding, feeding, or working farm animals as a vocation;
- Adds to the definition of "participant (in farm animal activities)" a person who engages in the activity within the scope of the person's employment as a farm or ranch employee or as an independent contractor engaged by a farm or ranch owner or operator;
- Includes in the limitation of liability a farm or ranch owner or operator.

HB 1089 by Rep. Ron Reynolds (D-Missouri City)

Died in House Judiciary and Civil Jurisprudence.

Amends the Tort Claims Act (Chapter 101, CPRC) to hold a local governmental entity liable for personal injury, death, or property damage proximately caused by the wrongful act or omission or negligence of an employee acting within the course and scope of employment if: (1) the employee is a county jailer, peace officer, public security officer, reserve law enforcement officer, telecommunicator, or school marshal; and (2) the employee would be personally liable to the claimant under Texas law. Raises the damages cap for all local governmental units (cities already have the higher caps) from $100,000 to $250,000 for money damages for

each person, and from $300,000 to $500,000 for each single occurrence for bodily injury or death. Authorizes exemplary damages against a local governmental entity found liable under these provisions. Excludes from the definition of governmental functions exempt from liability: (1) a negligent act or omission committed during an emergency response or reacting to an emergency situation; and (2) a negligent failure to provide or method of providing police or fire protection, or if such failure was consciously indifferent or committed with reckless disregard. Eliminates the exemption from liability based on a claim for injury or death connected with an act or omission arising from civil disobedience, riot, insurrection, or rebellion. Allows a claimant to discover the existence and amount of insurance held by the governmental unit.

HB 1130 by Rep. James White (R-Hillister)

Died in House Judiciary and Civil Jurisprudence.

Adds 251.204, Utilities Code, to authorize an operator of an underground facility or an excavator to bring a civil action to enforce statutory provisions requiring an excavator to provide notice of excavation and an operator to mark the location of a facility at or near the excavation site. Authorizes a substantially prevailing party to recover attorney's fees, court costs, and other expenses incurred in the action. Venue for an action is in the county where all or part of the alleged violation occurred, the defendant's principal place of business, or the defendant's residence in this state.

HB 1478 by Rep. John Cyrier (R-Lockhart)

Died in House Calendars Committee.

Adds Chapter 75B, CPRC, to limit the liability of a recreational vehicle park or campground for personal injury, death, or property damage of a participant in park or campground activities if the park posts a warning sign as prescribed by the statute. Does not limit liability if the park or campground's negligence evidences disregard for the participant's safety, the park or campground had actual knowledge of or reasonably should have known of a dangerous condition on the land, facilities, or equipment of the park or campground, failed to train or improperly trained an employee involved in the activity, or acted intentionally.

HB 1539 by Rep. Armando Martinez (D-Weslaco)

Died in House Public Health.

Requires a food service establishment with a designed or designated place for eating and that prepares a food item containing peanuts or a peanut product to post a warning sign.

HB 1548 by Rep. Cecil Bell (R-Mineola)

Died in Senate State Affairs.

Adds Chapter 95A, CPRC, to grant immunity to an owner of a business from liability arising solely from the owner's permission for a license holder for a concealed handgun to carry on the business premises. Provides that the lack of the notice required by §30.06, Penal Code, is sufficient to constitute allowing entry on the premises by a license holder.

HB 1793 by Rep. Julie Johnson (D-Dallas)

Died in Senate.

Adds Chapter 1955, Insurance Code, to prohibit a claimant and a personal or commercial auto insurer to enter into an oral release for claims arising out of property damage or injury for which the insurer may be liable under the policy. A release made in exchange for money is not enforceable unless in writing.

HB 1794 by Rep. Julie Johnson (D-Dallas)

Died in House Calendars Committee.

Repeals §75.004(b), CPRC, which requires the owner, lessee, or occupant of agricultural land used for recreational purposes to carry liability insurance.

HB 1826 by Rep. Trey Martinez-Fischer (D-San Antonio)

Died in House Calendars Committee.

Amends §17.46(b), Business & Commerce Code, to add to the list of false, misleading, or deceptive acts or practices selling or leasing disinfectant cleaning supplies and personal protective equipment at an exorbitant or excessive price, or demanding an exorbitant or excessive price for them.

HB 1953 by Rep. Donna Howard (D-Austin)

Died in Senate.

Adds Chapter 89A, CPRC, to shield from liability a person who donates in good faith to a nonprofit organization a feminine hygiene product for distribution to individuals in need of the product, if the donated product meets all quality control and labeling standards at the time the product is donated. Likewise shields the nonprofit organization that distributes the products. Immunity does not apply if the person who donated the product or the nonprofit organization acted intentionally or with gross negligence resulting in injury or death of an individual to whom the product is distributed.

HB 2071 by Rep. Ann Johnson (D-Houston)

Died in House Judiciary and Civil Jurisprudence.

Amends §16.003(a), CPRC, to abolish the statute of limitations for an action for personal injury arising from the sexual assault of a child. Applies to certain pending claims.

HB 2144 by Rep. Cody Harris (R-Palestine)

Died in House Judiciary and Civil Jurisprudence.

Abolishes the common law doctrine of public nuisance. Substitutes a new statutory cause of action embodied in Chapter 100F, CPRC. Provides that a person may only be held liable for a public nuisance if the person causes an unlawful condition and controls the condition at the time the condition violates an established public right (a right commonly held by all members of the public to the use of public land, air, or water). Provides that the aggregation of multiple individual injuries or private nuisances do not constitute violations of an established public right. Provides that only the state or a political subdivision can bring an action for public nuisance and may only do so by a government attorney for the relevant jurisdiction. Allows enforcement by a private citizen only if the private citizen can show a special injury by clear and convincing evidence. Provides that as a matter of law, the use of or damage to public land, air, or water with only personal, spiritual, cultural, or emotional significance to the individual is not a special injury. Remedies include injunctive relief and non-speculative monetary of non-monetary resources necessary to abate the nuisance (as shown by clear and convincing evidence).

HB 2174 by Rep. Matt Shaheen (R-Plano)

Died in House Judiciary and Civil Jurisprudence.

Adds Chapter 129B, CPRC, to hold the owner of an internet site, including a social media site, liable for damages for allowing a person under 18 years of age to access pornographic materials on the site. Holds a person personally liable for uploading pornographic material on an internet website if a person under 18 years of age accesses the material on the site.

HB 2188 by Rep. Matt Shaheen (R-Plano)/
HB 2965 by Rep. Tony Tinderholt (R-Arlington)

Died in House State Affairs.

Makes a social media platform with more than one million users civilly liable for censoring, restricting, or suppressing information both to the information content provider and any person who might have seen the material if it had been posted. Provides for compensatory damages, treble damages, punitive damages, court costs, and attorney's fees. Excepts certain pornographic or obscene material or excessively violent or harassing material. Provides that if the social media platform states in its terms of service that it is a publisher and the claimant agrees to the terms, the claimant may not bring an action. Allows a social media platform to limit content to subject matter expressly states in its terms of service without liability.

HB 2520 by Rep. Ed Thompson (R-Pearland)

Died in House Transportation.

Adds Chapter 644A, Transportation Code, to provide that the deployment, implementation, or use of a motor carrier safety improvement by or as required by a motor carrier or a related entity, including through contract, may not be considered when determining whether the operator of the motor vehicle is an employee or joint employee of the carrier or an independent contractor for purposes of state law.

HB 2549 by Rep. Harold Dutton (D-Houston)

Died in House Calendars Committee.

Amends §101.106, CPRC (dismissal of suit against governmental employee), to provide that filing suit against a governmental entity does not prohibit the plaintiff from filing a direct action against a governmental employee for assault, battery, false imprisonment, or other intentional tort, including a tort involving disciplinary action by school authorities.

SB 12 by Sen. Bryan Hughes (R-Mineola),
Rep. Scott Sanford (R-McKinney)

Died on House Calendar.

Adds Chapter 143A, CPRC, to create a cause of action against an interactive computer service for "censorship," defined as the suppression of lawful speech. Applies to a service with more than 100 million active users in a calendar month. Provides for declaratory and injunctive relief and recovery of attorney's fees and costs. Authorizes a court to impose sanctions for failure to comply with a court order. Authorizes the attorney general to bring suit and recover fees and costs. The committee substitute additionally requires a social media company to disclose its content management, data management, and business practices, as well as an acceptable use policy. Requires a social media company to publish a quarterly transparency report with specified content. Requires a social media company to establish a readily accessible complaint system. Requires the company, if it removes content, to notify the user and provide an opportunity to appeal. Establishes a process for reviewing complaints. Provides enforcement by the attorney general with recovery of costs, investigative expenses, and attorney's fees.

HB 2782 by Rep. Jay Dean (R-Kilgore)

Died in House Judiciary and Civil Jurisprudence.

Adds Chapter 100C, CPRC, to provide immunity to liability for injury or death caused by exposure to the 2019 novel coronavirus disease that occurred due to the entity's activities or operations, unless a claimant provides that the exposure was caused by gross negligence or wilful misconduct. Applies prospectively only.

HB 2788 by Rep. Jeff Leach (R-Plano)

Died on House Calendar.

Adds Chapter 150E, CPRC, to establish procedures for a civil action against a transportation network company (e.g., Uber, Lyft). Applies to an action or an arbitration proceeding in which the company is a defendant, the claimant seeks recovery for personal injury, death, or property damage, the claim arises out of the ownership, use, operation, or possession of a personal vehicle while the driver or passenger was logged on to the company's digital network, and the theory of recovery against the company is based on the ownership, operation, design, manufacture, or maintenance of the digital network accessed by the driver or passenger, or the affiliation or interaction with the driver logged into the network. Requires a claimant who names the company as a defendant, at the time of initial complaint, to file an affidavit by the claimant's counsel setting out each theory of recovery, the negligent act, error, or omission by the company, and the factual basis for each claim. Requires an additional affidavit signed by a qualified, competent third party that the claimant's damages exceed the applicable insurance coverage limit. Requires a court or arbitration tribunal to dismiss with prejudice an action filed without the affidavits. Makes an order granting or denying a motion to dismiss immediately appealable. Prohibits a company from being held vicariously liable for damages if the company did not commit a crime under federal or Texas law and has fulfilled all of the company's obligations with respect to the driver under Chapter 2402, Occupations Code.

HB 2942 by Rep. Diego Bernal (D-San Antonio)

Died in House Calendars Committee.

Amends §17.463, Business & Commerce Code, to authorize district and county attorneys to investigate claims under the DTPA of charging an excessive or exorbitant price for necessities during a declared disaster. Splits any recovery 50-50 between the state and the county.

HB 3024 by Rep. Gene Wu (D-Houston)/ SB 1691 by Sen. Borris Miles (D-Houston)

Died in House Criminal Jurisprudence and Senate Criminal Jurisprudence.

Adds Chapter 98C, CPRC, to impose civil liability on a person who engages in doxing for damages arising from the posting of private information by the defendant to the person whose information was posted. A prevailing claimant may recover actual damages, including mental anguish damages even though no other damages are shown, court costs, and attorney's fees. Injunctive relief may also be provided. Provides that a court has personal jurisdiction over a defendant if the defendant resides in Texas, the person whose information was posted resides in Texas, the private information posted is stored on a server located in Texas, or the private information is available for view in this state. Provides that person found liable is jointly and severally liable with any other defendant for the claimant's damages.

HB 3095 by Rep. Julie Johnson (D-Dallas)

Died in House Human Services.

Adds Chapter 95, Property Code, to regulate senior living facilities and to impose civil liability for regulatory violations or a facility's failure to implement a safety policy or procedure that the resident reasonably believed was adopted by the facility. Excepts claims under Chapter 95 from Chapter 74, CPRC.

HB 3105 by Rep. Steve Toth (R-The Woodlands)

Died in House State Affairs.

Adds Chapter 113, Business & Commerce Code, to impose statutory duties on social media platforms regarding policies, rules, terms, and agreements pertaining to censorship, deplatforming, and shadow banning standards. Establishes a standard for journalistic enterprise and bars a social media platform for censoring such an enterprise. Establishes standards for political speech on social media platforms. Imposes civil penalties for violations. Provides civil liability through the DPTA, including up to $100,000 in statutory damages, actual damages, punitive damages, equitable relief, and costs and attorney's fees.

HB 3440 by Rep. Mike Schofield (R-Houston)

Died in House Judiciary and Civil Jurisprudence.

Adds §90.0031, CPRC, to require a claimant asserting an asbestos-related injury on or after 9/1/21 to serve, together with the petition, on each defendant a sworn information form specifying the evidence that provides the basis for the claim against each defendant. Prescribes the content of the information form. Imposes a continuing duty to supplement

the information form. Requires the court to dismiss with prejudice a claim against a defendant whose product or premises is not identified in the information form. Requires the court to dismiss without prejudice against all defendants for failure to comply.

HB 3836 by Rep. Todd Hunter (R-Corpus Christi)

Died in House Business & Industry.

Adds Chapter 642, Business & Commerce Code, requires the owner or operator of a website or online service that deals substantially in the electronic dissemination of third-party commercial recordings or audiovisual works, directly or indirectly, to consumers in this state to clearly and conspicuously disclose the owner or operator's true and correct name, physical address, telephone number, and email address. Creates a private cause of action to enforce this requirement and provides for injunctive relief and recovery of reasonable attorney's fees by the prevailing party. Also makes a violation of this chapter a false, misleading, or deceptive act or practice under the DTPA.

HB 4126 by Rep. Cody Vasut (R-Angleton)

Died in House Business & Industry.

Defines electricity and natural gas as a "necessity" during a declared disaster for purposes of the DTPA.

HB 4481 by Rep. Tom Oliverson (R-Cypress)

Died in House Judiciary and Civil Jurisprudence.

Adds Chapter 100C, CPRC, to limit liability for ordinary negligence from COVID-19 exposure if a person acted in good faith in the course or during the performance or provision of the person's business operations or on the premises owned or operated by the person if the person acted as an ordinary, reasonable, and prudent person would have acted under the same or similar circumstances, including the adoption of reasonable safety measures. Creates a rebuttable presumption that compliance with CDC guidelines is reasonable. Expires 9/1/23.

HB 4533 by Rep. Alex Dominguez (D-Brownsville)

Died in House Criminal Jurisprudence.

Amends §98B.002(a), CPRC, to create a rebuttable presumption that a person does not consent to the dissemination of intimate visual material if the depicted person reports the dissemination to law enforcement within 48 hours of discovery. Referred to House Criminal Jurisprudence on 3/29.

SB 680 by Sen. Lois Kolkhorst (R-Brenham)

Died in Senate Business & Commerce.

Amends §17.46(b), Business & Commerce Code, to include in the term "false, misleading, or deceptive acts or practices" demanding an exorbitant or excessive price for electricity.

Medical Liability

HB 1914 by Rep. Mike Schofield (R-Katy), Sen. Lois Kolkhorst (R-Brenham)

Signed by the Governor 6/15/21. Effective 9/1/21.

Provides immunity from civil liability for a children's isolation unit that treats children with highly contagious infectious diseases unless the act or omission that proximately causes personal injury or death constitutes gross negligence or wilful misconduct.

HB 2064 by Rep. Jeff Leach (R-Plano), Sen. Bryan Hughes (R-Mineola)

Signed by the Governor 6/16/21. Effective immediately.

Amends §55.004(b), Property Code (hospital lien statute), to add a third option for attachment of the lien: the amount awarded by the trier of fact for the services provided to an injured individual by the hospital less the pro rata share of attorney's fees and expenses incurred by the individual in pursuing the claim. Further deducts the pro rata share of attorney's fees and expenses from the amount of the lien in the existing options: the amount of hospital charges in the first 100 days of the injured person's hospitalization or 50% of the person's recovery.

SB 232 by Sen. Nathan Johnson (D-Dallas), Rep. Yvonne Davis (D-Dallas)

Filed without signature 5/30/21. Effective 9/1/21.

Adds §74.353, CPRC, to authorize a court, on motion of a claimant filed not later than 30 days after the date the defendant's original answer is filed, to make a preliminary determination of whether the claim is a health care liability claim for purposes of the expert report requirement of §74.351. Provides that if the court determines that the claim is a health care liability claim, the claimant must serve an expert report not later than the later of: (1) 120 days after the date the defendant's original answer is filed; (2) 60 days after the court makes the determination that the claim is a health care liability claim; or (3) the date agreed to in writing by the affected parties. Provides that the court's determination only applies for purposes of §74.351 and is subject to an interlocutory appeal. Provides that if the court does not issue a preliminary determination prior to the 91st day after

the claimant files a motion, the court shall determine that the claim is a health care liability claim. Provides that if on interlocutory appeal a court of appeals reverses the trial court's preliminary determination that a claim is not a health care liability claim, the claimant shall serve an expert report not later than 120 days after the court of appeals' opinion is issued.

HB 1221 by Rep. Liz Campos (D-San Antonio)

Died in House Human Services.

Requires long-term care facilities to designate a quality assessment and assurance committee to approve and monitor the facility's infection prevention and control program. Requires a facility to designate a primary and secondary infection preventionist with specialized training. The preventionist has a number of duties involving the investigation and evaluation of a disease outbreak; notification of local health authorities and staff, residents, and resident representatives within 12 hours of the verification of an infectious disease at the facility; implementation of enumerated control and prevention measures; monitoring of all treatment provided to a resident or staff member exposed to and as a result of the exposure infected with a disease at the facility; and report to the executive commissioner or local health authority accurate information regarding the number of cases at the facility. Imposes administrative penalties for violations.

HB 1222 by Rep. Liz Campos (D-San Antonio)

Died in House Public Health.

Requires the Department of Health Services to compile, aggregate, and publish on its Internet website epidemiological reports of disease outbreaks that identify the disease, the date reported, and the probable source of infection. During a public health emergency, the reports must also include the number of deaths caused by or suspected of having been caused by the disease, the date of each death, total number of deaths, and the probable source of infection for each case of the disease.

HB 2151 by Rep. Shawn Thierry (D-Houston)/HB 2325 by Rep. Ed Thompson (R-Pearland)

Died in House Human Services.

Requires a licensed nursing facility or an assisted living facility to maintain an operational emergency generator or other power source with a sufficient amount of fuel to operate and maintain air temperature at no more than 81 degrees Fahrenheit for at least 72 hours.

HB 2185 by Rep. Tan Parker (R-Flower Mound)

Died on House Calendar.

Adds Chapter 444, Health & Safety Code, to allow a pharmaceutical manufacturer or its representative to promote a product for a medically truthful and accurate off-label use of a drug, biological product, or device. Allows a physician or health care provider to communicate that information to a patient. Blocks a state regulatory authority of the manufacturer, physician, or provider from taking disciplinary action based on marketing an off-label use as permitted by this statute. Prohibits the state or a local governmental entity from using public money to cooperate with the federal government against a manufacturer who promotes an off-label use. Applies to pending disciplinary actions.

HB 2406 by Rep. Yvonne Davis (D-Dallas)/
SB 1106 by Sen. Bryan Hughes (R-Mineola)

Died in Senate State Affairs.

Amends §74.351(r)(5), CPRC, to add a chiropractor or physician to the definition of "expert" for the purpose of giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the standard of care for a chiropractor. Adds §74.403(c-1), CPRC, to permit a chiropractor to give opinion testimony in a health care liability claim against a chiropractor.

HB 3031 by Rep. Stephanie Klick (R-Fort Worth)

Died in House Public Health.

Amends §311.025(a), Health & Safety Code, to prohibit a hospital, treatment facility, mental health facility, or health care professional from flagrantly overcharging a patient or third party for a treatment provided to the patient.

SB 350 by Sen. Borris Miles (D-Houston)

Died in Senate State Affairs.

Adds §101.030, CPRC, to impose liability on the Texas Department of Criminal Justice for personal injury or death proximately caused by a physician's or health care provider's treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, safety or professional or administrative services directly related to health care if the physician or provider was an employee or the department or performing services under contract with the department when the conduct occurred.

SB 493 by Sen. Nathan Johnson (D-Dallas)

Died in Senate Health & Human Services.

Requires a licensed nursing facility to maintain professional liability insurance against the liability of the facility or the facility's employees for a health care liability claim. The coverage must provide minimum annual limits of $300,000 per occurrence and $1 million aggregate, be written on an occurrence basis, and issued by an authorized insurer. The coverage may not include the cost of defense in the liability limit. A nursing facility owned and operated by a governmental unit must maintain sufficient coverage to meet the unit's liability under the Tort Claims Act. A management company that manages a governmental unit-owned facility must maintain professional liability coverage in the amounts specified above. To the maximum extent allowed by law, the cost of the required insurance coverage is an allowable cost for reimbursement under the state Medicaid program.

SB 1988 by Sen. Borris Miles (D-Houston)

Died in Senate Business & Commerce.

Amends §75.0022, CPRC, to extend liability protection for an electric transmission utility that has an agreement with a political subdivision to allow use of an easement or land for certain public purposes to include a transportation use.

Product Liability

HB 74 by Rep. Barbara Gervin-Hawkins (D-San Antonio)

Died in House Business & Industry.

Requires a manufacturer selling a cosmetic to disclose on the manufacturer's website: a list of each ingredient in the cosmetic and the chemical abstract service number for each ingredient. The manufacturer is not required to list the concentration of each ingredient.

HB 90 by Rep. Barbara Gervin-Hawkins (D-San Antonio)

Died in House Business & Industry.

Directs the Executive Commissioner of the Health and Human Services Commission by rule to require a manufacturer that sells a lipstick or lip gloss cosmetic to disclose on the manufacturer's website and on the product label: any toxic metal, regardless of concentration, and each ingredient in the cosmetic.

HB 847 by Rep. Shawn Thierry (D-Houston)

Died in House Public Health.

Prohibits a pharmacist from dispensing or delivering an opioid if it does not bear a warning label in the manner prescribed by the Board of Pharmacy. Requires the Board to adopt a rule mandating a warning label to be affixed to the prescription.

HB 848 by Rep. Shawn Thierry (D-Houston)

Died in House Public Health.

Prohibits a pharmacist from dispensing or delivering an opioid if not packaged in the manner prescribed by the Board of Pharmacy. Requires the Board to adopt a rule mandating that the bottle or container have a distinctive red top or label.

HB 849 by Rep. Shawn Thierry (D-Houston)

Died in House Public Health.

Prohibits a pharmacist from dispensing or delivering an opioid unless the person taking possession of the opioid signs an acknowledgement of the risks in the manner prescribed by the Board of Pharmacy. The pharmacist must retain the signed acknowledgment on file. Requires the Board to adopt a rule prescribing the form of acknowledgement.

Eminent Domain

HB 2730 by Rep. Joe Deshotel (D-Beaumont), Sen. Lois Kolkhorst (R-Brenham)

Signed by the Governor on 6/16/21. Effective 1/1/22.

- Amends §402.031, Government Code, to add to the LOBOR notice of the property owner's right to file a written complaint with TREC regarding misconduct by easement or right-of-way agents;
- Requires the LOBOR to include an addendum of required terms for the instrument of conveyance of a pipeline or electric utility easement;
- Requires the OAG to conduct a biennial review of the LOBOR with public input;
- Amends Chapter 1101, Occupations Code, to require easement or ROW agents to complete required courses to obtain or renew a certificate of registration (16 hours every two years);
- Prohibits an easement or ROW agent from receiving a financial incentive to make an offer the agent knows or should know is lower than adequate compensation;
- Amends §21.0113, Property Code, to require the written initial offer to include a copy of the LOBOR, an addendum of easement terms, and a prominent notice of whether the offer includes damages to the remainder, if any, or a written appraisal that includes damages to the remainder, if any, prepared by a certified appraiser;
- Requires the initial offer to include an instrument of conveyance with the required terms under §21.0114 unless the entity has previously provided it, the property owner desires a different form, or the property owner provided a form to the entity before the initial offer;
- Requires the offer to include the name and phone number of an entity employee or legal representative;
- Adds §21.0114, Property Code, to establish required easement terms for certain for-profit pipeline and electric transmission entities;
- Requires the entity to notify the property owner of the owner's right to negotiate: (1) to recover damages (or a notice that the consideration for the easement includes damages) for damage to vegetation or income loss from agricultural production or other leases; (2) to require the entity to maintain commercial liability insurance or self-insurance against the entity's negligence;
- Permits the entity and the property owner to agree to different easement terms, including terms different than or not included in the condemnation petition;
- Permits the entity and the property owner to negotiate subsequent amendments to the easement, which must be provided to the property owner 7 days before the date the entity files a condemnation petition (unless otherwise agreed);
- Amends §21.012(c), Property Code, to require the entity to provide the condemnation petition to the property owner's counsel on receipt of written notice that the owner is represented by counsel;
- Amends §21.014, Property Code, to require the trial court to appoint special commissioners not later than the 30th calendar day after the petition is filed;
- Requires the court to appoint two alternative commissioners and limits the time period in which the entity or property owner may strike a special commissioner to 10 calendar days after the date of the order appointing commissioners or 20 days after the date the petition was filed;
- Permits a party to exercise a strike after the other party has stricken a commissioner, if the party has not already exercised a strike;
- Requires the entity to provide a copy of the court's order appointing special commissioners to the property owner and the owner's counsel, if applicable.

SB 721 by Sen. Charles Schwertner, Rep. Ben Leman (R-Iola)

Signed by the Governor 5/18/21. Effective 9/1/21.

Adds §21.0111(a-1), Property Code, to require an entity seeking to acquire property by eminent domain to provide to the property owner, at least three business days before the special commissioners' hearing, all current and existing appraisal reports relating specifically to the owner's property and used in determining the entity's opinion of value, if the report is intended to be used at the hearing.

SB 722 by Sen. Charles Schwertner (R-Georgetown)

Died in Senate State Affairs.

Amends §21.0111(a), Property Code, to make the entity liable for the property owner's attorney's fees if the entity fails to disclose all appraisal reports produced or acquired by the entity relating specifically to the owner's property in the 10 years preceding the date of the offer.

SB 723 by Sen. Charles Schwertner (R-Georgetown)/ Rep. Ben Leman (R-Iola)

Died in House Land and Resource Management.

Amends §402.031, Government Code, to require the notice to a property owner of the owner's rights concerning the examination or survey by an entity with the power of eminent domain to include a statement that: (1) the entity is responsible for damages to the property arising from the survey; (2) the property owner has the right to refuse permission to enter the property to conduct a survey; (3) the property owner has the right to negotiate terms under which the survey may be conducted; and (4) the entity has the right to sue a property owner to obtain a court order authorizing the survey if the property owner refuses. The bill also requires that if the entity provides a form requesting permission to survey the property, the form must conspicuously make the same statements. The bill further amends §§21.0112(a) and 21.0113(b), Property Code, to require the entity to provide the LOBOR at the initial offer and to link provision of the LOBOR to the bona fide offer requirement. It likewise adds §21.0114, Property Code, to require the entity to separately identify in the initial offer real property that the entity does not seek to acquire by eminent domain and make a separate offer for that property. Finally, the bill requires the attorney general to update the landowner's bill of rights to reflect these changes and post to the website not later than January 1, 2022.

SB 724 by Sen. Charles Schwertner (R-Georgetown)

Died in Senate State Affairs.

Adds §21.047(a-1), Property Code, to mandate the award of costs to the property owner if either the commissioners' award or a court judgment exceeds the amount of the entity's final offer by at least 20 percent. Makes the award of attorney's fees and professional fees discretionary.

SB 725 by Sen. Charles Schwertner (R-Georgetown), Rep. Ben Leman (R-Iola):

Signed by the Governor 5/18/21. Effective 9/1/21.

Amends §23.46, Tax Code, to provide that the penalty for a change of use of agricultural land as a result of condemnation is the personal obligation of the condemnor. Provides further that a portion of a parcel of land is not diverted to nonagricultural use because it is subject to a right-of-way less than 200 feet wide acquired by eminent domain, as long as the remaining land qualifies for agricultural use.

SB 726 by Sen. Charles Schwertner (R-Georgetown), Rep. Ben Leman (R-Iola)

Signed by the Governor 5/24/21. Effective 9/1/21.

Amends §21.101, Property Code, to change the definition of "actual progress" by requiring three of the specified actions to be completed rather than two and by eliminating two actions from the list: the acquisition of a tract or parcel adjacent to the property for the same public use project for which the owner's land was acquired from the list of actions and the adoption by a governing body of a development plan that indicates the entity will not complete more than one action before the 10th anniversary of the acquisition of the owner's property. The bill also carves out navigation districts, port authorities, and water districts implementing a project included in the state water plan, which are only required to complete one action, provided that the governing body adopts a development plan indicating that it will not complete more than one action within 10 years.

HB 448 by Rep. Ernest Bailes (R-Shepherd), Sen. Robert Nichols (R-Jacksonville)

Died in Senate.

Amends §402.031(b), Government Code (landowner bill of rights), to add a provision stating that the property owner has the right to file a written complaint against an entity exercising eminent domain authority that is regulated by the Railroad Commission. Authorizes the RRC to impose administrative penalties on an entity that uses the LOBOR to harass, intimidate, or mislead a property owner. The committee substitute takes the ombudsman language from HB 2730 to replace the RRC complaint process.

HB 3312 by Rep. Cody Harris (R-Palestine)

Died in House Land and Resource Management.

Adds §112.063, Transportation Code, to limit the use of property acquired by a private entity for a high-speed rail project upon a representation that the entity has eminent domain authority for a high-speed rail project.

HB 3385 by Rep. Glenn Rogers (R-Graford), Sen. Bryan Hughes (R-Mineola)

Died in Senate.

Amends §402.031, Property Code, to add a provision to the LOBOR notifying a property owner of the right to submit to the appraisal district office a report of decreased value for the owner's remaining property after the taking.

HB 3633 by Rep. Ben Leman (R-Iola)

Died in House Land and Resource Management.

Establishes the High-Speed Rail Legislative Review Committee to conduct an assessment and make a recommendation to the Legislature regarding whether to approve or disapprove the recreation of the Texas High-Speed Rail Authority to approve a franchise for a high-speed rail project.

HB 4107 by Rep. Dustin Burrows (R-Lubbock), Sen. Lois Kolkhorst (R-Brenham)

Signed by the Governor 6/18/21. Effective 9/1/21.

Amends §111.019, Natural Resources Code, to require a common carrier, before entering property for the purpose of a preliminary survey to be used in connection with the power of eminent domain, to provide the property owner with a written notice of intent to enter and an indemnification provision against any damages caused by the survey. Requires the notice to be provided by the 2nd day before entry and include the name and phone number of a person to contact with questions or objections. Limits entry to only that part of the property on the proposed pipeline route or location of pipeline appurtenance and only to performing the survey. Bars removing, cutting, or relocating a fence (unless the landowner consents) without prompt restoration. Requires restoration of the land to its previous condition, removal of equipment, and sharing with the landowner of any non-privileged information acquired by the survey. Does not prevent an entity in a civil action from seeking survey access rights or seeking to prevent interference.

HJR 92 by Rep. Mike Schofield (R-Katy)

Died in House Land and Resource Management.

Amends Art. III, §52j, Texas Constitution, to require a governmental entity to offer for repurchase to a property owner or the owner's heirs, successors, or assigns if no actual progress is made toward the public use, the purpose for which the property was acquired is canceled, or the property is unnecessary for public use. Referred to House Land and Resource Management on 3/11.

HJR 93 by Rep. Mike Schofield (R-Katy)

Died in House and Land Resource Management.

Amends Art. I, §17(b), Texas Constitution, to exclude from the term "public use" the transfer of property acquired by eminent domain to a private entity (deletes currently language "for the primary purpose of economic development or enhancement of tax revenues").

SB 848 by Sen. Cesar Blanco (D-El Paso)/ HB 3229 by Rep. Joe Moody (D-El Paso)

Died in Senate Natural Resources and Economic Development and House Urban Affairs.

Amends Chapter 253, Local Government Code, to require a municipality to offer the previous owner of property acquired by eminent domain for repurchase by the owner at the current market value if the municipality seeks to transfer the property to another owner under a Chapter 380 economic development agreement.

SB 986 by Sen Lois Kolkhorst (R-Brenham)

Died in Senate State Affairs.

Makes a number of changes to the eminent domain process, as follows:

- Requires the attorney general to solicit public comment before making a change to the LOBOR;
- Establishes an ombudsman's office in the Texas Real Estate Commission to provide information to landowners;
- Requires right-of-way agents to complete education requirements to obtain or renew a certificate of registration;
- Prohibits a right-of-way agent from accepting a financial incentive to make an initial offer the agent knows is less than adequate compensation;
- Requires a pipeline or electric transmission entity to include in a bona fide offer an offer of compensation at least equal to or greater than the market value of the property as determined by: (1) an appraisal performed by an independent appraiser; (2) the sales price based on three comparable arms-length sales; (3) a comparative market analysis prepared by an independent real estate broker; (4) a broker price opinion prepared by an independent real estate broker; or (5) a market study prepared by an independent real estate broker;

- Requires the bona fide offer to include a written report of the basis of compensation, the notice of terms that the property owner may negotiate in the easement, notice that the property owner may receive a final offer based on a written appraisal; a copy of the notice of the property owner meeting; and the written appraisal report with the final offer unless previously provided;
- Requires the offer to separately state the market value of the property and damages to the remainder;
- Specifies required terms for the instrument of conveyance provided to the property owner by a pipeline or electric transmission entity;
- • Requires a court to direct the entity to pay the property owner's costs and attorney's and professional fees if it determines the entity did not comply with the easement provision;
- Requires a court to appoint two disinterested real property owners in the county as alternate special commissioners
- Requires notices to be served in accordance with the Texas Rules of Civil Procedure for service of citation;
- Requires a pipeline or electric transmission entity to notify a property owner of the owner's right to attend an information meeting and the date, time, and location of the meeting;
- Requires notice of the meeting to be sent to the county judge;
- Requires the entity to hold one meeting for each contiguous 100-mile segment of the project route;
- Requires a central location for the meeting not more than a 50-mile distance from the majority of property owners;
- Prohibits a meeting prior to the time the entity has sent at least 25% of initial offers;
- Allows the owner to attend with a lawyer or appraiser, an employee or lessee of the owner with knowledge of the property, and employee of the owner who provides management services, and the county judge (limit of five people per tract);
- Specifies the information the entity must present at the meeting;
- Prohibits the entity from contacting a property owner within 3 days following the meeting;
- Requires the entity to hold another meeting following a re-route;
- Mandates the award of costs and fees to a property owner if the entity does not comply with the meeting provision and abates the proceeding.

SB 1842 by Sen. Sarah Eckhardt (D-Austin)/ HB 1506 by Rep. Erin Zwiener (D-Driftwood)

Died in Senate State Affairs and House Land and Resource Management.

Amends 21.021, Property Code, to block a condemnor from taking possession of the property prior to 180 days after the date of the special commissioners' award, except the state, county, municipality, irrigation district, water improvement district, or water power control district may take possession immediately upon deposit with the court of damages and costs. Does not prevent the parties from agreeing to an earlier possession date.

Oil and Gas Litigation

SB 1259 by Sen. Brian Birdwell (R-Granbury), Rep. Reggie Smith (R-Van Alstyne)

Signed by the Governor 5/24/21. Effective immediately.

Provides that the payee of a royalty does not have a cause of action for breach of contract against the payor for withholding royalty payments in the event of a title dispute, unless the contract requiring payment requires otherwise.

HB 4218 by Rep. Tom Craddick (R-Midland), Sen. Bryan Hughes (R-Mineola)

Vetoed by the Governor 6/18/21.
Veto message references freedom to contract.

Creates a cause of action for a bad faith washout of a person's overriding royalty interest in an oil and gas lease.

Commercial Litigation

SB 1247 by Sen. Brandon Creighton (R-Conroe)/HB 4267 by Rep. Tom Oliverson\ (R-Cypress)

Died in Senate State Affairs and House Judiciary and Civil Jurisprudence.

Makes changes to §15.03, Business & Commerce Code, regarding the attorney general's civil investigation authority and the subject's right to demand and make objections to demands for document production.

Employment Law

HB 21 by Rep. Victoria Neave (D-Dallas), Sen. Judith Zaffirini (D-Laredo)

Signed by the Governor 6/9/21. Effective 9/1/21.

Amends §21.201(g) and §21.202(a), Labor Code, to extend the limitations period for filing a complaint alleging sexual harassment with the Texas Workforce Commission from 180 to 300 days.

SB 45 by Sen. Judith Zaffirini (D-Laredo), Rep. Erin Zwiener (D-Driftwood)

Signed by the Governor 5/30/21. Effective 9/1/21.

Adds Subchapter C-1, Chapter 21, Labor Code, to make it an unlawful employment practice if sexual harassment of an employee occurs and the employer or the employer's agents or supervisors knows or should have known that the conduct constituting sexual harassment was occurring and fail to take immediate and appropriate corrective action.

HB 38 by Rep. Ron Reynolds (D-Missouri City)/ HB 392 by Rep. Rhetta Bowers (D-Dallas)/ SB 77 by Sen. Borris Miles (D-Houston)

Died on House Calendar and in Senate State Affairs.

Adds §21.0195, Labor Code, to make it an unlawful employment practice for an employer, labor union, or employment agency to adopt or enforce a dress or grooming policy that discriminates against a hair texture or protective hair style commonly or historically associated with race.

HB 318 by Rep. Gary Vandeaver (R-New Boston)

Died in Senate Natural Resources & Economic Development.

Prohibits employment discrimination against an employee who is a volunteer emergency responder for an emergency service organization.

HB 360 by Rep. Carl Sherman (D-DeSoto)

Died in House International Relations & Economic Development.

Adds Chapter 24, Labor Code, to make it an unlawful employment practice for an employer to inquire into or consider an applicant's wage history information in hiring, unless the employee voluntarily discloses the information. Makes it an unlawful employment practice for an employer to rely on an applicant's or employee's wage history for hiring, compensation, or promotion. Prohibits retaliation against a person who takes action on a violation of this chapter. Enforcement is by civil lawsuit in district court. Authorizes injunctive relief, damages, and reasonable attorney's fees and costs.

HB 405 by Rep. Ana Hernandez (D-Houston)/ SB 57 by Sen. Judith Zaffirini (D-Laredo)

Died in House International Relations & Economic Development and Senate Natural Resources & Economic Development.

Extends the deadline for filing a wage claim with the Texas Work Force Commission from 180 days to the first anniversary date of the date the wages became due for payment.

HB 419 by Rep. Carl Sherman (D-DeSoto)

Died in House International Relations & Economic Development.

Adds Chapter 24, Labor Code, to make it an unlawful employment practice for an employer to inquire into or consider an applicant's wage history information in hiring, unless the employee voluntarily discloses the information. Prohibits retaliation against a person who takes action on a violation of this chapter. Enforcement is by complaint under Chapter 21, Labor Code.

HB 455 by Rep. Joe Deshotel (D-Beaumont)

Died on House Calendar.

Except as otherwise required by law, prohibits an employer from including a question regarding an applicant's criminal history information on an initial employment application form. Allows the employer to inquire after determining that the applicant is otherwise qualified for employment and has either offered employment or invited the applicant for an interview.

HB 698 by Rep. Jon Rosenthal (D-Houston)/SB 578 by Sen. Sarah Eckhardt (D-Austin)

Died in House International Relations & Economic Development and Senate Natural Resources & Economic Development.

Adds §21.1068, Labor Code, to define employment discrimination to include discrimination on the basis of an employee's marital status at the time of a pregnancy, the use of assisted reproduction to become pregnant, the use of contraception or a specific form of contraception, or the use of any other health care drug, device, or service related to reproductive health. Covers discrimination because of a reproductive decision of the employee, the employee's spouse or partner, the employee's dependent, or any other member of the employee's family or household. Bars mandatory arbitration agreements to the extent the agreement limits the reproductive decisions of the employee or the other covered persons.

HB 1687 by Rep. Candy Noble (R-Lucas)/
SB 2245 by Sen. Angela Paxton (R-McKinney)

Died in House International Relations & Economic Development and Senate Business & Commerce.

Adds Subchapter H-1, Chapter 21, Labor Code, to prohibit employment discrimination based on an employee's failure to receive a COVID-19 vaccine.

HB 1980 by Rep. Victoria Neave (D-Dallas)

Died on House Calendar.

Adds Chapter 25, Labor Code, to void a confidentiality or non-disclosure agreement to the extent that the agreement that prohibits or limits an employee's ability to report sexual assault or harassment committed by another employee or other person at the workplace, or that prohibits an employee from disclosing the assault or harassment to another person. Applies to existing agreements, not just those entered into on or after the effective date.

HB 2002 by Rep. Scott Sanford (R-McKinney)

Died on House Calendar.

Adds Chapter 786, Health & Safety Code, to prohibit an employer of a first responder to take any adverse employment action against the responder because the employer knows or believes the responder has a mental illness. An aggrieved first responder may claim a violation of this section and seek compensatory damages, attorney's fees and costs, and any other appropriate relief.

HB 2507 by Senfronia Thompson (D-Houston)/
HB 2972 by Rep. Penny Morales Shaw (D-Houston)

Died in House International Relations & Economic Development.

Amends §21.202, Labor Code, to provide that with respect to an allegation of discrimination in payment of compensation, an unlawful employment practice occurs each time: (1) a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted; (2) an individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or (3) an individual is adversely affected by application of a discriminatory compensation decision or other discriminatory practice affecting compensation, including each time wages affected wholly or in part by such decision or practice are paid. Provides that liability may accrue and an aggrieved person may obtain relief, including recovery of back pay, for practices that occurred outside the 180-day period for filing a complaint if there is a pattern of the same or similar practices. Adds Chapter 24, Labor Code, to create an unlawful employment practice if an employer inquires into an employee's or applicant's prior wage history or requires an employee or applicant to disclose it.

HB 2542 by Rep. Toni Rose (D-Dallas)

Died on House Calendar.

Adds Chapter 106, Labor Code, to prohibit an employer from inquiring about an applicant's past criminal history or posting a job announcement implying that persons with criminal histories should not apply. Allows an employer who has made a conditional offer solicit criminal history information and may not take adverse action unless the employer determines that the applicant is unsuitable for the position based on the employer's assessment. Requires the employer to inform the applicant in writing of the adverse action based on criminal history. Allows an employment agency or labor organization to solicit criminal history information about a person only after it has determined to classify or refer the person. Authorizes a $500 administrative penalty for each violation.

HB 3796 by Rep. Christina Morales (D-Houston)

Died in House International Relations & Economic Development.

Amends Chapter 21, Labor Code, to add sexual orientation and gender identity or expression to actionable discriminatory employment practices.

HB 4122 by Rep. Toni Rose (D-Dallas)

Died in House State Affairs.

Amends §544.002, Insurance Code, to prohibit an insurer from discriminating against a person on account of sexual orientation or gender identity or expression. Amends §21.051, Labor Code, to make such discrimination by an employer an unlawful employment practice.

HB 4195 by Rep. Jake Ellzey (R-Waxahachie)

Died in House International Relations & Economic Development.

Amends §21.055, Labor Code, to prohibit an employer, labor union, or employment agency from retaliating or discriminating against a person who engages in lawful conduct involving the exercise of constitutionally guaranteed civil rights during the employee's off hours away from the worksite.

HB 4445 by Rep. Gina Hinojosa (D-Austin)

Died in House International Relations & Economic Development.

Requires an employer to provide written notice to employees and the employee of any subcontractor present in the same

area of a worksite of any infected employee of potential exposure to COVID-19 on the next day after the employer receives notice that an infectious person was in the same area of the worksite. Prescribes the content of the notice. Requires the employer to report a worksite outbreak to the local health authority, as well as subsequent cases. Prohibits an employer from retaliating or discriminating against an employee because the employee discloses a positive test, diagnosis of illness, or quarantine order.

SB 209 by Sen. Sarah Eckhardt (D-Austin)

Died in Senate State Affairs.

Amends Chapter 21 and adds Chapter 25, Labor Code, to void a nondisclosure or confidentiality agreement between an employer and employee to the extent the agreement prohibits or limits the employee's ability to: (1) notify law enforcement or a state or federal regulatory agency of sexual assault or sexual harassment committed by an employee of the employer or at the employee's place of employment; and (2) prohibits an employee from disclosing to any person facts surrounding any sexual assault or sexual harassment committed by an employee of the employer or at the employee's place of employment. Likewise prohibits mandatory arbitration agreements that impose arbitration of a dispute involving an allegation of sexual assault or sexual harassment. Finally, the bill makes it an unlawful employment practice for an employer to fail or refuse to hire, discharge, harass, or discriminate against an individual who refuses to sign any of the above agreements. Prohibits an employer from requiring an employee to sign a mandatory arbitration agreement as a condition of employment.

SB 1835 by Sen. Sarah Eckhardt (D-Austin)

Died in Senate Natural Resources & Economic Development

Amends §21.201(g), Labor Code, to extend the limitations period for perfecting a claim for an alleged unlawful employment practice from 180 to 300 days.

SB 2045 by Sen. José Menéndez (D-San Antonio)

Died in Senate Natural Resources & Economic Development.

Amends §21.202(a), Labor Code, to provide that an unlawful employment practice occurs each time a discriminatory compensation decision or other practice is adopted, an individual becomes subject to the decision or practice, or an individual is adversely affected by the decision or practice each time wages are paid. Provides that liability may accrue for discriminatory compensation practices that occurred outside the period for filing a complaint of the practices are related or similar to practices that occurred during the period for filing the complaint.

Construction Law

HB 2116 by Rep. Matt Krause (R-Fort Worth), Sen. Beverly Powell (D-Burleson)

Signed by the Governor on 6/15/21. Effective 9/1/21.

Amends §130.002, CPRC, to void a provision in a contract for engineering or architectural services to the extent that it requires a licensed engineer or architect to defend another party against a claim based wholly or partly on the owner's negligence or breach of contract. Provides that a covenant in such a contract may provide for the reimbursement of the owner's reasonable attorney's fees in proportion to the engineer or architect's liability. Provides that the owner may require in the contract that the engineer or architect name the owner as an additional insured on any of the engineer or architect's insurance coverage to the extent that additional insureds are allowed under the policy and provide any defense to the owner provided by the policy to the named insured. Exempts contracts in which the owner contracts with an entity to provide both design and construction services. Exempts a covenant to defend a party, including a third party, against a claim for negligent hiring of the architect or engineer. Adds §130.0021, CPRC, to prohibit a contract for engineering or architectural services from requiring an engineer or architect to perform professional services to a level of professional skill and care beyond that which would be provided by an ordinarily prudent engineer or architect with the same professional license under the same or similar circumstances.

HB 3069 by Rep. Justin Holland (R-Rockwall), Sen. Bryan Hughes (R-Mineola)

Signed by the Governor 6/14/21. Effective immediately.

Amends §16.008, CPRC, to require a governmental entity to bring suit for a design defect against a registered or licensed engineer, architect, interior designer, or landscape architect who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property not later than five years (current law is ten years) after the substantial completion of the improvement or the beginning of the operation of the equipment arising out of a contract entered into by TXDOT, a project that receives funds from state or federal highway funds and mass transit spending, or a civil works project. Extends limitations one year if the claimant presents a request for indemnity before the expiration of limitations. Makes the same change in §16.009, CPRC.

SB 219 by Sen. Bryan Hughes (R-Mineola), Rep. Jeff Leach (R-Plano)

Signed by the Governor on 6/16/21. Effective 9/1/21.

- Provides that a contractor is not civilly liable or otherwise responsible for the consequences of defects in and may not warranty the adequacy, sufficiency, or suitability of plans, specifications, or other design or bid documents provided to the contractor by a person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier.
- Prohibits waiver of this provision.
- Exempts a contract entered into by a person for the construction or repair of a critical infrastructure facility owned or operated by the person or any improvement to real property owned or operated by the person that is necessary to the critical infrastructure facility.
- Defines "critical infrastructure" to include refineries, electric generating facilities, chemical manufacturing, water and wastewater plants, liquid natural gas terminals or storage facilities, natural gas compressors, telecommunications facilities, ports, railroad switching yards, truck terminals, gas processing plants, radio or television transmission stations, steel mills, dams, animal feed operations, above-ground pipelines, oil and gas drilling sites and wellheads, oil and gas facilities with active flares, pipelines, electric transmission and distribution facilities, transportation fuel production facilities, and commercial airports.
- Holds a contractor responsible under a design-build contract in which the contractor provides all or part of the plans or specifications (limited to defects in the part of the design specs provided by the contractor).
- Provides that if a contractor agrees to provide input and guidance regarding the plans or specifications, and the contractor's input is incorporated into plans provided by a registered professional, the contractor may be liable for a defective design. Requires that if a contractor learns of a design defect, the contractor must disclose in writing a known design defect that is discovered by the contractor or reasonably should have been discovered using ordinary diligence.
- Provides that a contractor who fails to disclose the defect may be held responsible for the consequences of the failure to disclose.
- Provides that a construction contract for architectural or engineering services may not require a standard higher than the same exercise of professional skill and care ordinarily provided by competent architects and engineers practicing under the same or similar circumstances with the same professional license;
- Prohibits waiver of the standard of care provision.

HB 3416 by Rep. Drew Darby (R-San Angelo), Sen. Eddie Lucio (D-Brownsville)

Signed by the Governor. Effective 9/1/21.

Amends Chapter 127, CPRC, relating to indemnity provisions in mineral agreements, to make it apply to agreements pertaining to oil, gas, or water wells or a mine for a mineral that requires a subcontractor to provide any part of a contractor's services required under a separate contract with a third party or for a mutual or unilateral indemnity obligation between the contractor, subcontractor, and third party, unless the contractor before entering into the agreement provides written notice to the subcontractor that: (1) describes the subcontractor's indemnification obligations to the contractor and third party; (2) is provided as a separate document from the agreement; and (3) is written in plain English. Also requires a statement to the third party of the subcontractor's insurance coverage and dollar limits.

HB 2621 by Rep. Andrew Murr (R-Junction)

Died in House Business & Industry.

Amends §53.024, Property Code, regarding the limitation of a subcontractor's lien, to limit the lien to the lesser of the proportion of the total subcontract price already performed minus payments received (existing limit) *or the contract price minus previous payments received by the original contractor and the claimant on the subcontract (new language)*.

HB 3162 by Rep. Armando Martinez (D-Weslaco), Sen. Eddie Lucio (D-Brownsville)

Died in Senate.

Amends §150.002, CPRC (certificates of merit), to exempt from the certificate of merit requirement a third party plaintiff who is a design-builder or design-build firm if the action or arbitration proceeding arises out of a design-build project in which a governmental entity contracts with a single entity to provide both construction and design services.

HB 3221 by Rep. Jeff Leach (R-Plano)/ SB 1781 by Sen. Brandon Creighton (R-Conroe)

Died in Senate State Affairs.

Adds §2272.010, Government Code, to specify that a cause of action against a contractor by a governmental entity under Chapter 2272 accrues on the date the report required by §2272.03 (notice of specific construction defect) is postmarked by USPS.

HB 3293 by Rep. Mike Schofield (R-Katy)

Died in House Judiciary and Civil Jurisprudence.

Adds §150.002(b-1), CPRC, regarding the certificate of merit for suit against a licensed engineer or architect, to require the affidavit to set forth specifically facts sufficient to establish the affiant's familiarity or experience with the relevant practice area showing the affiant's qualifications to render an opinion. Requires the affiant to attach to the affidavit as an exhibit the affiant's CV or similar document.

HB 3355 by Rep. Mike Schofield (R-Katy)

Died in House Business & Industry.

Adds §53.027, Property Code, to require a person who performs labor, furnishes labor or materials, or specially fabricates materials for construction or repair who does not have a contract with the owner, original contractor, or subcontractor to recover payment only through enforcement of a lien or other statutory remedy and not under contract or quasi-contract theories such as quantum meruit or unjust enrichment.

HB 3595 by Rep. Jeff Leach (R-Plano)

Died in House Judiciary and Civil Jurisprudence.

Amends §27.01, Property Code, to specify that an "appurtenance" means a garage, outbuilding, retaining wall, landscaping improvement, or other improvement constructed by a contractor in connection with the construction of a new residence whether or not attached to the dwelling unit. Conforms other definitions to the repeal of the Residential Construction Commission. Modifies the definition of "economic damages" to exclude speculative damages or damages for bodily or personal injury. Clarifies that "structural failure" includes a foundation or framing system. Amends §27.003(a) to clarify that a contractor is not liable for normal cracking of a settling foundation within the tolerance of building standards, reliance on outdated information from an official government record, any condition (including noncompliance with an applicable code, standard, warranty, manufacturer's recommendation, or contractual plan or specification) that does not result in actual physical damage to the residence or the failure of a building component to perform its intended function or purpose at the time notice of a defect is sent. Amends §27.004 to give the contractor, at the contractor's request, the opportunity to conduct multiple inspections during the 35-day period after the date the contractor receives notice or during the extension of the inspection period. Specifies that the contractor's offer to repair must include the estimated time for completion, and, if the offer is accepted, the estimated time of completion shall be considered reasonable. Directs a court of arbitration tribunal to dismiss (rather than abate) a claim if the claimant failed to provide notice or give the contractor a reasonable opportunity to inspect. Bars the claimant from recovering attorney's fees, costs, or expert fees if the claimant rejects a reasonable offer or refuses to permit the contractor to inspect or repair the defect, or if the contractor elects to purchase the residence. Amends §27.005 to impose a five-year statute of repose dated from the earlier of: (1) the date construction of the residence was completed; (2) the date of the final inspection or certificate of occupancy; (3) the date of transfer of title to the first purchaser of the residence; (4) the date of first occupancy of the residence; (5) the date of final payment to the contractor; or (6) the date an affidavit of completion is filed in the county in which the residence is located. Amends §27.006 to limit the claimant's recovery under Chapter 27 solely to economic damages. Repeals §27.004(f), which provides that the limitation on damages recoverable by the claimant does not apply if the contractor fails to make a reasonable offer.

HB 3503 by Rep. Stan Lambert (R-Abilene)

Died in Senate.

Adds §27.007, Government Code, to specify that a person in justice court may be represented by itself or a non-attorney employee, owner, officer, partner or other authorized agent. Allows the court for good cause to permit an individual to be assisted by a family member or other non-compensated individual. Amends various sections of Chapter 27, Property Code, to make conforming changes reflecting the repeal of the Texas Residential Construction Commission and other conforming changes pertaining to the Texas Business Organizations Code.

Procedure/Discovery/Privileges/Limitations

HB 549 by Rep. Senfronia Thompson (D-Houston), Sen. Judith Zaffirini (D-Laredo)

Signed by the Governor on 6/15/21. Effective 9/1/21.

Authorizes a professional to disclose a patient's confidential information to mental health personnel (in addition to medical personnel or law enforcement) if the professional determines that there is a probability of imminent physical injury by the patient to the patient or another person or there is a probability of immediate mental or emotional injury to the patient. No cause of action exists against a person for disclosing confidential information under these circumstances. Does not create an independent duty or requirement to disclose any information.

HB 1939 by Rep. Reggie Smith (R-Van Alstyne), Sen. Brandon Creighton (R-Conroe)

Signed by the Governor 6-7-21. Effective 9/1/21.

Adds §16.013, CPRC, to require a person to bring suit for damages or other relief arising from an appraisal or appraisal review conducted by a real estate appraiser or appraisal firm not later than the earlier of: (1) two years after the day the person knew or should have known the facts on which the action is based; or (2) five years after the date the appraisal or review was completed. Does not apply to a suit based on fraud or breach of contract.

HB 2086 by Rep. Eddie Morales, Jr. (D-Eagle Pass), Sen. Bryan Hughes (R-Mineola)

Signed by the Governor 6/16/21. Effective immediately.

Amends §51.014(a), CPRC, to authorize an interlocutory appeal from the grant or denial of a motion for summary judgment under §97.002(b), CPRC (immunity of TXDOT highway contractors who are in compliance with contract documents material to the condition or defect giving rise to a claim for personal injury, death, or property damage). Immediate effect.

SB 1137 by Sen. Lois Kolkhorst (R-Brenham), Rep. Tom Oliverson (R-Cypress)

Signed by the Governor 6/18/21. Effective 9/1/21.

Requires a hospital to make public: (1) a digital file containing a list of standard charges for all hospital services and items; and (2) a consumer-friendly list of shoppable charges. The list must contain a description of each service or item, the gross charge, the de-identified minimum negotiated charge, the de-identified maximum negotiated charge, the discounted cash price, the payer-specific negotiated charge by the name of the payer and plan associated with the charge, and any code used by the hospital for purposes of accounting or billing the service or item. The list must be posted in a prominent place on the hospital's website, be free to use, and searchable. Establishes requirements for the consumer-shoppable list. Gives the Health and Human Services Commission enforcement authority, including auditing and imposing administrative penalties for non-compliance.

HB 1737 by Rep. Joe Moody (D-El Paso)

Died in House Calendars Committee.

Adds Subchapter C, Chapter 52, Government Code, to provide that a deponent and the attorneys of record and parties to a case in which a deposition is taken are entitled to obtain a copy of the deposition transcript from the court reporter or court reporting firm. Authorizes the reporter or firm to charge a reasonable fee for a copy of the transcript. On request of a deponent or the deponent's attorney, the reporter or firm to notify the deponent or attorney when the transcript is available for review and allow the deponent at least 20 days to review a secure digital copy of the transcript and provide a separate signed document listing any changes in form and substance the deponent desires to make to the transcript and the reasons for the changes. On the earlier of the expiration of the review period or receipt of the signed document, the court reporter or firm shall promptly deliver the original deposition transcript to the custodial attorney responsible for preserving the integrity of the transcript. Adds the original deposition transcript and first copy, as well as each additional copy, to the list of documents for which the attorney who takes the deposition and the attorney's firm are jointly and severally liable for payment. Amends §154.112(b), Government Code, to permit a noncertified shorthand reporter to report an oral deposition if a certified reporter is not available in person or by remote technology.

HB 2173 by Rep. Matt Krause (R-Fort Worth)

Died in House Transportation.

Amends §730.011, Transportation Code, to prohibit the Department of Motor Vehicles from charging a fee for the disclosure of personal information allowed under §§730.005 (information for certain government purchases) and 730.006 (information disclosed with the consent of the subject of the information).

HB 2184 by Rep. Tan Parker (R-Flower Mound)

Died in House Transportation.

Amends §730.007(b), Transportation Code, which authorizes personal information in connection with motor vehicle records to be disclosed for certain purposes (including civil actions) to allow disclosure of only the last four digits of the subject's driver's license number. Amends §730.013, which allows reselling or redisclosing personal information disclosed under this chapter, to prohibit resale or redisclosure of the information.

HB 2380 by Rep. Reggie Smith (R-Van Alstyne)

Died in Senate.

Allows a physician to appear at an Informal Show Compliance hearing or settlement conference at the Texas Medical Board by videoconference or teleconference.

HB 2925 by Rep. Harold Dutton (D-Houston)

Died in House Judiciary and Civil Jurisprudence.

Adds §18.001(a-1), CPRC, to provide that if a claimant offers medical or health care bills into evidence totaling $50,000 or less, no affidavit is necessary to support a finding of fact by a judge or jury that the amount charged was reasonable or that the service was necessary.

HB 2918 by Rep. Mike Schofield (R-Katy)

Died on House Calendar.

Amends §31.002, CPRC, to insert the word "sales" before "proceeds" with respect to the prohibition of an order requiring the turnover of proceeds from exempt property. Further provides that if a judgment creditor has attempted to satisfy a judgment and the final money judgment remains unsatisfied, the judgment creditor is entitled to a hearing on the creditor's application. If notice of the hearing is provided to the judgment debtor, the court shall appoint a receiver to enforce the judgment unless the debtor appears and asserts an exemption. Authorizes a court to issue an order without requiring the judgment creditor to prove the existence of certain property.

HB 2919 by Rep. Mike Schofield (R-Katy)

Died on House Calendar.

Amends §34.001, CPRC, to change current law regarding dormancy of a judgment to provide that the failure to appoint a turnover receiver within 10 years after rendition of the judgment triggers dormancy (in addition to failure to issue a writ). Same change applies to a subsequent writ or appointment of a receiver issued within 10 years of the previous writ.

HB 3333 by Rep. John Smithee (R-Amarillo), Sen. Bryan Hughes (R-Mineola)

Died on Senate Local and Consent Calendar.

Adds §16.073, CPRC, to bar a party from asserting a claim in an arbitration proceeding if the party could not have asserted the claim in court due to expiration of limitations. Permits a party to assert that claim if the party brought suit in court before the expiration of limitations and the parties either agreed to arbitrate the claim or the court ordered arbitration.

HB 3692 by Rep. Julie Johnson (D-Dallas)

Died in House Judiciary and Civil Jurisprudence.

Adds §51.018, CPRC, to allow a party that files a notice of appeal to file an appendix that replaces the clerk's record for the appeal. Requires the party to notify the court of appeals that it will file an appendix not later than the 10th day after the notice of appeal is filed. Requires the appendix to be filed with the party's appellant brief. Requires the brief and appendix to be filed not later than the 30th day after the later of: (1) the date the party provided notice to the court of appeals; or (2) the date that a reporter's record, if any, is filed with the court of appeals (except by order of the court or in an expedited proceeding). Requires the appendix to contain a file-stamped copy of each document required by Rule 34.5, TRAP, for civil actions and any other item the appellant refers to in its brief. Does not allow the appendix to include any document not filed with the trial court, absent agreement of the parties. Provides that the appendix becomes part of the appellate record and does not allow the appellate clerk to charge a fee for a clerk's record if the appendix if filed. Provides a parallel procedure for criminal cases.

SB 207 by Sen. Charles Schwertner (R-Georgetown), Rep. Greg Bonnen (R-Friendswood)

Died in House Calendars at request of sponsor.

This heavily negotiated bill addresses a loophole in the paid or incurred statute (§41.0105, CPRC) by which a plaintiff's lawyer can get an agreement from a health care provider not to submit medical expenses to a third-party payor in a personal injury lawsuit. This practice allows the plaintiff to submit as evidence only the billed chargemaster rates, which no one actually pays. As amended on the Senate floor, SB 207 now provides a safe harbor from discovery for a health care provider that submits either the amounts actually paid by third-party payors, such as private insurers, Medicare, or workers' compensation insurance, or, in the absence of actual payments, 150% of the workers' compensation reimbursement rate for the same procedure. SB 207 further addresses a glaring abuse of §18.001, CPRC, which allows a plaintiff to submit health care expenses in an affidavit certified by a billing clerk but does not allow a defendant to file a counter-affidavit contesting the reasonableness of the charges without hiring an expert. To make matters worse, trial judges routinely strike counter-affidavits given by medical billing experts, and even physicians with knowledge of particular procedures. SB 207 addresses these abuses by eliminating the counter-affidavit and substituting a notice to controvert in its place. It also provides that if the defendant serves notice to controvert, the plaintiff's affidavit comes in to evidence as a business record, not an opinion of the reasonableness of the charges. As previously noted, if the health care provider submits actual payments or 150% of workers' comp, a defendant would not have the ability to do any further discovery from the provider.

HB 1907 by Rep. Armando Walle (D-Houston), Sen. Lois Kolkhorst (R-Brenham)

Died in Senate Business & Commerce.

Establishes a statewide all payor claims database at the University of Texas Health Science Center at Houston to collect, process, and store health care claims information. The information must include the name of the provider paid by the payor, the type of health care benefits provided by the provider, the amount paid by the payor for the benefits, the estimated copayment paid by the patient. Requires public access to the database. Requires the Department of Health Services, Department of Insurance, and the Texas Higher Education Coordinating Board to enter into an MOU assigning duties and responsibilities for each agency.

SB 1684 by Sen. Beverly Powell (D-Burleson),
HB 4045 by Rep. Armando Martinez (D-Weslaco)

Died in Senate Business & Commerce and House Business & Industry.

Requires a health care facility to post its gross charges and Medicare reimbursement rate for each service on a public site. Limits interest on a medical debt. Provides that a spouse or other person is not liable for the medical debt of a person 18 years of age or older. Bars a medical debt collector from taking certain extraordinary measures to collect a debt. Bars a medical debt collector from reporting a medical debt for one year after the debtor first received the bill. Prohibits collection of a medical debt while a benefit review is ongoing. Makes violations actionable under the DTPA.

SB 2014 by Sen. Dawn Buckingham (R-Lakeway)

Died in Senate Business & Commerce

Requires a health care provider to maintain and make available on its public website a charge list. Authorizes the relevant regulatory authority for the provider to assess administrative penalties for violations.

SB 1845 by Sen. Charles Schwertner (R-Georgetown)

Died in Senate Business & Commerce

Requires a health care provider to provide to the patient an itemized list of all charges prior to pursuing collection of a debt against the patient.

Insurance

HB 1787 by Rep. Stan Lambert (R-Abilene),
Sen. José Menéndez (D-San Antonio)

Signed by the Governor 5/15/21. Effective 9/1/21.

Amends §1952.060(d), Transportation Code, to require liability coverage under a personal automobile insurance policy for a temporary vehicle provided to the insured by a repair facility to specifically name a person excluded in a named driver exclusion.

HB 3433 by Rep. John Smithee (R-Amarillo),
Sen. Bryan Hughes (R-Mineola)

Signed by the Governor 6/18/21. Effective 9/1/21.

Prohibits an insurer from discriminating against a person because of the person's political affiliation. Provides enforcement authority by the commissioner of insurance.

SB 1602 by Sen Larry Taylor (R-Friendswood),
Rep. Ed Thompson (R-Pearland)

Signed by the Governor 6/16/21. Effective 9/1/21.

Requires an insurer to notify a policyholder of cancellation for failure or refusal to cooperate and may cancel the policy on the 10th day following the policyholder's receipt of the notice.

HB 359 by Rep. Charlie Geren (R-Fort Worth)

Died in Senate.

Overrules the Brainard decision. Provides that an insured may provide notice of a claim for uninsured or underinsured coverage by giving written notification to the insurer that reasonably informs the insurer of the facts of the claim. Provides that a judgment or legal determination of the other motorist's liability or the extent of the insured's damages is not a prerequisite to recovery in an action under §541.151, Insurance Code, for a violation of §541.060. Provides that the insured's only extra-contractual cause of action with respect to a UM or UIM claim is provided by §541,151 for damages under §541.152 for a violation of §541.060.

HB 429 by Rep. Ken King (R-Canadian)

Died in House Insurance.

Expands the Texas Windstorm Insurance Association to cover tornado insurance and wildfire insurance.

HB 431 by Rep. Ken King (R-Canadian)

Died in House Insurance.

Prohibits an insurer from considering loss and expense experience caused by a disaster declared by the governor to set rates outside the designated area of the disaster.

HB 552 by Rep. Ed Thompson (R-Pearland)

Died in House Insurance.

Effective January 1, 2022, requires minimum amounts of motor vehicle liability coverage to cover diminution of value as the result of an accident.

HB 804 by Rep. Julie Johnson (D-Dallas)

Died in House Insurance.

Amends §1952.159, Insurance Code, to disallow an offset, credit, or deduction if the insurer has not paid, in relation to the accident, the full amount of the applicable liability policy limit under the owner's or operator's policy.

HB 1110 by Rep. Julie Johnson (D-Dallas)

Died in Senate.

Adds §2002.007, Insurance Code, to require a residential property insurance policy that includes replacement cost coverage to provide that in a valid claim for damage to the insured property, the policy will pay full replacement cost regardless of whether the policyholder has repaired or replaced the property.

HB 1111 by Rep. Julie Johnson (D-Dallas)

Died in House Insurance.

Amends §554.002, Insurance Code, to prohibit an insurer from discriminating against an individual based on sexual orientation or gender identity or expression.

HB 1131 by Rep. Travis Clardy (R-Nacogdoches)

Died in House Insurance.

Amends §1952.301, Insurance Code, to prohibit an insurer from (1) requiring that a vehicle be repaired with a part or product on the basis that it is the least expensive available, or (2) that the beneficiary of the policy purchase a part of product from any vendor or supplier on the basis that it is the least expensive available. Further prohibits an insurer from considering any part of product of like kind and quality as an original equipment manufacturer of a part or product for any purpose unless the insurer or manufacturer has conclusively demonstrated that the part or product (1) meets the original manufacturer's fit, finish, and quality criteria, (2) is the same weight or metal hardness of the original manufacturer's part or product, and (3) has been tested using the same crash and safety test criteria as the original manufacturer's part of product. Further prohibits an employee or agent of an insurer or adjuster from (1) limiting the beneficiary's selection of a repair person or facility in order to obtain repair with any out-of-pocket costs other than the deductible, (2) intimidating, coercing, or threatening the beneficiary to use a certain repair person or facility, or (3) offering an incentive or inducement to the beneficiary for using a certain repair person or facility, other than a warranty issued by the repair person or facility. Extends the same prohibitions to claims for property damage of a vehicle to third party claims and broadens the applicability to agents and employees of the insurer, an adjuster, or an entity that employs an adjuster. Amends §1952.302, Insurance Code, to prohibit an insurer, employee or agent of an insurer, adjuster, or entity that employs an adjuster from (1) restricting a beneficiary to travel at a distance considered inconvenient by the beneficiary to obtain repairs (current standard is "unreasonable"), (2) offering, communicating, or suggesting in any manner that a particular repair person or facility will provide faster repair times, faster service, or faster and more efficient claims handling, or (3) disregarding a repair operation or cost identified by an estimating system, including the system's procedural pages and any repair, process, or procedure recommended by the original manufacturer.

HB 1145 by Rep. Julie Johnson (D-Dallas)

Died in House Insurance.

Adds §843.355, Insurance Code, to prohibit an HMO from requiring utilization review, including a preauthorization determination that a health care service is medically necessary or appropriate, of a service provided to an enrollee by a participating physician or provider. Adds §1301.1345, Insurance Code, to prohibit a health insurer from requiring utilization review of a medical care or health care service provided to an insured by preferred physician or provider. Makes conforming changes to limit preauthorization to services provided by a nonpreferred physician or provider.

HB 1682 by Rep. Matt Krause (R-Fort Worth)

Died in House Insurance.

Requires an insurer, upon the request of a claimant asserting a claim that might be covered under a liability insurance policy between the insurer and policyholder, to provide specified information by sworn statement to the claimant, including the name of the insurer, the name of each insured, the coverage limits, and any policy or coverage defense the insurer reasonably believes is available to the insurer. The insurer must further provide a copy of the policy. Imposes a $500 administrative penalty for non-compliance. A claimant may also request the information from the policyholder. The insurer must provide the requested information within 30 days after receiving the request. Requires the insurer to amend the sworn statement or a policyholder to disclose a material change within two days of becoming aware of the change.

HB 2118 by Rep. Eddie Lucio III (D-Brownsville)

Died in House Insurance.

Adds Chapter 564, Insurance Code, to prohibit certain health plans, programs, or arrangements from deceptive marketing practices, including: (1) representing a plan as providing benefits it does not provide; (2) sell or offer multiple plans to an individual in a single transaction in a false, misleading, or deceptive manner; (3) use terms associated with health care coverage under Obamacare in a false, misleading, or deceptive manner; (4) use terms associated with major medical coverage in a false, misleading, or deceptive manner; (5) represent that the federal open enrollment period applies to an excepted benefit plan or discount health care program; (6) misrepresent that the rate will change if the individual does not make an immediate decision; (7) fail to explain the difference between an excepted benefit plan and major medical coverage; (8) solicit the sale of an insurance product in any medium that does not show the agent's name and national producer number in a visible manner; (9) contact a prospective purchaser or participant without identifying the agent's name and national producer number at the beginning of the contact; (10) try to contact a prospective purchaser or participant by phone and fail to leave a voicemail if it is possible to do so; or (11) use marketing media that has not been filed with TDI. Imposes a duty to record and retain marketing calls. Imposes a duty to submit certain information to TDI when requested. Imposes a duty to file with TDI copies of any sales or marketing materials for products sold in Texas. Makes violations enforceable by administrative

penalties if the issuer is certified to do business in Texas. Makes violations committed by non-certified issuers a violation of the DTPA.

HB 2330 by Rep. Ed Thompson (R-Pearland)

Died in House Insurance.

Adds §1952.061, Insurance Code, to require an insurer authorized to write automobile insurance in this state to include a provision in a personal automobile insurance policy requiring the insurer to: (1) attempt to communicate with the named insured at least five times until the insured responds within the 45-day period following the date a liability claim is made against the insured by a third party; and (2) if the insurer is unable to communicate with the insured during that period, pay the claim to the third party in accordance with the policy and decline to renew the policy.

HB 2534 by Rep. Travis Clardy (R-Nacogdoches)

Died in Senate Business & Commerce.

Adds Subchapter I, Chapter 1952, Insurance Code, to require a personal automobile insurance policy to contain an appraisal procedure as specified by this chapter. Allows the insurer or named insured to demand appraisal not later than the 90th day after proof of loss is filed with the insurer if the insurer and insured do not agree on the amount of the loss. Requires each party to appoint a qualified appraiser and give notice to the other within 15 days of the demand. Requires the two appraisers to determine the loss and seek agreement. In the event of disagreement, requires the appraisers to select a qualified umpire, whose decision is binding. Establishes a procedure for a court to appoint the umpire if the appraisers cannot agree on one. Makes each party responsible for the party's appraiser's fees and expenses. Requires the insurer to refund the amount of the insured's out-of-pocket costs for appraisal if the final determination is more than $1 greater than the insurer's proposed undisputed loss statement. If the process upholds the insurer's determination, the insured shall refund the insurer's expenses.

SB 249 by Sen. Charles Schwertner (R-Georgetown)

Died in Senate Business & Commerce.

Adds §2002.007, Insurance Code, to require a policy of business interruption insurance issued for delivery, delivered, or renewed on or after January 1, 2022, to cover loss caused by a pandemic, including loss caused by the order of a civil authority to mitigate the spread of the pandemic, without regard to whether the pandemic caused direct physical loss to the policy owner's property.

SB 459 by Sen. Nathan Johnson (D-Dallas)/ HB 1529 by Rep. Trey Martinez-Fischer (D-San Antonio)/ HB 1541 by Rep. Julie Johnson (D-Dallas)

Died in Senate Business & Commerce and House Insurance.

Adds Chapter 1511, Insurance Code, to prohibit a health benefit plan issuer from denying coverage or refusing to enroll an individual in a plan on the basis of a preexisting condition, limiting, excluding or requiring a waiting period for coverage of the individual's treatment for the condition, or charging the individual more for coverage than the issuer charges an individual without the condition. Prohibits discrimination, through the design of the plan, against an enrollee on the basis of race, color, national origin, sex, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health condition. Prohibits the plan issuer from designing a plan with the effect of discouraging the enrollment of a person with significant health needs. Prohibits discriminatory marketing practices. Requires individual and small employer health plans to provide essential health benefits as designated by federal law as of January 1, 2017. Prohibits limits on annual or lifetime benefits for essential health needs. Prohibits cost-sharing for essential health needs that exceed the limits established by federal law.

SB 1538 by Sen. José Menéndez (D-San Antonio), Rep. Stan Lambert (R-Abilene)

Died in House Insurance.

Amends §1952.301, Insurance Code, to prohibit an insurer limiting an insured's coverage for damage to a motor vehicle that has an unexpired manufacturer's warranty. Prohibits an insurer from specifying a repair process unless it's the manufacturer's warranted part, product, or service for a vehicle with an unexpired manufacturer's warranty.

HB 4419 by Rep. Mayes Middleton (R-Wallisville)

Died in House Insurance.

Requires an insured under TWIA only to make a single claim per event to claim all losses from the event. Requires TWIA to give a detailed explanation of its notice of coverage to the policyholder. Imposes 18% interest on the amount of an unpaid claim. Requires an appraisal to be completed within 180 days after the date of demand. Requires TWIA to adequately detail the scope of appraisal, including a list of any portions of the claim that have been accepted. Provides that if the claimant and TWIA fail to reach a settlement within 180 days after appraisal, interest accrues at 10% on the higher amount. Provides that the appraisal becomes binding once signed by the umpire and either the claimant's or TWIA's appraiser. Gives either side 30 days to notify the other of dispute, and allows either to file an action in district

court 30 days after that. Dates the deadline to provide notice of intent to file an action to the last notice from TWIA. Entitles a prevailing claimant to prejudgment interest, court costs, and reasonable attorney's fees. Allows a claimant to recover consequential damages if TWIA unreasonably delays paying a claim once its liability is reasonably clear or offering to pay an amount of loss less than the appraisal or as determined by a finder of fact.

HB 1433 by Rep. Giovanni Capriglione (R-Southlake), Sen. Nathan Johnson (D-Dallas)

Died in Senate Business & Commerce.

Amends §707.004, Insurance Code, to require an insurer to refuse to pay a claim for withheld recoverable depreciation or a replacement cost holdback until the insurer receives reasonable proof of payment by the policyholder of any deductible applicable to the claim. Prohibits the insurer from waiving a deductible owed by the policyholder in exchange for the policyholder's use of the insurer's preferred or recommended contractor for the claim.

Workers Compensation

SB 22 by Sen. Drew Springer (R-Muenster)/ Rep. Jared Patterson (R-Frisco)

Signed by the Governor 6/14/21. Effective immediately.

Amends §607.052, Government Code, to add state and local government detention officers and custodial officers (defined as a member of the retirement system employed by the Board of Pardons and Paroles or TDCJ as a parole officer or caseworker, or an employee of TDCJ with a prescribed level of contact with inmates) to the list of first responders entitled to a presumption that certain cancers were contracted in the course and scope of employment and thus compensable under the workers' compensation system. Establishes a presumption that a firefighter, EMS technician, peace officer, correctional officer, or detention officer contracted SARS-CoV-2 or COVID-19 resulting in death or total or partial disability in the course and scope of employment if: (1) the responder is working in in the area of a declared disaster; and (2) contracts the disease during the disaster. Applies the presumption only to full-time employees who were last on duty not more than 15 days before testing positive. For deceased employees, applies the presumption to full-time employees last on duty not more than 15 days before: (1) the date of diagnosis following positive test; (2) the date on which the person began showing symptoms as determined by a licensed physician; (3) the date of hospitalization for symptoms; or (4) the date of death, if the virus was a contributing factor. Provides that a rebuttal of the presumption may not be based solely on evidence relating to the risk of exposure of an individual with whom the responder resides but may be rebutted based on evidence that an individual with whom the responder resides had a confirmed diagnosis. Establishes a reimbursement process for health care expenses paid by the responder if the insurer accepts coverage. Establishes the procedure for challenging the insurer's denial of coverage. Grandfathers claims filed on or after the date the Governor declared a disaster for COVID-19. Sunsets the COVID-19 presumption on September 1, 2023. Immediate effect.

HB 1752 by Rep. Tom Oliverson (R-Cypress), Sen. Charles Schwertner (R-Georgetown)

Signed by the Governor on 6/4/21. Effective immediately.

Amends §410.005, Labor Code, to permit the Workers' Compensation Division to conduct a benefit review conference telephonically, by video conference, or in person on a showing of good cause as determined by the division. Requires an in-person benefit review conference to be held at a location 75 miles or less from the claimant's residence at the time of the injury, except for good cause shown as determined by the division.

HB 34 by Rep. Terry Canales (D-Edinburg)

Died in House Business & Industry. (See SB 22)

Amends §607.054, Government Code, to extend the presumption that a firefighter, peace officer, or EMT who contracts tuberculosis or a respiratory disease contracted the disease in the course and scope of employment to SARS-CoV-2 and COVID-19.

HB 396 by Rep. Joe Moody (D-El Paso)

Died on House Calendar.

Creates a presumption under workers' compensation law that a nurse who treated or came into contact with a patient contracted COVID-19 in the course and scope of employment.

HB 776 by Rep. Armando Walle (D-Houston)/ SB 305 by Sen. Sarah Eckhardt (D-Austin)

Died in House Business & Industry and Senate Business & Commerce.

Requires building contractors and subcontractors to provide workers' compensation insurance for their employees.

HB 2502 by Rep. Jared Patterson (R-Plano)

Died in House Business & Industry.

Provides that for a claim of lifetime income benefits (LIB) by an employee who is a first responder, the maximum weekly income benefit in effect on the date the claim for LIB is

finally adjucated and is applicable for the entire time LIB is paid. Provides that LIB may be paid for a substantial paralysis to the extent that the employee must use a wheelchair for mobility, regardless of whether minimal movement of an affected limb is possible. Entitles a first responder to LIB in the amount of 100% of the employees average weekly wage (AWW).

HB 2598 by Rep. Jared Patterson (R-Plano)

Died in House Business & Industry.

Amends §504.019(c), Labor Code, to fix the date of injury for PTSD of a first responder on the 30th day after the date of first diagnosis (current standard is the date on which the responder knew or should have known the disorder may be related to his or her employment).

HB 3158 by Rep. Senfronia Thompson (D-Houston)

Died in Senate.

Amends §408.001, Labor Code, to permit the estate of a deceased employee to recover exemplary damages in a gross negligence action against the employer.

SB 612 by Sen. Judith Zaffirini (D-Laredo)

Died in Senate Business & Commerce.

Amends §408.009, Labor Code, to establish a presumption of compensability for public school employees who contract COVID-19 and suffer disability or death. on or after February 1, 2020. The presumption may be rebutted through showing by a preponderance of the evidence that a risk factor or other cause not associated with the individual's service as a school employee was a substantial factor in bringing about the disease, without which the disease could not have occurred. Requires the administrative law judge to make findings of fact and conclusions of law that consider whether a qualified expert provided the rebuttal evidence.

SB 1450 by Sen. Brian Birdwell (R-Granbury)/
HB 3120 by Rep. Giovanni Capriglione (R-Southlake)

Died in Senate Business & Commerce.

Extends lifetime income benefits to an employee who sustains a traumatic injury to the brain that results in permanent cognitive deficits that prevent further employment. Extends LIBs to first responders or political subdivision employees who suffer certain permanent and total disabilities under the Public Safety Officers' Benefits Act.

Civil Rights

HB 188 by Rep. Diego Bernal (D-San Antonio)/
HB 2524 by Rep. Ron Reynolds (D-Missouri City)

Died in House State Affairs.

Adds Chapter 100B, Civil Practice and Remedies Code, to create a cause of action for denying a person full and equal accommodations in any place of public accommodation based on a person's sexual orientation or gender identity or expression. Authorizes a court to award actual and punitive damages, reasonable attorney's fees and court costs, and injunctive relief. Requires state contracts to require a contractor to adopt employment policies under which the contractor or its subcontractors may not discriminate against an employee or applicant based on sexual orientation or gender identity or expression. Imposes an administrative penalty of $100 per day for violation of an employment policy. Adds sexual orientation or gender identity or expression to the list of prohibited employment practices under Chapter 21, Labor Code. Adds sexual orientation or gender identity or expression to the list of prohibited practices in the sale or rental of a dwelling under Chapter 301, Property Code.

HB 173 by Rep. Jon Rosenthal (D-Houston)

Died in House Judiciary and Civil Jurisprudence.

Adds Chapter 100B, Civil Practice & Remedies Code, to impose liability of up to $250 on a person who makes a false report to a law enforcement agent or emergency services provider if the report submitted was due to bias or prejudice on account of the falsely accused person's race, color, disability, religion, national origin or ancestry, age, gender, sexual orientation, or gender identity. Awards a falsely accused person attorney's fees and costs if the person prevails in an action under this section.

HB 2069 by Rep. Garnet Coleman (D-Houston)

Died in House State Affairs.

Adds Chapter 100E, CPRC, to create a new cause of action against a person for a discriminatory practice based on an individual's sexual orientation or gender identity or expression in any place of public accommodation in the state or otherwise discriminates against or segregates or separates an individual based on sexual orientation or gender identity or expression. Prohibits housing discrimination based on sexual orientation or gender identity or expression. Prohibits a person engaged in real estate-related transactions from discrimination against an individual based on sexual orientation or gender identity or expression. Prohibits a person from coercing, threatening, intimidating, or interfering with an individual in the exercise or enjoyment of a protected right based on sexual orientation or gender identity or expression. Prohibits

real estate listings from indicating a preference, limitation, or restriction based on sexual orientation or gender identity or expression. Prohibits steering or, for profit, attempting to influence an individual's entry into a neighborhood based on sexual orientation or gender identity or expression. Exempts religious organizations. Authorizes recovery of actual and punitive damages, attorney's fees, court costs, and injunctive relief. Makes changes to various laws relating to marriage to include same sex marriage.

HB 4166 by Rep. Gene Wu (D-Houston)

Died in Senate State Affairs.

Amends §27.003, CPRC (TCPA), to exempt from the TCPA a legal action based on a common law legal malpractice claim.

SB 1540 by Sen. José Menéndez (D-San Antonio)/ HB 3860 by Rep. Jessica González (D-Dallas)

Died in Senate State Affairs and House State Affairs.

Adds Chapter 113, Business & Commerce Code, to prohibit a person from discriminating against any person because of race, color, disability, religion, sex, national origin, age, sexual orientation, or gender identity (or status as a military veteran) to full and equal accommodation in any place of public accommodation in the state. Establishes a complaint procedure at the Texas Workforce Commission. Allows a complainant to file a civil suit if the commission denies a complaint. Authorizes compensatory and punitive damages. Authorizes award of attorney's fees to a prevailing party other than the commission. Provides trial de novo for a judicial proceeding. Provides for enforcement by the attorney general. Adds discrimination based on sexual orientation, gender identity, and status as a military veteran to unlawful employment practices parts of the Labor Code.

Court Records, Filing Fees, and Costs

SB 41 by Sen. Judith Zaffirini (D-Laredo), Rep. Jeff Leach (R-Plano)

Filed without signature 6/14/21. Effective 1/1/22.

Consolidates and allocates state civil court costs. Does not appear to increase existing filing fees or impose new fees.

Judicial Matters

HB 4344 by Jacey Jetton (R-Richmond), Sen. Judith Zaffirini (D-Laredo)

Signed by the Governor 6/15/21. Effective 9/1/21.

Amends Chapter 33, Government Code, to require the staff of the Judicial Conduct Commission to prepare and file with each member of the commission a report detailing the investigation of a complaint and recommendations not later than the 120th day after the date the complaint is filed (with a possible extension of up to the 270th day after the complaint filed under extenuating circumstances; at the request of the executive director, an additional 120 days may be added, with notice to the legislature). Requires the Commission to take action on a report not later than the 90th day following the date the report is filed. Requires that once a complaint is filed, each commission member be briefed about the complaint. Requires the Commission to file an annual report with the legislature. Directs the Commission to make recommendations for statutory changes to the next legislature.

HJR 165 by Rep. Jacey Jetton (R-Richmond), Sen. Judith Zaffirini (D-Laredo)

Election date 11/2/21.

Adds Art. V, 1-a (13-a), Texas Constitution, to authorize the Judicial Conduct Commission to accept complaints or reports, conduct investigations, and take any other authorized action regarding a candidate for judicial office in the same manner the Commission has authority to take against a holder of that office.

SB 1339 by Sen. Judith Zaffirini (D-Laredo), Rep. Tracy King (D-Uvalde)

Signed by the Governor 5/24/21. Effective immediately.

Authorizes a county employee who serves as the head of county's civil legal department to request the attorney general's advice regarding a matter in which the state is interested.

HB 2950 by Rep. Reggie Smith (R-Van Alstyne), Sen. Joan Huffman (R-Houston)

Signed by the Governor 6/16/21. Effective immediately.

Amends §74.161(a), Government Code, regarding the judicial panel on multidistrict litigation, to change the appointment authority from the chief justice of the supreme court to the court as a whole, and to permit the appointment of former or retired court of appeals justices. Amends §74.1625 to prohibit the panel from transferring a case brought by the consumer protection division of the attorney general's office under Subchapter E, §17.50, Business & Commerce Code.

HB 3774 by Rep. Jeff Leach (R-Plano), Sen. Joan Huffman (R-Houston)

Signed by the Governor 6/18/21. Effective 9/1/21.

This is the biennial court administration omnibus bill. The committee substitute:

- Adds new civil district courts in Bell, Harris, Tarrant, Williamson, Denton, Hays, Cameron, Smith, McLennan, and Hidalgo Counties;

- Adds a statutory probate court in Denton County and expands the jurisdiction of County Court at Law No. 2 in Denton County to include, regardless of the amount in controversy, eminent domain cases and direct and inverse condemnation cases;
- Establishes a statutory county court in Kendall County with concurrent jurisdiction with the district court in state jail, third degree, and second degree felony cases on assignment from the district judge;
- Adds a statutory county court in McLennan County and, upon request of a district judge presiding in McLennan County, authorizes the regional presiding judge to assign a county court at law judge to the district court to hear any matter pending in the requesting judge's court (excludes from county court at law jurisdiction suits on behalf of the state to recover penalties or escheated property, misdemeanors involving official conduct, and contested elections);
- Adds a statutory county court in Montgomery County;
- Expands the jurisdiction of a county court at law in Reeves County to family law cases and proceedings;
- Adds a statutory county court in San Patricio County and excludes from San Patricio County Court at Law jurisdiction in felony criminal matters and civil cases exceeding the statutory limit provided by §25.0003, Government Code ($250,000);
- Adds a County Criminal Court in Tarrant County;
- Adds a statutory county court in Williamson County;
- Bars a justice or judge from accepting a plea of guilty or plea of nolo contendere from a defendant in open court unless it appears to the justice or judge that the defendant is mentally competent and the plea is free and voluntary;
- Allows a judge exercising jurisdiction over a child in a suit under Subchapter E, Title 5, Family Code, to refer a "dual status child" (defined as certain children referred to the juvenile justice system with respect to child abuse or neglect) to the appropriate associate judge appointed under Subchapter C, Chapter 201, serving in the county with the associate judge's consent;
- Grants criminal jurisdiction to magistrates in Collin County, Brazoria County, and Tom Green County, and expands the jurisdiction of a magistrate in Burnet County to municipal court matters if approved by an MOU between the municipality and Burnet County;
- Establishes County Criminal Magistrate Courts in Brazoria and Tom Green Counties, appointed by the commissioners court with prescribed jurisdiction and powers;
- Expands the OCA's responsibility for the state electronic filing system to include public access to the site and allows OCA to charge a reasonable fee for optional services;
- Standardizes procedures for the electronic transfer of cases between courts;
- Permits an applicant for a writ of habeas corpus to serve the state's attorney by electronic service or a secure electronic transmission to the attorney's email address;
- Amends §64.101(c), CPRC, to require citation for a receivership to be published on the public information website, as well as a newspaper of general circulation;
- Requires the Texas Forensic Science Commission to adopt a code of professional responsibility to regulate the conduct of persons, laboratories, facilities, and other entities regulated by the commission and to investigate any allegation of misconduct or professional negligence or misconduct with respect to a forensic examination or test conducted by an unaccredited crime laboratory;
- Bars a commissioners court from using a juror donation to the county's veteran county service office either to determine the budget for the office or to supplant amounts budgeted for the office;
- Makes changes regarding the appointment of judges or magistrates to a regional specialty court program for certain criminal cases;
- Makes certain changes regarding confidentiality of vacated protective orders;
- Amends §52.001(a), Government Code, to define "shorthand reporter" and "court reporter" to require certification by the Texas Supreme Court as a court reporter, apprentice court reporter, or provisional court reporter;
- Amends §52.011, Government Code, to require a court reporting firm representative or court reporter to complete and sign a further certification stating that: (1) the deposition transcript was submitted to the witness or the witness's attorney for examination and signature, (2) the date of submission, (3) whether the witness returned it and date of return, (4) that any changes by the witness are attached to the transcript, (5) that the transcript was delivered in accordance with Rule 203.3, TRCP, (6) the amount of the charges for preparing the transcript, and (7) that a copy of the certificate was served on all parties and the date of service;
- Amends §52.041, Government Code, to authorize a certified shorthand reporter to be appointed by more than one judge of a court of record to serve more than one court, including an employee of more than one county or serving as an official court reporter under contract with more than one county;
- Amends §52.042, Government Code, to make the same change with respect to a deputy certified shorthand reporter;

- Adds §52.060, Government Code, to direct the Office of Court Administration to develop a model interlocal agreement that may be used by counties or courts to share the compensation and expenses of an official court reporter or deputy court reporter;
- Amends 154.001, Government Code, to conform the prior change in the definition of shorthand reporter or court reporter;
- Amends §154.105, Government Code, to authorize a shorthand reporter to administer oaths and witnesses in a jurisdiction outside of Texas and to administer an oath to a person who is or may be a witness in a case filed in Texas without being located with a party or the witness if the reporter is physically located in this state at the time the oath is administered or the witness is located in a state with which Texas has a reciprocity agreement and the reporter is located in the same jurisdiction as the witness;
- Further specifies the ways to prove the identity of a deposition witness who is not in the presence of a certified shorthand reporter;
- Amends §154.112, Government Code, to allow the employment of a noncertified shorthand reporter pending the availability of a certified shorthand reporter.

HB 228 by Rep. Andrew Murr (R-Junction)

Died in House Judiciary and Civil Jurisprudence.

Allows a county commissioners court to exempt a court from the requirement to appoint an official court reporter by authorizing an electronic recording device to report the court's proceedings. The judge of a statutory county court or county court may claim the exemption and provide for proceedings to be recorded using a good quality recording device. Further allows the commissioners courts within a judicial district to agree to authorize the same for a district court. Provides for the preparation of a transcript and establishment of fees for transcription and delivery of the record. Does not affect a person's rights under other law to request a court reporter.

HB 1159 by Rep. Andrew Murr (R-Junction)

Died on Senate Local and Uncontested Calendar.

Amends §92.0563, Property Code, to increase the amount a justice court may award a tenant for damages for the landlord's refusal to make repairs from $10,000 to $20,000.

HJR 66 by Rep. Cody Vasut (R-Angleton)

Died in House Judiciary and Civil Jurisprudence.

Amends Art. V, §1-a(1), Texas Constitution, to repeal the mandatory retirement age for appellate and district court judges.

SB 419 by Sen. Borris Miles (D-Houston)

Died in Senate Jurisprudence.

Raises the jurisdictional limit for justice courts and county courts from $20,000 to $50,000.

HB 1839 by Rep. Phil Stephenson (R-Wharton)

Died in House Judiciary and Civil Jurisprudence.

Amends §24.001, Government Code, to disqualify a person from serving as a district judge if on the date of election or appointment the person is 75 or older. Referred to House Judiciary on 3/11.

HB 1876 by Rep. Mike Schofield (R-Katy)

Died in House Judiciary and Civil Jurisprudence.

Changes the annual base salary of a district judge from $140,000 to 82.5% of the state base salary of a supreme court justice other than the chief justice. Changes the annual base salary of an appellate court justice other than the chief justice from 110% of the state base salary of a district court judge to 91% of the state base salary of a supreme court justice other than the chief justice. Requires the LBB to biennially calculate for the succeeding fiscal biennium: (1) the annual base salary from the state of supreme court justices other than the chief justice and judges of the court of criminal appeals other than the chief judge; (2) all other annual salaries to paid by the state based on (1). The amount of (1) shall be calculated by adding the annual base salary of (1) for the current fiscal year and the percentage change in the CPI during the preceding two state fiscal years. Authorizes the legislature to make pro rata reductions to meet available revenue.

HB 1880 by Rep. Mike Schofield (R-Katy)

Died in House Judiciary and Civil Jurisprudence.

Indexes the annual base salary of a district judge by the rate of inflation.

HB 2714 by Rep. Ana Hernandez (D-Houston)

Died in House Judiciary and Civil Jurisprudence.

Requires judges and court personnel to take implicit bias training. Requires each licensed attorney to take one hour per year of CLE in implicit bias training.

HB 3053 by Rep. Eddie Rodriguez (D-Austin)

Died in House Judiciary and Civil Jurisprudence.

Amends §24.001, Government Code, to disqualify a person from serving as a district judge if the person has been found to be a vexatious litigant under Chapter 11, CPRC. Amends §§25.0014 and 25.0033, Government Code, to disqualify a person from serving as a statutory county court or probate

judge if the person has been found to be a vexatious litigant under Chapter 11, CPRC.

HB 3966 by Rep. Eddie Morales, Jr. (D-Eagle Pass)

Died in House Calendars.

Makes a retired or former judge eligible to serve as a visiting judge if the judge certifies under oath that during the 12 years preceding assignment as a visiting judge the judge has not been publicly reprimanded or censured by the Judicial Conduct Commission and the judge: (1) did not resign or retire from office after the Commission notified the judge of commencement of a full investigation into an allegation or appearance of misconduct or disability and before the final disposition of that investigation; or (2) if the judge did resign from office, was not publicly reprimanded or censured as a result of that investigation. Provides that a former or retired district judge is ineligible for assignment if during the preceding 12 years the judge is identified in a public statement by the Commission that the judge resigned or retired in lieu of discipline.

HB 4213 by Rep. Andrew Murr (R-Junction)

Died in House Judiciary and Civil Jurisprudence.

Provides that if a party files a motion to recuse and is ordered to pay fees or expenses, the movant is entitled to a de novo appeal of the order upon notice to the court no more than 30 days following the order. Makes the determination of the appeal of the sanctions appealable to the court of appeals.

HB 4235 by Rep. Tom Craddick (R-Midland)

Died in House Judiciary and Civil Jurisprudence.

Eliminates the requirement that the Eleventh Court of Appeals District conduct its business in Eastland.

HB 4345 by Rep. Jacey Jetton (R-Richmond)

Died in House Calendars.

Gives the Judicial Conduct Commission the authority to enforce the Judicial Code of Conduct and administer discipline as it relates to candidates for judicial office.

SB 690 by Sen. Judith Zaffirini (D-Laredo)/
HB 3611 by Rep. Jeff Leach (R-Plano)/
HB 4081 by Rep. Jasmine Crockett (D-Dallas)

Died on House Calendar.

Adds §21.013, Government Code, to authorize a court of this state, either on its own motion or on motion of a party, to (1) conduct a hearing or other proceeding remotely without consent of the parties (except where consent is constitutionally required), and (2) allow a judge, party, attorney, witness, court reporter, juror, or any other individual to participate in a remote proceeding, including a deposition, hearing, trial, or other proceeding. If a jury trial is to be conducted remotely in a justice or municipal, the court shall consider on the record any motion or objection related to proceeding with the trial not later than 7 days before trial, or if a motion or objection is made within 7 days before trial, as soon as practicable. Requires the court to ensure that prospective jurors have access to the necessary technology. Requires the court to provide reasonable notice to the public if the court will hold a proceeding away from the court's usual location. Repeals §30.012(b), CPRC, which permits a witness deposition by electronic means only if it is conducted before the commencement of trial. The committee substitute adds the following provisions:

- Provides that a court that elects to conduct a remote proceeding shall give adequate notice to the parties, allow a party to file an objection to the remote proceeding not later than the 10th day after receiving notice, and provide a method to a person to notify the court that the person is unable to participate in the remote proceeding because the person is disabled, lacks required technology, or shows other good cause;
- Requires the court to adopt an alternative method that accommodates the person's disability, lack of technology, or other situation, allow the person to appear in-person, or conduct the proceeding in-person;
- Requires the court, upon receiving an objection to a remote proceeding and requesting an in-person proceeding, to consider and grant the motion for good cause shown;
- Requires the prosecutor and defendant to agree to a remote contested adversarial or contested evidentiary proceeding for a criminal offense punishable by confinement;
- Prohibits a district court, statutory county court, or county court from conducting a jury trial as a remote proceeding unless each party to the proceeding agrees.

SB 898 by Sen. Judith Zaffirini (D-Laredo)

Died in Senate Jurisprudence.

Adds §§33.02114, 33.02115, and 33.02116, Government Code, to direct the Judicial Conduct Commission to: (1) maintain on its website that a complainant is not required to maintain the confidentiality of the complaint; (2) establish guidelines for the imposition of a sanction to ensure that each sanction is proportional to the violation; and (3) establish a schedule outlining times for commission action on a complaint. Referred to Senate Jurisprudence on 3/11.

HB 3354 by Rep. Dustin Burrows (R-Lubbock), Sen. Charles Perry (R-Lubbock)

Died on Senate Local and Uncontested Calendar.

Allows a justice of the peace court in Lubbock County to be housed or conduct proceedings in a location outside the court's precinct.

SB 1506 by Sen. Drew Springer (R-Muenster)

Died in Senate Jurisprudence.

Requires the presiding judge of the Court of Criminal Appeals to approve any change in rule, procedure, or practice before it may be applicable in a criminal case.

SB 1638 by Sen. Borris Miles (D-Houston)

Died in Senate Jurisprudence.

Gives justice courts jurisdiction over offenses related to fraudulent conveyances of interests in real property.

SB 2027 by Sen. Brandon Creighton (R-Conroe)/ HB 1365 by Rep. Travis Clardy (R-Nacogdoches)

Died in Senate Jurisprudence. (See HB 3774).

Directs the Office of Court Administration to create a uniform standardized system for transferring cases between courts via the electronic filing system.

SB 2226 by Sen. Bryan Hughes (R-Mineola)

Died in Senate State Affairs.

Repeals §22.004(c), Government Code, which provides that a rule relating to a civil action adopted by the Supreme Court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions. This subsection also requires the Supreme Court to file, at the time a rule is adopted, a list of each section or article or part of each section or article of general law repealed or modified in any way by the adopted rule.

Jury Matters

HB 2485 by Rep. Abel Herrero (D-Robstown)

Died in Senate Jurisprudence.

Exempts firefighters and police officers from jury service, if they are permanent paid employees of a city, county, or special district or authority that provides firefighting services.

HB 3763 by Rep. Ryan Guillen (D-Rio Grande City)

Died in House International Relations & Economic Development.

Bars an employer who pays an employee wages or salary during the employee's jury service from requiring the employee to remit to the employer any reimbursement for travel, other expenses, or compensation received by the employee for jury service, or withhold or divert any part of the employee's wages or salary to offset the amount of reimbursement or compensation the employee received for jury service. Referred to House Judiciary on 3/22.

Attorney's Fees

SB 1821 by Sen. Joan Huffman (R-Houston), Rep. Terry Canales (D-Edinburg)

Signed by the Governor on 6/7/21. Effective immediately.

Amends §2254.102, Government Code, which limits the ability of the state or state agency to enter into a contingency fee contract for legal services, to add to the definition of a "contingent fee contract" an amendment to the contract if the amendment changes the scope of representation or may result in the filing of a lawsuit or the amending of a petition in an existing lawsuit. Heard in House State Affairs on 4/20. SB 1821 reported favorably from House State Affairs on 4/30.

HB 1428 by Rep. Dan Huberty (R-Houston), Sen. Joan Huffman (R-Houston)

Signed by the Governor 5/15/21. Effective 9/1/21.

Amends §2254.102(e), Government Code, which requires a political subdivision to get approval from the comptroller for contingency fee contracts, to exempt contracts to collect a delinquent obligation. Does not apply to fines or penalties arising from an action of a political subdivision under Chapter 7, Water Code.

HB 1493 by Rep. Abel Herrero (D-Robstown), Sen. Juan Hinojosa (D-McAllen)

Signed by the Governor on 6/15/21. Effective 9/1/21.

Authorizes a governmental entity to bring an action to enjoin another person's use of an entity's name that might falsely imply governmental affiliation with the government entity. Allows a court to award reasonable attorney's fees and costs to the governmental entity.

HB 1578 by Rep. Brooks Landgraf (R-Odessa), Sen. Bryan Hughes (R-Mineola)

Signed by the Governor 6/15/21. Effective 9/1/21.

Amends §38.01, CPRC, to add "organization," as defined by §1.002, Business Organizations Code, to the list of persons from whom a party may recover attorney's fees in an enumerated action. Exempts a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organizational, or a charitable trust.

HB 2416 by Rep. Barbara Gervin-Hawkins (D-San Antonio), Sen. Beverly Powell (D-Burleson)

Filed without signature 6/18/21. Effective 9/1/21.

Adds §38.0015, CPRC, to permit a person to recover attorney's fees from an individual, corporation, or other entity from which recovery of attorney's fees is permitted as compensatory damages for breach of a construction contract as defined by §130.001, CPRC. Does not create or imply a private cause of action or an independent basis to recover attorney's fees.

SB 484 by Sen. Juan Hinojosa (D-Edinburg), Rep. Jeff Leach (R-Plano)

Signed by the Governor 6/16/21. Effective 9/1/21.

Allows a member of the state military forces who is ordered to state active duty, training, or other duties by the governor or another appropriate authority to hire a private attorney to bring a civil action in district court for the same benefits and protections afforded to federal military service members. A court may award to a prevailing service member equitable and injunctive relief, other relief, including monetary damages, reasonable attorney's fees and costs of the action. Effective September 1, 2021.

HB 1162 by Rep. Andrew Murr (R-Junction)

Died in House Judiciary & Civil Jurisprudence.

Amends §38.001, CPRC, to require a party to prevail in order to recover attorney's fees for the enumerated actions.

HB 1495 by Rep. Harold Dutton (D-Houston)

Died in House Judiciary & Civil Jurisprudence.

Adds Chapter 38A, CPRC, to require a court to award court costs and reasonable and necessary attorney's fees to a party who prevails in an action challenging an order, ordinance, or similar measure of a political subdivision as preempted by the Texas Constitution or state statute. Also applies to an action challenging an officer of a political subdivision for failure to perform an act of the office required by the constitution or a statute.

HB 2809 by Rep. Jim Murphy (R-Houston)

Died in Senate Business & Commerce.

Amends §2254.102(b), Government Code, to exempt certain contingent fee contracts entered into by a political subdivision to enforce provisions of the Alcoholic Beverage Code from getting approval from the Comptroller's office.

HB 2817 by Rep. Chris Turner (D-Arlington)

Died in House Judiciary and Civil Jurisprudence.

Adds §402.022, Government Code, to require attorneys contracting with the attorney general to provide legal services to document and retain a record of hours worked on the matter and to provide a report to the attorney general of total hours worked at the conclusion of the matter. Provides that the information is public information. Heard in House Judiciary on 3/31.

HB 3150 by Rep. Morgan Meyer (R-Dallas)

Died in House Calendars.

Amends §§38.01 and 38.02, CPRC, to provide that a court may award reasonable and necessary attorney's fees to a prevailing party in the enumerated actions (eliminates limitation to an individual or corporation). Provides that to recover fees, the prevailing party must be represented by an attorney.

SB 1370 by Sen. Joan Huffman (R-Houston)

Died in Senate Jurisprudence.

Requires the comptroller to approve any contract between the attorney general and an attorney for the performance of services required of the attorney general. Requires an attorney to submit an invoice to the comptroller for determination of whether the billed charges are within the contract and eligible for payment.

Practice of Law

SB 247 by Sen. Charles Perry (R-Lubbock), Rep. Briscoe Cain (R-Houston)

Died in House Calendars.

Prohibits the State Bar of Texas from adopting a rule or policy that burdens a license holder's free exercise of religion, speech, association, or membership in a religious organization. Prohibits a rule, policy, or penalty that limits an applicant's ability to obtain or renew a law license based on a sincerely held religious belief. Does not apply to a rule or policy essential to enforcing a compelling governmental purpose and narrowly tailored to accomplish that purpose. Allows an aggrieved person to obtain injunctive relief. Creates a defense to an administrative hearing or declaratory judgment, unless based on sexual misconduct or the prosecution of an offense.

SB 418 by Sen. Borris Miles (D-Houston)

Died in Senate State Affairs.

Authorizes a member of the legislature to request information related to an attorney grievance filed with the ombudsman if the complainant consents to the disclosure.

SB 755 by Sen. Borris Miles (D-Houston)

Died in Senate Jurisprudence.

Adds §82.0625, Government Code, to require an attorney who receives for a client represented by the attorney money or other property paid to settle a claim in which the client has an interest to: (1) immediately notify the client of the receipt of the money or property; and (2) obtain the client's consent to payment owed by the client to a third party unless other law requires the attorney to pay the third party. Penalty for a violation is suspension from the practice of law for six months. Authorizes a client to sue an attorney for a violation and recover the amount received by the attorney, interest at the judgment rate, and reasonable attorney's fees.

HB 2393 by Rep. Yvonne Davis (D-Dallas)/ SB 891 by Sen. Sarah Eckhardt (D-Austin)

Died in House Local and Consent Calendars.

Prohibits voting discrimination based on age, sex, religion, race, color, creed, or national origin in state bar elections. Permits a person to bring an action for injunctive relief in Travis County district court against a member of the state bar for a violation, with recovery of court costs and attorney's fees. Lowers the requirement of a petition to place a candidate for president-elect to 500 signatures, rather than the current requirement of 5% of the membership. Allows electronic signatures on a petition.

HB 4543 by Rep. Briscoe Cain (R-Houston)

Died in House Judiciary and Civil Jurisprudence.

Prohibits an attorney from using a deceptive, false, or misleading law firm name, letterhead, or other professional designation. Allows an attorney to practice under a trade name that is not deceptive, false, or misleading; imply a connection with a governmental agency or public or charitable legal services organization; or does not imply the firm is something other than a law firm. Heard in House Judiciary on 4/21.

Landlord-Tenant

HB 900 by Rep. Dan Huberty (R-Houston)/ Sen. Drew Springer (R-Muenster)

Signed by the Governor 6/15/21. Effective 9/1/21.

Adds §24.0061(i), Property Code, to exempt a landlord from liability for damages to a tenant resulting from the execution of a writ of possession.

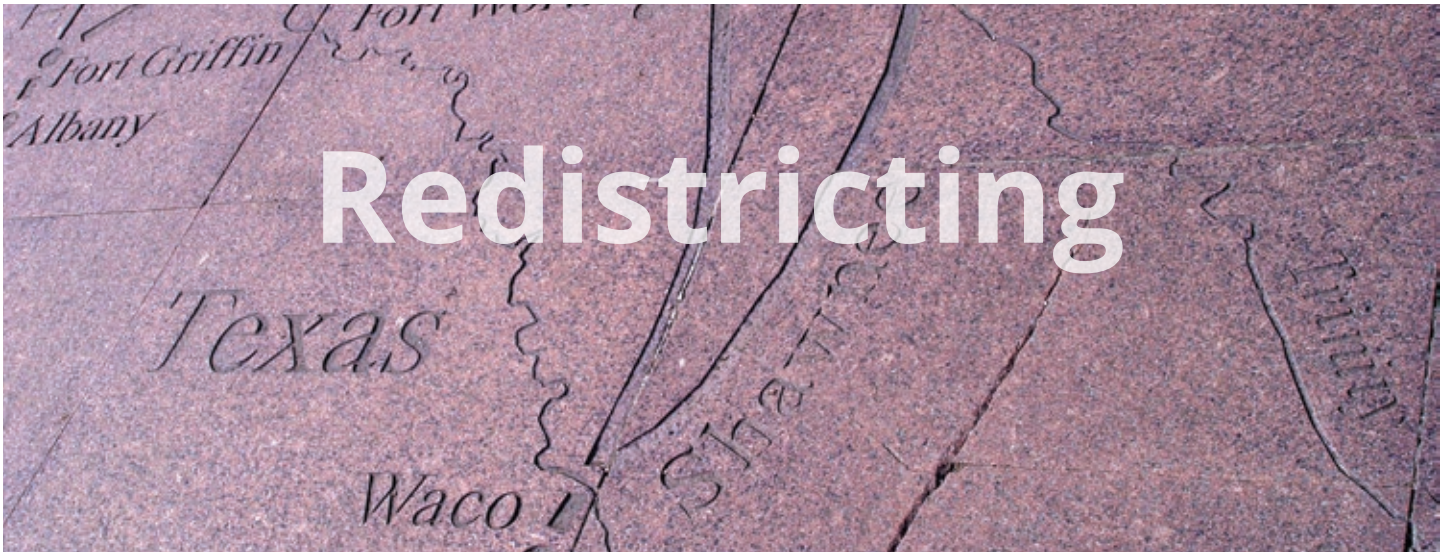
Adminstrative Procedures

HB 2580 by Rep. Jeff Leach (R-Plano)

Died in Senate.

Amends Chapter 2003, Government Code (Texas Administrative Procedures Act), as follows:

- Adds §2003.0401 to direct the chief administrative law judge to appoint a deputy to act in the event the chief judge is absent or unable to act, to supervise the ALJs (including senior or master ALJs), and to perform other services as directed by the chief ALJ; the deputy serves at the pleasure of the chief ALJ; makes conforming changes throughout the statute to reflect addition of a deputy chief ALJ
- Adds §2003.0501 to authorize the chief ALJ to modify or suspend a procedure governing an administrative hearing or alternative dispute resolution procedure affected by a disaster during the period the governor's disaster declaration is in effect; limits the emergency order to 30 days, unless renewed; requires the order to conform as nearly as practicable to a SCOTX emergency order
- Adds §§2003.0551 and 2003.0552 to authorize an ALJ to conduct a proceeding by videoconference and to authorize the State Office of Administrative Hearings to deliver decisions or orders by electronic means
- Repeals §2003.021(c) and (d) to eliminate the requirement that SOAH conduct workers' compensation hearings under Title 5, Labor Code, and hearings under the Agriculture Code
- Repeals §2003.024(a-2), which directs SOAH, if operating under an interagency agreement for quarterly payments, to track hours and estimate future hours for the fiscal year
- Repeals §2003.050(c), which requires SOAH rules to provide for certifying the identity of a witness appearing by telephone
- Repeals §2003.108, which requires SOAH to conduct quarterly review of the status of tax cases with the Comptroller
- Repeals §40.004, Insurance Code, which requires the insurance commissioner and SOAH to execute an MOU governing SOAH hearings under the Insurance Code
- Adds §411.1411, Government Code, to authorize SOAH to obtain criminal history information from DPS for SOAH employees, applicants, contractors, subcontractors, volunteers, interns, consultants, or contract employees. Received in Senate on 5/3.



Redistricting

Redistricting is the allocation of a set number of districts among governments. For the U.S. House of Representatives, this means reapportioning the 435 congressional seats among the 50 states. For the Texas Senate and the Texas House of Representatives, this means reapportioning 31 Senate seats and 150 House seats. The state legislature must redraw these lines every decade. The purpose of decennial redistricting is to equalize the population among the existing electoral districts, resulting in new districts with different geographical boundaries.

Redistricting is governed by two primary rules: (1) the representative districts (senate, house, congressional) must have equal or nearly equal populations; and (2) districts must be drawn in a manner that does not dilute voting rights of a group based on race, color or language. These principles are based in the 14th and 15th Amendments to the U.S. Constitution and the Voting Rights Act of 1965.

The Texas legislature typically takes up redistricting during the 1st regular session after the turn of a decade (e.g., 1991, 2001, 2011, 2021). Historically, the U.S. Census Bureau provides the updated population numbers in March or April while the legislature is still in session. This year, however, COVID-19 delayed the federal government data collecting efforts for the states, so the 87th Texas Legislature concluded before redistricting could be accomplished. The Census Bureau has indicated that it will release the new census data by August 16, 2021. Accordingly, Governor Greg Abbott is expected to call a special session on redistricting in the early fall of 2021.

While Texas will not receive the full data until September, the Census Bureau has released data showing the state's total population more than 29 million. That count has Texas gaining two congressional seats totaling 38 representatives in the U.S. House of Representatives after the 2022 elections. Each congressional seat will represent 766,987 people, up from 698,488 in 2010.

The total number of state legislators in Texas remains the same with 31 state senators and 150 state representatives. With the growth in Texas' overall population, the numbers of citizens represented in each district will also increase. The ideal district for a state senator in 2010 was 811,147; the new ideal senatorial district will represent a population of 940,178. The ideal number for a state representative district will increase from 167,637 to 194,303.

Texas law also provides for the reapportionment of judicial districts for district courts.[1] Unlike legislative districts, where the purpose is to equalize the populations of the districts, judicial redistricting is to equalize the "judicial burdens" (primarily caseloads) amongst the district courts. Judicial districts are not subject to one-person, one-vote and may have whatever populations the legislature wishes.

The Texas Constitution requires the Judicial Redistricting Board to reapportion the judicial districts if the legislature fails to act by June of the third year following a federal decennial census. If the Judicial Redistricting Board fails to act by August of that third year, the responsibility falls to the Legislative Redistricting Board. To date, neither the Legislature, the Judicial Redistricting Board, nor the Legislative Redistricting Board has done a comprehensive reapportionment of the judicial districts in Texas.

The public, interest groups and communities are welcome to participate in the redistricting process. This can be done by testifying before a legislative hearing or reviewing (or even drawing) maps on the www.redistricting.capitol.texas.gov website.

1. Unlike the district courts, the boundaries for the states' courts of appeals are determined by the legislature and may be redrawn

SCOTX Approves Use of Declaratory Judgment Act, Attorney's Fees Recovery in UIM Cases

In a decision that may throw open the door to a new frontier of attorney's fee litigation, a deeply divided Texas Supreme Court has permitted an insured to file a declaratory judgment action to adjudicate tort damages in an automobile accident involving an underinsured motorist and to recover attorney's fees. The decision appears to vitiate SCOTX's decision in *Brainard v. Trinity Universal Insurance Co.* (2006), which required the underlying tort claim in an accident between the insured and an underinsured driver to be adjudicated and the amount of damages established by judgment before the insured could proceed in a direct action against the insurer for breach of contract under the policy.

Legislation has passed the House in each of the last two sessions that would have overturned the *Brainard* decision, but the bill has not advanced in the Senate. This session **HB 359 by Rep. Charlie Geren (R-Fort Worth)** and **SB 1935 by Sen. Bryan Hughes (R-Mineola)** would have provided that an insured may provide notice of a claim for uninsured or underinsured coverage by giving written notification to the insurer that reasonably informs the insurer of the facts of the claim. It further provided that a judgment or legal determination of the other motorist's liability or the extent of the insured's damages is not a prerequisite to recovery in an action under §541.151, Insurance Code, for a violation of §541.060 (unfair settlement practices). Finally, it specified that the insured's only extra-contractual cause of action with respect to a UM or UIM claim is provided by §541,151 for damages under §541.152 (includes attorney's fees and court costs to the prevailing plaintiff) for a violation of §541.060.

The case, *Allstate Insurance Company v. Irwin* (No. 19-0885), arose from an automobile accident that injured Allstate's insured. The policy included $50,000 in underinsured motorist coverage. The insured settled with the underinsured driver for $30,000, her policy limits. He then notified Allstate, which offered $500. The insured sued Allstate under the Uniform Declaratory Judgment Act (Ch. 37, CPRC) seeking *a determination of his damages from the accident*, a declaratory judgment entitling him to recover under his UIM policy, and attorney's fees. A jury found the insured's damages from the accident to be nearly $500,000. Allstate tendered the policy limits and paid the court costs. The trial court, however, awarded attorney's fees to the insured under the UDJA. Allstate appealed the award of attorney's fees. The San Antonio Court of Appeals affirmed that the UDJA was appropriately invoked to determine the insured's entitlement to UIM benefits and affirmed the fee award.

In a majority opinion authored by Justice Devine, joined by Justices Blacklock, Lehrmann, Boyd, and Busby, the Court affirmed the Court of Appeals' decision. Citing a number of post-*Brainard* intermediate appellate decisions sanctioning the use of the UDJA in the UIM context, the Court held that because the insured did not have a mature breach of contract claim against Allstate (Allstate's liability under the policy had not yet been determined), his UDJA claim did not duplicate issues already before the trial court, so a declaratory judgment was therefore appropriate to assign rights and obligations under the policy. Once the Court determined the appropriateness of the use of the UDJA, it had no trouble signing off on the attorney's fee award. Because the UDJA gives the trial court the discretion to award fees that are equitable and just, absent evidence of an abuse of discretion the Court will not disturb such an award.

Chief Justice Hecht, joined by Justices Guzman, Bland, and Huddle, strenuously objected to the majority's analysis. The dissent saw *no* distinction between this case and *Brainard* and pointed out that the insured could have simply sued Allstate for breach of the policy, just as Brainard did. In fact, Chief Justice Hecht reminded the majority, Brainard actually *prevailed* on the breach of contract claim. The issue there was whether Brainard could recover attorney's fees under Chapter 38, CPRC, and the Chief Justice indicated in a footnote that he would now treat a UIM claim just like any other breach of contract claim under Chapter 38. By permitting the insured in this case to bring a tort action under the cover of the UDJA so that he could get his attorney's fees, Justice Hecht argues, the Court has now in effect *required* insureds to sue their insurers in a direct action under the UDJA because they cannot recover under a standard breach of contract claim, as Brainard did. As Justice Hecht observes,

> "The Court mandates the use of a TDJA action to try the tort issues used to determine the extent of UIM coverage. Here, the parties stipulated to the underinsured motorist's negligence, but in other cases, they might not. The UDJA action would then be, in every respect, indistinguishable from a simple tort suit. If the UDJA can be used that way in one situation, there is nothing to limit its use in all tort cases. That would provide an avenue for attorney-fee awards, not just in UIM cases, but in all tort cases."

If the Chief Justice is right, this decision could have very significant ramifications for tort litigation in Texas. We will keep you posted about whether Allstate files a motion for rehearing.

TEXAS CIVIL JUSTICE LEAGUE
400 W. 15TH Street
Suite 1400
Austin, Texas 78701
TCJL.com

PRSRT STD
US POSTAGE PAID
AUSTIN TX
PERMIT NO. 525

To unsubscribe from this publication, email info@tcjl.com with your name and address as it appears on this publication.

YES! I WANT TO ENCOURAGE MORE JOBS, NOT LAWSUITS.

Enclosed is my contribution to the Texas Civil Justice League PAC

PLEASE MAKE CHECKS PAYABLE TO Texas Civil Justice League PAC

$_____

_____
NAME

_____
MAILING ADDRESS

_____
CITY STATE ZIP

_____
PHONE E-MAIL

_____
*EMPLOYER *OCCUPATION

Contribute by Mail:
Texas Civil Justice League PAC
400 W. 15th Street
Suite 1400
Austin, Texas 78701

Contribute Online:
tcjlpac.com

E-mail:
info@tcjlpac.com

Phone:
512-320-0474

*This information required for reporting purposes. Corporate checks may be accepted for administrative purposes only and will not be used for political activity.

Political advertising paid for by Texas Civil Justice League PAC · 400 W. 15th Street, Suite 1400, Austin, Texas 78701