

**Texas Civil Justice League
2013 Session Report
June 3, 2013**

83rd Texas Legislature - Regular Session

The regular session of the 83rd Legislature ended on May 27. Governor Perry immediately called a special session to address congressional, House, and Senate redistricting in an effort to resolve ongoing legal challenges to the maps adopted by the Legislature in 2011. The Governor has indicated that he may widen the call to other issues in the coming days.

TCJL is pleased to report a generally successful and positive session for the civil justice system. Two of the League's legislative priorities this session—cleaning up the inactive docket for asbestos and silica cases and clarifying ownership of fracking waste for purposes of treatment and reuse—passed the Legislature and have already been signed into law. A first attempt to bring lawsuit lenders under state regulation did not pass, but this important and developing issue now has a place on the legislative docket for next session. Legislation addressing some of the complexities of the state's arcane statute governing oil and gas liens passed the Senate, but opposition in the House revealed considerable disagreement regarding the scope and purpose of the law. We expect this important issue to receive interim attention as well. Finally, TCJL worked with stakeholder groups to devise an appropriate legislative response to the Texas Supreme Court decision in the *Denbury* case. While no bill passed during the regular session, this issue is ongoing.

KEY ISSUES

1. Asbestos/Silica Inactive Docket

[HB 1325](#) by Rep. Doug Miller (R-New Braunfels) and Sen. Robert Duncan (R-Lubbock) permits dismissal of cases pending in the MDL asbestos/silica dockets in which the claimant has not served a complying report unless good cause is demonstrated for retention. The bill also extends limitations for re-filing when report can be obtained and provides for retroactive application of law in effect at the time the case was initially filed. The plaintiff's and defense asbestos bars negotiated the final version of the bill, which the Governor has signed into law. HB 1325 goes into effect on September 1, 2013.

2. Oil and Gas Waste Recycling

[HB 2767](#) by Rep. Phil King (R-Weatherford) and Sen. Craig Estes (R-Wichita Falls) clarifies that when fluid waste is transferred from the possession of the producer to that of a person who treats the waste for subsequent beneficial use, ownership of the waste transfers as well. The bill addresses producer concerns over liability for subsequent beneficial uses of treated waste fluid and will encourage treatment and recycling of such waste. Currently, liability fears compel most producers merely to dispose of fluid drilling waste in disposal wells. HB 2767 goes into effect on September 1, 2013.

3. Litigation Financing

[HB 1595](#) by Rep. Doug Miller (R-New Braunfels), would have required disclosure of agreements in which a plaintiff borrows money using his or her lawsuit as the asset securing the loan, placed litigation loans under the interest rate cap applicable to consumer loans generally, and subjected lawsuit lenders to regulation by the Office of the Consumer Credit Commissioner. HB 1595 was heard in House Judiciary & Civil Jurisprudence Committee. A substitute version of the bill was reported from committee, but did not make it to the House calendar. A related bill, [HB 1855](#) by Rep. Doug Miller (R-New Braunfels), dealt with disclosure of litigation financing agreements to parties in litigation. The bill was

not heard in committee.

The lawsuit financing industry supported [HB 1254](#) by Rep. Senfronia Thompson (D-Houston) and [SB 1283](#) by Sen. Kevin Eltife (R-Tyler). This bill would have sanctioned litigation financing, codified industry best practices, and required lenders to be registered with the Texas Department of Licensing and Regulation. HB 1254 was likewise heard in House Judiciary & Civil Jurisprudence Committee, but was not reported from committee. It is likely that this issue will be the subject of interim study and reappear next session in proposed legislation.

4. Oil and Gas Liens

[SB 1094](#) by Sen. Juan Hinojosa (D-McAllen) and [HB 1859](#) by Rep. Myra Crownover (R-Denton) addressed questions regarding the application of a section of the Texas Uniform Commercial Code to security interests in oil and gas proceeds. A Delaware bankruptcy court decision improperly applied Texas law by failing to recognize a perfected lien in oil and gas proceeds held by producers of the oil and gas. This case has cast a cloud over the interpretation of the statute, which may result in a downstream purchaser of oil and gas in the ordinary course of business having to pay twice for the same product. The bills sought to clarify that a producer lien is automatically perfected when it is created, and that a subsequent purchaser for value includes a purchaser who buys oil and gas by an exchange of value. SB 1094 did not advance beyond the committee stage in the House and will likely be the subject of further study this interim.

5. Common Carrier Pipelines

In response to the Texas Supreme Court's decision in the *Denbury* case, Sen. Robert Duncan (R-Lubbock) filed legislation establishing an administrative process at the Texas Railroad Commission for the issuance of common carrier pipeline permits. [SB 1637](#) required an applicant for a common carrier permit to notify the affected landowners, cities, counties, and the public by posting the permit application and map of the proposed route on the Internet, publishing notice in the newspapers, and mailing or delivering notice to the landowners, cities, and counties along the proposed pipeline route. The bill allowed landowners, cities, counties, and the RRC staff to protest the permit application and specifies a hearing procedure to be conducted at the commission. The bill further specified strict time limits for the hearing, the proposal for decision, and the RRC's final order. A party could appeal the RRC's final order in the same manner as in any other contested case hearing. TCJL supported this approach.

TCJL likewise supported legislation filed by Rep. Tryon Lewis (R-Odessa). [HB 2748](#) provided that the Railroad Commission's determination that an entity is a common carrier was not conclusive in a proceeding in district, statutory county court, and county courts unless the commission made that determination after notice, a hearing, and an opportunity to appeal. The bill further provided that an appeal of the RRC's determination of common carrier status is governed by existing law with respect to appeals of administrative decisions.

TCJL *opposed* an alternative common carrier bill introduced by Rep. Rene Oliveira (D-Brownsville). [HB 3547](#) would have prohibited a person who owns, operates, or manages a pipeline from exercising the power of eminent domain to construct a pipeline without a determination from the State Office of Administrative Hearings (SOAH) that the person is a common carrier. The bill defined "common carrier" to exclude a pipeline owner, operator, or manager unless at least 10 percent of the pipeline's capacity is used or is reasonably likely to be used to transport substances for one or more unaffiliated persons. To obtain a determination of common carrier status, the pipeline must have applied to the Railroad Commission and SOAH and undergone one or more SOAH hearings under the contested case procedure in the Administrative Procedures Act (Chap. 2001, Government Code). If

requested, at least one hearing had to be open to the public and held in the county where the pipeline would be located. SOAH had the discretion to have additional hearings in other affected counties. The introduced version of the bill did not specify whether judicial review of SOAH's decision is by trial de novo or substantial evidence.

PROCEDURAL

In addition to our priority legislation, TCJL worked with members of the House and Senate and stakeholder groups to address specific liability-related or procedural problems in the current system. For the most part, these matters passed with a consensus of the groups involved.

1. Filing of Medical Billing Records/Paid or Incurred

TCJL supports [SB 679](#) by Sen. Robert Duncan (R-Lubbock), which relieves the obligation to file medical records with clerk until time of trial, as long as the records are timely served on each party. The bill amends §§18.001 and 18.002 to permit "paid" or "actually incurred" amounts to be added to the affidavit. As originally filed, the bill may have inadvertently limited or overruled the *Escabedo* decision. At the behest of the Texas Association of Defense Counsel, language was added to the bill clarifying that that only amounts actually paid or incurred could be admitted at trial. SB 679 is awaiting gubernatorial action.

2. Health Care Claims

TCJL supports [HB 2843](#) by Rep. Kenneth Sheets (R-Dallas), which requires a claimant to file the expert report on each defendant not later 120 days of that defendant's answer (rather than the date of the original petition) and allows a defendant to object to the report not later than 21 days of the defendant's answer or service of the report, whichever is later. Although HB 2843 died on the House Calendar, the bill was later amended into [HB 658](#) (see below) in the Senate and has gone to the Governor for his signature.

3. Made Whole Doctrine

One of the most significant civil justice bills of the session addresses the "made whole doctrine," which the Supreme Court abrogated in the *Fortis* case. [HB 1869](#) by Rep. Fore Price (R-Amarillo) and Senator Duncan partially restores the doctrine as it relates to contractual liens in health insurance contracts. The bill establishes a proportionate recovery process that splits "first money" between the claimant and the insurer, which should ease the existing law disincentive to settle claims. The Governor has signed HB 1869, which takes effect January 1, 2014. TCJL supports this legislation.

4. Medicare Subrogation

[HB 658](#) by Rep. Kenneth Sheets (R-Dallas) tolls postjudgment interest on an unpaid balance of an award of damages subject to a lien held by the federal Centers for Medicare and Medicaid Services, as long as the defendant pays in response to a demand letter before the 31st day after receipt of the demand. TCJL supports this bill, which has been sent to the Governor for his signature.

5. Employment Law

Legislation to conform Texas law to the federal Ledbetter Act passed the Legislature and is on the Governor's desk. [HB 950](#) by Rep. Senfronia Thompson (D-Houston) and Sen. Wendy Davis (D-Fort Worth) clarifies that the statute of limitations for a wage discrimination claim runs from the date the discriminatory employment practice begins, not the date of the

compensation agreement between the employer and employee. Current Texas law provides that an employee must file an unlawful employment practice complaint with the Texas Workforce Commission civil rights division within 180 days after the alleged unlawful practice occurs. If the employee proves up the claim, he or she may recover up to two years of back pay. Appeal of the administrative review is to state district court. The net effect of HB 950 is to allow an employee who exhausts administrative remedies under current law to seek review in state court. A 2012 Texas Supreme Court decision had ruled that federal protections for wage discrimination did not extend to state law, forcing Texans to file legitimate claims in federal court (*Prairie View A&M v. Chatha*). TCJL supports HB 950 on the basis that the bill allows Texans a remedy for legitimate claims in the state courts their taxes support, maximizes judicial resources, reduces litigation costs, and encourages the expeditious settlement of claims at the administrative level.

6. Liability of Disaster Volunteers

Texas' recent experience with wildfires and other natural disasters has prompted two new legislators to file bills dealing with volunteer assistance in serious emergencies. [HB 487](#) by Rep. Cecil Bell (R-Magnolia) provides that the governing body of a city, the chief of a fire department, or a city emergency management director or coordinator may request or accept voluntary help, including the loan or operation of heavy construction equipment from a private owner or operator, that the designated authority believes necessary to respond to a hazardous or dangerous situation. The bill applies equally to assistance requested or accepted by a county commissioners court, county fire marshal, or incorporated volunteer fire department under contract with a county, or a county emergency management director or coordinator. HB 487 extends the same immunity from civil liability to an owner or operator of heavy construction equipment in these situations as currently exists for other volunteers. This bill has been signed by the Governor and took effect on May 24. TCJL supports this bill.

7. Barratry

TCJL supports [HB 1711](#) by Rep. Allen Fletcher (R-Tomball), which permits recovery of statutory barratry damages even if the attorney voluntarily voids the contract and adds a recoverable \$10,000 penalty. As amended in the Senate, the bill excludes an action to recover actual damages and a penalty for barratry from the expedited trial rule. HB 1711 is awaiting the Governor's signature.

8. Defamation Mitigation Act

TCJL supports [HB 1759](#) by Rep. Todd Hunter (R-Corpus Christi) and Sen. Rodney Ellis (D-Houston). The bill provides that a person alleging injury to reputation may only maintain an action against the publisher of the defamatory information if the person requests a retraction or correction, or if the publisher actually publishes a retraction or correction. A claimant must request the retraction or correction within the applicable limitations period, but if the request is not made within 90 days of receiving knowledge of the publication, the claimant cannot recover exemplary damages. A publisher has the right to request from the claimant further information relating to the alleged falsity of the information, and if the information is not provided, the claimant cannot recover exemplary damages unless the publication was made with actual malice. HB 1759 further defines the circumstances under which a published retraction or correction is timely and sufficient. Publication of a timely and sufficient retraction or correction immunizes the publisher from exemplary damages, unless the publication was made with actual malice. A request for retraction or correction is not admissible at trial, unless the publisher introduces the retraction or correction in mitigation of damages. Finally, HB 1759 requires a defamation action to be abated until a claimant files a sufficient request for retraction or correction. HB 1759 has been sent to the Governor.

9. Interlocutory Appeals

[HB 2935](#) by Rep. Hunter and Sen. Ellis clarifies that an interlocutory appeal may be taken from the denial of a motion to dismiss under §27.003, CPRC, which provides certain expedited hearing rules for motions to dismiss a claim based on the exercise of a constitutional right. The bill addresses a split among the courts of appeals on the issue. HB 2935 has been sent to the Governor.

INSURANCE

This session (as every session does) saw a great deal of activity on insurance-related issues, as described below.

1. Attorney-Client Privilege

[HB 1468](#) by Rep. Kenneth Sheets (R-Dallas) and [SB 926](#) by Sen. Joan Huffman (R-Houston) would have reversed *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012) by establishing that communications between an attorney representing a worker's compensation carrier and the employer (insured) in the administrative proceedings are protected by the attorney-client privilege. TCJL supported the legislation, which was opposed vigorously by TTLA and organized labor. HB 1468 passed the House and Senate committee, but died on the Senate Intent Calendar at the end of the session.

2. Workers' Compensation Bad Faith

[SB 1049](#) by Sen. Leticia Van de Putte (D-San Antonio) sought to reverse *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012), which abolished the common law cause of action for bad faith against a workers' compensation carrier. The bill received a hearing in Senate State Affairs, but never came out of committee.

3. Limits on Claims Against Insurers

Several bills dealing the claims process for property and casualty insurance were filed this session. [HB 1407](#) by Rep. John Smithee (R-Amarillo) would have mandated that automobile insurance policies permit an *insured* to invoke arbitration. [HB 1408](#) Rep. Smithee proposed to create an administrative dispute resolution process for claims brought under a policy issued by the Fair Plan. [HB 2956](#), also by Rep. Smithee, would have prohibited insurers from using a form that requires pre-dispute arbitration arising from most insurance contracts (excludes TWIA). None of these bills were heard in committee.

[HB 2125](#) by Rep. Van Taylor (R-Plano) provided claims under insurance policies governing property damage (excluding TWIA, Fair Plan, and Tex. Automobile Plan Association) must undergo an appraisal process (the cost of which as divided between the insurer and insured) as a condition to filing suit. The bill was reported out of House Insurance Committee late in the session and died in Calendars.

4. Statute of Limitations--Insurance

[HB 1651](#) by Rep. Smithee and [SB 851](#) by Sen. Larry Taylor (R-Friendswood) would have allowed an insurer in a homeowner or residential property insurance contract to limit the statute of limitations on first party claims to two years from the date of denial or three years from the date of loss. SB 851 was heard in Senate Business & Commerce but did not advance. HB 1651 was not heard in House committee, nor was [HB 2086](#) by Rep. Ruth Jones McClendon (D-San Antonio), which established a 4-year statute of limitations for claims

brought under Chapter 542 of the Texas Insurance Code.

5. Uninsured/Underinsured Motorist Actions

A number of bills affecting UM/UIM actions were proposed this session, but none passed. [HB 1773](#) by Rep. Ed Thompson (R-Pearland) would have barred an insurer from delivering, issuing for delivery, or renewing a named driver policy. The bill allowed an insurer to exclude individually named drivers, but not a class of drivers. HB 1773 passed the House but died in the Senate. TCJL opposed this legislation.

[HB 1558](#) by Rep. Stephanie Klick (R-Fort Worth) would have permitted an insured to recover attorney's fees against an insurer if the insured prevails in a UM/UIM action. [HB 1774](#), also by Rep. Ed Thompson, would have barred an uninsured claimant from recovering non-economic or punitive damages in an action arising from an automobile accident. These bills were never heard in committee.

OTHER CIVIL JUSTICE

Finally, TCJL became involved in a variety of civil justice-related matters on behalf of our membership. These include:

1. Technology Funding:

TCJL strongly supported [HB 2302](#) by Rep. Todd Hunter (R-Corpus Christi) and Sen. Royce West (D-Dallas), which establishes a statewide electronic filing system fund financed by a \$20 increase in filing fees. The bill passed both Houses and is awaiting the Governor's signature. Because the bill increases fees, it is likely to be closely scrutinized in the Governor's office, but TCJL and other civil justice organizations believe the bill is vitally necessary to improve the overall cost efficiency of court system and strongly urge the Governor to sign it.

2. Judicial Selection:

TCJL supports (and testified in favor of) [HB 2772](#) by Rep. Justin Rodriguez (D-San Antonio) and Sen. Robert Duncan (R-Lubbock), which calls for a joint Senate-House interim study of the judicial selection system in Texas. The study will cover the statutory, trial, and appellate courts. The interim study committee will report findings and recommendations to the 2015 Legislature. HB 2772 has been sent to the Governor. [SB 577](#) by Sen. Duncan, which established a non-partisan elect-appoint-retain system for judicial selection, and SB 103 by Sen. Dan Patrick (R-Houston), which eliminated straight-ticket voting in judicial races, both received a hearing in Senate State Affairs but did not get out of committee.

3. Unauthorized Capture of Image by Unmanned Vehicle:

[HB 912](#) by Rep. Lance Gooden (R-Terrell) and Sen. Craig Estes (R-Wichita Falls) imposes criminal and civil liability on a person who captures an image of an owner or tenant on private real property without consent under certain circumstances. Responding to industry concerns raised by TCJL and others, HB 912 was amended to ease its impact on legitimate uses of drone technology. Specifically, the bill allows electric utilities, pipeline operators, or entities that use satellite mapping to continue those operations without criminal liability (as long as the use of drone technology is without the intent to conduct surveillance on an individual or private property). It also clarifies that researching, developing, testing, manufacturing, assembling, distributing, or selling an unmanned vehicle or unmanned aircraft does not constitute a criminal offense. Images captured in connection with port authority surveillance and security, cattle ranching or agriculture and wildlife management,

oil and gas exploration, water supply safety, oil pipeline safety and rig protection, land surveying, agriculture or farming safety, or an air show are now exempt as well.

HB 912 also creates a civil cause of action for an owner or tenant of privately owned real property against a person who captures an image of the property or owner or tenant. The plaintiff may seek injunctive relief and recover a civil penalty of \$5,000 for all images captured in a single episode, or \$10,000 for disclosure, display, distribution, or other use of any images captured in a single episode. Actual damages are likewise recoverable if the person who captured the image discloses, displays, or distributes the image with malice. The bill was amended to clarify that all owners or tenants of a parcel of real property are considered to be a single owner or tenant for purposes of recovering civil penalties. Finally, a two-year statute of limitations was added to the bill.

4. Judicial Compensation

[SB 1](#), the General Appropriations Act, gives a much-needed pay increase of about 12% to state judges and justices. TCJL, TLR, TADC, TTLA, the State Bar, and other organizations interested in the judiciary strongly support the increase.

4. Exemplary Damages

[HB 3098](#) by Rep. Tryon Lewis (R-Odessa) sought to prohibit both the discovery and admissibility of a party's net worth as a component of exemplary damages. The bill was not heard in committee. TCJL supports this initiative and hopes that it will be reintroduced next session.

5. Appeals

[HB 3032](#) by Rep. Ana Hernandez Luna (D-Houston) required the Texas Supreme Court to adopt rules mandating the final disposition of appeals not later than one year after perfection and expedited resolution of interlocutory appeals within three months. The bill was not heard in committee. TCJL opposes this proposal.

6. Recusal

[HB 3380](#) by Rep. Todd Hunter (R-Corpus Christi) would have repealed §74.053(c)-(f), which govern objections to the assignment of a trial judge, and provides that a trial judge may only be recused or disqualified if timely motion is made and granted under Rule 18(a) or 18(b), TRCP. The bill was heard in House Judiciary & Civil Jurisprudence but did not advance.

Recent posts on www.tcjl.com

Second Pipeline Ruling from Beaumont Court

May 29, 2013

The Ninth District Court of Appeals in Beaumont issued a second decision involving a common carrier pipeline on May 23. In this case, *In re Texas Rice Land Partners, Ltd., James E. Holland, and David C. Holland* (No. [09-12-00484-CV](#)), relators petitioned the court of appeals for a writ of mandamus ordering the trial court to vacate a writ of possession issued to TransCanada Keystone Pipeline in conjunction with the pipeline's condemnation suit. The court of appeals denied mandamus.

The case arose from TransCanada's condemnation of an easement across land owned by Texas Rice Land Partners (TRL) for the Gulf Coast section of the Keystone pipeline project,

which extends from Cushing, Oklahoma to Port Arthur. Unable to settle on a purchase price for the easement, TransCanada filed a petition of condemnation. The trial court appointed special commissioners, who awarded compensation to TRL. TRL objected both to the amount of compensation and challenged TransCanada's common carrier status. TransCanada responded by filing a writ of possession. After holding two hearings, the trial court issued the writ of possession in favor of TransCanada.

After reviewing the relators' burden in proving an abuse of discretion by the trial court, the court of appeals evaluated TRL's claim that the trial court should have determined whether TransCanada was a common carrier under [§111.002](#), Natural Resources Code, before granting the writ of possession. The trial court reasoned that nothing in the *Denbury* decision requires or allows a pre-possession determination of common carrier status, and that whether a writ of possession may be granted is governed by [Chapter 21, Property Code](#), and is a separate question. As long as the condemnor pays the property owner the amount of damages and costs awarded by the special commissioners or deposits the amount of the award into the court's registry, the condemnor has constructive possession of the easement pending further litigation.

The court of appeals evaluated the evidence presented by TransCanada to the trial court supporting its common carrier status, which included testimony regarding the existing of several binding Transportation Service and Throughput Agreements with third party shippers under FERC tariffs. TRL, on the other hand, presented nothing to refute this evidence. Nevertheless, the court of appeals *did find that the trial court committed error* in failing to make a preliminary finding that TransCanada is, in fact, a common carrier, though the error was harmless in this instance. The court of appeals found that the trial court did not abuse its discretion in issuing the writ of possession and denied the petition for writ of mandamus.

The Ninth Court's opinion appears to regard common carrier status as an issue that should be "preliminarily decided" by the trial court in conjunction with the condemnation procedure under Chapter 21, Property Code. The full implications of this ruling are unclear, but it seems possible that condemnation proceedings concerning the level of compensation may now involve a full evidentiary review of whether the condemnor satisfies the *Denbury* test for common carrier status.

[HB 2767](#) Governor To Sign Fracking Waste Recycling Legislation

May 28, 2013

Governor Rick Perry has signed HB 2767 by Rep. Phil King (R-Weatherford) and Sen. Craig Estes (R-Wichita Falls), which clarifies ownership of oil and gas fluid drilling waste for purposes of treating and recycling such waste for subsequent beneficial use. HB 2767 clears the way for oil and gas producers to transfer their fluid waste to treatment companies for recycling rather than simply disposing of the waste in disposal wells. Prior to passage of HB 2767, the potential liability associated with future use of treated waste acted as a deterrent to recycling.

[HB 1325](#) Governor Signs Inactive Docket Legislation

May 28, 2013

Governor Rick Perry has signed legislation establishing a procedure for dismissing pre-2005 asbestos and silica claims from the inactive docket. HB 1325 by Rep. Doug Miller (R-New Braunfels) and Sen. Robert Duncan (R-Lubbock) allows the MDL court to dismiss claims

filed under the old law for which the medical criteria for determining impairment haven't been met. Those claims may be refiled in the future under the old law. TCJL is grateful to Rep. Miller and Sen. Duncan for their leadership on this issue.

Comptroller Susan Combs Not Seeking Re-election

May 29, 2013

My Future Plans

Dear Fellow Texans,

It is with a deep sense of gratitude for the past, coupled with excitement for the future, that I announce today I will not be seeking elective office in 2014. I want to make my intentions clear as soon as possible for prospective statewide candidates.

For the remainder of this article see: <http://susancombs.com/Future-Plans>

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