

TEXAS CIVIL  
JUSTICE  
LEAGUE

# JOURNAL

TEXAS CIVIL JUSTICE LEAGUE JOURNAL | MORE JOBS, NOT LAWSUITS

Fall 2019

## Inside this Issue

2019 Legislators of the Year .....	4
86th Legislative Session Report .....	6
Texas Civil Justice League Amicus Report .....	10
Eminent Domain: Why S.B. 421 was a Litigation Nightmare .....	14
Interim Study to Take Another Look at Judicial Selection .....	16
Paid or Incurred: Next Frontier of Tort Reform? Close Paid or Incurred Loophole .....	18

**TEXAS CIVIL  
JUSTICE  
LEAGUE**

**TEXAS CIVIL  
JUSTICE LEAGUE**

400 W. 15<sup>TH</sup> 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*

**Trey Jackson**

*Director, Information & Web*

**Alicia Glover**

*Comptroller*

# Board Of Directors

**Richie Jackson, Chairman**

Texas Restaurant Association  
*Executive Committee*

**Bill Oswald, Treasurer**

Koch Companies  
*Executive Committee*

**Jeff Bonham**

CenterPoint Energy  
*Executive Committee*

**Louis J. Goodman**

Texas Medical Association  
*Executive Committee*

**Robert Levy**

Civil Justice Reform Group  
& Exxon Mobil  
*Executive Committee*

**Todd Staples**

Texas Oil & Gas Association  
*Executive Committee*

**Hector Rivero, Vice Chairman**

Texas Chemical Council  
*Executive Committee*

**Leslie Ward, Secretary**

AT&T  
*Executive Committee*

**Jay Gibson**

Dow Chemical Company  
*Executive Committee*

**Travis Kessler**

Texas Association of Realtors  
*Executive Committee*

**Julia Rathgeber**

Association of Electric Companies  
of Texas  
*Executive Committee*

**Tom Sellers**

Conoco Phillips  
*Executive Committee*

**Corbin Van Arsdale**  
Associated General Contractors  
Texas Building Branch

**Eric Donaldson**

Altria Client Services

**Walt Jordan**

ONCOR Electric

**Kari King**

USAA

**Rob Looney**

**Nathan Morris**

U.S. Chamber of Commerce

**Amber Pearce**

Pfizer

**Richard Ponder**

Johnson & Johnson

**Sherena Shawrieh**

Valero Energy Corporation

**Paul Solomon**

State Farm Insurance

**Sonya Bishop**

Phillips 66

**John W. Fainter, Jr.**

**Sherman "Tiger" Joyce**  
American Tort Reform Association

**H. Lee Loftis, Jr.**

Independent Insurance  
Agents of Texas

**Julie Moore**

Occidental Petroleum

**Chris Newton**

Texas Apartment Association

**Steve Perry**

Chevron

**Julio Reyes**

AEP Texas

**Tara Snowden**

Zachry Corporation

**Jeanne Walker**

Shell Oil Company

***ex officio***

**Red McCombs**  
McCombs Enterprises

**Ralph Wayne**

# Chairman's Corner

by Richard Jackson

At this year's annual meeting I will turn over the reins to Hector Rivero, who will lead TCJL into the future. It has been an immense privilege to serve as Chair of the Executive Committee of this outstanding organization, and we can be justifiably proud of what we have accomplished working together for a civil justice system that serves all Texans fairly.

But as you know, the job is never done. When I first became associated with the League way back in 1986 (yes, I've been here since the beginning!), Texas suffered from a severe liability crisis that damaged the business climate and impeded economic development in the state. TCJL quickly began to turn things around, both in the Legislature and the courts. By 1995, landmark tort reform legislation had cleared the Legislature (which at the time had a Democratic majority, by the way), and Texas was on its way to having one of the most scholarly and well-respected Supreme Courts in the country.

As Texas grew and the economy became increasingly complex, however, new challenges arose. TCJL was there to meet these challenges, whether they involved foreign lawsuit forum shopping, mass asbestos litigation, construction liability, or, most recently, eminent domain. In the recently concluded 2019 legislative session, for example, TCJL took the lead on a wide variety of fronts, ranging from the submission of medical expenses in civil lawsuits to the standard of care in hospital obstetrical units to a sweeping reform of the state's anti-SLAPP law. And we still managed the Coalition for Critical Infrastructure's efforts to reach a workable compromise on eminent domain legislation and coordinated the business response to a battery of construction liability bills.

Our dedicated staff—Carol Sims, Lisa Kaufman, George Christian, Chantal Romo, and Trey Jackson—make all this possible. They have unmatched institutional knowledge of the Legislature, the judiciary, and the issues we work on every day. They are a professional resource that simply cannot be duplicated, and they have made TCJL one of the most well-respected and credible authorities in the Capitol. I am proud to have worked with them for all these years.

I have also been gratified and impressed by the close and productive collaboration that has developed between TCJL and our friends at Texans for Lawsuit Reform. We have long since learned that Texas is more than big enough for two organizations that look after our collective business and health care liability interests. I would like

to thank Dick Weekley, Dick Trabulsi, Lee Parsley, and Mary Tipps for their generosity in establishing a hand-in-glove working relationship that allows the two groups to maximize our impact by dividing up the issues, avoiding duplication of effort, and coming to the other's aid when most needed.

---

**“...TCJL took the lead on a wide variety of fronts, ranging from the submission of medical expenses in civil lawsuits to the standard of care in hospital obstetrical units to a sweeping reform of the state's anti-SLAPP law. And we still managed the Coalition for Critical Infrastructure's efforts to reach a workable compromise on eminent domain legislation and coordinated the business response to a battery of construction liability bills.”**

---

Finally, I want to re-emphasize the importance of the courts to the long-term health of the business climate in Texas. After having seen urban trial courts in Harris and Dallas County switch parties in prior elections, in 2018 we saw a seismic shift at the appellate court level. It is only a matter of time before the statewide courts, too, become competitive. We must stay engaged at this level, whether it is through the TCJL PAC or independent campaigns to promote a qualified and stable judiciary. We all know that what we win in the legislative process today may be lost in the courts tomorrow. This may be the most important task we can perform for the benefit of our state, and I urge all TCJL members to redouble their efforts to assist the League in any way possible to accomplish this.

Thank you again for allowing me to serve as your Chair. I am leaving the job in very good hands. ★



Chairman  
Texas Civil Justice League



2019

LEGISLATORS  
OF THE  
YEAR





# The Texas Civil Justice League is honored to recognize the following legislators for their outstanding service to the Texas civil justice system during the 2019 legislative session.



## **Rep. Jeff Leach (R-Plano)**

As Chair of the House Judiciary & Civil Jurisprudence Committee, Rep. Leach handled some of the most complex and important legislation of the session with patience, grace, and skill. Perhaps most notably, Chairman Leach spearheaded a much-needed overhaul of the Texas Anti-SLAPP statute (H.B. 2730), which not only aligns the statute more closely with its original intent but contains some of the most robust media protections in the country. In addition, he shepherded the judicial pay raise and omnibus courts bill through the House, passed significant construction-related legislation, cleaned up the hospital lien statute, authored an important campaign finance reform bill, and sponsored the first major reform of jurisdictional limits of Texas courts in decades. In short, Chairman Leach's leadership resulted in perhaps the most productive civil justice reform session since the last major tort reform effort in 2003.



## **Rep. John Smithee (R-Amarillo)**

As always, Rep. Smithee continues to build his legislative legacy of improving the civil justice system for all Texans. In 2019 he authored and helped negotiate a resolution to the procedure for submitting health care and other expenses in litigation (H.B. 1693), a relatively arcane but critically important aspect of personal injury and other lawsuits. He also sponsored legislation protecting employees called for jury service, passed a bill addressing guardianship abuse, fraud, and exploitation, and secured passage of court security legislation. As former Chair of both the House Insurance and House Judiciary & Civil Jurisprudence Committees, Rep. Smithee has earned our deepest gratitude and appreciation for his long service to the people of our state.



## **Rep. Stephanie Klick (R-Fort Worth)**

As first-time Chair of the House Elections Committee, Rep. Klick authored a much-needed reform of the Judicial Campaign Fairness Act. This bill eliminates unconstitutional provisions of the Act and clarifies confusing provisions that have for years bedeviled both judicial candidates and contributors

alike. She likewise clarified the rules corporations must follow to solicit PAC contributions and passed legislation pertaining to ballot security and voter information. In addition to her work in election law, she authored and sponsored numerous health care-related bills and successfully passed legislation authorizing the dispensation and use of low-THC cannabis.



## **Rep. Tom Craddick (R-Midland)**

Speaker Craddick needs no introduction to civil justice reform advocates. More than anyone else, he is responsible for the reforms of the early 2000's that have made Texas a beacon state for business and a leader in the global economy. As Chair of the House Land & Resource Management Committee in 2019, Speaker Craddick presided over consideration of eminent domain legislation. Proposed eminent domain legislation passed by the Senate would have adversely affected tens of billions of dollars of investment in vitally necessary energy infrastructure in the state by introducing uncertainty and additional litigation costs into the process. Speaker Craddick developed alternative eminent domain reform legislation that achieved the stated goals of landowners for additional transparency, fairness, and accountability in the system and shepherded the changes through the Texas House. Though legislation did not ultimately pass, Speaker Craddick's work on the issue sets a standard for workable reforms that will undoubtedly form the basis for going forward next session.



## **Sen. Bryan Hughes (R-Mineola)**

The list of important bills authored or sponsored by Chairman Hughes would take up the rest of this page but here are a few of the highlights: anti-SLAPP reform (H.B. 2730), expense affidavits (H.B. 1693), emergency care standard of proof (H.B. 2362), protection for business owners from gun violence on their property (S.B. 772), protection against frivolous actions by state agencies (S.B. 27), reform of civil penalties that may be collected by the Attorney General under the DTPA (S.B. 2140), and nearly 100 other bills. Chairman Hughes's unmatched experience and understanding of civil justice issues is invaluable to both to the Senate and to advocates for a fair and accessible civil justice system. We recognize him for his service to our state look forward to continuing to work with this outstanding legislator in the years to come. ★



# 86<sup>TH</sup> LEGISLATIVE SESSION REPORT

**T**he 86th Legislative Session began with a distinctly different tone than its predecessor. The November 2018 election registered voter dissatisfaction with an aggressively partisan approach that produced an overemphasis on social issues at the expense of addressing basic functions, primarily public education. The Lieutenant Governor narrowly won reelection, and if it hadn't been for a special election in which a Republican candidate won in a historically Democratic district, he would have lost his Senate supermajority as well. In the House, 12 Democrats turned Republican seats, shrinking the GOP supermajority and diminishing the influence of the Freedom Caucus even further. This shift played out in the race to succeed former House Speaker Joe Straus, as moderate candidates came to the fore. Eventually, veteran legislator Rep. Dennis Bonnen (R-Angleton), with strong backing from Republicans across the spectrum, as well as Democrats, won the gavel in a campaign that took place almost entirely behind the scenes.

Just as importantly, Governor Abbott backed the new Speaker in focusing on big issues: school finance reform, property tax limits, mental health, and rebuilding flood infrastructure in the wake of Hurricane Harvey. The Lt. Governor joined in, though his top legislative priorities continued to include hot-button base issues such as abortion restrictions, border security, voter fraud, religious freedom, and campus free speech. Still, particularly in the House, a far more bipartisan and even-tempered climate prevailed by and large for the whole session. While abortion-related and religious freedom bills roiled the waters somewhat, they did not produce the level of acrimony we have seen in the past. Moreover, the failure of a Senate initiative that Democrats believed designed to suppress minority voting got short-circuited in the House before it reached the floor. Meltdown averted.

When all was said and done, the Legislature passed a \$250 billion budget (16% higher than in 2017) with funds for teacher pay raises, mental health, buying down school property taxes, higher education, and other priorities. It also passed meaningful caps on property tax revenue increases for local governments and a school finance reform bill that reduces recapture by more than \$3 billion. Budget writers also used about \$6 billion from the Rainy Day Fund to finance Hurricane Harvey relief, a substantial contribution to the Teacher Retirement System for a so-called "13th paycheck" for retirees, and the usual Medicaid shortfall. Only one member in each chamber voted against it, whereas in the past conservatives would have raised a hue and cry about breaking into the state's piggy bank. While the big bills played out largely in personal diplomacy between the leadership and key committee chairs, a whole raft of new House chairs went about the business of churning bills out of committee. It seems that every House member (and even every Senator) got a chance to pass one or more bills of importance to him or her. With no one left out in the cold, and formerly alienated House members given important committee assignments and bills to carry, no one had much time for mischief.

With respect to civil justice issues, the 86th will go down as one of the most active and successful sessions for TCJL in many years, as you will see in the discussion below. Unquestionably, a major driver of this success was the appointment of Rep. Jeff Leach (R-Plano) as the new chair of the House Judiciary & Civil Jurisprudence Committee. A construction lawyer, Chairman Leach is deeply committed to improving the civil justice system and judiciary, and his collaborative approach to processing legislation in his committee paid big dividends for all stakeholders in the process. We would like to recognize the work of all the members of JCJ, in addition to Chairman





Leach: Jessica Farrar, Vice-Chair; James White; Reggie Smith; Morgan Meyer; Yvonne Davis; Julie Johnson; and Victoria Neave. While we didn't always agree with everyone on every issue, the members listened to our arguments and treated us with the utmost respect. It was a privilege to work with this group.

We are also grateful to Sen. Joan Huffman, who once again piloted the Senate State Affairs Committee, and its members, who ploughed through what seemed like a thousand bills in the closing weeks of the session—including those of intense interest to TCJL: Vice Chair Bryan Hughes (who carried two of our most important priorities this session); Brian Birdwell; Brandon Creighton; Pat Fallon; Bob Hall; Eddie Lucio; Jane Nelson; and Judith Zaffirini. Again, we appreciate the professionalism and courtesy with which this committee treated us and handled its important business.

Lastly, we thank Governor Abbott, Speaker Bonnen, and Lt. Governor Patrick for always giving us a fair shake. We could not be successful without a pro-business, pro-civil justice leadership team that allows us to fully debate the issues and reach the best policy outcomes possible.

---

## ATTORNEY DRUG ADVERTISING

---

**S.B. 1189 by Sen. Dawn Buckingham (R-Lakeway), Rep. Gio Capriglione (R-Southlake)**

*Signed by the Governor 6-7-19. Effective 9-1-19*

Requires a disclaimer on any attorney drug ad warning people not to stop taking their medicine without consulting with their physician; prohibits ads from containing misleading statements (i.e., “medical alert,” “health alert,” or

“public service announcement”), using governmental logos, or claiming a drug has been recalled if it has not.

---

## OIL & GAS TITLE DISPUTES

---

**H.B. 3372 by Rep. Tom Craddick (R-Midland),  
S.B. 1988 by Sen. Pat Fallon (R-Prosper)**

*Died in Calendars*

This bill addressed an industry practice known as “royalty suspense.” When an oil and gas company learns of competing claims to ownership of a royalty interest, the company will suspend payments until the title issue is resolved. This avoids (or at least mitigates) the company’s exposure to paying the royalty twice. For example, if the company believes that A owns a certain royalty interest based on title research, but B initiates a suit against A claiming that B is the legitimate owner of the interest, then B has a potential claim against the company for the money paid to A that should have been paid to B. The company can mitigate this exposure by suspending payments to A and waiting until the litigation is over to pay out the suspended funds.

The oil and gas industry has long considered that the suspense practice was protected by statute (§91.402(b), Texas Natural Resources Code) that allows for payments to be withheld without statutory interest for late payments if there is a “dispute concerning title that would affect the distribution of payments.” A recent Texas Supreme Court upset this reliance on the statute. The Court asked for “clear language from the Legislature” indicating an intent to allow oil companies to withhold royalty payments without liability

# Session Report

## 86<sup>th</sup> Legislative Session Report

for breach of contract claims in the event of a bona fide title dispute. Consequently, the Court's decision puts the company in the position of having to pay the same royalty to both the legal owner of the interest and a party that is not entitled to the royalty in the first place. If the company doesn't pay twice, it risks being sued for breach of contract and having to pay the other party's attorney's fees. Clearly, this is not the intent of §91.402(b), whose purpose is to avoid double payment of royalties.

H.B. 3372 would have solved the problem by amending §91.402(b), Natural Resources Code, to clarify that royalty payments may be suspended without giving rise to a claim for breach of contract in the event of a dispute concerning title which affects the distribution of payments.

---

### IMMUNITY FROM CIVIL LIABILITY FOR CHARITABLE ORGANIZATIONS IN DISASTERS

---

**H.B. 3365 by Rep. Dennis Paul (R-Houston)**

*Signed by Governor on 6-2-19, effective immediately*

Amends various sections of the CPRC to provide immunity from civil liability for negligence for charitable organizations and their representatives that provide assistance during a disaster.

---

### ALI RULE OF DECISION

---

**H.B. 2757 by Rep. Jeff Leach (R-Plano)**

*Signed by the Governor 6-10-19. Effective 9-1-19.*

Amends §5.001, CPRC, to specify that the American Law Institute's Restatements of Law are not controlling in Texas.

---

### EMINENT DOMAIN & CRITICAL INFRASTRUCTURE

---

**Comprehensive Eminent Domain**

**S.B. 421 by Sen. Lois Kolkhorst (R-Brenham), Rep. Tom Craddick (R-Midland)**

**H.B. 991 by Rep. DeWayne Burns (R-Cleburne)**

*Died in Conference Committee*

Comprehensive eminent domain legislation failed to pass this session, as in previous sessions. Despite diligent, good faith negotiations with landowners that began in January, stakeholders were unable to reach final agreement on the

bill. The heart of the bill, as filed, vastly expanded the potential for costly litigation and would have led to delay of vitally needed infrastructure projects. The final House version removed some of the logistical barriers and litigation incentives while still providing information to landowners regarding the basis for initial offers, standardized easement terms, and an opportunity for landowner meetings. It also addressed landowner concerns regarding right of way agent practices and the timing of special commissioners' hearings. Unfortunately, the differences could not be overcome as Chairman Craddick and Sen. Kolkhorst were unable to reach agreement in conference.

### Critical Infrastructure Protection

**H.B. 3557 by Rep. Chris Paddie (R-Marshall)**

**S.B. 2229 by Sen. Pat Fallon (R-Prosper)**

*Signed by the Governor on 6-14-19, effective 9-1-19*

Provides that a defendant who has engaged in an offense under §30.05, Penal Code, regarding causing damage to a critical infrastructure facility, is liable to the property owner for intentionally or knowingly damaging or destroying a critical infrastructure facility. Also creates an offense if a person enters or remains on or in a critical infrastructure facility with the intent to damage or destroy the facility or impair or interrupt the operation of the facility. Also imposed liability on an organization acting through an officer, director, or other person acting in a managerial capacity that knowingly compensates a person for causing damage to a critical infrastructure facility. Allows recovery of actual damages, court costs, and exemplary damages. Limits the penalty against a corporation or association for a criminal violation to \$500,000.

### Appraisals, Dismissal, Fees

**H.B. 1157 by Rep. Cecil Bell (R-Magnolia)**

*Died in House Land & Resource Management Committee*

- Added §21.0111(a-1), Property Code, to require an entity to disclose any new, amended, or updated appraisal report obtained after making the offer and used in determining the entity's opinion of value. The disclosure must be made by the earlier of ten days after the date the entity receives the report or the third business day before the date of a special commissioner's hearing, if the report is to be used at the hearing.
- Amended §22.019, Property Code, to add Subsection (b-1) directing a court to dismiss a condemnation



# Session Report

## 86<sup>th</sup> Legislative Session Report

proceeding if the court finds that the party that filed the petition failed to comply with any provision of §§21.0111 (disclosure of appraisal), 21.0112 (landowner bill of rights), 21.0113 (bona fide offer), and 21.012 (condemnation petition). If a court dismissed under this subsection, it must grant to the landowner reasonable and necessary fees for attorneys, appraisers, and photographers and for other expenses incurred by the property owner. The bill further amended this section to apply to the dismissal of part of a condemnation proceeding on motion of the condemnor. The effect of this change was to award fees and expenses to a landowner if the condemnor moved to dismiss only part of the action.

- Amended §21.012, Property Code, to require a court to dismiss a condemnation petition unless the entity proved that the petition met the requirements of this section and that the entity had complied with the notice to the landowner requirement.
- Repealed §21.047, Property Code, which, among other things, allows the special commissioners to adjudge the

costs of a condemnation against either party and directs a court to award costs to a condemnor if the special commissioners award is appealed and the court awards the same or a lesser amount to the property owner than the condemnor originally offered.

### Change in Use

**S.B. 555 by Sen. Charles Schwertner (R-Georgetown), Rep. Trent Ashby (R-Lufkin)**

*Died in House Land & Resource Management Committee*

Amended §23.46, Tax Code, to provide that land condemned for a right-of-way is not diverted to nonagricultural use if the right-of-way is less than 200 feet wide and the remainder of the parcel qualifies for agricultural use. Further provided that any additional taxes and interest imposed for a change of use is the personal obligation of the condemnor and not the property owner.


The proposed committee substitute eliminated the 200-foot corridor and provides that a portion of a parcel is not diverted to nonagricultural use because the portion is

*see Session Report, Page 24*

## 2020 ELECTION CANDIDATE TRACKING

<p><b>STATEWIDE</b> 10 Races 24 Candidates</p> <p><b>HOUSE</b> 150 Races 285 Candidates</p> <p><b>SPECIAL ELECTIONS</b> 3 Races 27 Candidates</p>	<p><b>SENATE</b> 16 Races 24 Candidates</p> <p><b>COURTS OF APPEALS</b> 24 Races 45 Candidates</p>
---	--

203  
Races
405  
Candidates


# TCJLPAC.COM

[tcjlpac.com/texas-elections](http://tcjlpac.com/texas-elections)

TCJLPAC.com currently provides candidate data tracking for at least **10 statewide races, 16 Senate races, 150 House races, 24 judicial courts of appeals races and 3 special elections** (scheduled for the November 5, 2019 special election date). That's **203 races with 405 potential candidates** — filing information, candidate data, and links to relevant candidate websites and social media accounts when available. And the filing window hasn't even opened yet.

**We tracked 400+ candidates across nearly 200 races through the last primary and general election cycles.**

**For the latest election updates  
Visit [TCJLPAC.com](http://TCJLPAC.com) Today!**



# *amicus curiae*

## TCJL Amicus Report

Despite the intervention of a legislative session, TCJL's *amicus* program remained in high gear in 2018-19. In filings before the Texas Supreme Court and Courts of Appeals, TCJL addressed issues of broad and vital concern to the Texas business community. 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 Academy, Ltd. d/b/a Academy Sports + Outdoors, No. 19-0497**

This case arises from the terrible mass shooting in Sutherland Springs, Texas in 2017. Fifty-six families brought suit alleging that a San Antonio Academy store illegally sold a firearm and ammunition to a Colorado resident who used the firearm to commit the crime. Academy sought to have the suit dismissed under the federal Protection of Lawful Commerce in Arms Act (PLCAA), which expressly immunizes retailers of firearms from liability for third party criminal acts. The trial court denied Academy's motion to dismiss and allowed the case to proceed, despite undisputed evidence that Academy complied fully with the background check requirement of the Federal Gun Control Act. TCJL's brief in support of Academy's petition for a writ of mandamus argues that the trial court's decision improperly interjects the judiciary into the public policy debate about the best way to inhibit gun violence in this country. By enacting PLCAA, Congress specifically excluded the courts from this debate in order to avoid the myriad problems of "regulation by litigation." We also argue that allowing

the lawsuit to proceed will likely draw a swift legislative response that should not have been necessary in the first place. The Supreme Court recently stayed discovery in the lawsuit to consider the merits of Academy's petition.

### **2. Credit Suisse AG, Cayman Islands Branch, and Credit Suisse Securities (USA) LLC v. Claymore Holdings, LLC., No. 18-0403**

This case arises from a Nevada real estate deal gone bad in the wake of the 2008 financial collapse. Claymore brought a fraud action in a Dallas district court, which, applying New York law, rendered a more than \$300 million judgment against Credit Suisse. The Dallas Court of Appeals affirmed. While the legal issues in the case involve the construction of the risk allocation provisions of the financing contract at issue, as well as the proper interpretation of New York case law, TCJL's brief addresses the urgency of Texas Supreme Court review in the interests of the jurisprudence of the state. The brief makes three arguments. First, as the Texas economy becomes more integrated with the global community, Texas courts will be called upon more frequently to resolve disputes arising from transactions in other states. The quality, fairness, and consistency of trial court decisions in these matters, not to mention the proper application of the law, is a primary concern in every case, regardless of the applicable state law. Second, the fact that Texas follows the Restatement (Second) of the Conflict of Laws to allow parties to contract for choice of law should not exempt Texas trial courts from review of their decisions by higher courts, particularly in cases with a nine-figure transfer of wealth





between litigants. Third, the trial court's interpretation of the contract in question implicates any real estate financing contract that might come within the purview of a Texas court. Each entity involved in this litigation regularly finances investments in large real estate projects across the country. They each operate at a high level of sophistication and retain experienced legal counsel to ensure that the financial risk in these transactions is fairly distributed among the parties. They realize that real estate markets may rise or fall (sometimes suddenly and dramatically, as they did in 2008), and that at times some or all of a particular investment might be lost. They each make complex investment decisions with their eyes wide open, relying on their own assessment of asset values and potential returns. They each owe fiduciary and other duties to their investors to use their independent judgment and expertise to protect their interests to the greatest possible extent. Every deal they make carries the risk that market will turn south and real estate developments will fail. They know this for a fact, and they utilize intensively-lawyered contracting practices to allocate risk accordingly. This case is about holding the parties to the deal they made. If that is not a question "important to the jurisprudence of this state," then TCJL is not sure what is. Decision on accepting review is currently pending.

**3. In re Occidental Chemical Corporation, Oxy Ingleside Energy Center, LLC, Oxy Ingleside LPG Terminal LLC, and Oxy Ingleside Oil Terminal LLC, No. 18-0660**

This case arises from a 50-year-old boundary dispute

between San Patricio and Nueces Counties that has resulted in the double taxation of Occidental and other taxpayers with property in the disputed area. In 2017 the Legislature enacted a statute giving original jurisdiction to SCOTX to resolve the dispute and determine to which jurisdiction the taxpayers owed property taxes. Occidental filed the action, and TCJL wrote an amicus brief in support of both the constitutionality of Legislature's intervention and the propriety of SCOTX determining the dispute. The Court agreed and ordered Nueces County to cease issuing tax statements to the affected taxpayers. Nueces County filed a motion for rehearing, which the Court denied on December 14, 2018.

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

Here an air ambulance service seeks to circumvent the statutorily mandated reimbursement rates under the workers' compensation system and claims entitlement to full billed charges against the workers' compensation carrier. It argues that the federal Airline Deregulation Act applies to air ambulance services and pre-empts the state workers' compensation system. This case is about the 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. Workers' compensation insurance only works because the Legislature has crafted a mechanism for ensuring prompt payment of defined benefits while controlling health care costs and keeping litigation, transactional, and administrative costs low. This Court has repeatedly upheld the Legislature's authority to do so and recognized that the integrity of the system depends on every part of the system functioning as the Legislature intended and designed. TCJL is now asking this Court to do it again.

Since the filing of the petition for review in May, 2019, PHI Air Medical gave notice of bankruptcy, following which SCOTX abated consideration. The Court reinstated Texas Mutual's petition for review on July 26, 2019.

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

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

Decisions such as *Burk Royalty* caused untold damage to Texas' business climate in the 1980s and beyond. The 1986 House/Senate Joint Committee on Liability Insurance and Tort Law Procedure denounced this case (and others like it) as "examples of judicial activism" that undermined the stability and predictability of the liability system. In response, the Committee recommended that the Legislature

overrule *Burk Royalty*, adopt a clear and convincing evidence standard for punitive damages, and cap punitive damages. At the urging of TCJL, the Legislature adopted the first cap on punitive damages in 1987. In its landmark opinion in *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994), this Court established a clear and convincing evidence standard and overruled *Burk Royalty*. And in 1995, the Legislature codified *Moriel*. The whole trend of Texas law since 1986 is toward fulfilling Justice Cornyn's admonition that punitive damages are exceptional in nature, and their award can only be justified in situations comparable to criminal punishment.

Moreover, the Court of Appeals decision tears a potentially grievous hole in the workers' compensation system. By diluting the definition of gross negligence and lowering the standard of review, the Court of Appeals seriously weakens the exclusive remedy that underwrites the provision of workers' compensation insurance benefits to begin with. Threatened with increasing numbers of ordinary negligence claims repackaged as "gross negligence" claims for punitive damages, employers might be forgiven for fleeing a system that has ceased to serve the beneficial purposes for which it was created. If decisions like this one go uncorrected, they could return us to the 19th-century condition in which an employee injured at work would have to file a civil lawsuit to recover his or her health care costs and lost wages. That might be a good outcome for certain legal practitioners, but certainly not for Texas businesses and their employees.

SCOTX denied review on May 31, 2019. Goodyear filed a motion for rehearing on June 17. The motion for rehearing is currently under consideration.

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

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

In 2003, the Texas Legislature passed a statute (Chapter 26, TCPRC) directing the Texas Supreme Court to use its rulemaking authority with respect to exhaustion of



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

Subsequent to the enactment of Chapter 26, the Texas Supreme Court amended Rule 42 to reflect the Legislature's mandates. Of course, the primary basis of Rule 42 is Federal Rule 23, adopted in 1937. Rule 42, like its federal counterpart, establishes standards for the appropriateness and certification

of a class action, as well as procedures for the appointment of class counsel and the calculation of the attorney's fees of class counsel. Neither Rule 42 nor its federal progenitor make any distinction between political subdivisions and other class members, and we can locate no state or federal authority that reads such a distinction into the rule.

In this regard, the Texas Supreme Court has opined that because Rule 42 is patterned on FRCP Rule 23, "federal decisions and authorities interpreting current federal class action requirements are persuasive authority." See *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000). Moreover, following federal precedent, the Supreme Court requires that courts "must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met. Although it may not be an abuse of discretion to certify a class that could later fail, we conclude that a cautious approach to class certification is essential." See *Bernal*, 435. The class action at issue in this case was settled and a final judgment issued in the same year as the *Bernal* decision. That judgment was subsequently upheld twice on appeal. See *Northrup and Wiesen v. Southwestern Bell Tel. Co.*, 72 S.W.3d 1 (Tex. App.— Corpus Christi 2001, no pet.); *Northrup and Wiesen v. Southwestern Bell Tel. Co.*, 72

*see amicus curiae, Page 38*



# TEXASJUDGES.org

Judicial races are "down ballot." What this means is that they're typically at the end of a very long list of items needing voters' attention. The Texas Civil Justice League is reminding Texans that ballot fatigue is bad for our state — we are urging voters to become educated and to vote all the way through their ballots. Join us and help your circle of influence understand that:

- **Judges are important.** They have a direct impact on citizens, perhaps more than any other elected official, because they make decisions that can affect jobs, homes, children and personal freedoms.
- **Voters must take the responsibility to educate themselves** about judicial races. And they must vote! Turnout is important, for both the primaries and the general election.
- **Texans need to elect judges who are fair, impartial and well qualified.** It's easy to run as a single-issue candidate, but judges with activist agendas are not good for Texas. Learn about the people on your ballot and vote for the ones who will do a great job for our state.
- **See TEXASJUDGES.org for judicial candidate comparisons**

**As Texans, we get to elect our judges. That's a big responsibility. Help us urge people to do their homework, to go to the polls, and to vote for good people who will make great judges.**

Eminent Domain: Why S.B. 421 was a

# LITIGATION NIGHTMARE

Since the failure of eminent domain legislation at the end of the 2019 legislative session, recriminations from the landowner side have reverberated through the halls of the Capitol and in the media. Much of the landowner animus has been directed against House Land & Resource Chair Tom Craddick. Chairman Craddick's version of the legislation (S.B. 421) passed the House and got to conference committee, but the Senate side did not come up with a counterproposal, thus killing the bill.

The Coalition for Critical Infrastructure (CCI) subsequently distributed a statement expressing its disappointment with the failure of the legislation and setting straight the facts about the bill's demise in the waning hours of the session. CCI also reiterated its determination to continue working toward a permanent legislative solution in 2021 so that Texas infrastructure development can move forward in a climate of certainty and predictability.

But in light of some of the allegations that have been made, it is important to emphasize that CCI could not agree to the Senate version of S.B. 421 and sought changes in the House primarily because the bill contained a series of technical requirements that would have been difficult, if not impossible, for entities seeking to acquire easements for pipelines or electric transmission lines to comply with. In each of the three main sections of the bill—the contents of the initial offer, the easement terms, and the landowner meeting—the failure to comply in every detail would have resulted in a violation of the statute punishable by abatement of the eminent domain process and the award of attorney's fees and costs.

S.B. 421 would have increased litigation and fee exposure in these specific instances:

1. Under current law, an entity seeking to acquire property for public use must make a bona fide offer to a landowner that includes, among other things, an initial written offer and a written final offer accompanied by a written appraisal, easement terms, and the landowner's bill of rights. Failure to

comply with the bona fide offer requirements may subject the entity to abatement and payment of attorney's fees. S.B. 421, however, substantially increased the burden of complying with the bona fide offer requirements by attaching additional requirements to the initial offer, including, for example, a requirement that the entity "participates in the property owner information meeting in the manner prescribed by Section 21.037." This section, added by S.B. 421, contains a long list of specific requirements, dispute over any of which could raise a compliance issue and trigger a "violation" of the bona fide offer requirement. By the same token, S.B. 421 also adds a laundry list of specific and technical items that must be included in the easement terms, a dispute over any of which would raise the issue of whether the entity provided a complying copy of the easement as part of the bona fide offer. Thus, the section of the bill designed to prevent "low-ball" offers (despite the fact that no evidence of systematically low initial offers has yet been presented) by requiring some objective basis for the initial offer is in fact a litigation trap that would actually drive initial offers to minimum level necessary for compliance with the statute. The current law works because compliance is straightforward and entities and landowners have flexibility to negotiate at the initial offer stage. S.B. 421 would put an end to this flexibility by heavily regulating the initial offer process and penalizing technical violations of the statute.

2. The same is true of the second section of the bill, dealing with easement terms. As it did in 2017, CCI sought agreement with landowner groups on easement terms that should be part of the easement form, subject, of course, to negotiations to



meet landowner needs in each individual case. While much progress has been made in this area with respect to specific easement provisions, the Senate version makes each provision of the easement subject to judicial review for technical noncompliance with the statute and imposes liability for costs and attorney's fees on the entity. The bill also makes the requirement easement terms vastly more complex, almost to the point that it might be better just to write a real estate contract into the statute so both sides know exactly what language complies with the law. It bears repeating that this section of the bill establishes an entirely new and independent basis for litigation prior to the final offer stage that does not exist in current law. It also potentially operates to ramify the non-compliance penalty because the same technical violation involving the easement terms also violates the bona fide offer requirement, which carries its own cost and attorney's fee penalty provision. And the bill does this with absolutely no analysis of the potential impact on entities, ratepayers, and consumers of project delays and increased litigation costs that these provisions may cause.

3. S.B. 421 required a landowner meeting for every 100 miles of a pipeline route. The bill further provided that a "majority of property owners" could not be required to drive more than 50 miles to attend the meeting. There are long stretches of rural Texas in which meeting facilities are few and far between, must less located exactly halfway on a 100-mile route. Conversely, if a pipeline or electric transmission line runs through a densely populated suburban area, there could be hundreds of affected property owners that must be accommodated in a meeting facility. The bill also allows a property owner to bring certain relatives and representatives to the meeting, up to a maximum of 5 persons per tract. It's not hard to foresee a scenario in which the property owner meeting might have to be held at a local high school football stadium. Finally, S.B. 421 contains a long list of items that must be covered at the meeting. And—you guessed it—if the entity neglects to discuss one item or a dispute arises about whether the entity adequately covered one or more items at the meeting, a court can abate the proceeding and make the entity pay the property owner's attorney's fees and costs. Moreover, the bill is unclear what it would mean if a court found that the entity violated the public meeting requirement and abated the proceeding. Does it mean that the entity has to have another public meeting to remedy a technical violation of the first one? How much would this cost? How long would it delay the project? Could this provision be used to slow down projects by mounting serial litigation based on alleged violations? Nobody knows.

**"...THE FAILURE TO COMPLY IN EVERY DETAIL WOULD HAVE RESULTED IN A VIOLATION OF THE STATUTE PUNISHABLE BY ABATEMENT OF THE EMINENT DOMAIN PROCESS AND THE AWARD OF ATTORNEY'S FEES AND COSTS."**


And again, the Senate conducted no analysis of the potential impact of these changes.

S.B. 421 also creates new law regarding the types of damages that may be considered by the special commissioners. The bill required the special commissioners to consider the characteristics, size, or visibility of any infrastructure on the condemned property or any limitation of future expansion of the remaining property. This language introduces a subjective measure of damages into the process for which no objective proof can be obtained. Eliminating the current law requirement that damages be based on a market value standard would undoubtedly produce more litigation and substantially raise the cost of acquiring right-of-way for these projects. And like the compliance issues listed above, no analysis of the increased costs associated with this provision was done.

These are the problems that Chairman Craddick attempted to address in the House version of S.B. 421. The House version addressed the same three areas of concern—initial offers, easement terms, and public meetings—but did it in a way that did not create litigation incentives and impose penalties for technical noncompliance. It also provided much-needed certainty to the process by imposing a 10-year repose on additional changes to the statute.

Given the sheer magnitude of infrastructure needs in Texas in the years to come, certainty and predictability in the law is paramount to the future economic development of our state and the prosperity of its citizens.

Finally, we should keep in mind that any changes to the law of eminent domain that apply to one type of entity will eventually be expanded to apply to them all. As we all know, S.B. 421 attempted to limit discussion to privately-owned pipelines and electric transmission lines (even though at times the bill arguably went beyond that). But as the bill's sponsors made clear in a press conference held when the bills were initially introduced in the Senate and House, whatever changes might be made to eminent domain as applied to private entities would ideally be extended to public entities at a future date. Indeed, it would be legislative malpractice for anyone representing the interests of entities that must from time to time resort to acquiring private property for public use to treat any changes to Chapter 21, Property Code, as limited to any given type of entity. That is why CCI exists and that is why it will continue to exist for as long as it takes to reach consensus on reforms that address property owner concerns without placing an undue burden on a growing public reliant on infrastructure development. ★



# Interim Study to Take Another Look at Judicial Selection

For at least the fourth time in the last 35 years, an interim study committee will examine possible reforms to Texas' method of electing judges. Each of the last four organized efforts—former Chief Justice John Hill's Committee of 100 in the mid-1980s, a joint House-Senate-citizen study in the late 1980s, former Lt. Governor Bob Bullock's initiative in the mid-1990s, and the Luce Commission in the late 1990s—has recommended a variation of merit selection in order to solve recurrent problems of wholesale turnover and the pernicious influence of money in judicial elections. In 2017, the Legislature decided to eliminate straight ticket voting, partly in the belief that it would reduce the effect of partisan sweeps in judicial races. The jury is out on this question, but in 2019 Governor Abbott threw his support behind an appoint-retain plan for the appellate and major metropolitan trial courts as a possible way forward. This plan is expected to be a starting point for the blue-ribbon panel when it is eventually appointed this fall.

HB 3040 charges the study committee, named the "Texas Commission on Judicial Selection," with reviewing the method of selection of all levels of trial and appellate courts, including statutory county court and probate court judges. It must specifically consider at each level of court whether partisan elections are "fair, efficient, or desirable," as well as the merits of selecting judges at each level by lifetime appointment, appointment for a term, appointment followed by either a partisan or nonpartisan retention election, partisan election for an open seat with nonpartisan elections for

incumbents, and using some kind of "public member board" to vet the qualifications of or nominate judicial candidates.

The 15-member commission will have a mix of elected and public members. The Governor has four unrestricted appointments. The Lieutenant Governor and Speaker each have four appointments, three of which must be senators or House members (and at least one of those has to be a Democrat). The other three members will be appointed by Chief Justice Hecht, Court of Criminal Appeals Presiding Judge Sharon Keller, and the board of directors of the State Bar of Texas. The commission's report is due on December 31, 2020, just in time for the 2021 legislative session.

What are the prospects for the commission's work? Unquestionably, the 2018 election results have gotten the attention of the state leadership. That election wiped out experienced Republican incumbents in every metro area but Fort Worth, and 2020 isn't shaping up to be any better. Past sweeps have generally hit only the district courts, but for the first time the courts of appeals suffered as well. Moreover, there is very real fear that the courts of last resort will soon follow suit. It bears remembering that when the current GOP statewide dominance geared up around the turn of the 1990s, lower ballot statewide races, such as the statewide courts, were among the first to turn red. Could the reverse trend be happening now? That remains to be seen, but there is good reason to think that this interim study will be conducted with more urgency than previous ones. ★





# TEXAS CIVIL JUSTICE LEAGUE 33<sup>rd</sup> ANNUAL MEETING

Wednesday | November 6, 2019

10:00 AM-11:30 AM  
Board of Directors Meeting

11:30 AM-1:00 PM  
Annual Meeting Luncheon

Moody Bank Building  
3<sup>rd</sup> Floor Auditorium  
400 W. 15<sup>th</sup> Street  
Austin, Texas 78701



# TEXAS CIVIL JUSTICE LEAGUE CONSTRUCTION LAW & RISK MANAGEMENT CONFERENCE

State Bar of Texas MCLE Course No. 17406371

Wednesday | November 6, 2019  
1:30 PM - 5:30 PM

Texas Medical Association Building  
Thompson Auditorium (1<sup>st</sup> Floor)  
401 W. 15<sup>th</sup> Street  
Austin, Texas 78701

All TCJL Members, Friends, and Legislative Staff Welcome

Attorneys will receive 3 Accredited CLE Hours



**RESERVE YOUR SEAT TODAY**  
**512-320-0474**

Event Details: [tcjl.com/events](http://tcjl.com/events)

RSVP: [rsvp@tcjl.com](mailto:rsvp@tcjl.com)









# Next Frontier of Tort Reform?

---

## Close the Paid or Incurred Loophole

---

One of the cornerstone provisions of the landmark 2003 tort reform legislation is §41.0105, Civil Practice & Remedies Code, the so-called “paid or incurred rule.” Enacted with the strong support of civil justice reform and health care organizations, the paid or incurred rule is designed to limit the recovery of medical or health care expenses only to the amount actually “paid or incurred” for the services. The courts have further interpreted this provision to limit recovery of such expenses to the amount reimbursed by third-party payors, such as private insurers or public programs like Medicare or Medicaid. The policy objective of the paid or incurred rule is to prevent inflation of “hard” economic damages in personal injury actions, partly because allowing such inflation raises the settlement value of cases involving health care expenses (and thus incentivizing more litigation by increasing the amount of attorney’s fees available in low-dollar cases) and partly because the cap on punitive damages is based on the award of economic damages. Clearly, if plaintiff’s lawyers could find an end run around the paid or incurred rule, it would have a substantial adverse effect on the design of the whole system.

Well, they may have found one. Three years ago TCJL and other groups began to sound the alarm about an emerging practice in personal injury litigation: the use of letters of protection. A letter of protection is an agreement between a plaintiff’s lawyer and a health care provider under which the provider agrees not to submit medical expenses to a third-party payor who may be obligated to pay those expenses in return for a promise to pay a higher amount out of an eventual settlement or judgment in the case. This arrangement allows the plaintiff’s lawyer to submit the full billed amount (the so-called “chargemaster” rate) as the amount “paid or incurred” for the claimant’s medical treatment.

Once submitted, the burden shifts to the defendant to prove that the rate is excessive, or, in other words, that it exceeds the reasonable and customary amount paid for the specific service in the area in which the service was provided. In order to prove that, the defendant must hire an expert and seek discovery of third-party reimbursement rates pertaining to the medical expenses involved in the case. Whether

# Next Frontier of Tort Reform?

## Close the Paid or Incurred Loophole

the defendant can actually get the information is another question altogether. Some trial judges may permit it, some may not. TCJL is aware of numerous cases, in fact, in which trial judges have denied such discovery and even stricken the defendant's retained expert on medical billing, particularly if the expert was not a health care provider practicing in exactly the same field as the treating provider. 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.

Among other things, the upshot of this situation is the revival of 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, plaintiff's lawyers have an incentive to take and file more cases. We can thus expect frequency and severity to start going up again after a period of relative stability. We can also expect defendants to reconsider whether to litigate claims where liability is a significant issue in light of the increased costs of discovery and higher exposure, particularly in urban trial courts roiled by mass turnover in recent elections. If this practice continues to spread, the paid or incurred rule will become a dead letter, eliminating a foundational part of the 2003 medical and general liability reforms.

**To illustrate the seriousness of the problem, consider the following (somewhat simplified) example:**

Dr. X is an orthopedic surgeon. One day Dr. X sees five patients. Each patient has the same injury: a herniated disc of approximately the same severity. Dr. X orders an x-ray and prescribes the same treatment protocol for each patient: a period of light activity, anti-inflammatory medication, pain management, and physical therapy. After two months of treatment, each of the five patients report no improvement in their condition. Dr. X orders myelogram for each patient, which reveals that the herniated disc is putting significant pressure on the nerves around the spinal column, causing moderate to severe pain and inhibiting the patients' daily activities in approximately the same way. Dr. X counsels each of the patients that a discectomy, in each case partial removal of the herniated disc, would be the best option to relieve the pain and allow the patients to return to normal life. Each patient agrees, and Dr. X schedules them for surgery at the local hospital on the same day. Dr. X performs surgery on each patient on the same day using the same operating room, the same anesthesiology team, and the same surgical staff.

Each patient recovers normally and is discharged at the same time. Each patient receives appropriate follow-up care in the same manner.

In a perfectly rational world, we would expect the cost of treating each of the six patients to be the same. But as we all know, this isn't a perfect world, especially when it comes to health care and medical billing. Here is the situation:

**Patient #1:** Patient #1 was getting out of bed one morning when he felt a twinge in his back. As the day wore on, the pain kept getting worse, to the point that he could not move around at all. He called Dr. X and set an appointment. When he got the appointment, he produced his insurance card upon request. He is covered by private health insurer Z, which requires a small co-pay. Dr. X is in-network and has an agreement with Z establishing reimbursement rates for Dr. X's services to Patient #1. Dr. X submits his bills to Z, and Z pays them accordingly. There is no question that Patient #1's injury is unrelated to his employment or to any negligence by a third party.

**Patient #2:** Patient #2 drives a delivery truck for her employer. While making deliveries one morning, Patient #2 is involved in a rear-end accident with another vehicle. Later that day and in the days that follow, Patient #2 suffers moderate to severe back pain, to the point that she cannot go to work. Patient #2 notifies her employer, who advises her to see an orthopedist for her back and provides her with a list of physicians approved by the employer's workers' compensation insurer. She selects Dr. X and makes an appointment. Dr. X treats Patient #2 as described above and submits his bills to the patient's workers' compensation insurer. The insurer concludes that the patient's injuries were incurred in the course and scope of employment and authorizes payment. Dr. X is reimbursed at the scheduled rates for the services he provides.

**Patient #3:** Patient #3, also a delivery truck driver, has exactly the same experience as Patient #2, but in this case her employer is a "non-subscriber" who self-insures for on-the-job injuries. In this case, the employer carries a health insurance policy for employees that likewise has an in-service network of which Dr. X is an authorized provider. Dr. X submits his bills to the insurer and is reimbursed according to contracted rates (similar to Patient #1). These rates may or may not be the same as the scheduled rates under workers' compensation insurance or the amount of reimbursement under a private health insurance policy covering a non-work-related injury. Here Patient #3 is satisfied with her medical care, returns to work, and does not talk to a lawyer.



# Next Frontier of Tort Reform?

## Close the Paid or Incurred Loophole

**Patient #4:** Patient #4 is in exactly the same position as Patient #3. In this case, however, she makes her first call after the accident not to her employer, but to a plaintiff's attorney whose advertisements she has seen on television. The attorney tells her not to worry, that he will get her a good doctor, and that she won't have to pay anything until she recovers in her case. The attorney then calls Dr. X, with whom she has a history of doing business in similar cases under letters of protection. Dr. X agrees to treat Patient #4 under a letter of protection and not seek reimbursement from the employee or from the non-subscribing employer's health insurance. The attorney files suit against the driver of the other vehicle and submits Dr. X's bills (chargemaster rates). The suit also seeks damages for pain and suffering and punitive damages for the driver's gross negligence. The driver's insurer defends the case and seeks discovery of the letter of protection and Dr. X's contracts with the employer's health insurer and other insurers to determine the reasonable and customary charges for Dr. X's treatment. The insurer also hires a billing expert to rebut Dr. X's bills. The trial judge denies discovery of the information and strikes the insurer's expert. The only evidence of "paid or incurred" medical expenses is the chargemaster rate for Dr. X's services. Rather than trying the case, the insurer settles for much higher medical expenses than a proper application of the paid or incurred rule would have entailed. The insurer then seeks reimbursement from the non-subscribing employer's insurer. More litigation ensues, and the non-subscribing employer's rates come to reflect it.

**Patient #5:** Patient #5 has a straight-up rear-end collision with no employer in the picture. She, too, watches television and calls a plaintiff's attorney. The attorney proceeds in the same way as in Patient #4's case. In this case, Patient #5 has private health insurance but does not notify the insurer of the injury. Under the letter of protection, Dr. X does not send his bills to the insurer. The negligent driver's liability insurer is put in the same position as in the case of Patient #4, but this time the insurer refuses to settle and contests the amount of medical expenses at trial. Predictably, the insurer loses because it can't get in any controverting evidence of medical expenses. More litigation. Everyone's rates come to reflect it.

[**Note:** There are also separately billed costs for hospital care, anesthesiology, physical therapy, medication, and other associated services in this example. They too could be treated the same way as Dr. X's expenses in each case.]

We can now see why the paid or incurred rule is so important. In each of the five cases, Dr. X provides the same services

and gets his bills paid. In each of the five cases, however, the amount Dr. X gets paid for the same services is not the same, as follows:

---

**CASE 1:** negotiated rate between Dr. X and private health plan

**CASE 2:** scheduled rate under the workers' compensation law

**CASE 3:** negotiated rate with non-subscriber's insurer

**CASE 4:** reimbursement determined by amount of settlement, but substantially greater than negotiated rates

**CASE 5:** reimbursement determined by amount of eventual award and judgment in the case, but could be substantially greater than negotiated rates

---

It is difficult to construct a rationale in support of this system. Health care providers are understandably frustrated at the levels of reimbursement by private and public payors, but using the civil justice system to balance the scales simply shifts costs to employers, insurers, and ultimately to consumers through higher premium costs and skinnier coverage. By holding health care expenses to the amount third party payors actually pay for services, the Legislature sought to prevent this from happening. Moreover, the paid or incurred rule is simply an extension of the general principle that an injured party has an obligation to mitigate damages, and submitting medical bills to a party obligated to pay them is the first order of mitigation. The letter of protection loophole is specifically designed to run up medical bills, thus inflating the value of a case and raising pressure on defendants to settle or face expensive and protracted litigation over expenses.

If we do not find a solution, much of the value of the 2003 reforms will be lost. We should also remember that the problem can occur in any personal injury claim, including a health care liability claim. Any party who may find itself defending such a claim has a stake in closing this loophole.

There is simply no time to lose. ★



Justice Jimmy Blacklock  
Randy Chapman



Justice Melissa Goodwin, Jennifer Freel



Chief Justice Tom Gray, Hon. Robert  
Duncan, Cory Pomeroy



Hon. John W. Fainter, Darren  
Whitehurst, Chris Newton



Justice Phil Johnson



Hon. Robert Duncan

# TEXAS CIVIL JUSTICE LEAGUE



Kari King, Paul Solomon, Sonya Bishop



Dr. George S. Christian, Bill Oswald



Julie Moore, Cory Pomeroy  
Rob Looney



Chief Justice Tom Gray, Justice Melissa  
Goodwin, Justice David Puryear





Paul Solomon, Kari King



Nina Hess Hsu, Chief Justice Tom Gray  
Rick Bradley



Hon. Tom Phillips



Ted Delisi, Harold Cook



Chief Justice Nathan Hecht



Hector Rivero

# 32<sup>ND</sup> Annual Meeting

November 8, 2018



Dr. George S. Christian



Lisa Kaufman



Bill Oswald



Carol Sims

# Session Report

## 86<sup>th</sup> Legislative Session Report

(continued from Page 9)

subject to a right-of-way that was taken by condemnation if the remainder of the parcel, evaluated as a single and contiguous parcel, qualified for agricultural use.

### Actual Progress

**H.B. 1253 by Rep. Ben Leman (R-Iola), Sen. Charles Schwertner (R-Georgetown)24**

*Died in House Land & Resource Management Committee*

Amended §21.101, Property Code, to change the definition of “actual progress” by requiring three of the specified actions 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 carved out navigation districts and port authorities, 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.

The proposed substitute retained the change in the definition of “actual progress” in the original bill (two to three actions) and amended §21.101(b)(3) to include the term “easement” along with the current language referring to preparation of a plan or plat. It added language that allows an architect, engineer, or surveyor described in §21.101(b)(3), Property Code (hiring of an architect, engineer, or surveyor as evidence of actual progress), to be an employee hired by a contractor working for the entity that acquired the property for public use. It further added a specific provision for a navigation district or port authority allowing the district or authority to establish actual progress by the completion of one of the actions described by §21.101(b) and the adoption of a development plan indicating that the authority will not complete more than one action before the 10th anniversary date of the acquisition of the property.

### Complaints to RRC

**H.B. 1919 by Rep. Ernest Bailes (R-Shepherd)**

*Died in House Land & Resource Management Committee*

Amended §402.031(b), Government Code (LOBOR/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 Texas Railroad Commission.

The proposed substitute retained the addition of language to the LOBOR regarding a written complaint against an entity regulated by the Railroad Commission for the entity’s alleged misconduct while exercising the right of eminent domain. The substitute added §81.0591(d), Natural Resources Code, authorizing a property owner to file such a complaint with the RRC. The substitute added §81.073, Natural Resources Code, to prohibit an entity regulated by the RRC from using a LOBOR to harass, intimidate, or mislead a property owner. Imposed a civil penalty of \$1,000 for the first violation and \$5,000 for subsequent violations, enforced by the attorney general.

### Reporting Challenges to Condemnation Authority

**H.B. 1987 by Rep. Ben Leman (R-Iola)**

*Died in House Land & Resource Management Committee*

Amended §2206.154, Government Code (reporting requirements for entities with eminent domain authority), to require an entity to report to the comptroller any court proceeding filed to determine the validity or extent of the entity’s eminent domain authority not later than 30 days after the date the proceeding is filed and the outcome of the court’s proceeding not later than 30 days after completion of the proceeding. Directed the comptroller to include on a separately maintained list an entity whose status is under challenge.

The proposed committee substitute required an entity that claimed in a report to the comptroller that it had eminent domain authority to notify the comptroller within 30 days a finding of a state court of competent jurisdiction that the entity does not have eminent domain authority. If the entity reported a finding, the comptroller must, as soon as practicable after receiving notification, reflect the finding in the eminent domain database. The substitute retained a requirement for a separate list of entities that a court has found do not have eminent domain authority.

### Notice of Hearing

**H.B. 2831 by Rep. Terry Canales (D-Edinburg)**

*Died on the Senate Intent Calendar*

Permitted notice of a special commissioners’ hearing in an eminent domain proceeding to be served by any manner provided by the Texas Rules of Civil Procedure.

### Pipeline Community Procedures

**H.B. 3327 by Rep. Erin Zwiener (D-Driftwood)**

*Died in House Land & Resource Management Committee*



# Session Report

## 86<sup>th</sup> Legislative Session Report

### The filed version:

- required a common carrier pipeline that intends to acquire property by eminent domain to notify the county judge of each county in which the pipeline will be located (as well as the county judge of a county whose boundaries are within five miles of the proposed route), and the board of directors of each groundwater district located in the county or in a county whose boundaries are within five miles of the route.
- required the notice to state the entity's intent to acquire property by eminent domain, specify that the public use is the construction and operation of an oil and gas pipeline, identify real property that the entity seeks to acquire and the property owners, and identify and provide contact information for all the persons to whom the notice is sent.
- prohibited the entity from contacting property owners before the 7th day after notice is sent. Permitted, not later than 60 days after the last recipient receives the notice, the county judges and affected water districts to confer and schedule a public meeting.
- required notice of the meeting not later than 30 days before the meeting.
- required a representative of the entity to attend and participate in the meeting.
- barred an entity that does not attend the public meeting from making a bona fide offer.

### The proposed substitute:

- applied to a common carrier pipeline, an entity granted the rights of a common carrier pipeline under §2.105, Business Organizations Code, or a gas utility as defined by §121.001(a)(2), Utilities Code.
- retained notice to the county judge, but limited it to counties in which the pipeline will be located.
- eliminated notice to the groundwater district.
- changed the contents of the notice to require only that it include information about the authority of the county judge to call a closed meeting of the commissioners court and state the deadline for the judge to respond to the pipeline operator.

- authorized the county judge to call a closed meeting of the court to discuss with the pipeline operator the proposed route or waive the right to call the meeting.
- gave the county judge 30 days to give a written response to the operator stating whether a meeting will be held.
- required the operator to coordinate with the county judge to schedule the meeting and arrange for representatives of the operator to attend.
- required a quorum of the court to convene in open meeting to announce the closed meeting and its purpose.
- allowed county staff to attend the meeting upon request of the judge or a commissioner.
- allowed the commissioners court to invite representatives of other political subdivisions and to share information regarding the route, including plans for future public infrastructure, planned developments, site-specific public safety concerns or environmental sensitivities, specific geologic or hydrologic concerns, and county open-space plans.
- barred the court from making specific recommendations regarding the specific tracts the proposed line should or should not cross.
- required the court to keep a certified agenda or recording of the closed meeting.
- authorized the court to conduct subsequent closed meetings before the operator contacted landowners.
- prohibited an operator from contacting property owners until the date the operator received a timely written response from the county judge, the 30th day after the date of the initial closed meeting, or, if the operator did not receive a timely response from the county judge, the 35th day after the operator sent the notice of intent to the judge.

### Separate Property

**S.B. 553 by Sen. Charles Schwertner (R-Georgetown), Rep. Trent Ashby (R-Lufkin)**

*Died in House Land & Resource Management Committee*  
Amended §402.031, Government Code, and §21.0114, Property Code, to require, if the initial offer includes property that the entity is not seeking to acquire by eminent domain, a separate identification of the real property that the entity did not seek to acquire by condemnation and a separate offer for that property.

# Session Report

## 86<sup>th</sup> Legislative Session Report

### Survey Access Disclosure

**S.B. 552 by Sen. Charles Schwertner (R-Georgetown), Rep. Trent Ashby (R-Lufkin)**

*Died in House Land & Resource Management Committee*

Amended §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 required that if the entity provides a form requesting permission to survey the property, the form must conspicuously make the same statements. Finally, the bill required 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, 2020.

---

## WORKERS COMP

---

### Cancer Presumption

**S.B. 2551 by Sen. Juan Hinojosa (D-McAllen), Rep. Dustin Burrows (R-Lubbock)**

*Signed by the Governor 6-10-19, effective immediately*

This bill clarifies existing law to now expressly include which cancers are subject to the presumption statute for firefighters and emergency medical technicians and are therefore compensable under the Workers Compensation Act. It also provides for the waiver of sovereign immunity in workers' compensation cases when a political subdivision is assessed a penalty by the Division of Workers Compensation. Political subdivisions will now be able to prudently invest funds to cover long-term costs like death benefits and lifetime benefits. The new law will also relax the statutory requirements to give an injured worker more time to provide his medical records prior the political subdivision having to make an initial determination.

### PTSD

**H.B. 2143 by Rep. John Turner (D-Grand Prairie), Sen. John Whitmire (D-Houston)**

*Signed by the Governor 6-14-19. Effective 9-1-19*

Last session, the legislature determined that PTSD is a compensable injury/disease under workers' compensation for

first responders based upon a single incident that occurred during the scope of employment. This bill expands that coverage to include an instance where multiple events resulted in the first responder suffering from PTSD.

---

## TCPA/ANTI-SLAPP TEXAS CITIZENS PARTICIPATION ACT

---

**H.B. 2730 by Rep. Jeff Leach (R-Plano), S.B. 2162 by Sen. Angela Paxton (R-McKinney)**

*Signed by the Governor on 6-2-19, effective 9-1-19*

Makes a number of amendments to Chapter 27, CPRC:

- Amends the definition of "Exercise of the right of association" to mean "to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern."
- Amends the definition of "legal action" to include declaratory relief. Excludes from the definition of "legal action":
  - (1) a procedural action taken or motion made in an action that does not add a claim for legal, equitable, or declaratory relief;
  - (2) alternative dispute resolution proceedings; or
  - (3) post-judgment enforcement actions.
- Amends the definition of "matter of public concern" to mean "a statement or activity regarding:
  - (1) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
  - (2) a matter of political, social, or other interest of the community; or
  - (3) a subject of concern to the public.
- Amends §27.003(a), CPRC, to require the action to be "based on or in response to a party's exercise of the right to petition, right to free speech, or right of association (removes the broad "relates to" language in current law) or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b)"(new Sec. 27.010(b) provides that the TCPA specifically applies to certain media organizations).

*see Session Report, Page 28*



# 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.



**TEXAS CIVIL  
JUSTICE  
LEAGUE**

For membership, please contact the Texas Civil Justice League by calling 512-320-0474 or by emailing [info@tcjl.com](mailto:info@tcjl.com)

400 W. 15<sup>th</sup> Street, Suite 1400  
Austin, Texas 78701  
512-320-0474  
[info@tcjl.com](mailto:info@tcjl.com)

[TCJL.com](http://TCJL.com)

# Session Report

## 86<sup>th</sup> Legislative Session Report

(continued from Page 26)

### Survey Access Disclosure

**S.B. 552 by Sen. Charles Schwertner (R-Georgetown),  
Rep. Trent Ashby (R-Lufkin)**

- Excludes from the definition of “party” a governmental entity, agency, or official or employee acting in an official capacity.
  - Amends §27.003(b) to allow the parties my mutual agreement to extend the deadlines for filing a motion.
  - Adds §27.003(c) and (d) to require the moving party to provide written notice of the date and time of the hearing not later than 21 days before the date of the hearing unless otherwise provided by agreement of parties or order of the court. The non-moving party must file the response no later than 7 days before the hearing unless otherwise agreed or ordered.
  - Amends §27.005(a) to require the court to rule no later than 30 days after the hearing concludes.
  - Amends §27.005(b) to require the court to dismiss if the moving party demonstrates that the legal action meets the requirements for dismissal (deletes preponderance of evidence standard).
  - Amends §27.005(d) to require the court to dismiss if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law (deletes “establishes by a preponderance of evidence each essential element of a valid defense to the movant’s claim.”)
  - Amends §27.006(a) to allow the court to consider evidence that a court could consider under Rule 166a, TCRP.
  - Amends §27.007(a) to provide that if the court awards sanctions (deletes at the request of the party), the court must issue findings.
  - Adds §27.0075 to specify that neither the court’s ruling on a motion to dismiss nor the fact that it made a ruling is admissible at any later stage of the litigation. Provides that the court’s ruling on a motion to dismiss in no way affects a burden or degree of proof in the action.
  - Amends §27.009 to make an award of sanctions permissive rather than mandatory. Limits recovery to reasonable attorney’s fees and court costs (current statute also allows other expenses). Also adds a new provision that if the court dismisses a compulsory counterclaim, it may only award attorney’s fees on a finding the counterclaim was frivolous or solely intended for delay.
- Amends §27.010, CPRC, to add several exemptions to the applicability of the statute:
    - (1) a legal action arising from an officer-director, employer-employee or independent contractor relationship that seeks recovery for misappropriation of trade secrets or corporate opportunities or seeks to enforce a nondisparagement agreement or covenant not to compete;
    - (2) a legal action filed under Titles 1, 2, 4, and 5, Family Code, or an application for a protective order made under Chapter 7A, Code of Criminal Procedure;
    - (3) a DTPA action other than one brought under §17.49(a), Business & Commerce Code;
    - (4) a legal action in which a moving party raises a defense based on §160.010, Occupations Code, §163.033, Health & Safety Code, or the Health Care Quality Improvement Act of 1986 (medical peer review);
    - (5) an eviction suit under Chapter 24, Property Code;
    - (6) a disciplinary act or proceeding under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure;
    - (7) a legal action under Chapter 554, Government Code (whistleblower actions), or
    - (8) a legal action based on a common law fraud claim.
  - Adds §27.010(b) to specify that the TCPA applies to communications for the creation, dissemination, exhibition, advertisement, or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including AV work, a motion picture, a television or radio program, or an article published in a newspaper, magazine, website, or other platform. Also applies the TCPA specifically to Yelp reviews and similar reviews of consumer opinions or business ratings.
  - Adds §27.010(c) to apply TCPA to a legal action against a victim or alleged victim of family violence or dating violence.



---

## COURTS & JUDICIARY

---

### Access to Courts

**H.B. 3336 by Rep. Jeff Leach (R-Plano),**

**S.B. 2342 by Sen. Brandon Creighton (R-Conroe)**

*Signed by the Governor 6-10-19, effective 9-1-19*

- Raises the cap on the amount in controversy for purposes of the expedited trial rules from \$100,000 to \$250,000 for county courts at law.
- Raises the maximum jurisdictional limit for statutory county courts from \$200,000 to \$250,000.
- Requires a jury in a case pending in a statutory county court in which the matter in controversy is \$250,000 or more to be composed of 12 members, unless the parties agree to fewer.
- Standardizes statutory county court jurisdiction in a number of counties to the \$250,000 cap (Angelina, Bosque, Hood, Jim Wells, Lamar, Wise, and Taylor).
- Raises the jurisdictional limit for JP courts from \$10,000 to \$20,000.

### Judicial Pay Raise

**S.B. 387 by Sen. Joan Huffman (R-Houston),**

**H.B. 2384 by Rep. Jeff Leach (R-Plano)**

*Signed by the Governor on 6-14-19, effective 9-1-19*

Raises the minimum base salary of a district judge from \$125,000 to \$140,000. The actual salary amount will be determined by the General Appropriations Act. This has the effect of raising the base salaries of appellate judges, which are set at 110% of a district judge's salary for the courts of appeals and 120% for the Supreme Court. The committee substitute also includes raises for statutory county court judges, probate judges, family judges, prosecutors, and others. Raises the monthly amount of longevity pay from .031 to .05% multiplied by the amount of the judge or justice's current monthly state salary and becomes payable after 12 (rather than 16) years of service.

### Omnibus Courts Bill

**H.B. 2120 by Rep. Jeff Leach (R-Plano),**

**S.B. 891 by Sen. Joan Huffman (R-Houston)**

*Signed by the Governor 6-10-19, effective 9-1-19*

**New Courts:** Removes Brazoria County from the 23rd Judicial District and creates a new Brazoria County district

court with preference for family law matters. Removes Medina County from the 38th Judicial District and creates a new district court for Medina County. Creates a number of new district courts, including courts in Travis, Guadalupe, Montgomery, Comal, Denton, Collin (two new courts, one with preference for family law and the other for civil matters). Creates county courts at law in Chambers, Comal, Ellis, Gillespie, Hidalgo (two), Rockwall, and Liberty Counties.

**Magistrates:** Allows magistrates to be appointed by the El Paso Council of Judges (criminal jurisdiction), Collin County Commissioners Court, and Fort Bend County Commissioners Court. Authorizes the Bell County Commissioners Court to select masters to serve the JP courts in truancy matters. Authorizes the Kerr County Commissioners Court to enable district and statutory county court judges to appoint magistrates.

**Court Reporters:** Requires service of notice of appeal under the TRAP to be served on each court reporter responsible for preparing the reporter's record. Provides that on the request of a court reporter who reported a deposition, a court reporting firm shall provide the reporter with a copy of the document related to the deposition, known as the further certification, that the reporter has signed or to which the reporter's signature has been applied. Creates an apprentice court reporter certification and a provision court reporter certification.

**Office of Court Administration:** Requires OCA to publish a list of new or amended court costs and fees every two years. Requires the OCA to develop and maintain a public website that allows a person to easily publish public information on the site. Requires the OCA to provide technical support to specialty court programs and to monitor specialty court programs for compliance with programmatic best practices. Allows a person required to publish citation or notice in a newspaper to publish the citation or notice only on the OCA's public information website if the person files a statement of inability to pay court costs under the TRCP, the total cost of the required publication exceeds the greater of \$200 or the amount set by the Supreme Court, or the county in which the publication is required does not have a newspaper. Shifts oversight of specialty court programs from the criminal justice division of the governor's office to the OCA. Directs the OCA to provide technical assistance to specialty court programs and to monitor compliance with programmatic best practices. (H.B. 2955 by Price)

# Session Report

## 86<sup>th</sup> Legislative Session Report

**Notice:** Requires the Supreme Court to adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence, if substituted service of citation is authorized under the TRCP. The Court shall adopt rules not later than December 31, 2020. Requires notice served by publication to be published on the public information website maintained by OCA as well as in a newspaper. If service is made by publication, proof of service consists of an affidavit made by the OCA that contains a copy of the published notice and states the date of publication on the OCA website.

Authorizes a district clerk to post an official and legal notice by electronic display rather than a physical document.

**Visiting Judges:** Changes the eligibility requirements for a retired former judge to allow a visiting judge to be appointed if the judge has not in the preceding 10 years been publicly reprimanded or censured by the State Commission on Judicial Conduct in relation to behavior on the bench or judicial duties, provided the judge served as an active judge for at least four terms in office, and has not been convicted of a felony or crime involving domestic violence or moral turpitude.

### Definition of “Person” for Purposes of Criminal Prosecution

**H.B. 2361 by Rep. Joe Moody (D-El Paso),  
S.B. 1258 by Sen. Dawn Buckingham (R-Lakeway)**

*Signed by the Governor 5-22-19, effective 9-1-19*

Amends various sections of the Penal Code to add a limited liability company or other entity or organization governed by the Business Organizations Code to the term “person” for purposes of criminal prosecution. The current definition includes only an “individual, corporation, or association.”

### Judicial Conduct Commission

**S.B. 467 by Sen. Judith Zaffirini (D-Laredo)**

*Vetoed by the Governor*

Required the Judicial Conduct Commission to report the number of pending complaints pending with the commission annually, the number of complaints pending for more than a year without decision, the number of complaints referred to law enforcement, and the number of complaints deferred pending criminal investigation. Required the JCC to post complaints and status of complaints on its website. Required the commission to establish guidelines for the imposition of sanctions to ensure each sanction is proportional to the judicial misconduct.

## What’s on the Web

facebook

@TCJL86

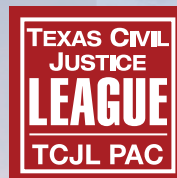
twitter

@TCJL86



**TCJL.COM**

Current articles & information of interest  
Legislative resources & summaries  
Amicus briefs  
Full details on races and candidates for:  
- Statewide races - Senate races  
- House races  
TCJL staff & board information  
TCJL publications back to 1988



**TCJLPAC.COM**

Current articles & information of interest  
Calendar for political events, fundraisers, elections, session info, etc  
TCJL PAC endorsements & press releases  
Judges, including a link to judicial candidate comparison on texasjudges.org



**TEXASJUDGES.ORG**

Current articles and information of interest  
Judicial candidate information for:  
- Supreme Court of Texas  
- Texas Court of Criminal Appeals  
- Texas District Courts of Appeals  
Texas court structure  
Judicial elections history  
Detailed race & candidate information  
Comparisons of 2018 judicial candidates

# Keep in Touch Online



Required the commission to establish a schedule outlining times for commission action on complaints.

### **Judicial Campaign Fairness Act**

**H.B. 3233 by Rep. Stephanie Klick (R-Fort Worth), Sen. Pat Fallon (R-Prosper)**

*Signed by the Governor on 6-2-19, effective immediately*

Repeals a number of potentially unconstitutional provisions of the Judicial Campaign Fairness Act, including: the requirement that a person intending to make certain levels direct campaign expenditures to support or oppose a judicial candidate file a written declaration of the intent to make those expenditures; the requirement that a candidate for judicial office file a written statement stating an intent to comply with the expenditure limits or to make expenditures that exceed the limits; the provisions that allows a complying candidate to lift the contribution, expenditure, and reimbursement of personal loan limits if an opposing candidate does not comply with the voluntary limits; the provision allowing a complying candidate to state voluntary compliance on political advertising; the expenditure limits; and the Judicial Campaign Fairness Fund.

### **Judicial Selection Study**

**H.B. 3040 by Rep. Todd Hunter (D-Corpus Christi), Sen. Joan Huffman (R-Houston)**

*Signed by the Governor 6-14-19, effective immediately*

Establishes a select committee on judicial selection. Applies to trial and appellate courts. The committee consists of four senators appointed by the Lieutenant Governor, four house members appointed by the Speaker, four members appointed by the Governor, and one member appointed by each of the president of the state bar, Chief Justice of the Supreme Court, and Presiding Judge of the Court of Criminal Appeals. The committee must report its recommendations by December 31, 2020.

---

## **CONSTRUCTION LAW**

---

### **Duty to Defend**

**H.B. 1211 by Rep. Drew Darby (R-San Angelo)**

*Died on Senate Intent Calendar*

As occurred last session, this spring we saw a wide range of bills proposing significant changes to construction law and contracting practices. Some proposals focused on construction of public works, while others dealt with the allocation of risk in

private construction projects. The primary focus of discussion this time was H.B. 1211 by Rep. Drew Darby (R-San Angelo), which barred a property owner from contracting with a design professional (engineer or architect) for the defense of claim arising from a construction defect. The bill also contained a limitation on contracting for a specific standard of care for a design professional. Despite intensive negotiations with Rep. Darby and the engineers, we were unable to reach a compromise. The bill passed the House, but failed in the Senate, partly because its Senate sponsor, Sen. Kolkhorst, used the bill as a vehicle for reviving her eminent domain bill, S.B. 421.

### **Design Defects**

**H.B. 2901 by Rep. Jeff Leach (R-Plano)**

*Died in House Calendars*

Legislation fundamentally changing Texas construction law with respect to contractor responsibility for design defects was introduced again this session. H.B. 2901 by Chairman Jeff Leach (R-Plano) provided that a contractor is not responsible for defects in, and may not warranty, the adequacy, suitability, accuracy, or sufficiency of plans, specifications, or other documents provided to the contractor by the client entity or client representative, including design professionals. The bill as filed also barred the waiver of this provision by contract. TCJL worked with Chairman Leach to amend H.B. 2901 to exempt property owners who own or operate critical infrastructure projects, as that term is defined in the Government Code. The amendment went on the bill before it came out of committee. The bill, however, never made it to the House floor. We expect to see it again next session.

### **Contract Documents**

**H.B. 2268 by Rep. Senfronia Thompson (D-Houston)**

*Died in House Calendars*

A third bill that TCJL worked extensively to amend was H.B. 2268 by Rep. Senfronia Thompson (D-Houston). As originally filed, this bill would have rendered voidable any provisions in a construction contract that was incorporated by reference and was not provided in hard copy to a general contractor or subcontractor. This bill raised very significant concerns for industry, which routinely requires contractors to comply with myriad safety and other requirements incorporated into their contracts. Working with Rep. Thompson's office, TCJL successfully amended the bill to provide that such documents could be provided electronically through a vendor portal on the owner's website. We also worked on a more general exception for critical infrastructure

# Session Report

## 86<sup>th</sup> Legislative Session Report

facilities, which frequently involve complex engineering standards incorporated by reference. H.B. 2268 cleared the House Business & Industry Committee but did not proceed to the House floor.

---

### Other Construction Law

---

#### School District Construction Defects

**H.B. 728, H.B. 1734 by Rep. Justin Holland (R-Rockwall)**

*Signed by the Governor on 6-14-19, effective 9-1-19*

Requires a school district that brings an action for damages for a construction defect to provide the Commissioner of Education with a copy of the petition, by registered or certified mail, not later than the 30th day after the action is filed, or the action will be dismissed. The dismissal extends the statute of limitations for 90 days. If the district receives state assistance for facilities, the commissioner may join the action. The district must use the proceeds of the action to repair the defect and ancillary damage to furniture or fixtures, the replacement of the damaged facility, the reimbursement of the district for repairs, or any other purpose with the approval of the commissioner. Gives the Attorney General additional authority to enjoin a violation of this section recover the state share of any recovery, if the state has provided part of the financing for the construction of an instructional facility that is the subject of the suit. Also authorizes the Attorney General to recover a \$20,000 civil penalty.

#### Right to Repair - Public Projects

**H.B. 1999 by Rep. Jeff Leach (R-Plano)**

*Signed by the Governor on 6-14-19, effective immediately*

Requires a governmental entity (the state and local governments), before bringing an action against a contractor or design professional for a construction defect, to provide each party with whom the entity has a contract for construction or design of an affected structure a written report by certified mail, return receipt requested, that clearly identifies the specific defect, describes the present physical condition of the affected structure, and describes any modification, maintenance, or repairs to the affected structure by the governmental entity or others since the structure was initially occupied or used. Requires the contractor to provide a copy of the report to each subcontractor whose work is subject to the claim. Allows the opportunity to inspect within 30 days and to correct within 120 days after inspection. Provides that an entity is not required to allow a party to make a correction or repair if

the party cannot provide a bond, provide liability insurance or workers' compensation insurance, has previously been terminated for cause, has been convicted of a felony. Also provides that the entity is not required to allow the party to make a correction or repair if the entity has already complied with the process and the defect was either not corrected or the attempt to correct the defect or related condition resulted in a new construction defect or related condition. Tolls the limitations period for one year after the report is sent, if it occurs in the final year of the limitations period. Provides that the entity can recover the costs of the report if it prevails in the action or a correction or repair is made. Requires an insurer to treat written notice of a defect or receipt of a report to the party as filing a suit asserting a claim against the party for purposes of the relevant policy terms.

#### Certificates of Merit

**H.B. 2440 by Rep. Matt Krause (R-Fort Worth),**

**S.B. 1928 by Sen. Pat Fallon (R-Prosper)**

*Signed by the Governor on 6-10-19, effective immediately*

Amends §150.002, CPRC, to require the third-party professional who gives a certificate of merit on behalf of a claimant against a licensed professional to practice in the same area as the defendant (current law merely says "knowledgeable" in the defendant's area of practice).

#### Design Defects - Road Projects

**H.B. 2899 by Rep. Jeff Leach (R-Plano)**

*Signed by the Governor on 6-2-19, effective immediately*

Provides that a contractor operating under a contract with a governmental entity for the construction of a road, highway, bridge, tunnel, overpass, or other highway extension, is not responsible for defects or the consequences of defects in the adequacy, accuracy, sufficiency, or suitability of plans, specifications, or other design or bid documents provided to the contractor by the governmental entity or a third party under a separate contract with the governmental entity. Applies to the state and political subdivisions of the state. Also provides that a governmental entity may not require the engineering or architectural services be performed to a level of professional skill and care beyond the level that would be provided by an ordinarily prudent engineer or architect with the same professional license and under the same or similar circumstances in a contract for engineering or architectural services or that contains engineering or architectural services as a component of the contract.



### Waiver of Sovereign Immunity

**H.B. 1185** by Rep. John Cyrier (R-Lockhart),

**S.B. 737** by Sen. Bryan Hughes (R-Mineola)

*Died on the House Calendar. Senate companion never received a hearing.*

Amended §114.003 and §114.004, CPRC, to expand the waiver of sovereign immunity to a suit against a state agency for breach of contract by removing the limitation that the waiver only applies to a claim for break “of an express provision” of the contract. The bill also allowed recovery of increased costs directly resulting from owner-caused delays or acceleration regardless of whether the contract expressly provided for that compensation, as well as the recovery of just and equitable attorney’s fees, regardless of whether the contract expressly provided recovery of attorney’s fees to all parties to the contract.

### Construction Defects - Statute of Repose

**H.B. 1737** by Rep. Justin Holland (R-Rockwall)

*Died in House Calendars*

The committee substitute reduced the statute of repose for a claim against a contractor, registered or licensed architect, engineer, interior designer, or landscape architect from 10 to 7 years arising out of a defective or unsafe condition of real property, an improvement to real property, or equipment attached to real property.

---

## CIVIL PROCEDURE

---

### Expense Affidavits

**H.B. 1693** by Rep. John Smithee (R-Amarillo),

**S.B. 1465** by Sen. Bryan Hughes (R-Mineola)

*Signed by the Governor on 6-10-19, effective 9-1-19*

Amends §18.001, CPRC, to:

- Modify the deadlines to give a defendant additional time to determine whether to controvert the affidavit. The deadline would run from the earlier of 120 days after the defendant files an answer or the date the offering party must designate expert witnesses under a court order; and
- Clarify that the affidavit does not support a finding of the causation element of the claimant’s underlying cause of action. It also clarifies that a counter-affidavit may not be used to controvert the causation element of the claimant’s underlying cause of action.
- Also provides that if services are first provided after 90 days after the defendant files its answer, the plaintiff must

serve the affidavit by the date the plaintiff must designate an expert under the TRCP. The defendant may file a counter-affidavit by the later of 30 days after service of the affidavit or the date the defendant must designate an expert under the TRCP.

### Court Proceedings During a Disaster

**S.B. 40** by Sen. Judith Zaffirini (D-Laredo),

**H.B. 2006** by Rep. Jeff Leach (R-Plano)

*Signed by the Governor 6-7-19, effective Immediately*

Extends from 30 to 90 days the duration of an order of the Supreme Court to modify or suspend procedures for the conduct of any court proceeding affected by a disaster declared by the governor. Authorizes the presiding judge of an administrative judicial region to modify the terms and sessions of a district court or statutory county court in the district affected by a disaster, with the approval of the affected judge. Does the same for statutory probate courts (by the presiding judge of the statutory probate courts), county courts (by the presiding judge of the administrative judicial region, with the approval of the county judge), and justice courts and municipal courts (with the approval of the judge of the affected courts). Alternate locations may either be in the county or outside the county, with the approval of the presiding judge of the administrative judicial district in that county.

### LLC Acknowledgment Form

**H.B. 1159** by Rep. Four Price (R-Amarillo)

*Signed by Governor on 5-14-19, effective 9-1-19*

Amends §121.006(b), CPRC, to add to the definition of “acknowledged” in an acknowledgment form a member, manager, or authorized officer acting for a limited liability company when the member, manager, or authorized officer acknowledges before the officer taking the acknowledgment that the person is acting on the LLC’s behalf for the purposes and consideration expressed in the instrument.

### MDL Transfer

**S.B. 827** by Sen. Joan Huffman (R-Houston),

**H.B. 2083** by Rep. John Smithee (R-Amarillo)

*Signed by the Governor on 6-2-19, effective 9-1-19*

Removes from the MDL transfer process cases for Medicaid fraud under Chapter 36, Human Resources Code, and actions brought under the DTPA not covered by the laundry list in §17.46 (actions brought by consumers for specified deceptive acts and practices).

# Session Report

## 86<sup>th</sup> Legislative Session Report

### Collection of Judgment

**S.B. 2364 by Sen. Bryan Hughes (R-Mineola)**

*Signed by the Governor on 6-14-19, effective 9-1-19*

Amends §31.002(a), CPRC, to include a justice court in the courts of appropriate jurisdiction required to assist a judgment creditor in collecting a judgment. 4

### Limitation in Arbitration Proceeding

**H.B. 1744 by Rep. John Smithee (R-Amarillo)**

*Died on House Calendar*

Adds §171.004, CPRC, to prohibit a party from asserting a claim in an arbitration proceeding if the party could not bring suit for the claim in a court because of limitations, unless the party brought suit for the claim in a court before the expiration of the limitations period and a court ordered the parties to arbitrate the claim.

### Arbitration Agreements

**H.B. 2375 by Rep. Julie Johnson (D-Carrollton)**

*Died in House Judiciary and Civil Jurisprudence*

Adds §171.0221, CPRC, to prohibit a court from enforcing an arbitration agreement in a dispute that had not yet arisen at the time the agreement was made if the agreement requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute or would have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under federal or state law. Does not apply to an agreement to arbitrate between an employer and a labor union or between labor union.

### Offer of Settlement

**H.B. 2500 by Rep. Julie Johnson (D-Carrollton)**

*Died in House Judiciary and Civil Jurisprudence*

Amended §§42.002 and 42.005, CPRC, to allow any party to an action to invoke the offer of settlement procedure. The current law only allows defendants to invoke it. Directed the Supreme Court to adopt rules implementing the change by January 1, 2020.



**PGA National Resort & Spa  
West Palm Beach, Florida  
November 11-13, 2019**



**2019 LEGISLATIVE CONFERENCE  
FOR STATE COALITION LEADERS**

ATRA.org | Registration: [mfullenbaum@atra.org](mailto:mfullenbaum@atra.org)



## Disclosure of Experts

**H.B. 2825 by Rep. Charlie Geren (R-Fort Worth)**

*Died in House Judiciary & Civil Jurisprudence*

Added Subchapter D, Chapter 22, CPRC, to require a party to disclose to all other parties the identity of any expert witness the party may use at trial. Provided that if an expert witness is retained or specially employed for the case, or if the party has an employee who regularly gives expert testimony, the disclosure must be accompanied by a written report that: (1) contains a complete statement of all the opinions to be expressed and the basis or reasons for those opinions; (2) the facts and data relied on by the witness to form an opinion; (3) copies of any exhibits; (4) the witness's qualifications, including all publications in the preceding 10 years; (5) a list of other cases in which the witness has testified in the last four years; and (6) a statement of the compensation paid for study and testimony in the case. If the witness is not required to file a report, then the disclosure must only include the subject matter of the witness testimony and a summary of the facts and opinions to be presented. Unless otherwise stipulated by the court, the disclosure must be made no later than 90 days before trial or, for rebuttal evidence, 30 days after the date of the other party's disclosure. Bars discovery of a communication between an attorney and expert witness made in anticipation of litigation or deposition or for trial, but does not bar discovery of the compensation to be paid to the witness, or facts, data, or assumptions supplied by the attorney and that the witness relied on in forming an opinion. Bars discovery of a draft of a written report or other disclosure under this chapter.

## Transfer of Venue

**H.B. 3238 by Rep. Brooks Landgraf (R-Odessa)**

*Died in House Judiciary & Civil Jurisprudence*

Added §15.0635, CPRC, to require the court to transfer an action to another county of proper venue if the court finds, based on the petition and affidavits of the parties: (1) the defendant was joined for the primary purpose of establishing venue in a county that would not otherwise be a county of proper venue; or (2) the facts pleaded concerning the defendant who is the connection to the county is the primary basis for establishing venue in the county are materially false. Permitted the court to consider whether the trier of fact would impose significant liability on the defendant, or the plaintiff who joined the defendant has a good faith intention to prosecute the action and seek judgment against the defendant. Made a judge's decision to transfer reversible error.

---

## MEDICAL LIABILITY

---

### ER Standard of Care

**H.B. 2362 by Rep. Joe Moody (D-El Paso),**

**S.B. 2378 by Sen. Bryan Hughes (R-Mineola)**

*Signed by the Governor on 6-15-19, effective 9-1-19*

Amends §74.153, CPRC, to modify SCOTX's decision in Texas Health Presbyterian Hospital of Denton, Marc Wilson, M.D., and Alliance Ob/Gyn Specialists, PLLC v. D.A. and M.A., Individually and as Next Friends of A.A., a Minor (2018) with respect to the standard of proof for medical care provided in a hospital obstetrical unit. The agreed substitute provides that the willful and wanton standard does not apply to: (1) medical care or treatment that occurs after the patient is stabilized and is receiving medical treatment as a nonemergency patient; (2) medical care or treatment that is unrelated to a medical emergency; or (3) any physician or health care provider whose negligent act or omission proximately causes a stable patient to require emergency medical care.

### Medical Liability Caps

**H.B. 765 by Rep. Gene Wu (D-Houston)**

*Died in House Judiciary & Civil Jurisprudence*

Amended §§74.301 and 74.302, CPRC, to index the caps on noneconomic damages and the amounts of required financial responsibility in health care liability claims.

### Expert Reports

**H.B. 3186 by Rep. Matt Krause (R-Fort Worth)**

*Died in House Judiciary & Civil Jurisprudence*

Amended §74.351, CPRC, to require a claimant who files a supplemental or amended pleading in a health care liability claim that asserts a theory of direct liability against a defendant against whom the claimant had previously asserted a theory of vicarious liability to serve on the defendant an expert report not later than 60 days after filing the supplemental or amended pleading.

### Authorization for Release of Records

**S.B. 1565 by Sen. Pat Fallon (R-Prosper),**

**H.B. 3248 by Rep. Reggie Smith (R-Sherman)**

*Signed by the Governor on 5-22-19, effective 9-1-19*

Amends §72.054(c), CPRC, the form used to authorize the release of health care information in a health care liability claim, to change "Place of Birth" to "Date of Birth" at the top of the form.

# Session Report

## 86<sup>th</sup> Legislative Session Report

### Hospital Liens

**S.B. 1159 by Sen. Kelly Hancock (R-North Richland Hills), H.B. 2927 and H.B. 2929 by Rep. Jeff Leach (R-Plano)**

*Signed by the Governor on 6-10-19, effective immediately*

Adds §55.0015, Property Code, to provide that for purposes of the attachment of a hospital lien, an injured person is considered admitted to a hospital if the person is allowed access to any department of the hospital for the provision of any treatment, care, or service to the individual. Provides that a hospital lien is for the lesser of the amount of the hospital's charges during the first 100 days of the injured person's hospitalization or 50% of all amounts recovered by the injured individual through a cause of action, judgment, or settlement described by §55.003(a). A hospital lien does not cover charges for which recovery is barred under §146.003, CPRC (timely billing of third-party payors).

---

## GUN LIABILITY

---

### Failure to Post Inadmissible

**S.B. 772 by Sen. Bryan Hughes (R-Mineola), Rep. Drew Springer (R-Muenster)**

*Signed by the Governor on 6-14-19, effective 9-1-19*

Several bills were filed this session dealing with the consequences of a premises owner's decision to allow or prohibit licensed handguns on the premises. The bill that finally emerged, S.B. 772, provides that failure to post the statutory notice required to forbid the carrying of handguns on the premises of a business, or any other evidence of the business owner's failure to exercise the option of forbidding handguns on the premises, is not admissible as evidence in a trial on the merits in an action: (1) against the person who owns, operates, or manages the property; and (2) in which a cause of action arises from an injury on the property. The bill further provides that such evidence does not support a cause of action against the owner, operator, or manager of the property.

---

## COMMERCIAL LITIGATION

---

### Covenants not to Compete

**H.B. 1522 by Rep. Chris Paddie (R-Marshall)**

*Died in House Energy Resources Committee*

Prohibited a downstream, midstream, or upstream oil and gas operation from requiring an independent contractor

to enter into a covenant not to compete that restricts the contractor from performing work or providing a service for another entity engaged in a downstream, midstream, or upstream oil and gas operation.

### Conflict of Law and Contract

**H.B. 1957 by Rep. Harold Dutton (D-Houston)**

*Died in House Business & Industry Committee*

Added Chapter 275, Business & Commerce Code, to provide that in a conflict between Texas law and a term or condition of a contract, Texas law controls.

### Contractual Appraisal

**H.B. 4223 by Rep. Yvonne Davis (D-Dallas)**

*Died in House Judiciary & Civil Jurisprudence*

Amended Chapter 154, CPRC, to: (1) require a person who receives notice of a dispute that may be subject to a contractual appraisal process to determine the amount of loss covered by the contract to invoke the appraisal process before the 60th day after receipt of the notice; (2) require a party that may be liable under a contract for a loss the amount of which may be determined by a contractual appraisal process to promptly investigate and pay any obligation under the contract, regardless of the existence of the appraisal provision; (3) restrict the scope of a contractual appraisal provision to the determination of the amount of loss and not to any statutory or common law obligation to investigate and promptly pay a contractual obligation or exempt a party from prompt payment of penalties or attorney's fees recoverable ordinarily when a party fails to adequately and timely pay a covered loss.

---

## ATTORNEY FEES

---

### Contingency Fee Contracts by Local Governments

**H.B. 2826 by Rep. Greg Bonnen (R-Friendswood), Sen. Joan Huffman (R-Houston)**

*Signed by Governor on 6-10-19, effective 9-1-19*

Requires a political subdivision of the state seeking to retain a lawyer on a contingency fee basis to select a well-qualified lawyer or firm on the basis of demonstrated competence, qualifications, and experience in the requested services and attempt to negotiate a fair and reasonable price. Allows the political subdivision from requiring the lawyer or firm to



indemnify, hold harmless, or defend claims or liabilities arising from the negligent acts or omissions of the attorney, firm, and its employees but not for the negligent acts and omissions of the political subdivision or its employees. Requires the subdivision to give notice and hold a hearing prior to entering into a contract, specifically addressing the reasons for pursuing the matter that is the subject of the legal services and the desired outcome of pursuing the matter, the competence, qualifications, and experience demonstrated by the attorney or firm, the nature of any relationship between the political subdivision and the attorney or firm, the reasons the legal services cannot be performed internally or reasonably obtained by payment of hourly fees, and the reasons that entering into a contingency fee contract is in the best interest of the residents of the political subdivision. Requires the governing body to approve the contract in an open meeting called for that purpose. The political subdivision must issue a statement in writing stating its findings regarding the necessity of entering into a contingency fee contract with an outside lawyer or firm. Provides that the approved contingency fee contract is a public record. Requires the Attorney General to approve contingency fee contracts within 90 days of receiving the contract from a political subdivision. Allows the Attorney General to reject a contract if the AG finds that the matter is within the AG's jurisdiction, it is in the best interest of the state for the AG to pursue the matter, or the political subdivision did not comply with the procurement process. Allows a political subdivision to appeal the AG's decision to SOAH. Voids a contingency fee contract entered into without complying with this section.

### **Motion to Dismiss for Failure to State a Claim**

**H.B. 3300 by Rep. Andrew Murr (R-Junction), Sen. Joan Huffman (R-Houston)**

*Signed by Governor on 6-10-19, effective 9-1-19*

Amends §30.021, CPRC, to allow rather than require a court to award attorney's fees to a prevailing party as a result of a motion to dismiss granted or denied under supreme court rules adopted under §22.004(g), Government Code.

---

## **OTHER SIGNIFICANT BILLS THAT DID NOT PASS**

---

### **Litigation Financing Disclosure**

**H.B. 2096 by Rep. Matt Krause (R-Fort Worth),**

**S.B. 1567 by Sen. Pat Fallon (R-Proser)**

### *Died in House Judiciary & Civil Jurisprudence and Senate State Affairs*

Directed the Supreme Court to adopt rules providing for mandatory disclosure of third-party litigation financing agreements to the parties in a civil action in connection with which third-party litigation financing is provided.

### **Mitigation of Damages**

**H.B. 3832 by Rep. Reggie Smith (R-Van Alstyne),**

**S.B. 1215 by Sen. Charles Schwertner (R-Georgetown)**

### *Died on Referral*

Under the paid or incurred rule, a liable defendant is only responsible in damages for medical expenses actually paid or incurred by the claimant, not the full chargemaster rate for the service. A growing practice in which plaintiffs do not file insurance claims under so-called "letters of protection" under which the plaintiff's attorney promises to pay more for medical services than the negotiated rate threatens to undermine the paid or incurred rule altogether. This bill addressed this problem by simply stating that the trier of fact may consider the claimant's omission to file an insurance claim as a failure to mitigate damages.

### **Uninsured Motorist**

**H.B. 1739 by Rep. Charlie Geren (R-Fort Worth)**

### *Died in the Senate*

As originally filed, H.B. 1739 by Rep. Geren prohibited an insurer from requiring as a prerequisite to asserting a claim under underinsured or uninsured motorist coverage a judgment or other legal determination establishing the other motorist's liability or uninsured or underinsured status. The bill further specified that such a judgment or legal determination is not a prerequisite to having a claim under Chapters 541 or 542, Insurance Code. H.B. 1739 would have barred an insurer from requiring as a prerequisite to paying benefits under underinsured or uninsured coverage a judgment or legal determination of the other motorist's liability or the extent of the insured's damages before benefits are paid under the policy. It further required an insurer to make a good faith attempt to effectuate a fair, prompt, and equitable settlement of a claim once liability and damages become reasonably clear. Under the bill, prejudgment interest would have accrued on an uninsured or underinsured motorist claim on the earlier of the 180th day after the date the claimant notifies the insurer of the claim or the date on which suit is filed against the insurer to recover under uninsured or underinsured coverage. For

# Session Report

## 86<sup>th</sup> Legislative Session Report

purposes of the recovery of attorney's fees under §38.002, CPRC, a claim for uninsured or underinsured coverage would be presented when the insurer receives notice of the claim (defined as written notification to the insurer that reasonably informs the insurer of the facts of the claim).

After the bill cleared the House Insurance Committee, it was amended in an effort to address the concerns of the insurance industry and civil justice reform groups. As amended, the bill 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 specified 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. Finally, it provided

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. H.B. 1739 passed the House in this form, but was never referred to committee in the Senate. This high priority bill for TTLA will almost certainly make a comeback next session.

---

### NEW CAUSES OF ACTION

---

Of particular importance to TCJL are bills that create new private causes of action. This session, we identified approximately 60 bills that fell into that category, a significant decrease from the 130 or so we saw two years ago. Of these bills, only 10 made their way to the Governor's desk, and all involve specific and limited circumstances. ★

---

## *amicus curiae*

### TCJL Amicus Report

(continued from Page 13)

S.W.3d 16 (Tex. App.— Corpus Christi 2002), petition for review dismissed, 2004 LEXIS 85 (Tex. Jan. 30, 2004). The Texas Supreme Court, having just cautioned trial judges against a too hasty decision in favor of class certification, might well have scrutinized this case for flaws in the trial court's determination to certify the class, the process by which the trial court selected class counsel, or the terms of the settlement. It declined to do so. We can thus assume that this case complied with Rule 42 in all material respects and that the parties to the judgment were justified in their belief that the case was over.

Indeed, "a principal purpose of a class action settlement is to achieve finality. When class members are permitted to bring collateral challenges to a settlement, on ground that were, or could have been, raised during the settlement process, the very integrity of the settlement process is undermined." American Law Institute, Principles Law Agg. Lit. § 3.14 (2010), Comment a. Federal and state courts across the country have consistently held that collateral attack on a final judgment in a class action undermines the very purpose of class actions and contradicts the policy objectives of finality: to provide certainty, reduce costs, and prevent inconsistent outcomes. See William B. Rubenstein, Finality in Class Action Litigation: Lessons from Habeas, UCLA School of Law, Public Law & Legal Theory Research Paper Series, Research Paper 07-19, 2007,

830-33; American Law Institute, Principles Law Agg. Lit. § 1.03 (2010) (aggregation should further the pursuit of justice under law by enforcing substantive rights and responsibilities, promoting the efficient use of litigation resources, facilitating binding resolution of civil disputes, and facilitating accurate and just resolution resolutions of civil disputes by trial and settlement). Nothing in the record suggests that the District failed to receive notice and could not in a timely fashion have opted out of the class, objected to the appointment of class counsel or settlement agreement, or at least taken some action to indicate dissatisfaction with the outcome of the litigation. Instead, the District filed a lawsuit a decade after the settlement seeking to re-litigate the same claims. If such an action does not undermine the "very integrity of the settlement process," it is hard to imagine what would.

The District argues that Rule 42 does not apply to it because a statute directs the process by which Appellee retains counsel. See Tex. Health & Safety Code §281.506. This argument fails for two reasons. First, any number of entities may construct a process for the retention or the identity of counsel. A public entity may be constrained by statute, a private entity by its bylaws, and an individual by its determination only to do business with his or her attorney sister-in-law. If every class member that hired a lawyer in a prescribed fashion could claim that a final judgment did not apply to he, she, or it



because the legally appointed class counsel did not get hired that way, we might as well abolish class actions altogether. That view, as we have seen, does not represent the position of the Legislature or the Texas Supreme Court.

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

Even supposing that the District could make a plausible claim for special treatment under Rule 42, its case should fail for the complete lack of substantive grounds for challenging the final judgment. In general, a “judgment embodying a class action settlement may not be challenged, except: (1) before the court in which the settlement occurred on grounds generally applicable under the governing rules of civil procedure for obtaining relief from judgment; or (2) before the same or a different court on the ground that the settlement court lacked personal or subject-matter jurisdiction, failed to make the necessary findings of adequate representation, or failed to afford class members reasonable notice and an opportunity to be heard as required by applicable law.” American Law Institute, Principles Law Agg. Lit. § 3.14 (2010). None of these grounds exist here. Allowing the District to re-litigate the Mireles settlement would violate the public policy promoted by the doctrine of *res judicata*, undermine Rule 42, and unsettle the law governing post-judgment challenges to settlement. To persuade the courts to do that, the District ought to have much better reasons than the one it argues here.

The Austin Court of Appeals reversed and rendered judgment on behalf of AT&T on May 3, 2019. The District’s motion for rehearing was denied on July 1, 2019.

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

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

provisions in existing contracts and creates uncertainty in the law and in contracting practices going forward.

A lawsuit in which a party walks away with more than \$20 million without having suffered actual damages sets off alarm bells in the business community. Our civil courts adjudicate breaches of legal duties and compensate parties to whom those breaches cause harm. If somebody hails a fellow citizen into court and asks the state to remedy such harm, that somebody should at least have to demonstrate how and to what extent the person has been damaged. We can find no indication in the record or the Court of Appeals’ decision that the Respondent did any such thing in this case. Texas law takes a dim view of stipulated damages provisions in contracts because of the risk of “unjust punishment” when stipulated damages far exceed the actual damages from a breach. See §2.718(a), TEX. BUS. & COM. CODE. The Court of Appeals’ opinion properly cites §2.718(a), as well as case law, for the proposition that a stipulated-damages clause is unenforceable if, in effect, it is a penalty. See Op. at 23; *Dresser-Rand Co. v. Bolick*, 2013 WL 37700950 (Tex. App.—Houston July 18, 2013, pet. abated); *Khan v. Meknojiya*, No. 03-11-00580-CV, 2013 WL 3336874 (Tex. App.—Austin June 28, 2013, no pet.) (mem. op.).

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

The Court of Appeals relied on two cases to conclude that the “transfer fee” provision is not a stipulated-damages clause because the clause does not condition the fee on a breach of contract. But those cases, *Dresser-Rand* and *Khan*, bear only a superficial relationship to this one. *Dresser-Rand* involved a dispute between an employer and employee over a relocation expense reimbursement clause. *Khan* concerned a landlord-tenant dispute over the amount of base rental in a holdover period under a commercial lease. In both cases the events contemplated by the contracts actually occurred (the employee resigned during the period covered by the reimbursement clause; the tenant held over after the landlord terminated the lease), so the contract provisions triggered accordingly. In this

case, however, while a change of control occurred, the continued fee for the Petitioner's license rights and access to the data did not. Under the transfer fee provision, EP owed the fee only for the data still licensed to the Petitioner. Reading this provision, the Court of Appeals determined that the only question it had to answer was whether the new controlling party had a license from Fairfield for the same type of data. But the provision has to assume that in order to trigger liability for the transfer fee, the new controlling party must actually continue to have access to the data under an active license. Otherwise, the agreement makes no sense, for its purpose was to assure that any data licensed by Fairfield and subject to access by a new party would be duly paid for. When the trial court looked at the case, it found no harm, no foul, and no penalty. Enforcing a plain and unambiguous contract provision does not require us to take leave of our common sense.

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

The Court declined review on June 14, 2019. EP filed a motion for rehearing on July 31, 2019.

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

This case is part of a windstorm insurance crisis that compelled the Texas Legislature to intervene in 2011 to shut down a wide range of litigation abuses threatening the solvency of the Texas Windstorm Insurance Association ("TWIA"). Whereas earlier windstorms had produced relatively few lawsuits arising from contested claims, Hurricane Ike produced thousands, most of which were filed years after the storm and well after the initial claims had been adjusted and settled. It is estimated that TWIA alone will eventually pay about \$1.8 billion to settle Hurricane Ike claims, hundreds of millions of which have already gone to attorneys involved in the litigation. In fact, the Texas Supreme Court has previously rejected the method used to calculate attorney's fees in TWIA settlements, which results in a 66.6% fee. See *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 428 (Tex. 1995). Clearly, business

was good for someone in the TWIA lawsuit industry, just not for the millions of Texas business and individual consumers and policyholders who paid the freight. The Legislature acted as it did to make sure this particular misuse of the civil justice system never happens again.

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

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

**2. Pre-suit notice.** H.B. 3 requires the claimant to provide to TWIA a notice of intent to file suit within two years of receiving TWIA's notice of acceptance or denial of all or part of the claim. If the claimant provides this notice, TWIA has the option to require the claimant, as a prerequisite to filing suit, to submit the dispute to alternative dispute resolution. If the claimant does not provide the notice in a timely fashion, the claimant waives the right to contest TWIA's full or partial denial of coverage and may not bring an action against TWIA for denial of coverage. Here, without giving any notice and without informing TWIA of any unaddressed issues, the claimant filed suit four years after the storm, two years and nine months after the claimant signed the first sworn Proof of Loss, and six months after the claimant provided a second



sworn Proof of Loss representing that its total losses had been paid. To make matters worse, the initial post-litigation appraisal inspections did not take place until more than five years after the storm and after repairs had already been made. In hours of public testimony on H.B. 3, the Legislature heard this scenario repeated over and over again: claim adjusted and apparently amicably settled; lawsuit filed out of the blue; irregular appraisal process conducted years after the damage was done, paid for, and repaired. Appraisal award comes back in multiples higher than the original loss. Had the pre-suit notice provision been in effect at the time, there would at least have been an orderly process for identifying the nature and scope of the dispute in advance and avoiding the judicial farce that played out later.

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

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

**5. Expert guidelines.** H.B. 3 directs the commissioner of insurance to appoint a panel of experts to advise TWIA “concerning the extent to which a loss to insurable property was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges.” The purpose of the panel is to make recommendations for the commissioner to use in publishing guidelines for TWIA’s use in settling claims. These guidelines are presumed to be “accurate and correct” in any review of the claim or lawsuit against TWIA, “unless clear and convincing evidence supports deviation from the guidelines.” This provision addresses one of the core problems in TWIA litigation: the haphazard, inconsistent, and, in this

case, non-existent analysis of the extent to which property damage caused by Hurricane Ike was caused by wind or water. If the guidelines had existed for this litigation, neither the claimant’s appraisers nor the trial court could so easily have stonewalled or ignored TWIA’s attempts to establish the extent to which the claimant’s losses were in fact covered by the policy.

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

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

The Court of Appeals reversed the trial court’s decision and remanded the case for further proceedings. A petition for review was filed in the Texas Supreme Court on January 18, 2019.

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

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

if allowed to stand, could affect virtually every third-party construction-related insurance policy issued in Texas.

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

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

Unfortunately, however, on occasion a bad decision threatens to change the rule and destabilize the system. Here the court

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

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

SCOTX reversed and remanded to the Court of Appeals on February 15, 2019. ★

# ILR SUMMIT 2020

The Future in Focus | April 1, 2020

<https://www.instituteforlegalreform.com/legal-reform-summit>

The U.S. Chamber of Commerce Institute for Legal Reform's 2020 Summit will gather top legal minds, business and industry leaders, and preeminent issue experts to discuss the current state of legal reform.

ILR's Legal Reform Summit is recognized as the nation's most comprehensive legal reform symposium that gathers business and industry leaders, government officials, and the media to explore relevant legal issues and discuss the current state of legal reform and its importance to the greater business community and national economy.

1615 H Street, NW | Washington, DC 20062







# BACK THE PAC

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

After the loss of hundreds of years of judicial experience in our appellate courts in 2018, we must pull together and guarantee the candidates we support have sufficient resources to run competitive campaigns. For starters, four Texas Supreme Court justices and more than twenty of the state's courts of appeals justices are on the ballot. Following the sweep of the courts last cycle, 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.

Several factors combine to make the 2020 election cycle particularly unpredictable. The absence of straight-ticket voting next November is likely to produce some unexpected results. The last couple of cycles have included "bump" candidates, those that are particularly popular or unpopular, and those results tend to skew any ability to make predictions or design strategy in other races.

And since this is the end of the decade, new district maps will be drawn in the 2021 session. The majority party has much more influence on the outcome of redistricting, so candidates in this

---

***“For starters, four Texas Supreme Court justices and more than twenty of the state’s courts of appeals justices are on the ballot...Our effectiveness has always depended in part on our participation in the elective process, and your generous support in the past has enabled us to assist in races in which we are most needed.”***

---

election cycle will pull out all the stops in order to try to control the maps for the next decade.

Our staff has spent countless hours researching and interviewing candidates. We've vetted their philosophies and scoured their records. With complete confidence, we have endorsed judicial and legislative incumbents and candidates committed to a fair and balanced civil justice system. With your help, we can make direct contributions to candidates. None of the money you contribute will be wasted. It will directly fund the candidates we have voted to endorse.

Our effectiveness has always depended in part

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

Sincerely,

**Red McCombs**  
**Chair, TCJL PAC**



**TEXAS CIVIL JUSTICE LEAGUE**

400 W. 15<sup>TH</sup> Street  
Suite 1400  
Austin, Texas 78701  
TCJL.com

PRSR STD  
US POSTAGE PAID  
AUSTINTX  
PERMIT NO. 525

To unsubscribe from this publication, email [info@tcjl.com](mailto: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. 15<sup>th</sup> Street  
Suite 1400  
Austin, Texas 78701

**Contribute Online:**  
[tcjlpac.com](http://tcjlpac.com)

**E-mail:**  
[info@tcjlpac.com](mailto: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, Austin, Texas 78701