

TJCL Civil Justice Advocate

A newsletter of the Texas Civil Justice League

Summer 1990

TJCL URGES INCLUSION OF PRODUCTS LIABILITY BILL

The Texas Civil Justice League is actively working toward passage of a products liability reform bill to be considered by state legislators. Governor Bill Clements did not include products liability reform in any of the special sessions on workers compensation and school reform, including the 6th special session which just concluded. Meanwhile, efforts are now underway to encourage inclusion of the bill during any future called sessions. Should the bill not be included in a later special session, if any, it will be strongly promoted by TJCL during the regular legislative session beginning in January 1991.

The proposed bill, which has been sponsored in the Senate by Senator Bob McFarland and in the House by Representative Curtis Seidlits, Jr., aims to create a fairer and more reasonable environment for Texas business people.

Under existing law, sellers of products are subject to the same liability as product manufacturers. The proposed bill seeks to absolve retailers from liability for product related injuries unless the retailer was actually responsible for the product's defective condition or is the only supplier of the product who can be sued in Texas. A similar bill was presented during the 1989 regular session and passed the House soundly and the Senate Economic Development Committee with only one negative vote. Because the Texas Civil Justice League did not wish for the bill to compete with passage of workers compensation reform, the bill was not brought to the Senate floor during the last days of the session.

"This legislation offers a fair

balance between the rights of consumers and businesses," said Representative Seidlits. "We are not seeking to change the basic principles of Texas products liability law. As an attorney who represents plaintiffs in liability cases, I am committed to defending the rights of persons injured by products and enforcing and promoting product safety in Texas. At the same time, by curbing the excesses in the current law, we can restore confidence in our civil justice system."

All Texans will be affected positively by products liability reform. According to a study by Baylor University Economist Dr. Ray Perryman, 90 percent of the state's economic development specialists believe product liability costs are discouraging businesses from locating in Texas. Products liability reform will

STUDY SHOWS THAT U.S. TORT SYSTEM MORE EXPENSIVE THAN OTHER NATIONS

See Products, page 3.

A risk management consultant reports that the U.S. tort system, as a percentage of gross national product, costs more than three times that of tort systems in a dozen other industrial countries.

The report by the Tillinghast division of Towers, Perrin, Forster & Crosby, Inc. shows that tort costs were 2.6 percent of the U.S. gross national product in 1986 and 1987. Tort costs include claims payments by insurers and administrative costs and attorneys' fees.

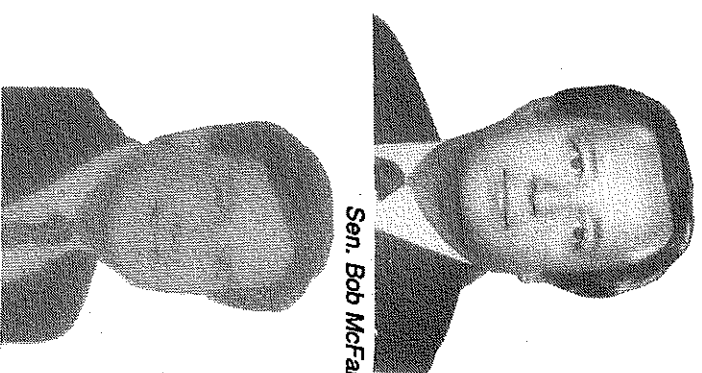
In comparison, 1986 tort costs in one of the 12 other industrialized

CIVIL JUSTICE PAC NEEDS YOUR HELP

Response to the recent Civil Justice PAC solicitation has been marvelous, and the results of your assistance were seen when voters went to the polls on March 13 and during the runoff April 10—almost all of the Civil Justice PAC-supported candidates won their primaries!

Many of you, however, received our mailing but we have not heard from you yet. There is still much to be accomplished in the legislative arena in the upcoming general election and it is vital that we have your support. PAC-supported tort reform candidates will need all the help we can provide during the general elections.

Please take a moment to mail your contribution to the Civil Justice PAC. If you have already given, please consider an additional contribution. Let's not pass up this unequalled opportunity to make civil justice reform a reality in Texas. Mail your contribution today to: Civil Justice PAC, 400 W. 15th St., Suite 817, Austin, TX 78701. Please, no corporate checks. NOTE: PAC contributors should be aware that such contributions are not deductible as charitable contributions for federal income tax purposes. (TJCL membership dues, however, are generally deductible for federal income tax purposes.)



Sen. Bob McFarland

countries exceeded 0.6 percent of GNP, according to the report "Tort Cost Trends: An International Perspective."

The U.S. tort system 'is both inefficient and unfair' as a method of compensating accident victims for losses, the report said.

Only 50 percent of total tort costs go to compensate actual economic losses and claimants' pain and suffering, for example. The remaining 50 percent pays for insurers' administrative costs, claims handling expenses, and plaintiff and defense attorneys' fees, according to the Tillinghast report.

The report shows that among other surveyed countries, the highest 1986 tort costs as a portion of GNP were 0.8 percent in Switzerland and the lowest in Australia at 0.3 percent.

Tort as a percentage of the gross national products among other countries in 1986 were: Japan, Spain and Denmark, 0.4 percent; West Germany and Italy, 0.5 percent; and France, Austria and Canada, 0.6 percent.

According to the report, tort costs as a percentage of GNP generally have not varied by more than 0.1 percent since the mid-1960s, while U.S. tort costs have increased steadily.

For example, U.S. tort costs in 1965 totaled \$7.9 billion, or 1.1 percent of GNP, and in the next ten years increased to \$22.2 billion or 1.4 percent of GNP. U.S. tort costs in 1985 were \$89.2 billion, or about 2.2 percent of GNP, increasing to \$108.4 billion, or about 2.6 percent, in 1986.

The Texas Trial Lawyers Association (TTLA) has been taking some broadside hits lately. The *Austin American-Statesman* recently stated, "The biggest loser in the March 13 primaries didn't even appear on the ballot. The Texas Trial Lawyers Association got clubbed by voters March 13."

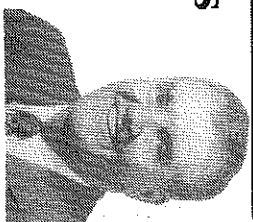
The defeat at the polls adds to a string of losses the TTLA has suffered since 1987 when the Legislature enacted major changes in tort laws over the objections of trial lawyers.

In 1988, trial lawyer-backed Supreme Court candidates lost with one exception.

And last year, three senators switched sides and helped pass workers compensation reform opposed by the trial attorneys.

Meanwhile, I'm advised that the Civil Justice PAC (Tort Reform) supported numerous senators and House members in the recent primary election and had tremendous success! Nearly all of the trial lawyer-backed

President's Message



J.P. Word

candidates lost. All five Senate candidates supported by the Civil Justice PAC were successful.

Eleven of 13 House member candidates supported by the Civil Justice PAC were successful. One of the three who were defeated asked for a recount but lost by eight votes.

All of the candidates supported by the Civil Justice PAC had strong plaintiff trial lawyer-backed opposition with the exception of the Arlington senatorial race.

Several other PACs obviously supported basically the same candidates and this effort by all must be characterized as tremendously successful, but it must be ongoing!

On another level, Justice Fred

Biery of the 4th Court of Appeals in San Antonio, who received trial lawyer backing for the Supreme

Court, was defeated by Gene Kelly, an unknown attorney from Universal City. Kelly will face Republican John Cornyn in the November election.

This Supreme Court seat is presently occupied by Justice Franklin Spears, who in key cases generally votes with the trial lawyers.

It would be premature to count the trial lawyers out. They are a strong organization with tremendous financial resources.

There are many crucial legislative and judicial races in the fall. It is important that TCJL and other organizations replenish their PACs and give all-out support to candidates who subscribe to a fair civil justice system. You can bet your boots that the TTLA will be back in full force.

TCJL President J.P. Word is executive director of the Consulting Engineers Council of Texas

TCJL FILES AMICI CURIAE BRIEF IN RESPONSE TO SUPREME COURT RULING ON FOREIGN CASES

The Texas Supreme Court ruled on May 28 to allow foreigners to sue in Texas courts for damages occurring outside of the United States. In response, the Texas Civil Justice League, along with the Texas Medical Association, filed an amici curiae brief asking for a rehearing on the matter.

The case which brought foreigners' right to sue to the attention of the Texas Supreme Court is Dow Chemical Company and Shell Oil Company v. Domingo Castro Alfaro, et al. Six

years ago, Alfaro, a Costa Rican banana field worker, and 81 fellow workers contended they suffered sterility from exposure to a pesticide manufactured by Dow and Shell. The largest amount of restitution allowed in Costa Rica is \$1,500, so the workers brought suit in Texas. The suit was initially dismissed by a Texas trial judge, who ruled that the case would more conveniently be tried in the worker's home country.

However, due to a 1913 state statute that appears to provide foreign-venue so that they apply equally to Texas and non-Texas corporations alike.

Amend the rules on sealing of court records.
Provide remedies for the high frequency of non-meritorious lawsuits.
Cap non-economic damage awards.

Require collateral source review.
Abolish joint and several liability.
Place restrictions on contingency fees.
Provide for periodic payments in tort actions.

PROGRAM OF WORK

The Texas Civil Justice League's program of work for 1990-1991 is based on protecting and implementing the recent legislative reforms, pursuing activities that will set the stage for finishing the tort reform agenda in future legislative sessions, reporting on significant Texas judicial actions, and interacting with interim legislative committees on topics of interest to League members.

1990 Program of Work

Product liability
Deceptive Trade Practices Act*
Corporate venue*

HOUSE BILL 7 PASSES HOUSE; FAILS SENATE

House Bill 7, which would have limited the personal liability of certain governmental officers and employees, passed in the Texas House of Representatives during the last special

ers the right to sue in Texas, the Court of Appeals reversed the trial judge's decision. Dow and Shell then appealed to the Texas Supreme Court. According to the *New York Times* law publication, critics of the ruling believe it will very likely overwhelm Texas-based corporations and the state's courts with lawsuits by foreigners who would probably be barred from suing in federal courts or in the courts of other states.

Dissenting from the majority opinion, Texas Supreme Court Justice Nathan L. Hecht said "Texas would become the courthouse of the world." Justice Raul Gonzales noted that Texas residents would be made to "wait in the corridors of our courthouses while foreign causes of action are tried."

As of press time, the court turned down the request. The Texas Civil Justice League will continue its efforts to protect Texas business and prevent excessive crowding of the state's courts.

Report Significant Texas Court

TEXAS CIVIL JUSTICE LEAGUE WINS ATRA STATE TORT REFORM AWARD

The Texas Civil Justice League, one of the largest and most successful tort reform coalitions in the United States, received the State Tort Reform Achievement Award from the American Tort Reform Association (ATRA) February 9 in Washington, DC.

"ATRA is delighted to present this award to the more than 2,300 members of the Texas coalition," said August W. Steinhilber, chairman of the ATRA board of directors. "The coalition's long history of successes and the active role they play in the Texas political process makes them a leader in the tort reform arena."

During the 1989 state legislative session, the Texas Civil Justice League worked hard to push a comprehensive products liability bill through the House only to have it held back by threat of a filibuster in the Senate in the last few days of the session.

The annual ATRA State Tort Reform Achievement Award is presented to coalitions for successful efforts to enact substantive tort reforms.

The American Tort Reform

TEXAS CHAMBER OF COMMERCE INITIATES TORT REFORM TASK FORCE

Our state's liability crisis in the civil courts is a malady draining the vitality from our economic system. Tort reform enacted in 1987, seating a fair majority on the state Supreme Court in 1988, recent workers compensation overhaul, and pending judicial reform are all steps in the right direction. However, specific tort law defects, such as little restraint of frivolous suits, the "joint and several" provision which often unfairly penalizes the deepest pockets, and the validity of settlement agreements remain patently unfair to business people trying to provide jobs, goods, and services to Texans.

In response, the Texas Chamber

LAWSUIT THREAT AFFECTING SCHOOLS AND PLAYGROUNDS

The threat of lawsuits is having a detrimental effect upon activities sponsored by public schools, according to a survey by the American Tort Reform Association.

"Increasingly, school activities are being curtailed, modified or eliminated because educators fear such activities might lead to costly litigation," said Martin F. Connor, ATRA president.

Last year, ATRA surveyed school principals who are members of the National Association of Secondary School Principals and by attorneys representing school boards that are members of the National School Boards Association.

Association is a diverse and broad-based coalition of more than 400 organizations — small and large businesses, professional societies, trade

associations and nonprofits — whose sole goal is to restore fairness, efficiency, and predictability to America's civil justice system.



TCJL Executive Vice President Ralph Wayne (right) accepts the ATRA State Tort Reform Achievement Award from August W. Steinhilber, chairman of the ATRA board of directors.

PRODUCTS

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of Commerce has created a monitoring task force to review remaining tort reform needs and place priorities on goals which must be achieved through legislative activism. Long-term efforts include utilizing effective strategies to achieve passage of a comprehensive tort reform package that will announce to the nation's commercial community that "Texas is open for business."

The task force is part of the Chamber's "Texas Strategy," a blueprint of action for the century's last decade. For more information, call or write Larry Milner at the Texas Chamber of Commerce, 300 W. 15th. St., Suite 875, Austin, TX 78701, 512/472-1594.

"The surveys illustrate that the threat of lawsuits is forcing school principals and school boards to abandon beneficial educational activities and the use of parental volunteers," Connor said.

Of the principals responding to the survey, 58 percent indicated a change in the type of school programs being offered due to liability concerns. Some of the programs include field trips, shop classes, physical education, laboratory science programs and playground activities.

Of the school board attorneys responding to the survey, nearly one in five indicated they had been involved in a lawsuit or out-of-court settlement during the past two years. More than one-third said that concern about liability and its costs had caused a change in the kinds of programs offered by their schools.

allow Texas businesses to devote more energy to productivity and less time to the defense of unnecessary and unfair legal action. The proposed law will not affect the state's product safety regulations, nor will it prohibit injured persons from seeking just compensation for injuries. It will, however, discourage frivolous claims, assist in clearing an overcrowded court system, and decrease legal expenditures.

Said Senator McFarland, "Businesses throughout Texas are asking that the Legislature pass this measure without delay. Manufacturers are withdrawing products for fear of being sued despite the fact that there was nothing wrong with the way those products were designed, manufactured, and marketed. Retailers and other small business owners are forced to spend thousands of dollars and hours away from work because they are sued for selling a defective product even when they had nothing to do with its design or manufacture."

Texas Civil Justice League President J. P. Word said, "Products liability reform continues to be at the top of the Texas Civil Justice League's 1990-91 program of work. Products liability reform has become an economic issue, and an improved business environment is essential for an economically strong and competitive Texas."

Please assist the Texas Civil Justice League in securing support of the products liability bill by contacting your legislators and expressing interest in products liability reform.

**BOARD AND EXECUTIVE
COMMITTEE MEMBERS
TEXAS CIVIL JUSTICE LEAGUE
MARCH 20, 1990**

(*) DENOTES EXECUTIVE COMMITTEE)

- Green, Cathy Onorot
Vice President of Public Affairs
H. B. Zecher
2500 Tower Life Bldg.
San Antonio, TX 78205
512/223-4061
- Grisham, Richard B.
Vice President, Secretary & General
Counsel
Ons Engineering Corporation
P.O. Box 819052
Dallas, TX 75381-9052
- Hanners, Sally
Director of Governmental & Legislative
Affairs
Texas Dental Association
1946 South Interregional Highway
Austin, TX 78704
512/443-3676
- *Jackson, Ed
Vice President, Governmental Relations
Texas Hospital Association
6225 U.S. Highway 290 East
Austin, TX 78723
512/465-1000
- Johansen, Lytle
Executive Vice President
Texas Association of Builders
510 W. 15th St.
Austin, TX 78701
512/476-6346
- *Kessler, Ron
Managing Partner
Jones, Day, Reavis & Pogue
301 Congress Ave., Ste. 1200
Austin, TX 78701
512/477-3939
- Kyle, Jack, III
Vice President
Union Pacific Railroad
One American Place, Ste. 1508
Baton Rouge, LA 70825
504/387-3179
- Lancaster, David
Executive Vice President
Texas Society of Architects
114 W. 7th. St., Ste. 1400
Austin, TX 78701
512/478-7386
- Lockner, Larry
Senior Staff Policy Specialist
Shell Oil Company
900 Louisiana, Room 1568-OSP
Houston, TX 77002
713/241-4539
- Looney, Robert L.
President
Mid-Continent Oil & Gas Association
400 W. 15th St., Ste. 500
Austin, TX 78701
512/478-6631
- Mason, Jimmie Lee, CPA
Past President, Texas Society of CPAs
c/o Mason Warner & Company, P.C.
5010 University Ave., Ste. 400
Lubbock, TX 79413
806/797-3251
- Mickey, Robert G. *
Executive Vice President
Texas Medical Association
1801 North Lamar Blvd.
Austin, TX 78701
512/477-6704
- Newton, Jon
Attorney at Law
Clark, Thomas, Writers & Newton
P.O. Box 1148
Austin, TX 78767
512/472-8800
- Schulte, Gerhard, Jr.
Executive Director
Texas Society of Professional Engineers
3501 Manor Rd.
Austin, TX 78723
512/472-9286
- Sewell, Jim
Executive Director
Associated General Contractors,
Building Branch
200 E. 10th st., ste. 615
Austin, TX 78701
512/478-5629
- Sheehy, J. Robert
Past President, Texas Association of
Defense Counsel
c/o Sheehy, Lovelace & Mayfield
1200 Allice Center
Waco, TX 76701
817/756-7231
- Shull, Bobby L., M.D.
Past President
Texas Association of Obstetricians &
Gynecologists
c/o Scott & White Clinic
2401 S. 31st St.
Temple, TX 76508
817/774-2111
- Smith, Freeman E.
Manager, Texas Area Public Affairs
Exxon Company, U.S.A.
800 Bell
Houston, TX 77002
713/656-4643
- Suzal, Frank *
Executive Director
Texas Municipal League
211 E. 7th St., Ste. 1020
Austin, TX 78701
512/478-6601
- Taylor, Des
Attorney at Law
Bab & Hanna, P.C.
905 Congress Ave.
Austin, TX 78701
512/473-8600
- Tunnell, Byron
Vice President
Temeco, Inc.
600 Congress Ave., Ste. 1700
Austin, TX 78701
512/476-4641
- Turrieta, Gilbert
Legislative Consultant
400 W. 15th St., Ste. 300
Austin, TX 78701
512/472-8386
- Von Kennel, Timothy J.
Director of State Relations
Emserch Corporation
710 EC
300 South St. Paul
Dallas, TX 75201
214/670-2631
- Wheeler, Jack D.
Legislative Consultant
Texas Association of Public &
Nonprofit Hospitals
1122 Colorado St., Ste. 1307
Austin, TX 78701
512/476-1497
- Whitworth, Harry
President
Texas Chemical Council
1402 Nueces
Austin, TX 78701-1534
512/477-4465
- Williams, James L.
Manager of Public Affairs and Regional
Director
Pharmaceutical Manufacturers Association
1100 15th St. N.W.
Washington, DC 20005
202/853-3520
- Wood Jay
Past President, Texas LP Gas Association
c/o Northwest Buane Gas Company
11551 Harry Hines Blvd.
Dallas, TX 75229
214/247-6121
- *Word, J. P. — President
Executive Director
Consulting Engineers Council of Texas
400 W. 15th St., Ste. 820
Austin, TX 78701
512/474-1474
- Word, Tim
Past President
Associated General Contractors,
Highways, Heavy Utilities Branch
c/o Dean Word Company
P.O. Box 310330
New Braunfels, TX 78131-0330
512/625-2365
- Yates, Jim
Board Member, Texas Retail Grocers
Association
c/o E-Z Mart Stores, Inc.
602 W. Fdvey
Teravanda, TX 75501
214/832-6502
- Adams, Jerry, CAE
Executive Vice President
Texas Apartment Association
816 Congress, Ste. 520
Austin, TX 78701-2448
512/479-6252
- Anderson, Bob
President
Texas Oil Marketers Association
C/O T. Wain Labs Petroleum
P.O. Box 1436
Athens, TX 75751
214/675-2502
- Anderson, Gary
Vice President of Administration
Texas Chemical Council
1402 Nueces
Austin, TX 78701-1534
512/477-4465
- *Barton, Bill — Vice President
General Counsel
Texas Railroad Association
1005 Congress Ave., Ste. 800
Austin, TX 78701
512/478-9389
- *Christin, George — Secretary/Treasurer
George Christin, Inc.
400 W. 15th St., Ste. 420
Austin, TX 78701
512/476-2113
- Coffey, Jim
General Attorney
Atlantic Richfield Company
1801 Bryan St., Room 41-135
Dallas, TX 75201
214/880-4890
- Del-Gazza, Luis
Vice President of Corporate Relations
Valero Energy Corporation
P.O. Box 500
San Antonio, TX 78292
512/246-2000
- Diprey, Ron C.
Manager Governmental & Public Affairs
Dow Chemical - Texas Operations
APB Building Freeport, TX 77541
409/238-7604
- Durr, James W.
Government Relations Manager
Ciba Geigy
131 Fashion Drive
Georgetown, TX 78628
512/259-4788
- Ehram, Philip
Executive Director
Texas Rental Association & Affiliates
1946 South IH-35, Ste. 100
Austin, TX 78704
512/440-8388

SUE, SUE, SUE PHILOSOPHY AFFECTING WORLD OF SPORTS

In sports and torts, you automatically lose if you're sued, and only the score — measured in legal fees, damage awards or out-of-court settlements — remains in doubt, according to a lobbying organization for sporting goods manufacturers.

Richard Feldman, executive director of the Coalition of Americans to Protect Sports (C.A.P.S.), said the victim in "sports tort" actions is usually the sympathetic party, regardless of whether the manufacturer's product was responsible for the injury. Feldman toured Southeast and West Texas for C.A.P.S. and TCIL during the 1989 legislative session, talking to sports writers, print and electronic news media about the problems the lawsuit

crisis is causing the sports industry.

He gave the example of a recent Michigan case in which a 42-year-old banker, trying to beat out an infield hit in an adult-league game, was hit on the head by a softball as he ran to first. The banker, seriously injured by the ball, sued the shortstop who made the throw, the ballpark owner, the U.S. Slowpitch Softball Association and the manufacturer of the softball. The case, settled out of court, resulted in a sizable award to the injured banker.

In another case, a Portland, Oregon jury in October awarded \$11.2 million to a former high school football player from a helmet manufacturer.

Feldman said the case in which a Florida surfer sued Dade County after he was bitten by a shark is a prime example of the "sue, sue, sue" philosophy reaching crisis proportions.

"There are no excuses for defective products," Feldman said. "The problem comes when products work exactly as promised and manufacturers are still punished in court."

He predicted that some sports will be come extinct. "Pole vaulting is about to go," Feldman said. "You will not find a trampoline in an American public school."

He added that diving boards have been removed in 90 percent of the U.S.'s public swimming pools due to the liability risk.