

# FILE COPY TCJL Civil Justice Advocate

A newsletter of the Texas Civil Justice League

Winter, 1990

## TCJL honors six lawmakers, Speaker Lewis, J.P. Word, during annual board meeting

The presentation of "outstanding legislator of the year" awards to six Texas lawmakers and special awards to House Speaker Gib Lewis and TCJL President J.P. Word highlighted the fourth annual TCJL Board of Directors meeting.

The custom-made awards were presented during a special ceremony at the meeting.

Receiving "outstanding legislator of the year" awards for their leadership in achieving civil justice reform during the 71st legislative session were: Sens. John Montford of Lubbock and Bob McFarland of Arlington, and Reps. Pete Laney of Hale Center, Curtis Seidits of Sherman, Chris Harris of Arlington and Tom Uher of Bay City.

In addition, the six legislators were recognized for "outstanding achievement in civil justice reform" by the American Tort Reform Association.



**Special Awards** — House speaker Gib Lewis and TCJL President J.P. Word received special awards during the TCJL Board of Directors Annual meeting. At left, Word presents Speaker Lewis an award for his role in fostering civil justice and tort reform. At right, TCJL Vice President Bill Barton presents Word with an award in recognition of his service as president.



Speaker Lewis received a special award from TCJL for his role in fostering civil justice and tort reform, and Word was presented a special award in recognition of his service as TCJL president.

In regular business, the board of directors elected officers and members of its executive committee for 1990.

Word (Consulting Engineers Council of Texas) was named president, Bill Barton (Texas Railroad Association),

vice president, and George Christian (George Christian, Inc.), secretary-treasurer.

Named to the executive committee were Ed Jackson (Texas Hospital Association), Ron Kessler (Jones, Day, Reavis & Pogue), Robert G. Mickey (Texas Medical Association), and Frank Sturzl (Texas Municipal League). TCJL officers Word, Christian and Barton also serve on the executive committee.

See Photos, page 3.

## Venue Shopping Provisions discourage economic growth

Provisions of Texas civil justice law that permit out-of-state companies to "venue shop" are extremely detrimental to economic development, according to James W. Wilson, general counsel of Brown & Root, Inc. of Houston.



**James Wilson** — spoke on corporate venue at TCJL Board meeting.

Wilson, a TCJL member, made the remarks at the fourth annual TCJL Board of Directors meeting on November 28.

He applauded the TCJL board for including reform of corporate venue provisions among the top targets of its 1990/1991 program of work.

See Venue, page 2.

## TCJL Membership doubles, greater participation needed

Membership in the Texas Civil Justice League has doubled in the last 20 months to 2,000 dues-paying members, according to TCJL Executive Vice President Ralph Wayne.

See Membership, page 4.

## Membership renewal notices computerized

As many of you may know from receiving your annual dues statement, TCJL has computerized its membership renewal process. On the anniversary date of your renewal, you will receive another notice automatically.

Despite the economic conditions in Texas, TCJL has continued to grow.

This is a positive sign of interest and concern about the issues we face. When you receive your renewal notice, please forward your membership dues as soon as possible so we can continue to grow and to address the issues that concern you.

# Venue...

continued from page 1.

"The present venue provision governing out-of-state corporations contributes to the reputation Texas has of having a civil court system which is unfair to business, particularly to out-of-state business," Wilson said. "Some out-of-state companies are hesitant to move into Texas or to expand operations here because of their concerns about the venue provision."

The present provision is discriminatory and unfair because it permits "venue" or "forum shopping." For instance, if a cause of action occurs in El Paso, suit may be brought in Beaumont if the defendant was incorporated under the laws of some other state and has an agency or representative in Beaumont.

"The Beaumont agency or representative does not have to have anything to do with the transaction which gave rise to the suit; it does not even have to have anything to do with the line of business that gave rise to

that transaction," Wilson said. "And this is true even if the headquarters of the company is in Texas, and it is a Texas business in every sense of the word."

Wilson said that it is well-known that some counties, such as Matagorda County, have a reputation for returning significantly larger verdicts, particularly in personal injury cases, than other counties. As a result, he said, a substantial number of lawsuits are brought in these counties even though the county has nothing to do with the transaction or the parties involved in the suit.

"Suit is allowed in the county only because the defendant is an out-of-state corporation, and it has an 'agency or representative' in the county," Wilson said. "Reform is needed because the present statute is subject to forum-shopping abuse."

The 70th session of the Legislature changed the rule regarding railroads when railroads threatened to remove their tracks and to terminate service in some high verdict counties to avoid venue in those counties, he said.

## Court opens door for limitations on excessive punitive damages

A U.S. Supreme Court decision has opened the door for possibly curbing excessive punitive damages under the Due Process Clause of the Fourteenth Amendment, said Martin Connor, president of the American Tort Reform Association.

In *Browning-Ferris, Inc. v. Kelco Disposal, Inc.*, the court refused to use the Excessive Fines Clause of the Eighth Amendment to restrict punitive damages, but said an inquiry into possible due process limits awaits "another day," Connor said.

The court held that the Eighth Amendment's excessive fines clause was not violated by the awarding of punitive damages in civil lawsuits between private parties. The court's reasoning, in a majority opinion written by Justice Robert Blackmun, was that the excessive fines clause historically was a limit on government prosecutorial power and did not apply to civil cases.

However, the court opened the possibility that punitive damages might be challenged under a Fourteenth Amendment due process claim.

"We have never addressed the precise questions presented here: whether due process acts as a check on undue jury discretion to award punitive damages

Wilson noted that the Legislature left the discrimination in effect regarding out-of-state corporations.

"The same problem railroad corporations faced exists as to non-railroad out-of-state corporations," Wilson said. "Many suits against companies incorporated in other counties are brought in these high verdict counties even though the county had nothing to do with the transaction or the parties involved."

Wilson added that several companies, including some based in Texas, that are incorporated in other states refuse to conduct business in some counties to avoid the possibility of litigation in those counties.

Wilson urged TCIL to again support legislation that would provide a plaintiff with several options for venue, but all options would have to have some relationship to the transaction or the parties.

"They are fair both to the plaintiff and to the defendant and do not permit a plaintiff to forum-shop in counties which have nothing to do with either the transaction or the parties," he said.

in the absence of any express statutory limit," the court opinion said.

"I join the Court's opinion," Justice William Brennan wrote in a concurring opinion, "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."

In a concurring opinion that addressed only the due process issue, Justices Brennan and Thurgood Marshall said,

"Without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in the given case, juries are left largely to themselves in making this important, and potentially devastating, decision."

In a dissenting opinion, Justices Sandra Day O'Connor and John Paul Stevens wrote, "Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000...The threat of such enormous awards has a detrimental effect on the research and development of new products.

"Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than introduce a new pill or vaccine

into the market."

Punitive damages are awarded over and above compensatory and non-economic damages to punish a defendant who intentionally and maliciously intends to harm. During the past decade punitive damage awards have become commonplace and are often awarded against defendants who mean no harm and act with only the best intentions, Connor said.

Connor said that punitive damages has replaced joint and several liability as the No. 1 tort reform issue in state legislatures.

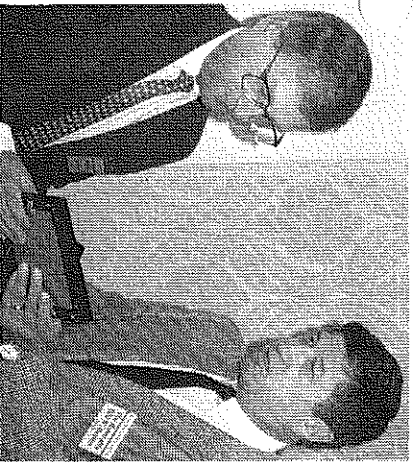
"The consensus among state legislatures is that the system is broke and needs fixing," Connor said.

In 1987, the Texas Civil Justice League strongly support legislation that capped punitive damages at the greater of either four times the actual damages or \$200,000.

Plaintiffs' attorneys in Alabama, raising the "separation of powers" issue, have challenged the constitutionality of their state's \$250,000 cap on punitive damages.

The attorneys argue that when the law was enacted the Alabama Legislature was wrong in believing that problems existed in the civil justice system and that changes in the tort laws would help solve those problems.

# TCJL honors six legislators



Legislators receive awards — TCJL presented six lawmakers with "outstanding legislator of the year" awards during its recent board of directors meeting. The six also received awards from the American Tort Reform Association. Receiving ATRA awards from TCJL Vice President Bill Barton are, clockwise from top left: Sen. John Montford of Lubbock, Reps. Pete Laney of Hale Center, Curtis Seidlis of Sherman, and Chris Harris of Arlington. Receiving TCJL awards from TCJL President J.P. Word are, below center, Sen. Bob McFarland of Arlington and Rep. Tom Uher of Bay City.



## TCJL files brief supporting SW Bell Telephone in DTPA case

The Texas Civil Justice League has filed an *amicus curiae* brief before the Texas Supreme Court in support of Southwestern Bell Telephone Company in a Deceptive Trade Practices Act case.

In January 1980, FDP Corporation contracted with Southwestern Bell to publish an advertisement in the next issue of the Houston Yellow Pages. When Southwestern Bell failed to include FDP's ad in the June 1980 Houston Yellow Pages Directory, FDP sued for breach of contract, negligence and breach of warranty under the Texas Deceptive Trade Practices-Consumer Protection Act. FDP claimed loss of substantial business revenues and profits, loss of sources and referrals of business, mental anguish from economic intimidation, loss of the use and benefit of its revenues prior to

judgment, and exemplary and punitive damages.

A trial jury ruled in favor of FDP, but awarded no damages! The trial court jury found that in addition to the written contract, Southwestern Bell had made an express warranty which it breached by failing to publish FDP's ad. However, the jury found that FDP had sustained no damages as a result of this breach of warranty.

The written contract between FDP and Southwestern Bell contained a clause limiting Bell's liability to the amount paid for the advertisement.

The Houston Court of Civil Appeals reversed the trial court's judgment and ordered a new trial. In support of its ruling, the appellate court made the following holdings:

- The DTPA is liberally construed to protect consumers against

breaches of warranties and its protection may not be waived.

- Because this was a case of breached express warranty to provide goods or services, FDP could sue under the DTPA, and the contractual limitation of liability was ineffective.

- A breach of warranty is actionable under DTPA.

In its *amicus curiae* brief, TCJL contended that an express warranty was not created; therefore, a breach of that express warranty could not have occurred.

"Accordingly, without a breach of an express warranty, this case would be taken out of the realm of the DTPA," the TCJL brief said. "We agree that this case involves a breach of contract, and that this case should not be controlled by the DTPA."

## Civil Justice PAC could play important role in 1990 races

With at least 17 House members and possibly four Senators indicating they will not seek reelection, Civil Justice PAC will have the opportunity to play an important role in the 1990 political campaigns.

In the next few days, you will receive a letter asking you to contribute to

Civil Justice PAC, the political action committee of the Texas Civil Justice League. Please carefully consider the importance of the races and their effect on our legislative agenda and mail your contribution as soon as possible.

Given their recent defeat in the workers' compensation reform battle and TCJL's progress in civil justice reform

during last year's regular session, we expect an all-out effort by the plaintiffs' attorneys on behalf of the House and Senate candidates they support.

Your contribution to Civil Justice PAC has never been more important! Let's not pass up this unequalled opportunity to support legislative candidates who are advocates of civil justice reform.

# Membership...

continued from page 1.

"While this tremendous growth is a sign of continuing interest, we must not be complacent, and we must keep the organization on a firm financial basis," Wayne said.

Wayne said member participation has never been more urgent due to special legislative sessions scheduled in 1990 and the regular session coming up in only 12 months.

The TCJL Board of Directors, Executive Committee, lobbyists and staff have been busy examining proposed legislation, talking to bill sponsors, preparing strategy and reviewing the 1990 political races.

"Although we have 2,000 members, making TCJL the largest tort reform organization in the nation, that number is somewhat misleading

because those are just the dues paying members," Wayne said. "We have more than 100 trade and professional association members, and their members share our interest in civil justice reform, which gives us a tremendous grassroots army of supporters."

For instance, he said, one association member has 42,000 members and another has 36,000 members, but each association is counted as only one TCJL member.

"We urge you to help us add to our membership," Wayne said.

If you need more information or to have membership information packets sent to a prospect, please contact Pam Evans at the TCJL address, or call (512) 320-0474.

## NOTICE

The filing deadline for state races was **January 2, 1990**. This year marks the first early party primaries in Texas, scheduled for **March 13**.

### TCJL Approves 1990/1991 Programs

During its fourth annual meeting, the TCJL Board of Directors approved the following programs of work:

1. **Products liability.** 1990
  2. **Deceptive Trade Practices Act.**
  3. **Corporate venue.**
  4. **Municipal liability.**
  5. **Remedies for the high frequency of non-meritorious lawsuits.**
1. **Reform products liability law.** 1991
  2. **Return DTPA to original intent.**
  3. **Expand governmental immunity for public officials.**
  4. **Amend statutes on corporate venue so that they apply equally to Texas and non-Texas corporations alike.**
  5. **Provide remedies for the high frequency of non-meritorious lawsuits.**
  6. **Re-enact sanctions on frivolous lawsuits.**
  7. **Cap non-economic damage awards.**
  8. **Require collateral source review.**
  9. **Abolish joint and several liability.**
  10. **Place restrictions on contingency fees.**
  11. **Provide for periodic payments in tort actions.**

## Workers' Comp. reform is finally a reality

After nearly a year's effort, workers' compensation reform is a reality in Texas.

Although the new legislation will not take effect until January 1, 1991, it will force sweeping changes in the workers' compensation system.

Following is a synopsis of major alterations in the law:

- The basis for determining the benefit for compensating injured workers will be essentially changed. Instead of basing compensation on the worker's loss of wage-earning capacity, impairment income will be based on guidelines set by the American Medical Association.

These guidelines form the basis for determining how much should be paid for injuries to different body parts. Those figures are then coupled with a formula that includes the worker's wages to determine how much impairment income the worker is entitled to receive.

- The maximum benefit for injured workers who cannot work will increase from the current \$238 a week to \$416 for up to 401 weeks. The maximum benefit to compen-

state a worker for being injured also will increase — from the current \$236 to \$291.

- The new legislation should substantially reduce, if not eliminate, the threat of going to court in disputed cases. Disputed claims first will go to an informal benefit review conference, which would not require a worker to have an attorney. The worker who needs advice can seek help from a new ombudsman's office at the Industrial Accident Board.

If the conference results in no agreement, the case can go to binding arbitration if both parties agree. If not, the case will go to a formal contested case hearing. If either party disputes the result of the hearing, the case can be appealed to an IAB appeals panel.

If a party still is unsatisfied, the case can go to court. However, unlike current rules, the jury will be informed of the IAB's findings. In addition, the appealing party faces legal restrictions that are not part of current law.

- Attorneys' fees will be based on time and effort expended rather than the current percentage of award they win. (A week before the new law was passed, the IAB voted to limit attorneys' fees from the

current 25 percent maximum to 15 percent.) The new law also greatly restricts the ability to settle a claim for a lump sum instead of receiving weekly benefits.

- Instead of having an unlimited right to consult with as many doctors as they want at the expense of the system, workers will have a right to choose their first doctor, but any changes can be made only with the approval of the insurer or IAB. Starting in 1992, only doctors on an IAB list can be used.

- Large companies will be able to self-insure, and smaller ones can group to get lower rates. Small companies can get a 10 percent premium discount if they have no lost-time claims for a year, and 15 percent for two years.

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