

TEXAS CIVIL JUSTICE LEAGUE JOURNAL

Chairman's Column

by Rob Looney

As it has in every legislative session since 1987, the Texas Civil Justice League responded successfully to challenges confronting the Texas business community this spring. Despite the overwhelmingly conservative make-up of the current legislature, liability issues rarely break down along party lines. In this environment, there is no substitute for sound policy research and effective advocacy.

TCJL members can be proud of this session's achievements. The League played a central role in developing, negotiating, and passing Governor Perry's tort reform initiative. For the first time in the history of our jurisprudence, Texas will have workable rules for the early dismissal of lawsuits and a mechanism for recovering costs from a party who brings a non-meritorious lawsuit. This important breakthrough has been part of TCJL's roadmap for legal reform since 1986.

The Governor's bill also closes a loophole in the 1995 and 2003 civil justice reforms with respect to the designation of responsible third parties. This change will protect businesses from stale claims that previously could have been revived under current law. This change would not have been possible without the League's hard work and continuing commitment to improving and perfecting past reforms.

The League's legislative activity, however, went far beyond tort reform proposals. When faced with potentially broad liability for damages or injuries resulting from the discharge of a firearm brought by an employee to an employer's parking area, Texas business and industry called upon TCJL to negotiate more airtight liability protections for employers. The result was much stronger liability protection for employers than would otherwise have been adopted, despite heavy lobbying by the personal injury trial lawyers and others against it. This is one of those legislative victories that will end up saving Texas business millions of dollars. And TCJL and its allies got it done.

This session wrap-up edition of the TCJL Journal details many other League initiatives and accomplishments over the past six months. As Chair of the League's executive committee, I would like to express my gratitude to the members of the TCJL Board of Directors, the TCJL staff, and the many TCJL members who worked tirelessly to make the 82nd Legislature a successful one.



Governor
Rick Perry

Governor Perry Signs LANDMARK REFORM LEGISLATION

On May 30, Governor Rick Perry signed into law the most extensive civil justice reform legislation since 2005. This is the third time in Governor Perry's tenure that he has made significant tort reform a top legislative priority, and in each instance the legislature has responded to his call for meaningful reform. The first came in 2003 with comprehensive medical malpractice and general liability reforms that have enhanced access to health care and improved the Texas business climate. The 2005 asbestos and silica legislation removed thousands of inactive, unimpaired asbestosis claims from court dockets across the state. Governor Perry's achievements remain unequalled anywhere else, and under his leadership Texas has emerged as the clear national leader in civil justice reform and a model for the states.



Representative
Brandon
Creighton

HB 274 by **Representative Brandon Creighton** (R-Conroe) and **Senator Joan Huffman** (R-Houston) contains five major provisions.

HB 274:

- directs the Texas Supreme Court to adopt rules implementing an early dismissal motion for failure to state a claim, as is currently available under the Federal Rules of Civil Procedure. These rules will allow a judge to dismiss non-meritorious lawsuits at an early stage with the potential for cost recovery against the claimant by the prevailing party;
- requires the Supreme Court to adopt rules governing an expedited trial process for claims valued between \$10,000 and \$100,000. This provision will ensure a more cost-effective, efficient, and accessible judicial system for small claims;
- allows a trial judge to certify an interlocutory appeal with respect to a controlling question of law that, if decided in advance of a costly trial, would dispose of the case at the pre-trial stage;
- prohibits a claimant from suing a person after the applicable statute of limitations has expired with

Continued on page 3

CONTENTS

- 1 Chairman's Column
- 3 Florida Supreme Court to Consider Constitutionality of Medical Liability Caps
Anti-Indemnity Provisions Become Law
- 4 Tort Reform in Action
- 5 Legislature Creates Few New Causes of Action
- 6 Governor Perry Announces Final Decisions on Legislation
TCJL Leads Tort Reform Efforts Nationwide
- 7 82nd Regular Session Summary
Windstorm Changes Approved
- 9 The Lone Star Jobs Surge
- 11 TCJL PAC Looks to 2012 Election Cycle

The Texas Civil Justice League Journal is published by the Texas Civil Justice League. Since 1986, the Texas Civil Justice League has led the fight to create a strong business climate by restoring fairness and stability to the civil justice system.

SUMMER 2011

STAFF

Carol Sims
Acting Executive Director
carol@tcjl.com

Sandra Richter-Brown
Controller
sandra@tcjl.com

S. Whitney May
Staff Attorney
whitney@tcjl.com

Marisa Peterson
Executive Assistant
marisa@tcjl.com

ADVISORS

George S. Christian,
Of Counsel
Shannon Ratliff
Walter Fisher

BOARD OF DIRECTORS

Robert L. Looney
Texas Oil & Gas Association
Executive Committee
Chairman of the Board

John W. Fainter, Jr.
Association of Electric
Companies of Texas
Executive Committee
Vice Chairman of the Board

Hector Rivero
Texas Chemical Council
Executive Committee

Richard Jackson
Texas Restaurant Association
Executive Committee

Bo Gilbert
USAA
Executive Committee

Louis J. Goodman
Texas Medical Association
Executive Committee

Steve Hazlewood
Dow Chemical Company
Executive Committee

Robert W. Jones
Pfizer, Inc.
Executive Committee

Dennis A. Kearns
BNSF Railway
Executive Committee

Robert Levy
Civil Justice Reform Group
and ExxonMobil
Executive Committee

Martin Loeber
Valero Energy Corporation
Executive Committee

Travis Kessler
Texas Association of Realtors
Executive Committee

William J. Oswald
Koch Companies Public Sector
Executive Committee

Bennett Sandlin
Texas Municipal League
Executive Committee

Victoria J. Waddy
Zachry Corporation
Executive Committee

Raul Allegue
Travelers

George B. Allen
Texas Apartment Association

Gary Barrett
Bayer Healthcare

Jeff Bonham
CenterPoint Energy

Fred C. Bosse
American Insurance Assn.

Russell Bridges
3M

Michael J. Chatron
Associated General
Contractors/Texas
Building Branch

Jayme Cox
Shell Oil Company

Jack Dillard
Altria Group

Frank Galitski
Farmers Insurance Group

Jonna Kay Hamilton
Nationwide Mutual
Insurance Company

Sherman "Tiger" Joyce
American Tort Reform
Association

Leah Lorber
GlaxoSmithKlein

J. Parker McCollough
Entergy Texas

Dan Pero
American Justice
Partnership

Gregory M. Redmond
MetLife

Julio Reyes
AEP Texas

Tom Sellers
ConocoPhillips

Phil Wilson
Luminant

EX OFFICIO

Ruben Martin
Martin Resource
Management Corp.

B.J. "Red" McCombs
McCombs Enterprises

Ralph Wayne

For more information, contact the Texas Civil Justice League,
400 West 15th Street, Suite 1400, Austin TX 78701
512-320-0474, 512-474-4334 fax, info@tcjl.com.

Landmark Reform Legislation continued from page 1

respect to that person if a defendant has designated the person as a responsible third party as allowed under current law; and

- modifies the offer of settlement procedures to make them more workable and effective.

Prior to the beginning of the legislative session, Governor Perry's office requested TCJL's involvement in the de-



Representative Brandon Creighton, (R-Conroe), House sponsor of HB 274 Governor Rick Perry (seated), Senator Joan Huffman, (R-Houston), Senate sponsor of HB 274

velopment of this proposal. As the legislation progressed, TCJL continued to assist the House and Senate sponsors and the members of the House Judiciary and Civil Jurisprudence Committee and Senate State Affairs Committee

in negotiating the final version of the bill.



Representative Jim Jackson

TCJL would like to recognize and commend Representative Creighton and Senator Huffman for their leadership in successfully shaping and passing this landmark legislation. Additionally, the



Senator Robert Duncan

two substantive committee chairs—**Representative Jim Jackson** (R-Dallas) and **Senator Robert Duncan** (R-Lubbock)—worked tirelessly to bring the

Continued on page 11

Florida Supreme Court to Consider Constitutionality of Medical Liability Caps

The 11th Circuit Court of Appeals has certified several issues concerning the constitutionality of Florida's medical liability caps to the Florida Supreme Court. Specifically, the 11th Circuit requests a determination of whether statutory caps on noneconomic damages violate the equal protection, open courts, right to trial by jury, and separation of powers provisions of the Florida Constitution.

TCJL has agreed to support the position of Florida health care providers by filing an amicus brief in the case of *McCall v. United States of America*, which arises out of the post-natal death of a woman in a U.S. military hospital. Florida law imposes an aggregate \$1,000,000 cap on noneconomic damages for wrongful death against all health care practitioners. A \$500,000 cap applies on a per claimant basis for personal injury or wrongful death arising from medical negligence of practitioners. The federal district judge for the Northern District of Florida, Pensacola Division, upheld the cap as constitutional under Florida law. The plaintiff has appealed the decision to the 11th Circuit, which certified the constitutional questions to the Florida Supreme Court.

TCJL's brief in this case will illustrate the substantial and compelling public benefits that have occurred as a result of Texas' medical malpractice reforms, particularly the \$250,000 cap on noneconomic damages.

These benefits include significantly enhanced access to health care, particularly in high-risk medical specialties such as obstetrics and neurosurgery, as well as in hospital and emergency care. Texas reforms have also resulted in reduced medical malpractice insurance rates and expanded availability of insurance statewide.

Anti-Indemnity Provisions Become Law

Governor Perry has signed legislation prohibiting some types of broad-form indemnity provisions in construction contracts. HB 2093, which in its original form regulated consolidated insurance programs, was amended with anti-indemnity language similar to SB 361 and passed both houses late in the session.

The new law bars indemnity and additional insurance provisions in a construction contract that require an indemnitor to hold harmless the indemnitee for the indemnitee's negligence. There is an exception to this broad prohibition for indemnity and additional insurance provisions pertaining to claims by an employee of the indemnitor, its agent, or the indemnitor's subcontractor of any tier. Thus broad form indemnity and additional insured provisions for claims involving property damages or personal injuries to non-employee third parties will no longer be enforceable.

The new law does not affect insurance policies, such as commercial or general liability coverage or workers' compensation insurance, or breach of contract or warranty claims that exist independently of the indemnity obligation. It also excludes public works projects by municipalities, construction contracts for single-family residences, and certain railroad construction. It allows post-claim joint defense agreements between the parties.

Original construction contracts entered into on or after January 1, 2012, will be subject to the new law.

TORT REFORM IN ACTION:

Update on 2005 Asbestos and Silica Reforms

Prior to the beginning of the 2011 legislative session, TCJL released a comprehensive study entitled “A Texas success story: Asbestos and silica lawsuit reform.” This report, authored by Kay Andrews, Mark Behrens, David Herrick, and Laura Kugler of TCJL’s asbestos litigation committee, provides the first detailed examination of the impact of SB 15, enacted by the legislature in 2005, on asbestos and silica litigation in Texas. As the report clearly illustrates, the 2005 legislation has accomplished precisely what the legislature intended: a dramatic reduction in unimpaired claims (many from jurisdictions outside of Texas) that overwhelmed the court system.

In 2003, the legislature took the first step toward corraling runaway asbestos and silica litigation by establishing multidistrict litigation courts (MDL) to handle pretrial matters in mass tort actions. Under rules adopted by the Texas Supreme Court, the Judicial Panel on Multidistrict Litigation created two MDL courts in 2004, one for asbestos and one for silica, and appointed **Judge Mark Davidson** and **Judge Tracy Christopher**, respectively, to preside over the asbestos and silica dockets. Upon **Judge Christopher**’s appointment to the 14th Court of Appeals, the MDL panel appointed **Judge Joseph Halbach** to replace her in 2009.

SB 15 established medical criteria for non-malignant asbestos and silica claims and required plaintiffs to file medical reports in order to proceed with their claims. The bill also directed the MDL judges to report to legislative leadership by September 1, 2010 regarding the status of claims pending in the MDL courts. These reports demonstrate the unqualified success of SB 15 in eliminating claims that do not meet the medical criteria for impairment.

“The effect of SB 15,” the report asserts, “was to make ‘inactive’ thousands of asbestos and silica cases that were transferred to the two MDL pretrial courts because the plaintiffs cannot meet—or have not made the effort to meet—the minimum medical criteria set out in the statutes.” **Judge Davidson** reported that as of August 31, 2010, the asbestos MDL court had nearly 8,000 pending

cases representing between 25,000 and 84,000 individual claimants (most asbestos cases have multiple claimants). Just over 80% of these cases are currently inactive, and **Judge Davidson** indicated further that non-malignant asbestosis claims have dramatically declined in Texas courts as a result of SB 15. With respect to the silica MDL court, **Judge Halbach** reported 667 pending cases representing 5,839 exposed persons. Only 22 exposed persons have met the medical criteria and thus have active cases; most claimants have not filed medical reports at all.

Judge Davidson commented that one of the problems with the existing system is that there is no effective way to dismiss inactive claims for want of prosecution. He further noted the cost to the state court system of maintaining inactive files.

This session **Representative Doug Miller** (R-New Braunfels) and **Senator Dan Patrick** (R-Houston) introduced legislation that would have, among other things, allowed a plaintiff to dismiss an inactive claim without prejudice and refile it once the medical criteria were met. While TCJL actively supported this legislation, it did not ultimately advance beyond the committee stage in either house. We hope that this legislation will be introduced again in 2013 to address the problems identified by **Judge Davidson**, as well as other issues, such as the treatment of settlements with asbestos bankruptcy trusts.

SB 15 proves that balanced, well-reasoned civil justice reform works. No legitimate asbestos or silica claim has been affected by this legislation, and valuable resources have been diverted from unimpaired claims to those with legitimate injuries and illnesses. Indeed, as it has in other areas, Texas law has become a model for the nation.



Representative
Doug Miller



Senator
Dan Patrick

Legislature Creates Few New Causes of Action

One of TCJL's primary functions is to minimize the number of new causes of action created each session by the enactment of statutes and regulatory requirements that broadly affect Texas businesses. The 82nd Legislature was no exception.

An initial review of legislation reveals the creation of six causes of action:

- SB 43: expands claims against the employer of a mental health services provider for sexual exploitation of a patient;
 - SB 1716: provides for fee forfeiture, additional damages (including attorney's fees), and voidability of contracts in cases procured by barratry;
 - HB 1711: adds a cause of action under the Deceptive Trade Practices Act applicable to a disaster remediation contractor;
 - HB 2592: imposes liability under the Deceptive Trade Practices Act on credit services organizations;
 - HB 2594: expands the liability of credit service organizations under the Deceptive Trade Practices Act for failure to disclose, failure to register, and failure to report required information;
 - SB 141: expands private cause of action against debt management service providers.
- The legislature also passed HB 1429, which created a new cause of action allowing residential tenants to file suit against landlords who failed to provide tenants with a copy of their lease in certain circumstances. **The Governor vetoed this bill.**

Most bills creating or expanding new causes of action, however, failed to pass. These include:

- HB 64: created a new cause of action under the Insurance Code for unfair practices related to crop insurance;
- HB 251: allowed a person who lives in a county where a wild animal is kept to file suit to enjoin violations of laws regulating wild animals;
- HB 321: expanded liability of insurers who use artificial intelligence applications without complete review of a claim for noneconomic damages;
- HB 985: required reporting of suspected abuse, neglect, or mistreatment of a resident in an assisted living facility and allows an employee who reports such conduct to sue the facility for retaliatory discharge or discrimination;
- HB 1197: created a qui tam action for a person who contracted for royalties with an oil and gas producer;
- HB 1440: expanded the Deceptive Trade Practices Act to impose liability on a person who offers consumer goods on a trial basis for failure to obtain a consumer's assent to the payment of a fee at the end of the trial period;
- HB 1444: established standards for electronic contracts and solicitations offered to consumers for goods or services and allowed suits to enforce the standards, including recovery of liquidated damages, attorney fees, and costs;
- SB 142: created private cause of action to enforce requirements and procedures relating to the business of homeowner's associations, including statutory damages and attorney fees;
- SB 212: allowed the attorney general or a private person to bring a civil action for deceptive election practices;
- HB 2878: established a qui tam action and a private cause of action against an employer of illegal aliens;
- HB 297: established a private cause of action against a person seeking to enforce federal health care legislation;
- SB 1320: allowed cause of action for damages, treble damages, costs, and fees against a person who requires a borrower to execute a deed conveying a home to the lender on or before the date the deed of trust is executed (this bill passed without the private cause of action and instead allows the attorney general to enforce the prohibition).



Governor
Rick Perry

GOVERNOR PERRY ANNOUNCES FINAL DECISIONS ON LEGISLATION

Governor Rick Perry announced his final decisions on major legislation passed during the 82nd Regular Legislative Session, including the veto of certain bills in order to protect ethics and public safety, and to limit government intrusion into Texans' lives. The governor also thanked lawmakers for their continued work during the current special session to move Texas toward a final budget that is balanced, doesn't raise taxes, lives within the state's means, and does not use the state's Rainy Day Fund in the next budget cycle.

"Our state faced significant challenges as we began the legislative session in January, and I am proud Texas will continue to live within its means while encouraging job creation and maintaining essential services. There is still some work to be done by lawmakers, but I am confident the bills I have signed will strengthen our economic momentum moving forward," Governor Perry said. "After thoroughly reviewing all legislation that reached my desk, there were some bills that would have done more harm than good to Texans, and I have used my authority to veto them."

The governor signed House Bill 1, which is a significant step toward arriving at a final state budget that lives within its means, doesn't raise taxes and protects the state's Rainy Day Fund. Lawmakers finalized the budget in the special session to fund public schools and adopt other fiscal measures that will balance the state's 2012-13 books.

In order to ensure continued open, honest and efficient campaign finance reporting, the governor vetoed House Bill 1616, which would have allowed the filer of a campaign finance report to correct, without penalty, any report within 14 days after a sworn complaint has been filed with the commission, undermining the Texas Ethics Commission's enforcement authority over campaign finance filings. The governor also vetoed House Bill 2327, which would have endangered motorists by allowing transit buses in certain urban counties to drive on highway shoulders during peak traffic hours, leaving no emergency lane. Also vetoed was House Bill 1768, which would have encroached on the rights of private enterprise and property owners while fundamentally altering and unnecessarily expanding the role of county government. Finally, the governor vetoed House Bill 2972, which would have limited voters' ability to vote on tax increases.

To see additional vetoes and all other action taken by the governor on legislation, please visit <http://governor.state.tx.us/news/bills/>.

TCJL Leads Tort Reform Efforts Nationwide

Sherman "Tiger" Joyce, President, American Tort Reform Association

Texas has been at the forefront of the civil justice reform movement for nearly twenty years. It has done so on a bipartisan basis as Texas's leaders have correctly recognized that a balanced civil justice system enhances access to life-saving medical care, promotes economic development and the creation of new jobs. The state is receiving appropriate recognition in today's challenging economic times as states and the nation as a whole struggles to recover from our ongoing economic woes.

This recent record of accomplishment followed a period when Texas's reputation for a fair legal system was anything but admirable. Simply put, the excesses and inequities of the system primarily served the interests of those "in the system." The broader public, by contrast, was ill-served. The problems were so pronounced that they attracted the attention of the national media – the type of attention no state wants for one of the cornerstones of society.

Borrowing loosely from an old saying, "What a difference nearly twenty years make." It didn't happen by chance, however. Many leaders in the state, including Governors and legislators from both parties, can claim the success of the last two decades as their own. They deserve praise and thanks for supporting legal reform, often against significant opposition.

Leaders of the health care and business communities deserve great credit as well. Within these groups, however, one has stood out: the Texas Civil Justice League.

The League has achieved a record of legislative accomplishment that is unmatched in the country. It has done so working with many strong allies, and most importantly has always focused on the goal of success in the legislature. The result is an unparalleled track record of success.

Beyond the success in Texas, however, the League has helped similar organizations in different states. I can attest that whenever I have asked the League's leadership to share their insights on how to advance civil justice reform, they have always done so – whether in our national conferences or in visits to leaders in states such as Illinois, Florida or California, to name just a few.

We at the American Tort Reform Association are proud of the League's accomplishments and are grateful to those from Austin who have served in our leadership. Most notably, the Honorable Ralph Wayne served as Chairman of our Board from 1999 to 2001.

We look forward to Texas continuing to set the national standard for accomplishment and success in the civil justice reform movement.

82nd Regular Session Summary

Monday, June 27, 2011

The 82nd Regular Session adjourned sine die May 30, 2011. Great strides were made in the area of legal reform this session. The following summary will highlight many of the achievements attributable to TCJL, as well as certain efforts that are likely to be revisited in the future.

The Governor’s “lawsuit reform” bill HB 274 by Creighton/SB 13 by Huffman

Signed by the Governor on May 30, 2011. Takes effect September 1, 2011. HB 274 requires the Texas Supreme Court to promulgate rules providing for the early dismissal of actions and expedited claims under \$100,000; provides a mechanism for mid-case, interlocutory appeals for controlling questions of law; improves the current offer of settlement statute; and corrects a flaw in the current statute dealing with the designation of responsible third parties. TCJL devoted substantial effort to negotiate and ensure passage of HB 274. This bill will solidify Texas’s position as a legal reform leader.

Trespasser Liability SB1160 by Seliger/HB 1971 by Jackson

Signed by the Governor on May 20, 2011. Takes effect immediately. One of TCJL’s top priorities this session was legislation that would protect Texas landowners from liability to trespassers. SB 1160 provides that a Texas landowner does not owe a duty of care to a trespasser except in certain delineated circumstances. The bill protects landowners from the unwarranted expansion of liability suggested in the *Restatement (Third) of Torts*, and this codification of the common law ‘no duty to trespassers’ rule is an important step in protecting Texas landowners.

Asbestos and Silica Litigation HB 2034 by Miller/SB 1202 by Patrick

Died in House Judiciary and Civil Jurisprudence Committee. TCJL proposed asbestos litigation reforms allowing the dismissal of inactive cases and requiring bankruptcy trust disclosure. Given the other reform initiatives on the table this session, this proposal was left for interim study and future action.

Continued on page 8

WINDSTORM CHANGES APPROVED

As the special session concluded, reforms of the Texas Windstorm Insurance Association’s (TWIA) method of finance, administration, claims process, and dispute resolution were approved. During the regular legislative session, different versions of HB 272 by **Representative John Smithee** (R-Amarillo) passed the House and Senate, but a conference committee was unable to reach a compromise by session’s end. Governor Perry added the issue to the June special session, which concluded on June 29. The House has passed virtually the same bill again—HB 3 by **Representative Smithee**—and **Senator John Carona** (R-Dallas), the Senate sponsor, passed the Senate version, sending the issue to conference committee for resolution.

One of the most contentious issues between the two houses was the limitation on damages that may be recovered in a policyholder suit against TWIA. The House bill established a dispute resolution process that involves an administrative procedure in which a TWIA-appointed umpire appraises the claim and attempts to resolve it, followed by an ADR procedure (if requested by TWIA), and only if these methods fail to dispose of the claim, a lawsuit in district court. If a case does go to court, the multidistrict litigation panel must appoint a judge to hear it (who must be a resident of a tier one or tier two coastal county). A claimant may only recover covered losses, pre-judgment interest, costs, and reasonable and necessary attorney fees. Under the Senate version of the bill, a claimant could also recover an additional penalty and double damages.

The House Senate compromise allows a claimant to recover double damages under certain circumstances.

Barratry SB 1716 by Duncan

Signed by the Governor on May 19, 2011. Takes effect September 1, 2011. TCJL supported this legislation, which imposes civil penalties for barratry (unethical solicitation of clients) and allows a client to void contracts for services procured by barratry. TCJL also supported and participated in other related barratry bills throughout the session (e.g., HB 620 and HB 1890 by Fletcher; HB 2163 and HB 2164 by Scott).

Voluntary Compensation Plans HB 2031 by Madden/SB 21 by Williams

Died in House Calendars Committee. TCJL proposed this novel initiative that has no counterpart in the law of any other state. HB 2031 would have created a framework for a defendant to establish a voluntary plan to compensate victims of an event without fear that establishment of a plan would be used against the defendant in court. The bill passed out of the House Judiciary and Civil Jurisprudence Committee, but it died in Calendars at the end of the session.

Court Reorganization SB 1717 by Duncan/HB 3445 by Jackson Special Session HB 79 by Lewis

HB 79 sent to the Governor on June 29, 2011 for his signature or veto. SB 1717 died in conference committee in the regular session. It was refiled in the special session as HB 79. It is a comprehensive court reorganization bill that included several important and necessary changes to the current system, including more uniform jurisdiction for county courts at law and other trial courts and the provision of additional resources to courts faced with complex litigation. TCJL supported its passage. The bill died in conference committee during the regular session. In the special session, HB 79 passed and went to the Governor just under the wire on the very last day of the session. The Governor has 20 days to sign, veto, or let it pass without signature.

Texas Windstorm Insurance Association HB 272 by Smithee/SB 1432 by Carona

Died in conference committee in the regular session. Numerous bills were filed to reform the abuses that have crippled this state agency in the wake of Hurricane Ike. TCJL supported the bill and assisted in the effort to pass certain TWIA reform-related initiatives, including a limi-

tation on damages that may be recovered by a policyholder against the agency. HB 272 passed both the House and the Senate, but the conference committee could not reconcile the differences between the two versions by session's end. Governor Perry added TWIA reform to the special session call on June 3, 2011, and the bill was refiled as HB 3 by Smithee, and passed as the session concluded.

Guns to Work SB 321 by Hegar/HB 681 by Kleinschmidt

Signed by the Governor; effective September 1, 2011. SB 321 prohibits employers from preventing their employees from bringing guns to work and storing them in their locked vehicles. With 90 House sponsors and 11 Senate sponsors, passage of this bill was virtually guaranteed from the beginning of the session. TCJL and its allies focused on strengthening employer liability protections in the bill. As a result of opposition from the personal injury trial lawyers and other groups, changes in the liability language were very difficult to achieve. Ultimately, several additional liability protections were added in conference committee. Language added in 52.063(c) provides that there is no employer duty to inspect, patrol, or secure parking areas to determine compliance with the law. There was some question as to whether an employer would be protected in the instance the gun was discharged someplace other than inside a locked vehicle, so 52.063(a) and (b) were amended to provide that an employer (or agent, principal, etc.) could not be liable for damages resulting from or arising out of an occurrence involving a firearm or ammunition that the employer was required to allow on its property. Finally, property owned or leased by certain chemical manufacturers or oil and gas refiners were exempted from the bill because of increased risk with regard to facilities that house volatile materials.

Indemnity HB 2093 by Thompson SB 361 by Duncan/HB 2010 by Smithee

Signed by the Governor; effective on January 1, 2012. TCJL has opposed anti-indemnity legislation for many years. During the 2009 session, TCJL participated in a negotiated effort to achieve an agreed bill, which failed to pass, and after exhaustive review of the issue TCJL returned to its long-standing traditional opposition to state intervention in contracts. While SB 361 by Duncan and HB 2010 by Smithee never made it out of the House Insurance Committee, thanks in part to substantial efforts by TCJL, there was consistent concern that the anti-indemnity legislation would be amended onto a related bill. This ul-

Continued on page 10

The Lone Star Jobs Surge

The Texas model added 37% of all net U.S. jobs since the recovery began.

Richard Fisher, the president of the Federal Reserve Bank of Dallas, dropped by our offices this week and relayed a remarkable fact: Some 37% of all net new American jobs since the recovery began were created in Texas. Mr. Fisher's study is a lesson in what works in economic policy—and it is worth pondering in the current 1.8% growth moment.

Using Bureau of Labor Statistics (BLS) data, Dallas Fed economists looked at state-by-state employment changes since June 2009, when the recession ended. Texas added 265,300 net jobs, out of the 722,200 nationwide, and by far outpaced every other state. New York was second with 98,200, Pennsylvania added 93,000, and it falls off from there. Nine states created fewer than 10,000 jobs, while Maine, Hawaii, Delaware and Wyoming created fewer than 1,000. Eighteen states have lost jobs since the recovery began.

The data are even more notable because they're calculated on a "sum of states" basis, which the BLS does not use because they can have sampling errors. Using straight nonfarm payroll employment, Texas accounts for 45% of net U.S. job creation. Modesty is not typically considered a Texas virtue, but the results speak for themselves.

Texas is also among the few states that are home to more jobs than when the recession began in December 2007. The others are North Dakota, Alaska and the District of Columbia. If that last one sounds like an outlier at first, remember the government boom of the Obama era, which

has helped loft D.C. payrolls 18,000 jobs above the pre-crisis status quo. Even so, Texas is up 30,800.

What explains this Lone Star success? Texas is a big state, but its population of 24.7 million isn't that much bigger than the Empire State, about 19.5 million. California is a large state too—36.9 million—and yet it's down 11,400 jobs. Mr. Fisher argues that Texas is doing so well relative to other states precisely because it has rejected the economic model that now prevails in Washington, and we'll second that notion.

Mr. Fisher notes that all states labor under the same Fed monetary policy and interest rates and federal regulation, but all states have not performed equally well. Texas stands out for its free market and business-friendly climate.

Capital—both human and investment—is highly mobile, and it migrates all the time to the places where the opportunities are larger and the burdens are lower. Texas has no state income tax. Its regulatory conditions are contained and flexible. It is fiscally responsible and government is small. Its right-to-work law doesn't impose unions on businesses or employees. It is open to global trade and competition: Houston, San Antonio and El Paso are entrepôts for commerce, especially in the wake of the North American Free Trade Agreement.

Based on his conversations with CEOs and other business leaders, Mr. Fisher says one of Texas's huge competitive advantages is its ongoing reform of the tort system, which has driven litigation costs to record lows.

He also cited a rule in place since 1998 in the backwash of the S&L debacle that limits mortgage borrowing to 80% of the appraised value of a home. Like a minimum down payment, this reduces overleveraging and means Texas wasn't hurt as badly by the housing crash as other states.

Texan construction employment has contracted by 2.3% since the end of the recession, along with manufacturing (a 1.8% decline) and information (-8.4%). But growth in other areas has surpassed these losses. Professional and business services accounted for 22.9% of the total jobs added, health care for 30.5% and trade and energy for 10.6%.

The Texas economy has grown on average by 3.3% a year over the last two decades, compared with 2.6% for the U.S. overall. Yet the core impulse of Obamanomics is to make America less like Texas and more like California, with more government, more unions, more central planning, higher taxes. That the former added 37% of new U.S. jobs suggests what an historic mistake this has been.

Reprinted by permission of Wall Street Journal, Copyright 2011, Dow Jones & Company, Inc. All Rights Reserved Worldwide. License Number 2691470836793.

The Texas Example

Net jobs since the recession ended in June 2009, through April 2011, in thousands

Texas	265
New York	98
Pennsylvania	93
All Other States	266

timately occurred when HB 2093, an uncontroversial bill regulating consolidated insurance programs, was amended in the Senate with the substance of SB 361. The anti-indemnity language survived the conference committee, was approved by both houses, and signed by the Governor.

Sharia Law HB 911 by Berman

Died in House Calendars Calendar. This bill prohibited state courts from applying foreign laws based upon the unfounded concern that Sharia (i.e., Islamic religious) law would be applied in family law cases in Texas. TCJL testified against the bill due to its unintended consequences for Texas businesses. If such a broadly applicable bill were enacted, it would have created uncertainty in contracts and put Texas businesses at a disadvantage in the global market. Attempts at amending these provisions onto another bill were equally unsuccessful.

Class Action Cy Pres HB 1886 by Morrison/SB 1535 by Watson

Died in the Senate. TCJL was the sole opposition to this problematic class action cy pres legislation. It provided for payment of class action funds to the State, and did not include provisions allowing class action defendants to negotiate to have unclaimed proceeds returned to the defendant. According to a U.S. Chamber Institute for Legal Reform report, “Cy pres awards in class actions engender a multitude of ethical and conflict of interest problems for judges, defendants, plaintiffs, and absent class members.”

SLAPP Suits HB 2973 by Hunter/SB 1565 by Ellis

Signed by the Governor; effective June 17, 2011. TCJL closely monitored various bills dealing with Strategic Lawsuits Against Public Participation (SLAPP suits). HB 2973 provides for a motion to dismiss and award of attorney’s fees and costs for an action relating to a person’s exercise of the rights to free speech, petition, or association.

Railroad Commission Sunset HB 3106 by Keffer/SB 655 by Hegar

Died in conference committee. TCJL testified and provided legal support during House consideration of the Railroad Commission sunset bills. TCJL prepared the bill sponsor and others for a floor debate on applicability of the Voting Rights Act to the Railroad Commission. Time expired before Conference Committee could resolve dif-

ferences in amendments to SB 655. Accordingly, the bill failed to pass and will be considered in 2013.

Validity of Arbitration Clauses SB 1216 by Estes

Signed by the Governor; effective June 17, 2011. From the outset, TCJL had concern about SB 1216. The bill would have overturned years of precedent on the “separability” principle as applied to all arbitration contracts. The result may have been problematic for Texas employers who use arbitration to resolve disputes. TCJL closely monitored the bill and worked with the bill’s sponsor to ensure the final bill was limited to family law matters only.

Class Action for Electronic Contracts HB 1444 by Yvonne Davis

Died in House Business & Industry Committee. HB 1444 required any contract entered into through electronic means to comply with certain formalities and provide a right to cancel. It also created a cause of action under the DTPA. TCJL opposed this bill as it provided for potentially unlimited liability for Texas business based on undefined and ambiguous conduct.

Qui Tam for Oil & Gas Royalty Claims HB 1197 by Keffer

Died in House State Affairs Committee. HB 1197 was aimed at suits related to oil and gas royalties and provided for a qui tam action under contract with the comptroller if the attorney general failed to file suit on the claim. As it has for several sessions, TCJL opposed and testified against HB 1197.

Unlawful Employment Practice HB 1747 by Veasey

Died in House Economic and Small Business Development Committee. TCJL opposed HB 1747, which abrogated longstanding precedent related to requisite proof in employment law cases. Specifically, HB 1747 allowed establishment of retaliation claims by an employee or former employee by showing that retaliation was only a contributing factor rather than the sole motivation of an adverse employment decision. The result of HB 1747 would have been to increase dramatically the number and expense of employment lawsuits against Texas employers.

Continued on page 11

Automatically Renewing Contracts HB 897 by Howard

Died in House Calendars Committee. HB 897 imposed notice, disclosure, and right-to-cancel requirements for some automatically renewing contracts and created a cause of action under the DTPA. TCJL opposed this bill due to its potential to expose Texas businesses to substantial liability through unlimited class action lawsuits.

Public Nuisance Lawsuits for Greenhouse Gas Emissions HB 2268 by Hancock/SB 875 by Fraser

Signed by Governor; effective June 17, 2011. SB 875 eliminates the possibility of public nuisance lawsuits against Texas businesses claiming damage from greenhouse gas emissions. These suits have occurred in other states. TCJL strongly supported this pre-emptive legislation.

TCJL PAC Looks to 2012 Election Cycle

Building on the enormous successes in the 2010 elections for pro-civil justice reform efforts, TCJL PAC has already begun planning for next year's cycle. Though no major state offices will be on the ballot, at least three Supreme Court seats are at stake, as well as every House and Senate seat. And in the first post-redistricting legislative election of the decade, combined with a high turnout presidential election, we can expect some surprises.

If the past is any indication of the future, some current legislators will take advantage of four new congressional districts and try to move to Washington, leaving open seats. Additionally, the new House map pairs a number of incumbent House members in the same districts. Still other incumbents are faced with running in substantially different districts than they have in the past. Given the volatility of the current political environment, just about anything could happen.

It is important to note that the real election will occur in March of next year, not in November. Redistricting plans are generally designed to protect incumbents in the first instance, and to enhance the power of the dominant political party in the second. In a state so heavily controlled by the GOP, virtually all of the contested races can be expected to come in the Republican primary.

We can also expect the plaintiff's trial bar to be very active in the next round of legislative elections. They know that the current majorities in both houses, as well as the composition of the courts, must be changed if they are to reverse more than a decade and a half of positive civil justice reforms. They will try to take advantage of redistricting to chip away at these majorities, or at least to mitigate them by running more anti-civil justice reform candidates

Landmark Reform Legislation continued from page 3



Representative
Tryon Lewis



Representative
Jerry Madden

various stakeholders together to come to an agreement acceptable to all parties. To achieve this result, Chairman Jackson appointed a subcommittee composed of **Representative Tryon Lewis** (R-Odessa), **Sarah Davis** (R-Houston), and **Jerry Madden** (R-Plano).

The subcommittee produced a bill that garnered overwhelming support in the House. On the Senate side, Chairman Duncan and **Senator Huffman** personally oversaw a week of intensive negotiations on the final product, which was approved unanimously by the Senate and House, and signed by Governor Perry.

Once again, congratulations to the Governor and the Legislature on working together for the benefit of all Texans seeking access to our courts.



Representative
Sarah Davis

in the primaries.

The importance of TCJL PAC's ability to participate meaningfully in legislative primary elections cannot be underestimated. Prior to the most recent 2011 session, TCJL PAC played a key role in the election campaigns of several members of the legislature who were appointed to the committees that deal with legal and business liability issues. While this support never guarantees any particular policy outcome, it does help give supporters of civil justice reform access to the legislative process and a seat at the negotiating table. This was crucial, for example, in shaping the Governor's reform package and improving the liability protections in the guns to work legislation.

The three Supreme Court seats up for election in 2012 are currently held by **Justices Nathan Hecht** (the court's senior member), **David Medina**, and **Don Willett**. None of the three have officially announced their intentions to run for reelection as yet. Given the recent history of Supreme Court elections, we can expect one or more primary challenges even to sitting incumbents. And if an incumbent justice decides not to run, it is likely that the resulting open seat would attract multiple well-qualified candidates seeking to move up. This is precisely what happened in 2010, when **Justice Debra Lehrmann** won a five-person race that went to a run-off.



Justice
Don Willett

The bottom line is that in order to be well positioned for the 2012 cycle, TCJL PAC needs resources in hand well in advance of the fall campaign season. **Please consider making a contribution to the TCJL PAC today. Your financial support can help make a big difference, especially in the many judicial races on the ballot this cycle. Contribution information is provided on the following page.**



Texas Civil Justice League
 400 West 15th Street, Suite 1400
 Austin, TX 78701

PRST STD
 US POSTAGE
PAID
 AUSTIN TX
 PERMIT NO. 525

Please let us know how you would like to receive publications from TCJL. You may email your information to info@tcjl.com, or send this form by regular mail to TCJL, 400 West 15th Street, Suite 1400, Austin, TX 78701. If you know someone else who would like to be added to our distribution list, please send us their email or mailing address as well. Thank you.

Email preferred. Printed copy by mail preferred. Please send both.

Name _____ Email _____

Address _____

Legislative advertising contracted for by Carol Sims, Texas Civil Justice League, 400 West 15th Street, Suite 1400, Austin, Texas 78701.



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

Enclosed is my contribution to TCJL PAC. \$ _____

NAME _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

PHONE _____ EMAIL _____

*EMPLOYER _____

*OCCUPATION _____

If paying by credit card: VISA Mastercard

Account to be charged to this card \$ _____

Name on card _____

Card number _____

Expiration date Month ____ Year ____

CV Code _____

PLEASE MAKE CHECKS PAYABLE TO:
TCJL PAC, 400 West 15th Street, Suite 1400, Austin, TX 78701

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

Political advertising paid for by Texas Civil Justice League PAC, Carol Sims, Treasurer; 400 West 15th Street, Suite 1400, Austin, TX 78701