



INSIDE Products Liability, Alfaro Bills Signed Into Law

**CHAIRMAN'S
COLUMN**

Pg 2

**LIABILITY
REFORM
ENDORSERS**

Pg 2

**MILLER
NAMED
CHIEF HOUSE
ASSISTANT**

Pg 2

**GIBSON FILLS
TOP SENATE
POST**

Pg 2

**EVERYTHING
IS BIGGER
IN TEXAS**

Pg 3

After two decades of debate and disappointment, the first products liability reform legislation ever passed by the Texas Legislature is in the books. S.B. 4, a compromise struck between representatives of TCJL and the Texas Trial Lawyers Association is a significant victory for pro-tort reform efforts in Texas and across the country.

The bill was amended in the House to remove the section relating to vaccines and to clarify the statute of repose for manufacturing equipment. Originally designed to protect manufacturers of vaccines for treatment of HIV-AIDS and prevention of childhood diseases, the vaccine section became a focus of confusion about the effect of the bill on a federal law designed to reimburse victims of serious vaccine reactions. Rather than create more uncertainty, it was agreed to remove the language pending clarification of the federal issue. The Senate concurred with the House amendments, and the Governor signed the bill on March 4.

Passage of S.B. 4 is a great achievement for all TCJL members who have worked for products liability reform for the past five years. Your financial support, phone calls, letters, and personal contacts made it happen. And your persistence paid off. Special thanks also go to the Texas business and professional associations and their members who publicly endorsed and worked to promote the legislation. A complete list of these groups and companies is included in this edition.

There are many state leaders to thank for this success as well, but no one deserves our gratitude more than Curtis Seidlits (D-Sherman). Representative Seidlits, current Chairman of the House State Affairs Committee, first authored products liability reform legislation in 1989, when he passed the bill through the House in spite of fierce opposition. He repeated this feat in 1991. It is due to Representative Seidlits' unstinting devotion to fair and balanced products liability laws that successful negotiations were possible in the first place. The League and its members certainly owe Representative Seidlits our deepest appreciation for his long and tireless efforts.

Teel Bivins (R-Amarillo) is deserving of special thanks. Senator Bivins shouldered the products liability issue in 1991, and his persistent efforts played a key role in getting the negotiations started prior to this session.

We again thank Senators Carl Parker (D-Beaumont), Jim Turner (D-Crockett), and Ike Harris (R-Dallas), and the many House co-sponsors of S.B. 4.

Tort reform supporters earned another victory with the final passage and gubernatorial approval of S.B. 2, the so-called *Alfaro* legislation. Also a result of negotiations sponsored by Lieutenant Governor Bullock, S.B. 2 restores the doctrine of forum non conveniens to Texas jurisprudence in most cases.

The Jobs for Texas coalition, chaired by Louis Austin of Dallas, spearheaded the legislative effort to overturn the 1990 Texas Supreme Court decision which made Texas the courthouse of the world. Chairman Austin, legislative counsel Bob Strauser of Baker & Botts, and the members of the coalition (many of which are TCJL members as well) deserve special recognition for the breakthrough.

Senate author **John Montford** (D-Lubbock) and House sponsor **Rob Junell** (D-San Angelo) took precious time from their budget-writing responsibilities to handle this complex piece of legislation, once again demonstrating their commitment to restoring balance to the Texas civil justice system. Senator Ike Harris was also a co-author of S.B. 2. Senator Montford sponsored similar legislation in 1991.

TCJL is grateful to Lieutenant Governor **Bob Bullock** and Speaker **Pete Laney**. Without their leadership and commitment to resolving these issues this session, genuine reform legislation might not have been possible.

Last but certainly not least, we thank Governor **Ann Richards** for encouraging the resolution of both products liability and forum non conveniens. Her support for a strong business climate in this state and willingness to sign into law S.B. 4 and S.B. 2 are greatly appreciated.



Ann Richards

Former Products Liability, Alfaro Sponsors Remembered

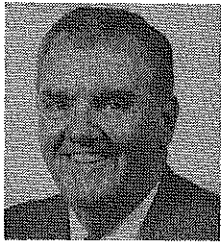
With the passage of S.B. 4 and S.B. 2, years of concerted effort by the League, its members, and other business and trade associations have borne fruit. While much of the credit should go to the leadership and those legislators who "did the deal," we should not overlook the contributions made by those members—past and present—who took up these causes.

Former Senator **Bob McFarland** (R-Arlington) carried the products liability reform bill in the Senate in 1989. Congressman **Frank Tejada** (D-San Antonio) co-sponsored products liability reform during his last session in the Senate in 1991.

With respect to *Alfaro*, former Representative **Parker McCollough** (D-Georgetown) passed legislation through the House in 1991. Senator **John Leedom** (R-Dallas) and Representative **John Culberson** (R-Houston) filed bills to overturn the *Alfaro* case this session and last.

Finally, former Speaker **Gib Lewis** (D-Fort Worth) put his name on both products liability reform and *Alfaro* and made each of them part of his own legislative package. Special mention also goes to former Representative **Bruce Gibson** (D-Godley), a staunch and tireless advocate of tort and judicial reform.

The efforts of these members, and many others who signed on to these bills, set the stage for this session's success. Our thanks to all of them as well.



Chairman's Column

by J.P. Word

A prominent jurist once observed that "the best tort reform is a fair judicial system."

If for no other reason, Texas Civil Justice League members should pay close attention to the legislative debate over judicial districts and proposals to change dramatically the way we choose our district judges in metropolitan areas.

The conflict is between those who advocate partisan subdistrict elections—59 Harris County judges, for example, would be elected from 25 state representative districts rather than countywide (while retaining countywide jurisdiction)—and those who advocate some form of merit plan which would substitute nonpartisan retention elections for the current system.

Although the U.S. Supreme Court has held that judges are covered by the Voting Rights Act the same as legislators, no federal court has issued an order requiring single-member or subdistricts. The issues were best portrayed recently by Chief Justice Tom C. Phillips in his "State of the Judiciary" address to the legislature. Judge Phillips advocates three essential steps before the system is changed:

1. Judicial campaign and ethics reform along the lines recommended by the Texas Ethics Commission. These include more frequent and more complete campaign finance disclosure, shorter campaign seasons, more detailed disclosure of financial activities and relationships, full disclosure of all fees paid to lawyers pursuant to judicial appointments, and a ban on fundraising by judges except during contested election campaigns.

2. Nonpartisan elections. Only eight other states, mostly in the South, select all their judges by partisan ballot. Phillips commented: "This practice had a certain practical virtue when all judges were of one party and the highest voter turnout was for that party's primary. In a two-party state, however, political labels in judicial elections only produce confusion. Should mayors be nonpartisan, while judges are Democrats or Republicans? If anyone should be without party affiliation, it is a judge, who, under the Code of Judicial Conduct, must promise only the 'faithful and impartial performance of the duties of office.'"

3. Retention elections on a "yes/no" ballot. About half the judges in Texas are initially appointed, not elected, and most of these judges never have an opponent at any time. Among all judges, more than four in five are unopposed after their first election. Thus, judicial elections are unlike elections to most other offices. Most judicial races are unopposed, particularly when incumbent judges are seeking re-election.

"These three changes are essential as Texans consider which method of initial judicial selection will best meet the goals of an independent and accountable judiciary while increasing its racial and ethnic diversity," the Chief Justice said.

The League urges you to stay abreast of the judicial reform issue and tell your legislators what you think about it. In many respects, our state judges are the most powerful of all lawmakers. Our tort laws—indeed all of our laws—are only as good as the judges who interpret them. All Texans have a right to fair and impartial judges and a judiciary free of partisanship and special-interest influence.

The following Texas businesses and business and professional organizations publicly endorsed products liability reform:

Texas Chamber of Commerce
 Texas Association of Business
 3M
 Texas Retailers Association
 Texas Chemical Council
 Alcoa
 Texas Farm Bureau
 National Federation of Independent Business
 Texas Rental Association
 Texas Mid-Continent Oil and Gas Association
 Texas Automobile Dealers Association
 Otis Engineering Corporation
 Dow Chemical Company
 Texas Society of Certified Public Accountants
 Halliburton Company
 Gantt Aviation
 Texas Public Employees Association
 Texas Food Industry Association
 Bell Helicopter
 Texas Recreation Corporation
 Texas Bankers Association
 Service Wholesale Druggists Association of Texas
 Valero Energy Corporation
 Independent Insurance Agents of Texas
 Texas Apartment Association
 Texas Association of Defense Counsel
 Automotive Wholesalers of Texas
 Texas Pharmaceutical Association
 Greater Austin Chamber of Commerce

Laney Names Miller as Chief House Assistant

Speaker Laney has chosen Barry Miller as his Executive Assistant and Chief of Staff. Miller, a graduate of the University of Texas at Austin and a former legislative assistant to the new Speaker, is a popular choice with members of the legislature. Most recently, Miller was a Government Relations specialist with the law firm of Johnson & Gibbs. We wish Barry well and look forward to working with him in his new capacity.

Former Rep. Gibson Fills Top Senate Post

Former State Representative Bruce Gibson (D-Goddy) joined Governor Bullock's staff as Executive Assistant last year after a distinguished 11-year House career. A graduate of Texas Christian University and the University of Texas School of Law, Rep. Gibson was a key leader on major business issues such as tort reform, workers' compensation, judicial reform, and Alfaro. His negotiating skills and nonpartisan demeanor earned him more than one appearance on Texas Monthly's "Ten Best" list. The business community of this state is fortunate to have a friend like Bruce Gibson in this key policymaking role.

Everything is Bigger in Texas —Including Jury Awards

by Bill Keffer*



*Bill Keffer is a Senior Attorney with ARCO Oil and Gas Company in Dallas, Texas. His article was originally published in the February 5 copyrighted edition of the Washington Legal Foundation's "Legal Opinion Letter". Both he and the Foundation graciously have permitted TCJL to reprint the article. Mr. Keffer acknowledges both Jim Cowles, a Dallas attorney, and the Texas Public Policy Foundation for their help in providing data for the article.

Texas recently enacted a state lottery in which the chance to win untold millions of dollars is extremely remote, yet which so far is enjoying great popularity. There is something irresistibly tempting about becoming immensely wealthy overnight. Human nature, perhaps even more so with Americans, yearns for that rare investment that requires little work but produces significant returns.

There is another game in Texas, however, and it is equally capable of producing significant returns but is a much better gamble than the lottery. It is called filing a lawsuit. It requires only a nominal filing fee, a colorable claim, and preferably a willing attorney (of which there is no short supply). Most commentators conclude that the United States, generally, has become an increasingly litigious society over the past several years.

Arguably contributing to that trend are the exponential growth in federal and state laws and regulations, expanding common-law theories, and the mind-boggling damages being awarded to plaintiffs on a regular basis. From that list, it seems likely that the damage awards have had the greatest impact on the plaintiffs' bar and their prospective clients, while the other two factors simply have provided the means to that important end.

Although this story is told in jurisdictions throughout the country, Texas seems to be suffering from an acute case of extremism in its courts and with its juries. The main problem has been an inordinate number of excessive awards in recent years. For every significant judgment, several unreported, significant settlements have surely followed. At some point, the market reacts to such trends. Businesses eventually begin to wonder about the financial risks of operating in a state where seven-figure awards have become more and more common.

Upon reviewing the following examples of a liability-and-damage system gone awry, it is difficult not to conclude that such a threshold in Texas has been reached, if not signifi-

cantly surpassed. In a recent death case involving a car and a train, the family of the deceased was awarded \$12.5 million because the railroad company was found to have acted "maliciously" by failing to mark the intersection. The railroad company claimed that only the state highway department has the legal right to mark the intersection. Even apart from the technical, legal defense, it has never been particularly easy to understand how a car or person can be hit by a train without a significant degree of contributory negligence. Never mind that; there was a tragedy, a family was forever changed, and the defendant had enough money to share.

In 1992, a Galveston jury awarded \$550 million to former bondholders of a disbanded company because they had allegedly been misled by the company's auditors and investment bankers. Also in 1992, a Dallas jury awarded \$120 million to a former executive of an independent oil and gas company for his claim of wrongful termination. This was the largest such wrongful termination judgment in Texas and possibly in the United States. The award was much more than the company's 1991 net income of \$639,000 and was about half of that year's gross revenue. If the purpose of punitive damages (\$80 million in this case) is to punish the defendant, putting the defendant out of business would seem to be the maximum punitive act - and would also seem to be counterproductive.

Texas has become viewed as the best place for plaintiffs to file a law suit. See *Report of the Subcommittee on Excessive Jury Awards, Texas House Business and Commerce Committee 2* (October 28, 1992) ("Texas is widely recognized in the business world as a plaintiff's forum and one which should be avoided (by businesses) at all costs"). Since six of the ten highest paid trial lawyers in the United States practice in Texas, that is not a difficult conclusion to reach. The infamous, record-setting case between Texaco and Pennzoil was tried in Houston. The largest toxic tort litigation in the nation (2729 plaintiffs against 372 defendants) is also pending in Texas. From 1962 to 1990, Texas ranked fourth in the United States in "million-dollar-plus" judgments. In 1991, Texas was home to three of the ten largest

judgments in the nation. Those three judgments totaled \$192 million. In Dallas County in 1991, there were 13 judgments of \$1 million or more that totaled \$44,758,000. During the first seven months of 1992 in Dallas County, there were ten judgments of \$1 million or more that totaled over \$205 million. In the entire United States (excluding Texas) during the same seven-month period in 1992, there were 67 judgments of \$1 million or more that totaled \$578 million. Dallas County alone awarded 35% of what the entire United States (except Texas) awarded in million-dollar-plus judgments.

Ironically, trial lawyers have traditionally considered Dallas County to be relatively conservative in jury awards. Conversely, Harris County (Houston) has traditionally been considered more liberal. Although it is difficult to believe juries could be much more generous than those in Dallas during the first seven months of 1992, the same period in Harris County saw 27 judgments of \$1 million or more that totaled \$480 million. Dallas County and Harris County alone racked up \$685 million in million-dollar-plus judgments just for the first seven months in 1992. That is more than the 49 other states combined.

Given these developments, what can Texas expect? The better question is can anything now be unexpected? In the past several weeks, an Austin, Texas man has been sued by his daughter for negligent parenting. On December 23, another Harris County jury awarded Pamela Jean Johnson \$25 million for various maladies she claimed resulted from defective silicone breast implants. The attorneys representing Mrs. Johnson filed several hundred more breast implant suits following their victory. According to the district clerk, at least 1300 breast implant suits have been filed in Harris County.

Whatever the reason, Texas juries seem to be thoroughly enjoying their opportunity to redistribute vast amounts of money. It is a game, however, with a short life and ultimately a high cost. If companies decide to leave Texas or never come at all because of the significant litigation exposure, then all Texans will lose. Perhaps before that last dollar is redistributed, somebody will figure that out.