

# THE TEXAS CIVIL JUSTICE LEAGUE ADVOCATE

401 W. 15th St., Suite 975, Austin, TX 78701

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Phone (512) 320-0474 • FAX (512) 474-4334

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Improve Outlook  
for Continued  
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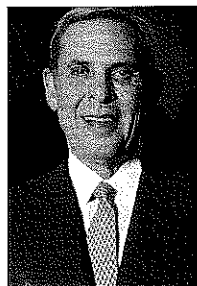
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## LIEUTENANT GOVERNOR & SPEAKER HIGHLIGHT TCJL ANNUAL MEETING

by Ralph Wayne, President, Texas Civil Justice League



Lt. Governor  
**Bob Bullock**

Lieutenant Governor Bob Bullock and Speaker Pete Laney were the featured speakers at TCJL's Annual Meeting

on Nov. 7. Gov. George W. Bush was ably represented by Secretary of State Antonio Garza. Also on hand were Chief Justice Tom Phillips, Justices John Cornyn, James Baker, and Greg Abbott, and Senator Tom Haywood (R-Wichita Falls).

This year's meeting was an opportunity for the League to thank our state's leaders for their bipartisan efforts to bring the civil justice system back into balance, and to inform them of the additional reforms that are necessary to keep Texas in the national mainstream.

At the business meeting, TCJL's Legislative Counsel Nub Donaldson moderated a discussion of the League's program of work for the 1997 legislative session. The program includes:

- forum non conveniens;
- third party liability;
- judgment reform (sum-

mary judgment, collateral source, settlement credits, prejudgment interest);

- premises liability;
- CPA privity;
- judicial selection reform;
- toxic tort definition;
- wrongful termination;
- chamber director liability;
- interlocutory appeals;
- offer of settlement;
- attorney-client privilege;
- venue-multiple defendants; and
- government standards defense to punitive damages.

Presenters of specific program issues were League counsel Nub Donaldson, Jack Roberts, Tony Grigsby, and George S. Christian; George Christian, the League's Secretary/Treasurer; Ed Pickle, Senior Counsel for Shell Oil Company; Jim Woodrick, President of the Texas Chemical Council; Bob Kamm, Senior Vice President, Government Affairs and General Counsel of the Texas Association of Business and Chambers of Commerce; and Bill Messer, legislative consultant to Texans for Lawsuit Reform, Texas Chemical Council, and Texas Hospital Association.

Following the legislative report, the TCJL PAC report was delivered by John Doner of John Doner & Associates in Austin. The PAC report was followed by our annual election and political analysis provided by Olan Brewer. The Texans Against Lawsuit Abuse report was given by Todd Olsen, Field Director of TALA.

The League's Board of Directors and membership also unanimously adopted a memorial resolution honoring Alex Short, who died earlier this year. Rebecca Short, Alex's widow, accepted our deepest thanks and gratitude for the life of Alex Short and all he meant to us, both as a friend and as a professional colleague. We miss him yet.

Once again, the League would like to express its gratitude to the members who attended the annual meeting as well as to all the members who make the League's advocacy of tort reform possible. The League has stood for bipartisan efforts to reform our state's civil justice system, and we plan to continue working with our members, the Texas Legislature, and the courts to assure a fair and balanced system for all Texans. ☞

T H E A D V O C A T E

# Robert Mickey Honored with First Alex Short Memorial Award



The Late **Alex Short**

At the annual TCJL luncheon, Bill Barton presented Robert Mickey, the Executive Director of the Texas Medical Association, with the first Alex Short Memorial Award to honor Mr. Mickey's longtime commitment to tort reform and to the Texas Civil Justice League.

Mr. Mickey has been a member of the League's executive committee since the creation of TCJL in 1986, and his contribution to the tort reform effort has been incalculable. Although he is scheduled to retire at the end of the year, we plan to continue calling on him for advice and counsel as we tackle the tort reform challenges of the future.



# TCJL PAC Report: 1996 Elections Improve Outlook for Continued Tort Reform

by *George S. Christian*

Although the 1996 legislative elections produced little overall change in the balance of power in the Texas Legislature, they reinforced the trend toward electing pro-business, pro-tort reform candidates over those supported by the plaintiff's bar.

In the Texas Senate, strong tort reform supporters Drew Nixon (*R-Carthage*) and Troy Fraser (*R-Marble Falls*) won hotly contested races against well-financed opposition. In the Dallas-Tyler senatorial district, David Cain (*D-Dallas*) was narrowly re-elected.

In a race of crucial importance to the tort reform effort, Rep. Robert Duncan (*R-Lubbock*) defeated Lubbock Mayor David Langston in a run-off election to fill the vacant seat of Senator John Montford. The election of Mr. Duncan, who has championed tort and judicial reform in the Texas Legislature, was the most important priority for the business community in 1996.

Another vacancy in the Senate will occur in January as Senator Jim Turner (*D-*

*Crockett*) was elected to Congress. Rep. Steve Ogden (*R-College Station*), a strong tort reform supporter, has announced his candidacy for the seat. It's too early to tell when the special election to fill the vacancy will be, but it probably won't be sooner than February.

As things now stand, the Senate consists of sixteen Republicans and fifteen Democrats due to the outcome of the Duncan-Langston race. Even so, Lt. Governor Bullock's bipartisan leadership should continue as before.

In the Texas House of Representatives, Speaker Pete Laney (*D-Hale Center*) easily won re-election over his Republican opponent, despite a well-financed campaign by organized GOP groups. Speaker Laney will preside over a House of 82 Democrats and 68 Republicans. The Republicans gained four House seats in the 1996 elections, but this should have little impact on the House's bipartisan



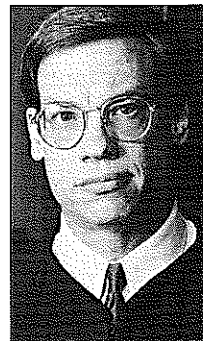
House Speaker **Pete Laney**

approach.

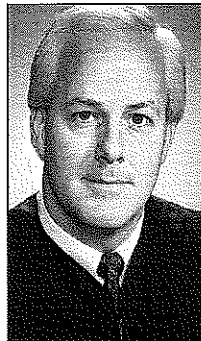
In other races of interest to TCJL PAC, Texas Supreme Court Chief Justice Tom Phillips,

and Associate Justices John Cornyn, James Baker, and Greg Abbott were re-elected; Justices Phillips, Cornyn, and Baker for six-year terms, Justice Abbott for a two-year unexpired term. Justices Abbott, Spector, and Enoch will be up for re-election in 1998.

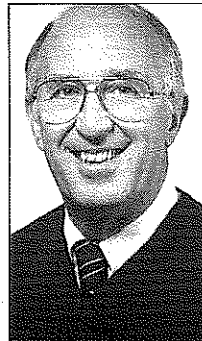
The members of TCJL PAC played a major role in the 1996 campaign. There is no question that the legislative prospects for tort reform have been improved, and this could not have been accomplished without your commitment. We appreciate your help and continued involvement in improving our civil justice system.



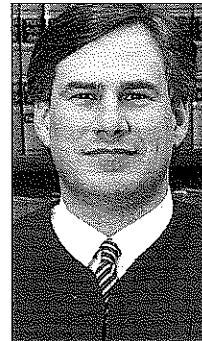
Chief Justice **Tom Phillips**



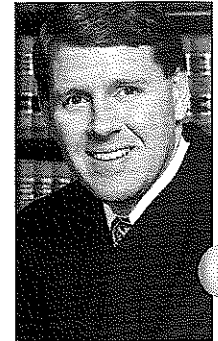
Justice **John Cornyn**



Justice **James Baker**



Justice **Greg Abbott**



Justice **Craig Enoch**



# Texas Forum Non Conveniens Statute Far More Restrictive Than Other States

by Bill Powers

There has been a growing controversy in Texas over the number of lawsuits filed in Texas courts by people who live outside the state.

Before 1993, a Texas statute precluded judges from using a well-recognized legal doctrine, called forum non conveniens, to dismiss out-of-state cases so that they could be heard in the state where they be-

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longed. Texas was the only state that expressly rejected forum non conveniens for personal injury claims. One international publication called Texas “the courthouse for the world.”

In 1993, the Texas Legislature amended the statute to partially restore a judge’s authority to dismiss certain lawsuits filed by non-residents so that the lawsuits could be brought in the appropriate states. But even though Texas now recognizes the doctrine of forum non conveniens, there are several significant differences between Texas’ version and other states’ version of the doctrine. A recurring question is whether these differences actually encourage non-residents to sue in Texas. Here are a few of the differences:

- A majority of states (28) follow legal standards adopted by the United States Supreme Court for applying the doctrine of forum non conveniens. Texas deviates from these standards.
- Texas law applies different standards to foreign country residents than to out-of-state residents. This makes it more difficult to control claims from other states. Only five other states make it harder for judges to transfer inter-state claims than to transfer foreign country claims.
- Texas law specifical-

ly prohibits a judge from dismissing certain types of claims. For example, personal injury claims involving air carriers, asbestos, railroads, and any alleged violations of federal law are exempt. They must be heard in Texas courts, regardless of where the claim arose. Only two other states (*Louisiana and Virginia*) exempt certain kinds of cases, and those exceptions are even narrower.

- Texas law requires that, if the claimant sues more than one defendant, all the defendants must agree to the transfer. There is only one other state that requires unanimous agreement.

Thousands of non-resident claims are filed in Texas every year. Many of these claims cannot be transferred because of the unique aspects of the Texas statute. Other states do not limit a judge’s authority to the extent Texas law does.

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stream. It hinders Texas judges’ ability to send cases to the appropriate forum. The Legislature should amend the statute and bring it into the national mainstream.

*Bill Powers is an attorney and law professor at the University of Texas School of Law. A nationally recognized scholar in the field of tort law, he has been a long-time consultant to the Texas Civil Justice League on tort reform issues. ☞*

# Plaintiff's Lawyers Try to Confuse the Non-Resident Lawsuit Issue...Again

by Ralph Wayne, President, TCJL

Don't be fooled by plaintiff's lawyers who claim that there are only a handful of asbestos-related lawsuits in Texas courts today.

In 1993, the Texas Legislature opened the door to asbestos claims from all over the country. They did this because the plaintiff's lawyers claimed that asbestos cases would be handled "administratively" and would not clog the courts. More specifically, they claimed that a special fund would be set up to pay asbestos claims without the need for costly and time-consuming trials on each and every claim.

For example, here's the quote from the Senate author who was defending the loophole:

"Next is injury from asbestos, and I'm told by those that know that it is so well established and there's a fund now, that any lawsuits come along; they just draw from the fund, so it was a legitimate exception."

The Legislature bought this story, and asbestos cases were excluded from the law allowing judges to dismiss non-resident claims.

Well, the administrative fund never happened.

Instead, Texas plaintiff's lawyers recruited tens of thousands of non-resident claims to Texas. As a matter of fact, since the asbestos loophole was passed by the Legislature, about 40,000 claims have been filed - more than 23,000 in 1995 alone.

This is where the plaintiff's lawyers are trying to confuse the issue. There are somewhere around 2,600 asbestos lawsuits currently pending in Texas courts.

About 1,800 were filed since the loophole went into effect. The plaintiff's lawyers want you to think that these lawsuits are "class actions". In other words, they imply that each lawsuit will be handled as if there were only one plaintiff, and that 1,800 such lawsuits don't put any strain on the court system at all.

This is simply not the case. These lawsuits are not class actions. Each of the 2,600 lawsuits contains anywhere from a few plaintiffs to thousands of plaintiffs. Each plaintiff has a unique claim that

must be handled separately by the court system: the facts are different, the alleged injuries are different, etc. The courts have to treat each claim just like a separate lawsuit. Each claim has its own discovery, its own set of motions, its own hearings, its own proof, its own testimony.

Now it is true that sometimes a court will hold a trial that deals with more than one claim. If the

aside one month per year to deal exclusively with those claims. Since an average trial judge works about ten months a year, this means that about one-tenth of the judicial resources of these courts is dedicated to these non-resident lawsuits. This costs millions of state and local dollars in judicial salaries alone.

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courts don't do this, they'll never get to the bottom of the stack. In fact, an average of 7 to 15 claims might be handled in single trial. However, even in one of these trials, each claim has to be proved separately. One such trial can take several weeks of a judge's time.

If every claim were tried in this manner (*and they aren't*), it would take about 4,000 separate trials to clear the dockets. In Dallas and Harris Counties, as well as in other counties, each judge that has pending asbestos claims must set

half a century to clear the courts of non-resident asbestos claims - assuming that the plaintiff's lawyers don't file any more of them. In view of what's happened in the last few years, that would not be a very safe assumption.

It's not good enough to fix the corral gate after the horses have already bolted. We've got to tackle the pending claims and assure that Texas defendants are not forced to pay for phantom injuries. If we don't solve the pending claims problem, that's exactly what we can expect to happen. ☛

## Federal Court Finds Majority of Asbestos Claims Without Merit

Fed up with battles between hired gun expert witnesses in asbestos-related cases, an Ohio federal court appointed independent experts to look into the validity of asbestos lawsuits filed in that court and found that almost two-thirds of the claimants had no asbestos-related medical condition.

*“One wonders if a similar proportion of the 40,000+ pending asbestos claims in Texas courts involve claimants without an asbestos-related condition.”*


In 1991, Carl J. Rubin, Judge of the U.S. District Court for the Southern District of Ohio, decided to appoint court experts under Federal Rule of Evidence 706 in 65 asbestos lawsuits. He believed that the experts hired by the opposing sides in the lawsuit were confusing the juries and providing little objective information upon which juries could base a decision.

The findings of Judge Rubin's experts were stunning. Ten independent court-appointed experts

found that 42 out of 65 plaintiffs examined (65%) did not have an asbestos-related condition or any condition giving rise to a cause of action.

In thirteen out of sixteen cases which went to trial and in which the court experts testified, the jury agreed with the court expert's opinion. There were eleven verdicts for the defense and 5 verdicts for the plaintiff.

The experience of the Ohio federal court is instructive for Texas. One wonders if a similar proportion of the 40,000+ pending asbestos claims in Texas courts involve claimants without an asbestos-related condition. Of course, by filing such a staggering number of claims, the plaintiff's lawyers are hoping that the actual medical conditions of each claimant are not looked into too closely. They reason that defendants (*under the intense pressure of tens of thousands of claims*) will agree to a settlement value for each claim, and that they will never have to put their claims to the test of an independent medical expert. So far, at least with respect to Texas courts, that reasoning has proven correct.

If a large proportion of asbestos claims are in fact without merit, as the Ohio federal court found, then it is even more outrageous for Texas law to require judges to sift through tens of thousands of non-resident claims. We need to get these cases out of Texas and back to the states in which they belong. 

## Uniform State Law Proposal Approved for Punitive Damages Reform

The National Conference of Commissioners on Uniform State Laws has approved a model punitive damages reform act. The July 18 approval makes the proposal available to states for legislative consideration.

wrongful conduct, the defendant's financial condition, and the amount of compensatory damages awarded; and

- allows defendants to seek a reduction in a


*“The 1995 punitive damages reform act contains some of the features of the uniform law, specifically the clear and convincing evidence requirement and the malice standard of liability. Our law goes beyond the uniform law in imposing a hard cap on most awards of punitive damages.”*

The main features of the model act are as follows:

- liability for punitive damages must be proved by “clear and convincing” evidence;
- to recover punitive damages, the plaintiff must prove that the defendant “maliciously intended to cause the injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury”;
- the trier of fact must consider the nature of the defendant's conduct and its impact on others, any profit or gain obtained by the defendant through the

punitive damages award by showing the defendant has already paid punitive damages for the same course of conduct.

The 1995 punitive damages reform act contains some of the features of the uniform law, specifically the clear and convincing evidence requirement and the malice standard of liability. Our law goes beyond the uniform law in imposing a hard cap on most awards of punitive damages.

The Texas Civil Justice League will be monitoring the effect of the new law and proposing legislation to limit multiple awards during the 1997 legislative session. 

# Ohio Enacts Landmark Tort Reform Bill

The Ohio Alliance for Civil Justice is celebrating a major victory for business and health care providers. Last month the Ohio Legislature approved and sent to Gov. Voinovich a comprehensive reform package.

*“Some of the measures enacted by Ohio which TCJL will pursue this session include the admissibility of evidence of collateral source payments, allowing the jury to consider the employer’s fault in third party liability cases, instituting a government standards defense for pharmaceuticals, and eliminating multiple awards of punitive damages.”*

The major features of the package include:

- defendants are jointly and severally liable only if they are more than 50% at fault, and joint and several liability applies only to economic damages;
- non-economic damages are limited to the greater of \$250,000 or three times economic damages to a maximum of \$500,000 (except in instances of severe, permanent injuries, where the limit is higher);
- punitive damages

are limited to the lesser of \$100,000 or three times the compensatory damages for businesses with fewer than 25 employees; for organizations with more than 25 employees,

- the limit is the greater of three times compensatory damages or \$250,000;
- multiple awards of punitive damages for the same course of conduct are prohibited;
- expands the government standards defense to include non-drug manufacturers and manufacturers of over-the-counter drugs and medical devices;
- allows collateral source payments, including workers’ compensation benefits, to be submitted

as evidence to the trier of fact, unless a right of subrogation is asserted or the plaintiff has not paid the premium for the insurance;

- juries are allowed to consider the fault of non-parties when apportioning liability;
- abolishes the theory of enterprise liability and adopts a fifteen-year statute of repose for products liability cases;
- adopts a six-year statute of limitations for medical malpractice claims and a fifteen-year statute of repose for improvements to real property;
- institutes an alcohol /drug defense and allows evidence of non-use of seat belts;
- requires a certificate of merit in medical liability cases; and
- prohibits contingency fees for expert witnesses.

While Texas has already adopted many of these reforms, much remains to be done to bring Texas up the level we have seen in states like Ohio, Louisiana, and Illinois.

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inating multiple awards of punitive damages.

Ohio’s reform effort shows that tort reform continues to be a top priority for the states. Texas should not permit itself to be lulled into a false sense of “already having done” tort reform. We’re just starting to put the system back into balance, and it will take several more legislative sessions just to repair the damage done during the 1970s and 1980s. ☛



# TABCC Survey Shows Tort Reform Still Top Priority For Texas Business

by Dane Harris, President, Texas Association of Business and Chambers of Commerce and Member, Board of Directors, Texas Civil Justice League

According to a recent survey conducted by the Texas Association of Business and Chambers of Commerce, continued tort reform and reducing the size and cost of government at all levels are the issues of greatest concern to Texas employers.

31%, and workers' compensation 26%.

When asked specifically about tort reform, seven out of ten respondents replied that Texas must go farther to reform the civil justice system. These employers agree

contractor provides or requires workers' compensation coverage for all employees, then they should get the benefit of the exclusive remedy workers' compensation insurance affords.

Judicial reform is also an important issue to Texas employers. Almost 70% of Texas employers support changing the current system of electing judges. Some 35% believe that judges should run in non-partisan elections, while 33% would have judges appointed from panels nominated according to professional criteria, and subsequently run in retention elections. Only 27% of employers support continuing the current system of electing Texas judges along political party lines.

One of the reforms TABCC is seeking this session, with the support and endorsement of the Texas Civil Justice League, is liability protection for volunteer chamber direc-

tors. Under current law, board members of charitable organizations are generally protected from personal liability for activities in connection with their board duties. The purpose of this law is to encourage volunteer participation in charitable causes. The same law should apply to chamber boards, which must rely on volunteer directors from the community. **✎**

*“When both first and second choices of employers are considered, tort reform emerges as the number one issue, with 41% of employers rating it as a first or second priority.”*

The survey, conducted by the Tarrance Group, represents the opinions of 900 randomly-selected Texas business owners and managers (both TABCC members and non-members). It has a margin of error of +/-5%.

Approximately 20% of the employers surveyed made tax reduction their top legislative priority, while another 15% believe that more far-reaching reform of the civil justice system is the number one issue in Texas. Continued work to fine-tune workers' compensation reforms is the leading employer concern among a group of other issues that were mentioned.

that recent tort reforms are positive, but believe the Legislature must do more in 1997. Only 14% of those surveyed think that no additional reforms are needed.

With respect to particular reforms, third party liability is the leading concern of Texas employers. Employers, by an overwhelming margin of 76%, believe that workers' compensation should be the sole remedy for workplace injuries. Third party liability, which was not addressed during the 1995 session, is perhaps the most compelling tort reform issue facing Texas employers today and must be addressed this session.

When both first and second choices of employers are considered, tort reform emerges as the number one issue, with 41% of employers rating it as a first or second priority. Tax restructuring received 32%, education

The TABCC will support legislation that deals comprehensively with this problem. This legislation should extend workers' compensation protection to all employees at the jobsite. If a premises owner or general

## TEXAS ASSOCIATION OF BUSINESS & CHAMBERS OF COMMERCE

Over the years, the TABCC has worked closely with the League and other groups to press for meaningful tort reform. We look forward to another successful legislative session in 1997.

### TEXAS CIVIL JUSTICE LEAGUE

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