

# THE TEXAS CIVIL JUSTICE LEAGUE ADVOCATE

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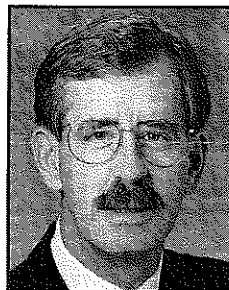
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## Forum Non Conveniens Legislation

**Signed by Governor** *by Ralph Wayne, President, TCJL*

In a legislative environment much less favorable than two years ago, the Texas Civil Justice League has successfully advocated three improvements in the civil justice system and helped block bills we considered to be unfavorable to the bulk of our membership.

The TCJL's top priority going into the 75th Legislature was the reform of Texas' forum non conveniens law. Following the leadership of Senator Teel Bivins (R-Amarillo) and Representative Rob Junell (D-San Angelo), the Legislature enacted and Governor Bush signed legislation bringing Texas law into the national mainstream. The legislation, S.B. 220, accomplishes most of the TCJL's



*Senator Teel Bivins*



*Rep. Rob Junell*

objectives. The bill:

- Repeals the loopholes for out-of-state asbestos, railroad, and aircraft claims and revises the forum non conveniens statute to parallel more closely the common law. The loopholes for out-of-state railroad and aircraft claims are repealed January 1, 1999.

- Provides that out-of-state asbestos claims filed on or after January 1, 1997 are subject to dismissal if the defendant agrees that a claim that is refiled in another state will be treated as if it was filed on the same day the claim was filed in Texas. Out-of-state claims filed between August 1, 1995 and December 31, 1996 may remain in Texas if the plaintiff agrees to the current Texas cap on punitive damages. Claims filed prior to August 1, 1995 are not subject to dismissal.

- Enacts a general borrowing statute in Texas. Under the statute, out-of-state residents must file out-of-state claims within the time period allowed by the

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## Bullock Will Not Seek Re-Election

Lieutenant Governor Bob Bullock has announced that he will not be a candidate for re-election in 1998. Bullock was elected as Lieutenant Governor in 1990 after serving as Comptroller of Public Accounts for 16 years.

In a press conference held on June 5, Bullock said, "It is time for me to set aside public life and focus more on my

family and friends, all of whom have been a constant source of inspiration, advice and deep-rooted support . . . In January of 1999, I will leave this office. I do so with a heart-full of memories that will last me the rest of my life."

During Lt. Governor Bullock's tenure, Texas has made enormous strides in civil

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## T H E A D V O C A T E

**Legislation** *continued*

statute of limitations in the state where the action arose. The borrowing statute has immediate effect for claims filed on or after May 29, 1997.

S.B. 220 faced stiff opposition from the beginning. The Texas Trial Lawyers Association fought it throughout the session, with the strongest effort coming from Dallas attorney Fred Baron, who hired his own lobby team to defeat the bill. Baron, one of the nation's most successful asbestos lawyers, proved to be a formidable foe at every turn. The margins of approval in both houses (28-3 in the Senate, 128-5 in the House) are somewhat misleading, as a number of legislators voted for the bill on final passage after attempting to weaken it. Nevertheless, the overwhelming support in both houses for forum non conveniens reform testifies to the strong public support for the legislation, as well as to the skill and persuasiveness of Senator Bivins and Representative Junell.

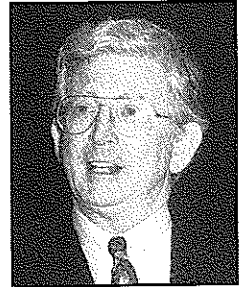
It is no surprise that the toughest fight involved pending out-of-state asbestos cases. Legislators are always reluctant to apply a change in the law to claims that have already been filed in Texas courts, and the trial lawyers were able to persuade many legislators that to pass a "retroactive" law was unfair. However, we were able to show that the exponential growth in out-of-state asbestos claims since 1993, coupled with the prospect of tens of thousands of new claims pouring into Texas courts, warranted the Legislature's attention. The bill which passed the Senate in March would have affected a substantially larger number of pending claims than the final version, but the bill nevertheless represents enormous progress in ending the mass filing of out-of-state asbestos claims in Texas.

It is important to note that there is much more to the bill than out-of-state asbestos claims. Two of our other primary goals—the repeal of the aircraft and railroad exemptions and enactment of a general borrowing statute—were likewise achieved. The trial lawyers vehemently opposed both measures, but Senator Bivins and Representative Junell held their ground against all trial lawyer assaults.

Obviously, legislation of this importance could not have passed without the leadership of Lieutenant Governor Bob Bullock, Speaker Pete Laney, and Governor George W. Bush. We are grateful to each of them for helping to keep the train on track, even when it appeared that the wheels were coming off.

The one person most responsible for keeping the wheels on, however, was TCJL's long-time chief negotia-

tor and legal counsel Shannon Ratliff. When it comes to the legislative process, there is no more trusted and respected authority on Texas tort law. Members of the Legislature rely on Shannon's knowledge and judgment more than anyone else's, and Shannon's continuous work with Senator Bivins, Representative Junell, and the Senate and House leadership to produce an effective and meaningful compromise paid off in the end. As the session neared its end, his work with Chairman Patricia Gray of the House Civil Practices Committee finally produced a forum non conveniens bill. The League is fortunate to be associated with him, and we hope that he will continue to serve our members for many sessions to come. We would also like to recognize the tireless efforts of the TCJL's lobby team, which has been working since the 1995 legislative session to bring S.B. 220 to fruition: Nub Donaldson, Jack Roberts, George Christian, George Scott Christian, Tony Grigsby, Bill Tryon, and Susan Lilly.



*Shannon Ratliff*

Of course, no legislative success is possible without the members of the Legislature. We would like to extend our special appreciation to the Senate Economic Development Committee, chaired by Senator David Sibley (R-Waco), for the rapidity and decisiveness with which it acted early in the session. Its members include: David Cain (D-Dallas), Robert Duncan (R-Lubbock), Eddie Lucio (D-Brownsville), Frank Madla (D-San Antonio), Jerry Patterson (R-Pasadena), Florence Shapiro (R-Plano), and Eliot Shapleigh (D-El Paso).

While we experienced philosophical differences with many of the members of the House Civil Practices Committee—on S.B. 220 and on tort reform legislation in general—we would like to recognize the committee's willingness to send a meaningful forum non conveniens bill to the floor.

Finally, our thanks go to our members, who took the time to communicate with their legislators regarding the importance of S.B. 220 to the state. Since the League's inception in 1987, we have maintained an extraordinary record of success in the legislative process. Although the broader tort reform agenda did not succeed this time, we should not underestimate the importance of the legislation that did pass. S.B. 220 was one of the 75th Legislature's signal achievements, and our members should be congratulated for making it happen. ★

## Out-of-State Asbestos Cases Flood Harris County

According to a June 3 story in the Houston Chronicle, plaintiff's lawyers filed more than 3,000 out-of-state asbestos claims in Harris County courts just one day before Governor Bush signed S.B. 220, the forum non conveniens reform bill. The Beaumont plaintiff's firm of Provost & Umphrey is handling the new cases, together with thousands of other out-of-state asbestos claims in courthouses across the state.

Wes McCoy, Harris County Assistant Chief Deputy Clerk, is quoted in the story as saying, "Certainly, as a taxpayer myself, I don't want our dollars that support this operation to be used by someone outside the state that could and should have filed cases in their own jurisdiction." This is just the case the TCJL made to the 1997 Legislature, which closed the loophole in the forum law that has permitted these cases to pour into Texas since 1993.

The irony is that the filing does not defeat the effect of the new law. S.B. 220 calls for the mandatory dismissal of certain out-of-state asbestos claims filed on or after January 1, 1997. It was just this situation that the bill was designed to prevent: the filing of thousands of claims just prior to the effective date of the new law. Not only does S.B. 220 have immediate effect, but it actually applies to cases filed earlier this year in anticipation of the reforms.

As reported by the Chronicle, the Harris County District Clerk was paid \$300 in filing fees for the two lawsuits, even though more than 3,000 individual claimants are involved. The district judge overseeing Harris County asbestos cases has ordered that each claim be separated, producing a total filing fee of \$436,000.

This recent onslaught of out-of-state asbestos claims, the great majority of which come from Alabama, proves once and for all that the Legislature did the right thing in enacting S.B. 220. If we needed any additional proof that our courts are being abused (as if more than 41,000 out-of-state claims is not proof enough), this latest example of prospecting in Texas courts closes the case. ★

## Bullock *continued*

justice reform. His accomplishments include the first comprehensive products liability reform legislation enacted by the Texas Legislature (S.B. 4, 1993), reinstatement of the doctrine of forum non conveniens (S.B. 2, 1993), punitive damages reform (S.B. 25, 1995), venue reform (S.B. 32, 1995), and joint and several liability reform (S.B. 28, 1995).

Just as importantly, Lt. Governor Bullock made judicial selection reform a top priority. In 1995, the Texas Senate passed a reform plan which would have instituted a merit-based system of selection of Texas appellate judges and non-partisan elections for state district judges. Similar reforms came close to passing again in 1997.

Lt. Governor Bullock also has spearheaded the effort to improve the state judiciary. In 1997, the Texas Legislature enacted a significant pay increase for state judges, as well as improvements to the technology and staffing infrastructure of our courts.

It is safe to say that no Lieutenant Governor has ever placed more emphasis on a fair and efficient civil justice system than Bob Bullock has. Of course, his achievements in other areas of state government are equally impressive and long-lasting. Nevertheless, his contribution to the stability and enhancement of our court system may have the most enduring benefits.

To say that the TCJL will miss Bob Bullock is not only stating the obvious, but it is severely understating our true feelings about him and his leadership for this state. We are proud to have had the rare opportunity to work with a public servant with his vision and total dedication to the people of Texas. ★



### TEXAS CIVIL JUSTICE LEAGUE

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# T H E A D V O C A T E

## Perspective on the 75th Legislature

By George Christian, Treasurer, TCJL

Have Texas plaintiff's attorneys, bruised from the wave of tort reform bills passed by the Legislature in 1995, regained their clout in 1997?

The answer has to be "yes," despite a generally more conservative Legislature. Nothing came easy for the Texas Civil Justice League and other tort reformers this session. It can be safely predicted that this is only the beginning of a trend.

It has little to do with partisanship. Plaintiff's attorneys are a powerful influence in the Democratic Party, nationally and in statehouses. But they have also made inroads into Republican politics.

It has to be conceded that the tort reform movement faces detractors who are smart, motivated, politically active as none others are, and willing to lobby personally as well as through professional lobbyists. And they don't like to lose.

One of the principal objectives of TCJL must be to protect the laws we have helped enact since 1987. In four of the five legislative sessions over that span of time, progress was made. While new causes of action are always a threat to a fair civil justice system, the greatest threat may be the potential undermining of punitive damages limitations, products liability restraints, a tight venue law, and other major gains.

The forum non conveniens law just passed was made necessary because plaintiff's attorneys managed to exempt asbestos, railroad and airplane claims from the 1993 "Alfaro" reform act. Asbestos lawyers have had a field day since then, bringing more than 40,000 out-of-state claims into Texas courts and forcing TCJL to seek closure of the loophole this session.

Almost every controversial measure in the Legislature has to undergo change before enactment. The plaintiff's lawyers are expert negotiators, as proven time and time again, and we were forced to compromise the loophole bill just passed. But make no mistake about it, it is a good bill, especially in dealing with out-of-state cases in the future.

One more abuse has been corrected. Some others remain, thanks to opposition from the plaintiff's bar. But again, keep an eye out for aggressive moves against the more equitable system built up over the past ten years.

Anyone who thought the trial bar was down and out should have been in Austin since January. ★

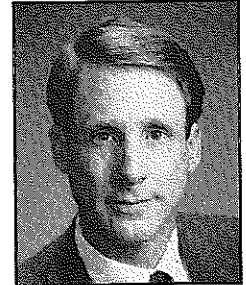
## Interlocutory Appeal Bill Passes

In addition to S.B. 220, an important piece of legislation on the TCJL's 1997 agenda was enacted by the Legislature and signed by Governor Bush.

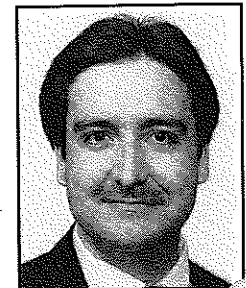
S.B. 453 by Senator Duncan and Representative Pete Gallego (D-Alpine) allows an interlocutory appeal from an order granting or denying a special appearance to contest the jurisdiction of a Texas trial court over a defendant. Under the current law, the Texas Rules of Civil Procedure allow a defendant to make a special appearance, but if the judge denies the motion and takes jurisdiction, the defendant's only remedy is to seek a writ of mandamus from the Texas Supreme Court against the trial judge. S.B. 453 instead allows a party to appeal the trial judge's decision to grant or deny a special appearance to the court of appeals. The appeal stays the commencement of trial pending resolution of the appeal. The purpose of the bill is to resolve jurisdictional issues prior to trial without having to resort to the extraordinary remedy of mandamus.

Another important bill, H.B. 768 by Representative Junell and Senator Duncan attempted to limit retaliatory discharge claims by employees against their employers. As a result of the punitive damages exposure associated with these claims, employers risked firing an employee for any reason, if that employee had filed a worker's compensation claim in the past. H.B. 768, as passed by the Legislature, provided that in order to prevail in a wrongful termination claim, the employee must prove that the employee's claim for worker's compensation benefits was a substantial cause of the discriminatory discharge. However, the bill was vetoed by the Governor at the request of the bill authors because a recent Texas Supreme Court decision, which establishes a "but-for" standard for wrongful termination claims, rendered the legislation unnecessary.

We greatly appreciate the work of Senator Duncan and Representatives Junell and Gallego on these pieces of legislation. ★



Sen. Robert Duncan



Rep. Pete Gallego

## TCJL Looks Forward to 1999 Session

Changing political circumstances and legislative attention to other issues, primarily taxation, slowed the impetus for broad-based tort reform during the 75th Legislature. Third party liability, premises liability, judgment reform, government standards, and other tort reform legislation failed to pass despite concerted efforts by the League and other tort reform supporters.

After the broad-based tort reform successes of the 1995 session, the Legislature never focused on tort reform with the same intensity in 1997. One of the reasons for this was the ascendance of the tax reform issue, spurred by Governor Bush's call for property tax relief. Tax reform consumed most of the legislative energy from January until May, leaving precious little time and attention for other major issues.

Another factor was the increased influence of the plaintiff's lawyers this session. Always a formidable foe, the plaintiff's bar devoted enormous resources to the defeat of any additional reforms. Their political clout, coupled with their legislative skill, was enough to slow down most of the tort bills long enough for the process to kill them. By the time the premises liability and judgment reform bills cleared the House Civil Practices Committee early in May, it was effectively too late for the bills to make it through the process. The third party liability bill never got out of committee in either the House or the Senate.

Nevertheless, as reported elsewhere in this newsletter, 1997 was not an unsuccessful session for tort reform. Three pieces of legislation were enacted, and a bill that would have severely limited the ability of premises owners (e.g., cities, hospitals, schools, businesses) to allocate risk in construction contracts was stopped. This so-called "anti-indemnity" legislation is related to the third party liability issue. The TCJL opposed the legislation partly because third party liability reform was not part of the proposal.

Since 1987 the TCJL has believed that tort reform is an ongoing process. While some fundamental issues don't change much, like punitive damages or joint and several liability, others may arise suddenly and change rapidly, like forum non conveniens and the explosion of mass tort actions. For this reason the TCJL is a permanent organization that is responsive to the immediate concerns of our members. Our reform agenda changes as the needs of our members shift from one area of concern to another. One session may involve products liability issues, the next session special venue concerns.

During the interim prior to the 1999 legislative session, we will be reviewing the legislation that did not pass this session, as well as new issues which must be addressed. You will be hearing from us soon, as we begin the process of identifying our legislative agenda. We will also be gearing up for the 1998 campaign season, which promises to be extremely competitive. Once again, we expect tort reform to be a central issue in a number of legislative races. We intend to be ready for that, and we will be asking you for your help in electing pro-tort reform candidates of both political parties to the Texas Senate and House. ★

### ATRA Report

The following appeared in a recent newsletter published by the American Tort Reform Association:

"Efforts to bring reasonable awards back to the civil justice system are working. In fact, according to an article that appeared in the Wall Street Journal, Texans have become 'downright stingy' when it comes to awarding damages in personal injury cases. Defense attorneys and their clients have recognized this trend and are opting to offer less for settlements while willing to take more lawsuits to trial. The threat of unlimited awards used to force high settlement offers even for weak cases. The article credits the current shift in juror attitudes to the media's intense coverage of high profile award cases.

"For example, according to the Blue Sheet, a service that reports most trial verdicts in Houston and surrounding counties, the number of rear-end auto collisions going to trial increased by 101% since 1994. Recognizing that jurors are quick to scrutinize intangible injuries such as neck or back related injuries, the Trial Report Service reports that insurance companies have refused to settle cases involving such complaints. Gary Harding, editor of the Blue Sheet, succinctly summarizes the current trend as "Juries are reforming the courts themselves. . . ."

Part of the TCJL's purpose is to raise public awareness of runaway jury awards and frivolous claims. It looks like those efforts are paying off.



# T H E A D V O C A T E

## TCJL Welcomes New Director of Political Education



We are pleased to announce that attorney Bill Tryon joined the TCJL in February as Director of Political Education.

Before joining the League, Bill was Vice President and Director of Political Affairs for the Greater Houston Builders Association for four years. In that position Bill served as a lobbyist and was responsible for fundraising and administration of the Association's political action committee. Bill

is now performing similar functions for the League.

Previously, Bill worked in the Texas House of Representatives as a legislative aide to three different House members. He is a graduate of the University of Texas and the South Texas College of Law.

Bill's first session with the League has been outstanding. We are proud to be associated with him and look forward to a long and mutually beneficial relationship. ★

## TCJL PAC Report

*by Bill Tryon, Director of Political Education, TCJL PAC*

The moment the 1997 legislative session ended, the 1998 campaign season began. Once again, the TCJL PAC will play a big role in the 1998 legislative and court elections. We have already started fundraising for what promises to be the most competitive and evenly balanced election cycle in Texas history. All of the major statewide offices are on the ballot: Governor, Lieutenant Governor, Comptroller, Attorney General, Land Commissioner, and Agriculture Commissioner. The Texas Supreme Court seats currently held by Justices Enoch, Spector, and Abbott are at stake. Half the Senate is up for re-election, including Senators Armbrister (D-Victoria), Bivins (R-Amarillo), Brown (R-Lake Jackson), Carona (R-Dallas), Duncan (R-Lubbock), Ellis (D-Houston), Gallegos (D-Houston), Gallo-way (R-The Woodlands), Haywood (R-Wichita Falls), Madla (D-San Antonio), Ogden (R-Bryan), Patterson (R-Pasadena), Ratliff (R-Mt. Pleasant), Wentworth (R-San Antonio), Sibley (R-Waco), Truan (D-Corpus Christi), and West (D-Dallas).

It is a foregone conclusion that the trial lawyers will try to regain majority support of the Senate in 1998. We expect them to target a number of pro-tort reform senators and to open their bottomless checking accounts in a massive attempt to defeat them. There are several swing districts up for grabs this time, and the trials can't afford to miss this opportunity to reverse the tort

reform trend. Once again, the TCJL PAC's job will be to educate the voters in each senate district about the difference between pro-business and trial lawyer candidates and the tremendous benefits of reasonable tort reform for all the citizens of this state.

Of course, all 150 members of the Texas House will be on the ballot as well. As was the case in 1996, we anticipate a number of competitive races. The philosophy of the TCJL PAC in these races will remain the same: we will support candidates who demonstrate bipartisanship and dedicated support for tort reform.

In addition to our continued focus on legislative and Supreme Court races, the TCJL PAC will concentrate on helping qualified candidates win election to the state's fourteen courts of appeals. It is essential that we monitor and participate in these races more than ever before, since we can be sure that the plaintiff's attorneys will try to reverse recent legislative setbacks by attempting to elect their allies to the bench.

You will be hearing from the TCJL PAC in the next few months about how you can help preserve pro-tort reform candidates for the Legislature and the Texas Supreme Court. Our PAC members are ultimately the drivers of our legislative success. We appreciate you and are counting on you in the election season to come. ★

## Pennsylvania Develops Innovative Rules for Handling Asbestos Cases

The Washington Legal Foundation, a 501(c)(3) tax exempt organization dedicated to disseminating information about pro-free enterprise developments in federal and state civil justice laws, recently published an article highlighting Pennsylvania's innovative rules for handling mass tort litigation, such as asbestos cases. The article, authored by Robert N. Spinelli, a partner in the law firm of Kelley Jasons McGuire & Spinelli in Philadelphia, and W. Matthew Reber, an associate in the firm, discusses a series of recent opinions by Pennsylvania appellate courts holding that only asbestos plaintiffs with objective proof of a present impairment or injury may recover damages in Pennsylvania courts. These decisions rule out recoveries by plaintiffs alleging a risk or fear of contracting a future disease as a result of asbestos exposure.

According to the article, these decisions have "had an obvious and immediate impact on the swollen

asbestos docket, removing the broad category of asymptomatic cases from the new filing and monthly trial lists. As a result, symptomatic plaintiffs have benefited from faster trial listings and defendants are no longer forced to expend substantial resources on cases where there were no real injuries. At the same time, those with non-symptomatic conditions have retained the right to sue if and when they develop a serious disease." The developments in Pennsylvania may provide a roadmap for Texas courts, which are likewise swamped with asbestos lawsuits - many of which involve asymptomatic plaintiffs. While S.B. 220 will likely shut the door on thousands of new out-of-state asbestos suits, we must still deal with the ones that are left in Texas courts.

For a copy of the Washington Legal Foundation article, please contact us, or call WLF at (202) 588-0302. ★

### Special Thanks to TCJL Association Members

As always, the support of TCJL's association members was indispensable to the overall tort reform effort. Special thanks go to the Dane Harris and Bob Kamm of the Texas Association of Business and Chambers of Commerce; Robert Howden of the National Federation of Independent Business; Jim Woodrick and Bill Messer of the Texas Chemical Council; Bill Stinson, Missy Warren, and Hector Rivero of the Texas Association of Realtors; Kim Ross, Alfred Gilchrist, David Marwitz, Connie Barron, and Harold Freeman of the Texas Medical Association; and John Martin and Martha Miller of Texas Association of Defense Counsel. We also appreciate the support of Dick Weekley, Dick Trabulsi, Leo Linbeck, and Randy Fritz of Texans for Lawsuit Reform.

### Alabama Supreme Court Reduces Award in BMW Case

Do you remember the infamous \$2 million punitive damages verdict against BMW for repainting an automobile and reselling it without disclosing the paint job?

The case spawned a U.S. Supreme Court decision determining that the punitive damages award was so disproportionate to the harm that it violated BMW's due process rights. On remand to the Alabama Supreme Court, the punitive damages award was reduced from \$2 million to \$50,000.

That still sounds like too much to us. ★

### Forum Non Conveniens Reform a Team Effort

The TCJL would like to acknowledge the tremendous efforts of representatives of many of the businesses who backed S.B. 220 and actively assisted in its passage. These include:

Bill Barton	Don Kennard
Dick Brown	Ron Kessler
Randy Erben	Carl Richie
Machree Gibson	Rossanna Salazar
Galt Graydon	Charles Schnabel
Rusty Kelley	Bob Strauser