JANUARY 2023

TLR ADVOCATE

TEXANS FOR LAWSUIT REFORM: MAKING TEXAS A BEACON FOR CIVIL JUSTICE IN AMERICA

JANUARY 2023

IN THIS ISSUE

OUR MISSION

Texans for Lawsuit Reform is a volunteer-led organization working to maintain fairness and balance in our civil justice system through political action, legal, academic and market research, and grassroots initiatives. The common goal of our more than 18,000 supporters is to make Texas the Beacon State for Civil Justice in America.

1233 West Loop South, Suite 1375
Houston, Texas 77027

www.tortreform.com
tlr@tortreform.com

@lawsuitreform

MAKE TEXAS A BEACON for CIVIL JUSTICE in AMERICA

Leg Ad Pd for by Texans for Lawsuit Reform
Richard J. Trabulsi Jr., Chairman
919 Congress, Suite 455, Austin, TX 78701

TLR in the Future: A Wider Scope of Activity

By Alan Hassenflu, TLR Board Member

TLR's persistent focus on civil justice issues for nearly 30 years helped turn Texas into the nation's most powerful economic engine. Our work in that area will continue unabated. We will advocate for passage of bills in 2023 to enhance the Texas judiciary and deter abusive lawsuits. We will also carefully review all bills—whatever the subject matter—creating or expanding a cause of action.

But a fair civil justice system is not the only key to creating and maintaining an outstanding business environment. We must also avoid both excessive regulation of businesses operating within our borders and burdensome litigation sanctioned by statute.

And so, in the upcoming legislative session, TLR—in coordination with businesses and trade associations—will engage on bills that impose an unwarranted regulatory burden on Texas businesses and embed a hidden tax on Texans. We will support select bills that lessen the regulatory burden so businesses can innovate, create jobs and benefit consumers.

As examples, we will support legislation to prevent big-city governments from creating a patchwork of employment laws in Texas that make it difficult for employers to operate in a uniform manner throughout the state. Similarly, we expect to oppose bills that impose new rules applicable to the healthcare and retirement plans employers provide to their employees, which would make it more difficult for employers to operate across state lines. We anticipate there will be a number of other measures related to free enterprise that TLR will support or oppose.

We have also embarked on the process of understanding and analyzing administrative litigation in Texas. In addition to potentially being wildly expensive, agency-based litigation can deprive individuals of their ability to engage in a trade or profession, as well as reallocate millions of dollars between various players in an industry. Our goal will be to ensure a fair and efficient process is used when a regulation is applied to a person or enterprise conducting business in our great state.

These initiatives are closely related to the work we have been doing for the past 28 years. We commit to bringing TLR's rigorous approach to bear on this set of issues in our continuing effort to keep Texas at the forefront of the world's economy. ■

Alan Hassenflu

On Our Radar in the 88th Legislative Session

By Amy Befeld, TLR Assistant General Counsel

TLR expects to engage in a number of issues pertaining to the legal system in the upcoming legislative session. Below is a sampling of some of our priorities.

The Creation of a Business Trial Court

TLR will pursue a legislative proposal that accomplishes the dual goals of enhancing our civil justice system and strengthening Texas' reputation as the best state for business and job growth.

TLR has studied business courts in depth, and the TLR Foundation has issued a thorough report on them. Twenty-nine states have specialized courts to handle business litigation and the time is ripe for the creation of such a court in Texas. We have the benefit of pulling the best and most effective aspects of these models in determining how to structure Texas' business court.

The "mother" of business courts in the U.S.—and the one most businesses look to when choosing a complex litigation forum—is Delaware's Court of Chancery.

In addition to Delaware's sophisticated business formation and governance laws, its trial-level judiciary—with significant expertise in applying these laws—makes it the place that multi-state and multi-national corporations select in their venue contractual provisions.

Texas is home to 54 Fortune 500 company headquarters. We should have a court system that allows them to litigate matters here rather than in Delaware or some other state. Importantly, we should recognize that most businesses in Texas are not of a size that allows them to choose another state for their litigation; therefore, they should have a Texas judiciary that provides fair and efficient resolution of disputes.

While specific details regarding the business court's jurisdiction may evolve through the legislative process, previous proposals in Texas have specified that an action must be either a derivative action on behalf of an organization or an action arising against, between or among business entities relating to a contract transaction for business, commercial, investment, agricultural or similar purpose, and must have a designated minimum amount in controversy. Personal injury lawsuits would not be within the jurisdiction of the business court.

There are numerous benefits to creating such a court: a specialized docket; designated judges who receive special training and consistently hear this type of dispute; a minimum jurisdictional amount; and assignment of a single judge who handles each dispute from beginning to end (no rotating docket), and who actively manages the case to reduce the amount of time to resolve the dispute.

Businesses seek certainty and predictability in judicial decisions, which encourage faster resolutions and fewer litigation costs. The most transformational benefit is likely the issuance of a written opinion by the assigned judge, which would allow Texas to build a bank of business law precedent as Delaware has, taking the surprise element out of complex business litigation.

In addition to the benefit it would bring to business litigants in Texas, a business trial court would assist *all* litigants by diverting these lengthy and complicated cases away from non-specialized courts, freeing up judges' dockets so they can effectively and efficiently attend to other types of cases.

In Texas, our court system is specialized from top to bottom. We are one of two states that have specialized high courts, and we have more than 200 specialty courts. A business court is the one specialized court we are missing.

The Creation of a 15th Court of Appeals

In another legislative proposal that has a dual function, TLR will advocate for the creation of a 15th intermediate court of appeals that will have jurisdiction over appeals originating from the business trial court discussed above, as well as those involving the state of Texas and constitutional questions.

Creating a trial-level business court is ineffective without an appellate court to efficiently hear its appeals. The new court of appeals will allow judges to apply highly specialized precedent in complex

subject areas, including business litigation, sovereign immunity, administrative law and constitutional law.

Due to statutory venue requirements, most of the cases involving the state of Texas are currently filed in Travis County and appealed to the Third Court of Appeals in Austin. The Third Court hears appeals from a 24-county area but is anchored by populous Travis County. Consequently, although the Third Court hears cases of statewide importance, its judges are selected by the voters of a single county.

Lawsuits against the state or state agencies typically contain nuanced legal issues and take significant time to resolve. Because these lawsuits are so time-intensive, the Third Court of Appeals receives additional resources to handle them. Judges currently handling these cases have varying levels of experience in such specialized matters, sometimes leading to incorrect and inconsistent results for the state and other litigants. And because the Texas Supreme Court only has the capacity to hear a small percentage of cases, the Third Court's decisions are often the final word in enormously consequential litigation.

For example, the Third Court of Appeals is currently hearing extremely complex administrative law matters, such as transmission line-siting cases involving the Public Utility Commission with billions of dollars at stake, or the issuance of permits for allocation wells by the Railroad Commission. As discussed on page 10 of this *Advocate* by Jason Ryan, Executive Vice President of Regulatory Services and Government Affairs for CenterPoint Energy, the potential for litigation abuse in certain regulatory cases is rampant. There is a common statewide interest in having a uniform body of case law in the jurisdictional areas intended for the 15th Court of Appeals, decided by judges who are selected by voters statewide.

The addition of a statewide court of appeals will make Texas' court structure similar to the federal judicial system, wherein there are 12 intermediate appellate courts sitting in districts, and a 13th court—the Federal Circuit Court—that has national jurisdiction and hears cases involving specialized areas of law.

Texas has already demonstrated a preference for specialty courts, and we should continue this on the appellate level.

A Perspective on the Public Nuisance Doctrine

The doctrine of public nuisance originated in 12th century England to prevent criminal or quasi-criminal conduct, primarily actions or conditions that infringed on royal property or blocked public roads or waterways. The tort was expanded slightly in the 16th century, still recognizing causes of action for activity impacting a public right, but also recognizing a remedy for activity causing distinct and peculiar harm to an individual.

Public nuisance theory was not developed to punish defendants but to (1) enjoin or abate an ongoing problem in an action brought by a governmental entity and (2) provide compensatory damages to persons who had been harmed by the nuisance.

In a classic public nuisance action, the remedy available to a governmental entity was a court order requiring the wrongdoer to cease and desist and remove that which caused the nuisance. The remedy of awarding damages was available only to individual plaintiffs suffering a special injury from the nuisance.

America recognized the public nuisance doctrine from its inception. Its use made sense when there were few government regulations to protect the public from a bad actor who, for instance, polluted the waterways or opened a house of ill repute.

Times have changed.

The 20th century brought with it sweeping regulations, and the doctrine of public nuisance fell out of relevance. That is, until 1994, when plaintiff attorneys dusted it off and sought to transform its original purpose. Our friends at the Institute for Legal Reform have described this unearthing as "waking the litigation monster" and have produced a comprehensive paper on the topic[1].

Today, governmental entities—encouraged by plaintiff's lawyers working for a piece of the recovery—often use the public nuisance doctrine to compel monetary settlements and impose policy objectives by way of litigation, rather than going through the appropriate channels at state legislatures or agencies.

In many cases, the plaintiffs know their claims do not fit into the well-settled law on public nuisance and that they will not prevail on the merits, but they use lawsuits to exert sufficient

continued on page 4

[1] *Waking the Litigation Monster: The Misuse of Public Nuisance*, U.S. Chamber Institute for Legal Reform (March 2019), www.instituteforlegalreform.com/wp-content/uploads/2020/10/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf.

pressure on defendants through the cost of litigation and public relations campaigns to force them into a settlement.

A few examples of public nuisance doctrine weaponization are cases involving:

» **Lead paint:** Local governmental entities in California sued paint manufacturers in 2000, seeking billions of dollars in damages to remove decades-old lead paint from homes in the state. A trial court initially ordered paint companies to pay $1.5 billion in 2014, but the case settled for $305 million. If that delta seems strange to you, Philip Goldberg points to a potential reason: "[The] court ruled that neither the private law firms nor the government in-house law departments could receive contingency fee payments from the abatement fund; those funds could be spent only on abating the alleged nuisance."[2] Suddenly, the law firms' enthusiasm for the case waned.

» **Climate Change:** One of the most popular new abuses of the public nuisance doctrine is the attempt to hold fossil fuel companies responsible for climate change, regardless of the fact that these companies produce legal and essential products and are heavily regulated.

» **Cars that are easy to break into:** And in the last, most absurd attempted application of the public nuisance doctrine, St. Louis city officials have threatened to sue Kia and Hyundai for creating a public nuisance because certain models of their vehicles have proven relatively easy to steal.

In sum, plaintiff's lawyers, working with local governments, are trying to morph the public nuisance doctrine into one that has no limits. In their view, any form of human activity is subject to regulation through a public nuisance lawsuit.

Regardless of how sympathetic a plaintiff's argument might be when making its case for solving issues of societal safety and importance, the courts are not the appropriate venue for these arguments.

Courts only see a small sliver of the problem, as they can only look at the facts of the specific case and the documents in the record. The appropriate deciders of these broad societal issues are legislatures and, in some instances, administrative agencies, who have the appropriate authority for policymaking.

Inventive plaintiff's lawyers—in concert with certain local governments—attempt to morph the public nuisance doctrine into one without limits or grounding in traditional American jurisprudence. In their view, any form of human activity is subject to exploitation through windfall-seeking litigation.

TLR believes the public nuisance doctrine should be returned to its historic domain and rational basis, rather than becoming a catch-all cause of action used to impose one person's political views on society as a whole.

During the 87th Legislative Session, we supported passage of House Bill 2144 by **Rep. Cody Harris (R, Palestine)**, which would have reined in the improper use of public nuisance lawsuits in Texas. In the 88th Legislative Session, TLR will work to codify historic law that a public nuisance claim cannot be pursued to obtain damages related to a lawfully manufactured product or lawfully conducted activity. ■

"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow."

JAMES MADISON—FEDERALIST NO. 62

[2] *Philip S. Goldberg, Is Today's Attempt at a Public Nuisance "Super Tort" the Emperor's New Clothes of Modern Litigation?, Mealey's int'l Arb. Rep., Vol. 37, #10 (Oct. 2022).*

Reining In Construction Litigation

By Rep. Terry Canales (D, Edinburg)

In Texas' booming economy, our construction industry is swamped. General contractors and teams of subcontractors are building everything from schools to skyscrapers. It is to be expected, in the normal course of business, that some construction errors will be made and that some amount of construction defect lawsuits will be necessary.

In construction defect lawsuits related to commercial buildings, it is typical for the owner of the building to sue the general contractor and for the general contractor to sue any subcontractor who may have contributed to causing the alleged defect. Standing alone, there is nothing wrong with conducting the lawsuit in this manner.

It is, however, a problem in many of these lawsuits when subcontractors are added who could not possibly have contributed to the alleged defect. As an example, the subcontractor who installed flooring might be brought into a lawsuit alleging a leaking roof.

In fact, it is sometimes the case that *all* subcontractors who worked on the project are joined into the lawsuit, which is then sent to a mediator to sort out liability. This puts enormous pressure on all defendants to settle even the most non-meritorious lawsuits.

In some instances—especially when the owner of the building is a local government, such as a school district—the owner's lawyer is working on a contingent-fee basis and files the lawsuit just before the expiration of the ten-year statute of limitations. These lawyers plead broadly that the building is rife with construction defects, and leave it to the pretrial discovery process to identify those defects, if any. The general contractor—with a statute of limitations looming and little information upon which to determine the appropriate subcontractors to add to the case—adds them all. Thus, a massive lawsuit is born.

The problem, of course, is that being wrongfully named in a lawsuit is expensive and time-consuming to resolve. Virtually all of the contractors will have insurance, but they may also have a deductible that must be paid out of pocket.

Even when the claim against them is meritless, their insurance company may have to pay lawyers for months, incurring costs that will be passed through to the subcontractor in the next year's premium. As with most litigation expenses, these bills are ultimately passed through to all of us.

There is no reason for this litigation abuse to continue in Texas. We need a more rational approach to construction defect litigation. There are a number of approaches to addressing this issue, and I'm committed to working with the stakeholders this session to find a solution. ■

A Closer Look at Causes of Action

By Lee Parsley, TLR General Counsel

When TLR started in 1994, it was preceded by decades of legislative and judicial activism in expanding civil causes of action beyond the normal scope of American jurisprudence.

The result was a grossly unfair civil justice system that harmed businesses, job creation, the delivery of healthcare and, worst of all, the integrity of the law.

In ensuing years, the Texas Legislature and a judicially conservative Texas Supreme Court have largely restored Texas law to the common-sense balance necessary for a fair system. But in every legislative session, numerous bills and amendments to bills are offered to create new or expand existing causes of action.

Historically, a primary role of TLR has been to prevent unnecessary, poorly conceived or badly written causes of action from being enacted, and we will continue to pursue that goal in the upcoming legislative session.

TLR operates under the following principles with regard to the creation of a new cause of action or expansion of an existing cause of action in legislation in Texas:

1. New or expanded causes of action are generally disfavored by TLR.

2. When a new or expanded cause of action is proposed and its proponent believes no other enforcement mechanism will suffice, TLR will work constructively with the proponent to refine the cause of action to achieve its goal, while ensuring the cause of action is narrowly fitted to the goal and does not invite expansive or meritless litigation.

3. A plaintiff in a cause of action should meet constitutional standing requirements to bring a lawsuit.

- A plaintiff must have suffered concrete harm unique to the plaintiff, not harm suffered by society as a whole. When society itself is harmed, the appropriate remedy is injunctive relief or governmental action—not private litigation—to alleviate the harm and prevent future harm.
- A plaintiff's harm must have a basis in American jurisprudence, which is necessary to give a potential defendant notice that the defendant's conduct could give rise to a lawsuit.

4. TLR can be expected to oppose causes of action that create liability without fault, create unusually low standards for recovery, or deprive defendants of meaningful defenses.

5. A cause of action should not impinge on constitutionally protected rights—such as the right to speak freely, assemble or associate with others or practice a religion—nor should it conflict with existing federal law under the preemption doctrine, which is a foundational principle of America's federalism.

6. If an injunction or other equitable relief is sufficient to enforce the statute, TLR can be expected to oppose a statutory provision providing for the award of damages.

- If awarding damages is necessary to enforce the statute, the damages that may be awarded must be based on actual, quantifiable harm to the plaintiff.
- Per-violation or per-day damages tend to attract entrepreneurial lawyers and opportunistic lawsuits, and, by definition, are unrelated to the harm actually suffered by the plaintiff. TLR, therefore, can be expected to oppose the use of per-violation and per-day penalties.

7. Punitive damages are a form of *punishment*, not compensation, and should be available only if the defendant's conduct was, in fact, anti-social and deserving of punishment. Non-egregious conduct, simple mistakes, inattention or inadvertence should not lead to the award of punitive, treble or additional damages.

- The heightened standards and procedures for recovering punitive damages provided in Chapter 41 of the Civil Practice and Remedies Code should apply any time a plaintiff is given a statutory right to pursue punitive damages.
- Similarly, other forms of enhanced damages—such as treble damages—should only be available upon a showing that the defendant has engaged in an enhanced level of wrongdoing reflecting either an intent to harm or knowledge that the action will likely cause serious harm.

8. The right to recover attorney fees should be reciprocal, allowing the prevailing party to recover attorney fees. Proposed one-way attorney fee awards deserve careful scrutiny and should seldom, if ever, be created. ■

Liability Protections to Encourage Carbon Capture

Whatever one's views on the efficacy of reducing carbon emissions and the impact a reduction would have on the climate, Texas can be a leader in a rational approach to carbon reduction. One beneficial approach is to capture carbon dioxide (CO_2) and either use or permanently store it.

The TLR Foundation recently studied existing state regulations across the country concerning the capture and storage of CO_2 to inform the public and policymakers on liability issues related to carbon capture, transportation and storage.

As the foundation's paper describes, a number of states in the U.S. already have CO_2 storage facilities operating under state regulations. All of these states have enacted plans for transferring title, responsibility, management and liability of underground CO_2 storage facilities to the state after a certain amount of time. Some states have other measures to prevent unwarranted litigation against companies engaged in capturing and storing CO_2.

Texas is the nation's leading oil and gas producer and one of the world's largest manufacturing hubs. Texans have unsurpassed expertise in mining and manufacturing, and it is expected that lawmakers will discuss the future of carbon capture, transportation and storage in the 88th Legislature. The goal of the foundation's paper is to help inform conversations about how best to address related liability issues in Texas.

In the upcoming session, TLR expects to engage with stakeholders to ensure the regulatory framework for carbon capture and storage will contain fair and reasonable liability protection provisions that will encourage industry compliance with safety protocols and deter costly and time-consuming lawsuits that would strangle the industry or try to regulate it through litigation.

To read this TLR Foundation paper, please visit **www.tlrfoundation.org**. ■

Welcoming TLR'S New Assistant General Counsel

Please join us in welcoming the newest addition to the TLR legal team, **Assistant General Counsel Amy Befeld**! Amy will work with TLR General Counsel Lee Parsley on legislative drafting, as well as legal research, analysis and development of TLR's legislative agenda. You've likely noticed her byline on a previous article in this *Advocate*.

Amy Befeld

An accomplished attorney, Amy joins us from the Texas Association of Counties (TAC), where she served as a legislative consultant and the liaison to the Texas District and County Attorneys Association. In this role, Amy tracked and analyzed more than 1,000 pieces of legislation focusing on criminal and civil justice, indigent defense, behavioral health and family law, and analyzed fiscal notes. She also gave educational presentations to local government officials, provided judicial training to county judges across the state and organized regional legislative exchanges and the 2022 TAC Legislative Conference.

Prior to joining TAC, Amy was a longtime Capitol staffer in the office of Texas Sen. Joan Huffman, serving as deputy committee director during Sen. Huffman's tenure as chair of the Texas Senate Select Committee on Mass Violence Prevention and Community Safety, the Texas Senate Select Committee on Redistricting and the Texas Senate Committee on State Affairs. Amy also served as a legislative aide in the office of State Rep. Charlie Geren and for the City of Fort Worth. Her in-depth, first-hand experience of the legislative process will be a critical asset to TLR's advocacy efforts at the Capitol.

Amy's courtroom experience includes handling civil defense litigation in the Texas Attorney General's Office Law Enforcement Defense Division, where she successfully litigated 50 cases simultaneously as lead counsel, from original complaint to final judgment. In this capacity, she focused on constitutional defense, torts and employment law, argued in both state and federal oral hearings and tried a federal civil rights lawsuit.

Amy is a native of Houston. She received a bachelor's degree *cum laude* in political science from Southwestern University and a law degree from The University of Texas School of Law. ■

The Appropriate Role of Regulation in Governance

By Emerson Kirksey Hankamer, TLRPAC Board Member

What is Over-Regulation?

Government at every level should create an environment in which businesses are free to make the best decisions for their customers, employees and owners. When individuals and businesses are free of excessive or unnecessary regulation, they are more innovative and productive, yielding affordable goods and services, high employment and enhanced tax revenue to fund essential government services. Often, regulations distort and lessen the benefits of free enterprise and create hidden costs—in the form of a job not created, an innovation not discovered or implemented, or an increase in the cost of a good or service.

A regulation that mandates or limits business activity should not favor a specific business or industry, or one size of business over another. The government should not attempt to pick winners and losers in the marketplace, but should provide a level playing field for all businesses. It is important to recognize that businesses themselves can be guilty of seeking a leg up over their competitors by using government authority to their own advantage.

Any intervention by the government through a tax, regulation, threat of private or public legal action or other mandate or restriction should meet a high bar and be carefully studied to compare the true and full costs and consequences of the action against its true and full benefits. This determination can be aided by considering whether the intervention (or a similar one) has been tried before and by measuring its real-world results.

In beginning to engage in this arena, TLR will join selectively with businesses and trade associations when a proposed conduct-regulating statute is plainly disruptive to a large swath of businesses operating in Texas.

As an example, during the third special session in 2021, TLR worked with a broad-based coalition to oppose bills allowing lawsuits against employers who complied with federal vaccine mandates, even while stipulating that those federal mandates were overreaching. These bills were anti-mandate *mandates*, which would have put Texas employers in the untenable position of either being sued by the federal government or sued by their employees.

When the federal government overreaches, Texas should challenge the federal policy or regulation directly. But we should not create a "damned if you do, damned if you don't" mandate on our employers by forcing them to choose between compliance with federal or state law.

Standardizing Local Government Regulation of Employment Relationships

Regulations on Texas businesses exist at all levels of government, including the local level.

Many of the large city governments in Texas seek to impose mandates on employers related to employment benefits, scheduling practices and hiring decisions. These actions include mandating paid sick leave for full- and part-time employees and requiring employers to pay a specified minimum wage.

The various local governments are unlikely to mandate the same policies. Some may impose the government's will on employers of a certain size while other regulations may apply to all employers in the community. Some local governments may require a few days of paid sick leave while others require weeks. As the differences accumulate across the state, operating a business across city lines becomes ever more complex and difficult.

Local government regulations will increase compliance costs and, thereby, increase the cost of doing business. They will make it difficult for employers to treat similarly situated employees in the same manner across geographic areas of the state, introducing the possibility for lawsuits claiming discrimination in employment practices.

Further, as the Texas Public Policy Foundation noted in testimony last session to the Senate Business and Commerce Committee, these regulations eliminate Texans' ability to negotiate for the package of benefits they would like to receive from an employer:

> *"Cities like Austin and San Antonio began passing one-size-fits-all mandates that forced private employers to offer specific benefits to full- and part-time employees. These new rules effectively limited the benefit choices available to employees that best work for them. By forcing employers to offer specific incentives, like mandatory paid sick leave, workers have less freedom to negotiate for more attractive benefits like flex time, vacation, higher pay, increased hours, or bonuses."*

continued on bottom of page 9

Protecting Texas' Pro-Jobs Business Environment

By Marc Watts, TLR Board Member

Texas is the best state in the nation to live, raise a family, and start or expand a business. This is the result of forward-looking leadership by our elected officials to allow the entrepreneurship and innovation of Texans full sway, with minimum interference by state government.

But this was not always the case.

From the 1970s to the early 1990s, Texas earned its infamous nickname as the "Lawsuit Capital of the World." Because of the abusive lawsuits aggressively pursued by many plaintiff's lawyers, business activity and job creation were depressed and the delivery of essential healthcare was inhibited. For this reason, the Texas business community initiated a vigorous and sustained tort reform movement in the early 1990s. Reining in non-meritorious lawsuits, coupled with low taxes and common-sense regulation, has made Texas the economic engine of the nation.

Recently, though, more and more bills creating or expanding causes of action have been filed and proposed. Among them are ones employing new, expansive statutory causes of action to regulate societal conduct—even though this kind of regulation-by-lawsuit conflicts with traditional conservative values of small government, light governmental interference in personal relations, deference to employer-employee relationships, adherence to established principles of litigation, and respect for federalism. These statutes also frequently conflict with federal law, making it difficult or impossible for businesses to operate among conflicting statutory and regulatory regimes. Further, the subject matter and expansive nature of some of the new and recently proposed causes of action have drawn national attention and invited copycat bills by "progressive" politicians in liberal states who are emboldened to use Texas-like causes of action to promote ill-advised policies.

Across the policy spectrum, it is a bedrock principle of conservative governance that excessive regulation hinders economic innovation and job creation. When the state—either through an administrative agency or the Legislature itself—tells a business it cannot do one thing or must do another, these imperatives have costs that impose a hidden tax on Texans via higher consumer prices, lower wages and fewer jobs.

Individuals and businesses should be allowed to deal with their employees, customers and contractors in ways that are largely determined in free markets. If Texans disagree with decisions being made by a particular business, they can and will stop supporting that business, opting instead to support businesses that share their values. Texas government should intervene sparingly in the spheres of free markets and contractual relationships so Texas can continue to be a place that businesses favor rather than fear, embrace rather than avoid—in contrast to the liberal states from which businesses flee.

During the 2023 legislative session, the business community will work with the Legislature to focus on the policy blueprint that made Texas the economic engine of the U.S., including keeping taxes low, cutting burdensome red tape, ensuring our courts are fair and accessible, and pursuing public policies to bolster job creation, economic competitiveness, opportunity and quality of life for all in the state of Texas. ■

The Appropriate Role of Regulation in Governance, *continued from page 8*

This is a glaring example of excessive regulation.

These regulations pick winners and losers among businesses of various size, limit the rights of both employers and employees to freely contract, presume government regulation is better than the honest judgment of private-sector actors and impose a hidden tax on consumers.

In the 2021 regular session, **Sen. Brandon Creighton (R, Conroe)**, introduced Senate Bill 14, prohibiting local governments from interfering in employer-employee relationships in Texas. Senator Creighton's bill provided that a local government "may not adopt or enforce an ordinance, order, rule, regulation, or policy requiring any terms of employment that exceed or conflict with federal or state law relating to any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms of employment."

Senate Bill 14 failed to pass in 2021 but is likely to be introduced again this legislative session, and TLR will support its passage. ■

Regulatory Litigation Reform Could Save Texans Millions While Maintaining Appropriate Oversight

By Jason Ryan, Executive Vice President of Regulatory Services and Government Affairs, CenterPoint Energy

An efficient, predictable and fair legal system has been critical to the oft-referenced "Texas Miracle" that has seen the Lone Star State welcome more Fortune 500 company headquarters than any other.

One of the seeds of the Texas Miracle was sown by the 1999 revisions to the Texas Rules of Civil Procedure promulgated by the Texas Supreme Court, which curbed litigation abuses and reduced cost and delay.

In the years since, the Texas Legislature has taken additional steps to remove incentives for lawyers to rack up exorbitant legal fees by strengthening the law to ensure frivolous lawsuits and claims don't tie up our courts and create unnecessary and expensive litigation.

While these reforms apply when any Texan or Texas business walks through the door of any state courtroom, they generally do not apply to Texas administrative agency proceedings.

Unlike the procedure applicable in courts, certain litigants are still reimbursed for their legal fees in administrative cases—win, lose or draw. Moreover, some administrative proceedings are required to go through not one, but two layers of litigation in front of duplicative administrative bodies.

Not only is this contrary to efficient regulation, but these administrative agency proceedings result in millions of dollars in costs passed on to Texas consumers and businesses annually.

Perhaps the most egregious examples of this hidden tax can be found in the processing of electric and gas utility rate cases. These cases review rate increases related to new investments to provide safe, reliable and resilient service to Texans.

But it's not as straightforward as it sounds. Unlike in most civil cases, where parties must only provide notice pleadings and then later marshal their evidence at trial, utilities are required to marshal all of their evidence at the beginning of these cases. Nevertheless, utilities are still subjected to thousands of discovery requests, *the cost of which is passed on to consumers through utility rates at the end of the case*.

Even worse, utilities (and their customers) must, by law, pay municipalities' lawyers to litigate against them—oftentimes twice!

Texas is unique as the only state in which cities regulate utilities, meaning attorneys can bill for proceedings at the city level and then again at the state level at the Public Utility Commission (PUC) and the Railroad Commission (RRC), which regulate electric and gas utilities, respectively.

Here's how the Texas Regulatory Two-Step works: Before utility rate proceedings go before the PUC or RRC, the utilities, by law, must first file and go through the exact same proceeding with municipalities in the areas they serve. Once the city proceeding has concluded, the case starts over with de novo review by either the PUC or RRC.

Two is not always better than one, and when it comes to litigation, two is *always* more expensive than one!

But even if we eliminate duplicative proceedings for utility rate cases, why should utilities' customers ever be required to pay the municipalities' lawyers to litigate those cases?

Texas taxpayers already pay to fund the PUC and RRC to effectively regulate electric and gas utilities with expert staff and attorneys, as well as the Office of Public Utility Counsel to represent consumer interests in those proceedings. Adding even more customer-funded lawyers to the process is not consistent with the policies that built the Texas Miracle.

While the Texas Two-Step remains popular in our dance halls, the Texas Regulatory Two-Step is outdated, inefficient and costly. Fortunately, Texas has already demonstrated the best way to solve this problem. The solution applied to Texas courts for the last two decades simply needs to be applied to administrative proceedings.

If municipalities feel compelled to incur millions of dollars in legal fees to participate in proceedings already staffed by the PUC and RRC and supplemented by the state-funded consumer advocate at the Office of Public Utility Counsel, they should ask their own citizens to pay those costs.

Texans would justifiably be up in arms if utilities kept the meter running with no accountability. It's time to make common-sense changes in the administrative context to prevent attorneys from doing just that. ■

The Legislative Landscape in 2023

By Mary Tipps, TLR Executive Director

As we head into the 2023 legislative session, TLR looks forward to working with many new and familiar faces in the course of our advocacy at the Capitol.

Gov. Greg Abbott, Lt. Gov. Dan Patrick and **Speaker Dade Phelan** will continue their capable leadership of our state, ensuring through common-sense conservative principles that Texas remains the best place to live, work and raise a family. All three of these proven leaders have been staunch advocates for lawsuit reforms throughout their time in public service.

Gov. Greg Abbott

Lt. Gov. Dan Patrick

Speaker Dade Phelan

While our state's leadership remains constant, the process of legislative redistricting provided a natural opportunity for changes in the rosters of both the Texas Senate and House, with many longtime members retiring and newly-drawn seats making for competitive election contests.

The result is that the freshman classes in both the House and Senate are large and dynamic.

Because of redistricting, all state senators were on the ballot this year, whereas in typical election cycles, their terms are staggered. While many incumbents won reelection, there are several new senators who were elected to seats opened by incumbent retirements.

Phil King (R, Weatherford), Mayes Middleton (R, Wallisville) and **Tan Parker (R, Flower Mound)**—each of whom were strong TLR allies when they served in the Texas House—will bring important, principled voices in their new roles in the Texas Senate. **Kevin Sparks (R, Midland)** fills an open seat and will bring his experience in the oil and gas industry to the Legislature's deliberations. **Pete Flores (R, Pleasanton)** was also elected in a newly drawn district. Pete previously served one term in the Texas Senate and was the first Hispanic Republican to serve in that body.

In the remaining open Senate seat, human resources attorney **Morgan LaMantia**, a Democrat, won election in SD 27 in the Rio Grande Valley. We expect to have a positive relationship with Ms. LaMantia, as we did with her predecessor, Sen. Eddie Lucio Jr.

The composition of the Senate will be 19 Republicans and 12 Democrats.

While we are happy to see the majority of incumbents returning to the Texas House, there is a wave of new faces filling open seats in the chamber.

Notably, this House freshman class features seven Republican women, all dynamic and principled conservatives who will bring critical perspective to their work. These new legislators are **Angelia Orr** in Hill County, **Ellen Troxclair** in Travis County, **Terri Leo Wilson** in Galveston County, **Caroline Harris** in Williamson County, **Kronda Thimesch** in Denton County, **Carrie Isaac** in Hays County and **Janie Lopez** in Cameron County. These new legislators join the ranks of **Reps. Geanie Morrison (R, Victoria)**, **Angie Chen Button (R, Richardson)**, **Stephanie Klick (R, Fort Worth)**, **Candy Noble (R, Lucas)**, **Valoree Swanson (R, Spring)**, **Lacey Hull (R, Houston)** and **Shelby Slawson (R, Stephenville)**—all of whom are staunch advocates for common-sense lawsuit reforms.

Also of note, four Hispanic Republicans were victorious in their races. In addition to **Kronda Thimesch** and **Janie Lopez**, we welcome **Mano DeAyala** in Houston and **John Lujan**, who won reelection in San Antonio.

They will join two incumbent Hispanic Republicans in the House—**Rep. Ryan Guillen (R, Rio Grande City)**, who served with distinction in the House as a Democrat and became a Republican last year, and **Rep. J.M. Lozano (R, Kingsville)**, who was first elected to the House as a Democrat in 2010 and became a Republican in his first term in office.

The composition of the House will be 86 Republicans and 64 Democrats.

We look forward to working again with many Democratic Senators and House Members who have supported TLR legislation in the past and are returning to the Legislature after their reelection. ■

The Case for Preserving ERISA

By Lee Parsley, TLR General Counsel

The Employee Retirement Income Security Act of 1974 (ERISA) allows multistate employers to design health and retirement benefit plans tailored to their workforces and to administer those plans uniformly across the nation.

In creating ERISA, Congress recognized that multistate employers cannot provide quality, affordable healthcare benefits and retirement plans to employees if they must comply with a patchwork of recordkeeping and reporting requirements—or multiple state and local mandates—in addition to complying with federal laws.

Uniformity encourages employers to offer health and retirement plans to employees, thus reducing the number of uninsured Texans and increasing the number of people who can retire without excessive reliance on government support.

ERISA comprehensively regulates the administration of employee healthcare plans that provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death." It does not regulate the substantive content of such plans. Thus, each employer can choose for itself the costs and benefits that best fit its circumstances.

ERISA guarantees uniformity by preempting any state or local law that "relates to" an employee benefit plan governed by ERISA. Preemption of state laws is allowed by the Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2), which comes into play when state law conflicts with valid federal law.

The Supremacy Clause should be viewed in context with the Tenth Amendment of the Constitution, which explicitly states that powers not delegated to the federal government by the Constitution are reserved to the states or the people. Courts have determined that ERISA is a valid federal statute pursuant to the Commerce Clause of the Constitution and, thereby, is a law that can properly preempt conflicting state or local laws.

The preemption rule in the ERISA statute expressly prohibits states and localities from forcing employers to create or amend an ERISA-sanctioned employee benefit plan, or from enacting statutes or ordinances controlling the administration of an employee benefit plan established under ERISA.

ERISA preemption matters for two reasons. First, it allows companies that operate across state lines to establish uniform health plans for their entire workforces. Second, entrepreneurial plaintiff's lawyers seek to end ERISA preemption for their personal gain.

Texas' Prompt Payment of Claims Act (PPCA) governs payments by insurance companies to healthcare providers. It is the most punitive law of its kind in the nation and, thus, can be richly profitable to lawyers who file late-payment lawsuits.

So profitable, in fact, that several years ago, numerous Texas lawyers solicited hospitals and doctors to sue insurance companies for alleged failures to timely reimburse them for patient services. In fact, one of Texas' wealthiest personal injury trial lawyers sent a letter to virtually every licensed attorney in the state claiming to have developed a computer algorithm that would identify late payment of claims. He asked all Texas lawyers to refer their doctor and hospital clients to him to pursue PPCA lawsuits for a share of the profits.

Because of this activity by profit-seeking lawyers, PPCA lawsuits were filed in courthouses across Texas seeking tens of millions of dollars in penalties. To the extent these lawsuits succeeded, Texas consumers paid the price in the form of higher insurance premiums—another "Tort Tax" buried in the cost of a necessary product.

Courts, however, eventually held that the PPCA is preempted by ERISA. Consequently, health insurance companies who manage employer-provided healthcare plans and the employers who pay for these benefits for their employees are not currently subject to PPCA lawsuits. This literally saves Texans millions of dollars.

But the trial lawyers' quest for enrichment has not ended. They want the Legislature to pierce ERISA's preemption, opening ERISA to mandated coverages, rate setting by governmental functionaries (rather than negotiated rates between the provider and insurer) and PPCA lawsuits. These lawyers would like to pursue PPCA lawsuits and personal injury lawsuits arising from alleged denials of benefits and breaches of fiduciary duty.

Ending or eroding ERISA preemption will adversely impact labor markets, disadvantage employees based on where they live or work, cause employers to cut back on benefit coverage and raise the cost of health insurance and retirement plans.

The Texas Legislature should protect ERISA preemption, not weaken it. ■