

Texas MERIT+SHOP Journal

Defending the Rights of Merit Shop Contractors

VOTE 2008:
Ways You Can Make
A Difference Now

Texas Runoff
Election Recap

PAY-IF-NOT-PAID:
New Contingent
Laws You Should
Know

JOB SITE SAFETY:
Is it a Thing of the Past?

ONE ON ONE WITH:
Speaker Tom Craddick

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Bankruptcy Law & Your Lien Rights

NLRB's Proposed Consent
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Texas MERIT SHOP Journal

Defending the Rights of Merit Shop Contractors



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5 What Are You Prepared To Do?

Feel like you have been bombarded by the onslaught of campaign materials lately? You're not alone. Now, more than ever, the individuals running for office are trying to court your vote. Make sure you are an educated voter by taking steps now to participate in the election process. From the novice to the seasoned voter, ABC has many ways for members to "Get into Politics".

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On September 1st, a new law went into effect which significantly restricts the use and enforceability of contingent payment clauses in certain construction contracts. Learn about the primary restrictions on enforcement and what steps you can take now to address protections lost to the new law.

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Texas Merit Shop Journal sits down with Speaker Tom Craddick to discuss his views on Government and his reasons behind seeking reelection.

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Recently, the ABC of Texas Board met to discuss the next Legislative session and priorities to be adopted by the State Association. Eight priorities were established, ranging from immigration to licensing, which are detailed in this article.

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Learn about a case, that is making waves throughout the state, which some believe has undermined the right of Texas workers to expect to return home safely from work each day. Find out what this case decision means for contractors and laborers.

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BARRY

Dear Reader,

Associated Builders and Contractors (ABC) of Texas was established in an effort keep all statewide members informed of legislative and political developments, and to ensure that ABC's values are represented at the State level. It incorporates all eight of ABC's local chapters, led by a Board of Directors consisting of elected members from each chapter. Today, after thirty-one years of growth and development, Associated Builders and Contractors of Texas is over 1,500 member companies strong. I am proud to say that it is a great privilege to serve as

the 2008/2009 Chairman of the ABC State Board of Directors, an opportunity that will allow me to further the influence of ABC throughout Texas.

With that in mind, I am excited to announce the launch of the ABC Texas Merit Shop Journal, Associated Builders and Contractors of Texas' first printed news magazine. The Texas Merit Shop Journal will be distributed to each ABC member and political affiliate in the State, featuring articles and information focused on current political and legislative news that affects our businesses locally, statewide, and throughout the country. Editorial segments include Political Action Alerts, News from the Capitol, Legislation Updates, Candidate Profiles, Regulatory Updates, and much more; all promoting the ABC message of Free Enterprise.

The Texas Merit Shop Journal will help keep ABC members more informed of all legislative activities throughout the state. Additionally, during this off-year in the legislative cycle, the Board is exploring the option of expanding our services by bringing on a State Executive Director who will help coordinate our efforts. Our hope is to serve you better through these new developments, and ensure that as ABC members, you are well-represented through the State political processes.

Enjoy!

Roger Berry
SpawGlass Construction Corp.
2008/2009 ABC of Texas Chairman

For information about ABC of Texas go to:
www.abctexas.org



WHAT ARE YOU PREPARED TO DO?



Unless you've been hanging out with Gilligan and the Skipper on an uncharted desert isle, you're well aware that 2008 is a crucial election year. Candidates for every office from the White House to the local court house have been flooding mailboxes, airwaves, and telephone lines with appeals for your vote. This Presidential election campaign began earlier than any one in recent memory and perhaps any campaign in history. In the beginning, there was a crowded field of candidates in both parties. For a time it seemed easier to identify the Senators who were not running for President. After many primaries and even more debates, the choices have been narrowed down considerably. For ABC members, and others who believe in succeeding on merit, less regulation, and free enterprise, the choice has been narrowed to one. At the ABC National Convention, our association became the first business association in the country to endorse John McCain for President of the United States.

Historically, ABC has been very active in the political arena. This year will be no different. Currently, ABC PAC has raised \$1.45 million in 2007-08 and is at 72 percent of its goal to raise \$2 million this election cycle. One hundred percent of contributions to ABC PAC (ABC National pays all administrative costs) go directly to the candidates who support our issues.

Clearly our members are motivated this cycle. For the future of our industry, ABC members must engage at a level unprecedented in our history. Our National Chairman, Bill Fairchild, has made a priority of his term as Chairman, to see ABC's impact and influence on this election cycle result in what he calls the "trifecta" the election of a business friendly majority in both houses of the U.S. Congress and the White House. To some this might seem too audacious a goal, but greatness was never achieved by those with small dreams.

There are many ways in which ABC member companies and individuals can make a difference in this election, some of our efforts require a financial commitment, and others do not. ABC National has provided and will continue to provide throughout the year, helpful information to your local chapter on how to mobilize our association to protect and secure our industry's future through the political process. Specifically, the Free Enterprise Alliance (FEA) will be producing educational materials for chapters to

distribute to member companies. These materials will help employers get invaluable information to their employees on the importance of voting, the issues emerging for our industry in this election, and where candidates stand on those issues, so that our association's members can make an informed choice at the polls.

In addition to the efforts of the FEA, our ABC National Grass Roots program will be providing helpful updates on any bills moving through Congress and a simple process to contact legislators to make your voice heard. The Grass Roots program will also assist ABC member companies, through their chapters, with step by step instructions on topics such as how to hold a voter registration drive at your company. We can not afford to leave any stone unturned this year.

"Make no mistake, those who oppose our ideals will be well funded, but all the money in the world doesn't make them right."

ABC will be on the front lines of this battle of ideas. We know the principles on which ABC was founded are the key to the success of our industry. We must see those principles in action in our government's policy making. To see this achieved we must have elected officials who share our loyalty to free enterprise, low taxes, freedom in the workplace, and the merit shop philosophy. Make no mistake, those who oppose our ideals will be well funded, but all the money in the world doesn't make them right. If we as an association take action and get our message to the politicians and the electorate, we will prevail. To find out more about what you as an ABC member can do this year, contact your local ABC Chapter. Remember the phrase that has been around ABC circles for many years, "Get into politics or get out of business."



WATTS

ABOUT THE AUTHOR

Lathan Watts is ABC National's Regional Political Manager. His territory includes Texas, Arkansas, Oklahoma, and Louisiana. He assists the chapters in those states with political activism and fundraising. Before joining ABC in March of 2006, he worked in Texas politics in various capacities where he contributed to the election of 5 U.S. Congressmen, multiple State Representatives, and one Governor. He received a B.A. in History from Harding University, graduating Magna Cum Laude and holds a Juris Doctor from the University of Mississippi School of Law. He and his wife Kim and their two daughters McKenna and Ashton live in Lewisville, Texas, where Lathan serves on the City Council. To contact Lathan Watts, please call (703)629-5931 or email watts@abc.org.



PAY-IF-NOT PAID: *The New Contingent Payment Law*

Contingent payment clauses are typically subcontract provisions conditioning a general contractor's obligation to pay its subcontractors on prior receipt of payment from project owners. General contractors and subcontractors have fought over these clauses for decades. Subcontractor groups began lobbying the state legislature to address the issue almost twenty years ago. Early draft legislation presented by these organizations sought to ban contingent payment clauses entirely. Subsequent drafts allowed enforcement only if the clause was conspicuous and payment had been wrongfully withheld by the owner. None of these bills passed in the Legislature and the battle waged on. After the 2001 legislative session, lobbying groups representing generals and subcontractors began working on a compromise bill to submit jointly. On September 1, 2007, a new law went into effect that settled the argument, at least for now. Texas Business and Commerce Code section 35.521, "Agreement for Payment of Construction Subcontractor", significantly restricts, but does not prohibit, the use and enforceability of contingent payment clauses in certain construction contracts.

HISTORY

Early versions of these payment provisions simply stated that general contractors did not have to pay their subcontractors until they had received payment from project owners. The disputes arose when owners, for whatever reason, never paid the generals who then relied on these clauses to avoid paying their subs. The conflict was first addressed in Texas courts in the early 1960s. By the mid-80s, Texas courts had established specific language was required to make these clauses enforceable. The courts required clear and specific language stating that receipt of payment from an owner was "an express condition precedent" to the contractor's obligation to pay its subcontractors, thus explicitly shifting the risk of nonpayment by the owner. Without this language, the courts held that these clauses related merely to when the general contractor must pay, not if he must pay; if the owner never paid, the general contractor was still responsible to pay its subcontractors, within a reasonable time. The distinction between an enforceable contingent payment clause and one relating only to the timing of payment is often identified by the labels "pay-if-paid" versus "pay-when-paid". This distinction remains important because the new law defines a contingent payment clause in accordance with the courts' description of

an enforceable "pay-if-paid" clause, and the so-called "pay-when-paid" clauses are excluded from the law's restrictions.

OVERVIEW

Outside the title there is no reference to "subcontractors" in the statute. This is because it applies equally to anyone seeking to enforce a contingent payment clause, whether they are general contractors, subcontractors, or others. The law refers to "obligors, contingent payors and contingent payees" rather than owners, generals and subcontractors. However, for ease of reference in this article, we will assume a typical commercial contract relationship between an owner (obligor), general contractor (contingent payor) and subcontractor (contingent payee), and reference the provisions of the new law accordingly. This article is an overview of a lengthy and complicated statute. It is not intended to address all issues surrounding this law, or even all of its contents. It is intended as a review of the most relevant portions and a commentary on some of the potential repercussions of each.

"Outside the title there is no reference to 'subcontractors' in the statute. This is because it applies equally to anyone seeking to enforce a contingent payment clause, whether they are general contractors, subcontractors, or others."

First, not all construction contracts are affected by this statute. It will not apply to contracts solely for design services, residential structures, or certain civil engineering projects—all as defined therein. Generally, for those affected by this statute, contingent payment clauses will not be enforceable in the following situations:

- 1) If the reason for nonpayment by the owner is based on the general contractor's breach of its contract with the owner;
- 2) If a subcontractor objects to enforcement of the provision in accordance with the statute;

- 3) If the general contractor and owner have a “sham contract” relationship;
- 4) If enforcement of the provision would be unconscionable.

PRIMARY RESTRICTIONS ON ENFORCEMENT

1) Breach of Prime Contract

Neither a general contractor nor its surety can enforce a contingent payment clause, if the general contractor is not paid due to a breach of its contract with the owner, i.e. the prime contract. However, this does not apply to enforcement against a subcontractor whose breach of its subcontract is the cause for the owner’s non-payment. On its face, this appears a reasonable adaptation of the common law “prevention doctrine”, i.e. one cannot use the non-occurrence of a condition to excuse his performance if he caused the condition not to occur. However, in application, some practical issues give cause for concern.

First, an owner may withhold payment for other reasons, yet claim it is due to a breach by the general contractor, or withhold funds for a suspected breach that turns out to be invalid. The new law provides little in the way of defense for a general contractor who has not breached its contract but may need time to prove that to an owner, or even a judge. Second, a legitimate problem with the work of one subcontractor, while not necessarily the fault of the general contractor, could still constitute a breach of the prime contract and prevent the general from enforcing the clause against any other subcontractor – even if the owner is withholding funds well beyond the amount owed for the work of the defaulting subcontractor. The Prompt Pay Act in the Texas Property Code will offer some assistance. However, the notice provisions and defenses for “good faith disputes” render it less helpful in a practical context.

2) Notice of Objection by Subcontractor

A subcontractor can challenge the enforcement of a contingent payment clause by submitting a written notice of objection to the general on or after the 46th day after the subcontractor’s submission of a written request for payment. If the subcontractor’s work is not the cause of the owner’s withholding payment, the contingent payment clause is unenforceable as to work performed after the notice becomes effective, as defined in the statute. Once the debt that was the subject of the notice has been satisfied, the contingent payment clause goes back into effect for work performed thereafter.

The general’s only statutory defense to a subcontractor’s notice, (other than a limited exception for a sovereign immunity issue), is a written response notifying the subcontractor that the owner is withholding funds based on a good faith dispute involving the subcontractor’s work. The general must send this response in accordance with a complicated set of alternative deadlines depending on the type of project. In most cases, the response will have to be received by the subcontractor within five days.

“Neither a general contractor nor its surety can enforce a contingent payment clause, if the general contractor is not paid due to a breach of its contract with the owner, i.e. the prime contract.”


3) Sham Contracts

Contingent payment clauses may not be enforced by general contractors in a “sham contract” relationship with an owner, as defined in the Texas Property Code. Section 53.026 of the Code defines a “sham contract” as one in which either the contractor can effectively control the owner, or vice versa, through ownership of voting stock, interlocking directorships, or otherwise.

This is the least significant exclusion under the new law. It was unlikely parties in such a business relationship could have enforced their contingent payment clauses even before this new statute, because of the prevention doctrine addressed above. The new law simply codifies this doctrine in the case of a “sham contract” relationship.

Continued on Page 8

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4) Unconscionability

Finally, the statute prohibits enforcing a contingent payment clause if doing so would be “unconscionable.” This appears to be the Legislature’s attempt to address situations where payment is withheld by an owner due to financial difficulty, or lack of action by a general to pursue payment on its subcontractors’ behalf. General contractors can defend against a claim of unconscionability by furnishing certain information to subcontractors about the owner’s financial viability and project funding before the subcontract is executed, in addition to pursuing payment from the owner in good faith or offering to assign its contractual claim against the owner.

“Opinions about the use of contingent payment clauses are strongly polarized. Subcontractors have long argued that it is inherently unfair to withhold their payment when there is no complaint about their work. Generals counter that they should not be made to bear the entire burden for an owner’s wrongful withholding of payment in amounts they cannot control.”

RECOMMENDATIONS

This new statute is complicated and untested. For now, we can only speculate as to how Texas courts will interpret some of its more complicated, and possibly conflicting, provisions. There are additional issues and requirements not discussed in this article. But in an effort to address some anticipated issues, the following measures should be considered.

General contractors should add provisions in prime contracts to address the protections lost to the new law. These may include shorter payment terms, immediate work stoppage for non-payment, procedures for determining reasonable amounts to be withheld by the owner in the event of conflict, and requiring owners to specifically identify the reasons for withholding payment prior to the time it is otherwise due – to give the general time to comply with the deadlines for responding to a subcontractor’s written notice of objection. Finally, providing the required financial information to subcontractors will help defend against a claim of unconscionability in the case of an insolvent owner. It should also address the cost and time impact of an owner’s delay in providing

this information, or replacing subcontractors who may not wish to continue with the project once that information is furnished.

Subcontract forms also need to be reworked. The statute prohibits any contractual waiver of its provisions. However, some changes can assist in complying with the statute, as well as allowing time to resolve disputed issues with an owner prior to payment coming due to subcontractors. Because “pay-when-paid” clauses are not affected by the new law, they too should be utilized in some manner - either in conjunction with, or in place of, the existing “pay-if-paid” provisions.

Subcontractors should familiarize themselves with the law’s notice provisions and exceptions. They must also be prepared to analyze the owner’s financial information and act upon it if the information causes concern over project funding.

Owners and lenders should be prepared to receive and respond to requests from generals for significant financial information that has not previously been requested of them, but perhaps should have. Untimely or incomplete responses may lead to project delays or cancelled contracts. Owners will not release this information lightly. Confidentiality issues are certain to arise, as well as disputes over the adequacy of the information provided.

CONCLUSION

Opinions about the use of contingent payment clauses are strongly polarized. Subcontractors have long argued that it is inherently unfair to withhold their payment when there is no complaint about their work. Generals counter that they should not be made to bear the entire burden for an owner’s wrongful withholding of payment in amounts they cannot control. Both arguments have merit. In the last twenty years, I have worked as a subcontractor, a general contractor, and as a construction lawyer. In that time, I have seen these clauses used inappropriately to avoid valid claims for payment, and I have seen them save good companies in bad situations from financial ruin. The Legislature has furnished subcontractors with a powerful weapon for debt collection. The industry will be best served if it is used wisely and with restraint, remembering it would not have been possible without the combined efforts of both generals and subcontractors.



MCGEE

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One on One With...

SPEAKER TOM CRADDICK

In 1969, at the young age of 25, Tom Craddick was elected to be the state representative of District 82 in Midland. At the time he was one of only nine Republicans in the 150-seat House. Tom Craddick's rise to the Speaker's seat parallels the growth of the Republican Party in Texas. In 1975, Speaker Bill Clayton appointed Craddick as the first Republican committee chairman in 100 years, and he continued to hold chairmanships under Clayton's successors, Gib Lewis and Pete Laney. On January 11, 2003, he made state history when he became the first republican speaker of the House in more than 130 years.

Since his election as speaker, Craddick has demonstrated an appreciation for diversity and bipartisanship by appointing a record number of women and minorities as chairmen. He has helped pass lawsuit reforms to protect patient access to healthcare, created a constitutional school finance system that raised standards and teacher salaries, and increased spending on border security by \$100 million.

Craddick is a sales representative for Mustang Mud, an oilfield supply company, owns Craddick Properties, a Midland investment business, and is president of Craddick, Inc. He is married to the former Nadine Nayfa, of Sweetwater. They have two children and a grandson.

Please describe your business background.

I am a sales representative for Mustang Mud, an oilfield supply company. I own Craddick Properties, a Midland investment business, and I am the president of Craddick, Inc. I balance these business ventures with my state service.

What is your view of the free enterprise system?

I support having a strong free enterprise system. Markets work and businesses prosper when they are free to do their jobs and excel with minimal government regulation and interference.

Do you view government as a friend or a foe?

As a conservative, I believe too much government interference can render a society helpless. We do have a responsibility in state government to help those most vulnerable through programs, such as CHIP (the Children's Health Insurance Program), Medicaid or college tuition grants. However, the government needs to allow people to use their ingenuity, drive and self-reliance to succeed.

Is the tax burden on businesses too high, too low or just right?

Over the past six years, the tax burden on businesses has improved tremendously. Two sessions ago, we passed a revised business tax that brought the franchise tax rate down from 4.5 percent to 1 percent. Although we brought more businesses under the umbrella by eliminating the Delaware sub, the tax now is flatter and fairer than ever before. In addition, we passed the largest property tax cut in history, which will undoubtedly affect countless businesses that own property.

Those changes have helped the state's economy outperform the national economy, but I am always interested in what we can do to improve the current situation for businesses. As we look toward the next session of the legislature, I hope that we will be able to reform the appraisal system so we can ensure that property tax rates in Texas continue to stay low and taxpayers truly experience the cuts we made two years ago.

The national economy appears to be faltering, what is your view of our state's economy?

In 2003, when I was first elected speaker, the state faced a \$10 billion budget shortfall. By writing conservative budgets and cutting spending, we have gone to a \$14 billion surplus in just five years. That is a \$24 billion upswing! Additionally, we have worked in a bi-partisan manner to implement a number of laws that make doing business in Texas more attractive. For example, we passed model tort reform legislation that has virtually eliminated frivolous lawsuits. Consequently, while the rest of the country seems to be in a recession, Texas' economy is still going strong.

Why do you want to be Speaker again?

There are few things I enjoy more than serving the people of Texas in the House of Representatives. I love this state, and though the legislature has made remarkable improvements over the years, there is more that needs to be done. We need to ensure that Texas' economy remains strong in spite of a national recession. We need to maintain our vibrant business climate. And we need to continue to evaluate health care, education and the like so that we are giving Texas taxpayers the best services possible.

ABC Texas Board Votes for 2009 Legislative Priorities



At the April 9, 2008 Texas ABC Board meeting a lively discussion was held concerning the 2009 ABC legislative priorities. Several chapters were very vocal about issues and concerns for the next Legislative session. As usual, there were concerns about bad legislation being proposed by other groups and how ABC should take action to kill those bills. Other issues will need the support of ABC members in grassroots efforts to make sure the proposed legislation will pass. The ABC lobbyist, Mike Toomey expressed his knowledge about certain types of legislation and the likelihood of that legislation being passed. There was also some discussion about proposed legislation that ABC should write, find sponsors and support.

After the discussion was completed each chapter used the new voting system to indicate their priorities for the next session. The results were:

1. Immigration Bills
2. General Contractor Licensing bill
3. Alternative Delivery Systems – son of HB 447
4. Cleanup of Contingent Pay bill
5. Indemnification/workers comp/third party liability
6. Trust Fund statute
7. Eliminate or reduce Prevailing Wage bill
8. Subcontractor Licensing bills

If you want to help ABC oppose or support any bills on these issues, please contact your local ABC State Board member, located on page 4 of this publication. This is not intended to be a complete list, and it is possible that the priorities will change during the legislative session. The Board will be flexible to adjust their priorities as issues evolve and change. If there is one constant about politics is that it is a moving target and 2009 will be no exception.

Election 2008

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IS JOB SITE SAFETY A THING OF THE PAST?

Interpreting the Entergy Gulf States, Inc. V. Summers Decision

The Texas Labor Code makes workers' compensation benefits an employee's exclusive remedy against an employer for covered work-related injuries. In the realm of construction projects, where multiple contracts between parties to a project abound, the question becomes whether a general contractor may be considered the "employer" of a subcontractor's employees and, thus, is shielded from suit by the Workers Compensation Act's (now codified in the Texas Labor Code) exclusive remedy defense.

The Labor Code defines "general contractor" as a person who undertakes to procure the performance of work or service, either separately or through the use of subcontractors. A general contractor may enter into a written agreement with a subcontractor under which the general contractor provides workers compensation coverage for the subcontractor's employees.

Such an agreement does make the general contractor the employer of the subcontractor and the sub's employees for purposes of workers' compensation laws.

The Case That Caused a Stir

In *Entergy Gulf State, Inc. v. Summers*, the Texas Supreme Court took this body of law and argument one step further, in applying the protections afforded a general contractor to a mere premises owner.

The facts of the Entergy case are as follows:

Entergy hired International Maintenance Corp. (IMC) to perform construction and maintenance on Entergy's premises. The parties entered a contract that referred to IMC as an "independent contractor" and an addendum to the contract recognized Entergy as the statutory employer of IMC employees, provided that Entergy would provide workers' compensation insurance to IMC's employees.

John Summers, an IMC employee, was injured on the job at Entergy's Sabine plant. He applied for and received benefits under the policy. He also sued Entergy for negligence. Based on the contract between Entergy and IMC, Entergy moved for summary judgment arguing it was effectively Summers' employer and thus shielded from suit under the Labor Code's exclusive remedy defense. The Court agreed and granted summary judgment in favor of Entergy.



On appeal, the court determined that Entergy was not a general contractor because it had not undertaken to perform work or services and then subcontracted part of that work to a subcontractor. In making this determination, the court of appeals borrowed from *Williams v. Brown & Root, Inc.*, which held that an entity that did not contract with an owner, but instead was the owner, was not protected by the exclusive remedy provision. Further, the appellate court looked to *Wilkerson v. Monsanto Co.*, which also held that a premises owner was not a statutory employer, based on the definition of subcontractor in use at the time - "a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform." Essentially, the appellate court was declaring that

an owner could not be a general contractor, because it cannot contract with itself.

"The threat of litigation accountability has long provided the single most powerful incentive to make dangerous workplaces safer. Without it, worker injuries and deaths become just a cost of doing business."

The Texas Supreme Court, in reaching its decision in *Entergy*, looked directly to the Labor Code's current definitions of general contractor and subcontractor, and reasoned that this definition does not preclude a premises owner who "undertakes to procure the performance of work or service" from serving as its own general contractor.

Opposition to the Decision

There is significant opposition and criticism of the Supreme Court's decision. In one of a number of amicus curiae briefs, the Texas AFL-CIO, Asian Pacific Labor Alliance, A. Phillip Randolph

Institute, Coalition of Labor Union Women, League of United Latin American Citizens, Labor Council on Latin American Advancement, Texas State Association of Electrical Workers, Texas Watch, and the United Steelworkers of America joined together in arguing that the Supreme Court's decision has fatally undermined the right of Texas workers to expect to return home safely from work each day.

According to the aforementioned groups, the threat of litigation accountability has long provided the single most powerful incentive to make dangerous workplaces safer. Without it, worker injuries and deaths become just a cost of doing business. By limiting injured workers' recovery to workers compensation alone, the Court has created new incentives to ignore process safety. The Court has broadly expanded statutory terms without legal authority or grounding in plain English. The result is that injured Texas workers are left with only workers compensation, which is often inadequate, as it was never intended to be a sole and exclusive remedy. In contrast to the fault-based tort system that addresses both compensation and prevention, the workers' compensation system addresses compensation alone. This decision forces workers exclusively into a no-fault system, thereby removing all incentives for wrongdoers to correct their negligent behavior and make their workplaces safer.

Although employing entirely different reasoning than the labor unions and workers' rights groups mentioned above, the Texas Trial Lawyers Association (TTLA), in its own amicus curiae brief, arrived at the same result - that the Supreme Court had reached the wrong decision.

The TTLA's argument focused primarily on the statutory language, rather than the effect of the decision on Texas' workers. Specifically, the TTLA argued that the Legislature used a very peculiar locution in defining "general contractor" - a person who undertakes to procure the performance of a work or service, either separately or through the use of subcontractors. By using the term "undertakes," the Legislature signaled its intent that the general contractor procure services for someone else... like the premises owner. Again, it all goes back to the fact that pursuant to the statute, a premises owner may not also be the general contractor.

Conclusion

So what does this mean for contractors and laborers? What effect will this decision have on your trade? Essentially, it is a warning. Remember that no one else will ever be as concerned about your safety as you are and the best way to protect yourself and your employees is to personally ensure jobsite safety. Although this decision may appear to have a negative impact on the precautions that a premises owner takes to make a site safe, it can also have a positive effect on the industry as a whole by bringing contractors and subcontractors closer together in fight to ensure jobsite safety.

ABOUT THE AUTHORS

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NLRB's Proposed Consent Election Procedure

No Bargain for Employers



Unions increasingly use corporate campaigns against merit shop companies to avoid democratic elections, thereby depriving employees of their federal right to a secret ballot election. The undeniable purpose of these corporate campaigns is to coerce companies into signing lop-sided, neutrality agreements with card check procedures that virtually guarantee union recognition. Unions rarely, if ever, fail to gain recognition when they extract recognition through neutrality agreements. The union win rate nearly doubles by using neutrality agreements instead of secret ballot elections.

To further stack the odds against open shop employers, the National Labor Relations Board (“NLRB” or “Board”) is proposing a new “voluntary” form of consent election, featuring a joint union-employer petition. To characterize the consent election as “voluntary” is laughable in light of the coercion used by unions in corporate campaigns to secure a “voluntary” neutrality agreement. The new consent election procedure makes it much easier for unions to petition for representation since the proposed election procedure eliminates a “showing of interest” requirement. Under existing election procedures, in order for a union to petition for a secret ballot election, the union must prove

to the Board that at least thirty percent of the targeted employer’s workers want the union to serve as their exclusive bargaining representative. Historically, unions would not even think of petitioning for an election unless they had approximately seventy percent of the employees expressing an interest since during the course of the campaign those numbers drop dramatically once the employees get the real story behind the union and its empty promises.

The Board’s proposed rule also shortens the time for the parties to campaign prior to the election. Currently, there is approximately forty-two days between the time the petition for election is filed and the date the election is held. Under the proposed joint election scheme, there would only be twenty-eight days for the campaign. Statistically, the probability of a union win increases as the length of the campaign decreases.

The unit description included on the face of the joint petition will be deemed appropriate under the proposed rule provided it is not contrary to any statutory provision. This is significant (and advantageous to the unions) in two respects. First, the employer will not be able to challenge the petitioned-for scope of the unit since it is a joint petition. Secondly, this will likely result in the scope of the unit being broader, capturing more categories of employees than normal under the existing NLRB election procedures.

Another proposed change under the consent election rule deals with “blocking charges.” Unfair labor practice charges against the company will not block the election or cause the ballots cast in the election to be impounded. Instead, the unfair labor charges will be handled in conjunction with any post-election proceedings, to be finally decided by the presiding Regional Director without any review by the full Board in Washington, D.C. and no opportunity for review by a federal court of appeals. This is significant since Regional Directors find more often in favor of unions than employers.

In the event this new proposed rule becomes final, there is no reason why a merit shop employer would want to “voluntarily” consent to an election under these conditions. There is nothing in the proposed rule that maintains the balance of power found in the existing petition/election procedure before the Board. This proposed rule merely tips an already uneven playing field further in favor of the unions.

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JODON

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Defending Underground Utility Claims: Recent Rules and Successful Defense Strategies

Builders and contractors are all too familiar with claims for damage to underground utilities. In today's litigious climate, utility operators are aggressively using these line cut claims not only to recover losses, but in many instances as a means to unfairly finance capital improvements to their facilities. Strategies for the successful defense of these claims include: (1) a familiarity with the statutes, case law, and administrative codes that govern the law in this area; (2) internal programs to investigate and document these occurrences; and (3) closely reviewing the utilities' repair documents and invoices to detect unfair improvements, not the mere repair of the damaged line. By taking these steps, the contractor can successfully defend the unmeritorious line cut claim.

The first step in defending line cut claims is keeping up with the current statutes, case law, and administrative rules that govern the law in this area. The contractor should be aware that the Railroad Commission of Texas has adopted new Rules concerning excavation in the vicinity of gas pipelines, effective September 1, 2007 (the "Rules"). The Rules contain several new requirements for excavators working around gas lines. These Rules add requirements for record keeping of locate responses, state that a locate should be available on one hour's notice, define the life of a locate notice as lasting fourteen days, mandate on-line reports in case of a gas line damage and in other circumstances, define the tolerance zone, and require white-lining in certain circumstances. The Rules also contain recommended penalties for non-compliance.

The Rules do not exempt TxDOT contractors, as does the Chapter 251 of the Texas Utilities Code, the "Texas Underground Facility Damage and Prevention Safety Act", in some circumstances. The Rules require an excavator to include in the notice to excavate the method or methods by which the excavator will receive a positive response – as defined in the Rules. The Rules require white-lining the excavation area prior to giving notice of intent to excavate when the

excavation site cannot be clearly identified and described on a line locate ticket. When an excavation project is too large to mark using white-lining or is so expansive that a full description cannot be provided on a locate ticket, the excavator and utility operator shall conduct a face-to-face meeting to discuss excavation activities and establish protocols for specifically identified topics. The Rules state that if an excavation project is not completed at the time a locate ticket expires; a new refresh notice is required, limited to the area yet to be excavated.

The Rules are found in Chapter 18 of Title 16 of the Texas Administrative Code. These Rules should be read along with the Texas Underground Facility Damage and Prevention Safety Act, which defines the duties of excavators and utility operators concerning planned excavation. The Texas Underground Facility Damage and Prevention Safety Act may be found on the Texas One Call web site. It is important that the Texas Underground Facility Damage and Prevention Safety Act also provide a legal defense for the excavator that has fully complied with that Chapter by calling in for a locate as required, if the utility operator does not comply with that Chapter by marking the approximate location of the utility within the applicable time limit. See TEX. UTIL. CODE § 251.157 (c).

Another critical step in any strategy for the defense of line cut claims is to institute and maintain a program for the investigation and documentation of line cut occurrences. As the construction executive well knows, by the time the line cut claim crosses his or her desk, the outcome of the claim has already been forecast by the quality of the investigation and documentation of the occurrence. A standard reporting form and uniform investigation procedures, timely investigation and photograph taking, and reliable record keeping will return dividends by greatly aiding in the defense of these claims.

Also essential to defending these claims is determining whether the utility is actually charging for repair of the damaged line or for improvements which are not allowed by law. Some utility companies consider line cut claims an opportunity to bill the contractor not for the mere repair of the line but for improvements or modernization of not only the damaged line but of other facilities as well. The assistance of a legal professional may be called for to obtain and review the utility's internal documentation to determine whether the utility is unfairly padding its repair bill.

Although line cut claims are a fact of life, payment of an unmeritorious or excessive claim need not be. Taking these steps will help turn back unfounded line cut claims and help contribute to a successful loss prevention program.



ROSSINI

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Texas Runoff Election Recap

and John Davis (R-Pasadena). Physician Mark Shelton (R-Fort Worth) won the Republican primary without a run off in Anna Mowery's former seat.

On the Democratic side, big winners included Dawna Dukes (D-Austin), Kino Flores (D-Mission), and Aaron Pena (D-Edinburg). Al Edwards (D-Houston), who lost last cycle, will also be making a return to the Texas House. Incumbent Democratic House members Representative Rene Oliveira (D-Brownsville), Garnet Coleman (D-Houston) and Jessica Farrar (D-Houston) easily won re-election.

There were Incumbent House members on both sides of the aisle who were defeated on April 8th. Those included Juan Escobar (D-Kingsville), Paul Moreno (D-El Paso), Kevin Bailey (D-Houston), Borris Miles (D-Houston), Pat Haggerty (R-El Paso), Corbin Van Arsdale (R-Tomball), Thomas Latham (R-Sunnyvale) and Nathan Macias (R-Bulverde). Macias lost by 17 votes and an election contest is underway....

The consensus on the outcome of these races is that this was a very strong election night for current Republican House Speaker Tom Craddick. As the Houston Chronicle headline stated: "Most Craddick supporters prevail in legislative primaries."


There were five races with run-off elections on Tuesday, April 8th. The winners were:

- District 52 - Brian Daniel – Central Texas Chapter area
- District 55 - Ralph Sheffield – State PAC area
- District 81 - Tyron Lewis (Incumbent Buddy West lost this seat) – State PAC area
- District 112 - Angie Chen Button - Metroplex Chapter area
- District 144 - Ken Legler – Greater Houston Chapter area

On the other side of the state's legislative rotunda, 15 Senators on the ballot are seeking re-election. For the primary, this meant two hotly contested Republican Senate races. Senator Tommy Williams (R-Woodlands) faced a threat from former rival Mike Galloway. Senator Craig Estes (R-Wichita Falls) easily won re-election from his primary challenge. One democratic primary was held to see who will run against Senator Mike Jackson (R-LaPorte). In that race, Galveston attorney Joe Jaworski defeated NASA engineer Bryan Hermann with 59.04% of the vote....

ODDS AND ENDS

At the Federal Level, it was not a big surprise that current Senator John Cornyn would be the Republican Nominee for U.S. Senator. The contested Democratic Primary selected Houston State Representative Rick Noriega, who received 50.97% of the vote, keeping him out of an expensive run-off. Noriega won the nomination over Corpus Christi teacher Ray McMurrey, who got 12.36% of the vote and perennial candidates Gene Kelly of Universal City with 26.89% and Rhett R. Smith (who ran as a Republican for governor in 2006) with 9.75%. Senator Cornyn



With the Presidential Race coming into play for the first time in Texas in modern memory, record voter turnouts occurred during the primary elections all over the state of Texas. The entire country had its eye on the presidential races, but, those around the Texas Capitol had their sights on the Texas House and Senate Primary Elections. While there were no surprises in the Senate, the House races were one of the most contentious and debated in quite some time. An analysis of those races and outcomes is below.

STATE RACES

The Texas House of Representatives races were the story of the night. With a current split of 79 Republicans and 71 Democrats in the Texas House - combined with 17 Republicans and 11 Democrats having primary challenges from their own party – the primary election outcomes were highly anticipated.

Most Republican House members were easily re-elected, even those with major primary opposition. They included Representatives Betty Brown (R-Athens), Byron Cook (R-Corsicana), Charlie Howard (R-Sugarland), Charles "Doc" Anderson (R-Waco), Phil King (R-Weatherford), Jerry Madden (R-Plano), Delwin Jones (R-Lubbock), Bill Zedler (R-Arlington), Charlie Geren (R-Fort Worth), Frank Corte (R-San Antonio), Joe Crabb (R-Kingwood),

and Noriega will face each other in November.

COURT RACES

In the Texas Supreme Court races, Sam Houston, an attorney from Houston, will be the Democratic nominee to take on Republican Supreme Court Justice Dale Wainwright in the General Election. Houston got 55.9% of the vote over Dallas attorney Baltasar D. Cruz. Linda Reyna Yanez, Justice of the 13th Court of Appeals in Edinburg, will be the Democratic nominee taking on Republican Supreme Court Justice Phil Johnson in November. Reyna Yanez received 51.44% of the vote to defeat Galveston district judge Susan Criss.

“While there were no surprises in the Senate, the House races were one of the most contentious and debated in quite some time.”

The complete results of all Texas primary elections and run-off elections can be viewed at the Texas Secretary of State’s Website at <http://enr.sos.state.tx.us/enr/>

Interim Charges – These are the interim study cases that the

presiding officers – Lieutenant Governor and Speaker have asked the appropriate committees to study. The study items ABC State will be following are listed:

SENATE COMMITTEE ON STATE AFFAIRS

- Study the economic impact of recent civil justice reform legislation in Texas.
- Study whether Texas should adopt the Restatement 2nd of Torts Sec. 674 (Wrongful use of Civil Proceedings) and whether a person should be allowed to recover court and attorney’s fees when he has been forced to defend a lawsuit filed without probable cause or for intimidation purposes.
- Monitor the Texas workers’ compensation system, and the continued implementation of the reforms of HB7, 79th Legislature, Regular Session, by the Texas Department of Insurance and other state agencies. Specifically evaluate the recent decision by the Texas Supreme Court in *Entergy v. Summers* in terms of its impact and the impact of previous legislation on the workers’ compensation system.

SENATE FINANCE COMMITTEE

- Evaluate the effectiveness of existing state tax incentives that encourage employers to provide health coverage to their employees, including tax incentives under the revised state

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business tax, and make recommendations for additional deductions or credits that increase the number of employees covered by health care insurance.

SENATE SUBCOMMITTEE ON HIGHER EDUCATION

- Review the method for measuring graduation rates to determine whether alternative measures are more appropriately suited for institutions with a large percentage of non-traditional students.

“With a current split of 79 Republicans and 71 Democrats in the Texas House - combined with 17 Republicans and 11 Democrats having primary challenges from their own party – the primary election outcomes were highly anticipated.”

SENATE BUSINESS AND COMMERCE COMMITTEE

- Study the number of state business licenses and the need and cost for each license. Estimate the cost and benefits to consumers of licenses and impact on small, start-up businesses.

HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION

- Study the Clean Air Act State Implementation Plan (SIP) to determine if:
 - Data is being collected adequately;
 - Recent changes to the SIP are bringing Texas closer to federal Environmental Protection Agency (EPA) requirements; and
 - There are any midcourse corrections necessary to achieve EPA requirements. As background, examine and document the trend in levels of air quality in Texas since 1980.
- Examine the progress of the Texas Emissions Reduction Plan, the Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program and the Texas Environmental Research Consortium.
- Examine the penalties and sanctions imposed on vehicle inspection and emissions testing facilities.

HOUSE COMMITTEE ON LICENSING AND ADMINISTRATIVE PROCEDURES

- Examine the current practice of certain occupations, and determine whether these occupations pose any significant threat to the health, safety and welfare of the general public to the extent that increased regulation is needed.

HOUSE COMMITTEE ON CIVIL PRACTICES

- Study the cumulative effects of Texas civil justice reforms enacted since 2003, with particular attention toward effects on Texas job creation, judicial efficiency, medical access, and medical malpractice insurance rates.
- Examine the effect on our tort system of meritless litigation filed in Texas, especially meritless litigation designed to harass Texans or intimidate Texans from exercising their rights. Consider the law in other states and consider whether Texas law should be amended to allow greater recourse, such as recovery of costs and other financial penalties, to reduce such litigation.

HOUSE COMMITTEE ON HIGHER EDUCATION

- Study and recommend policy approaches or structures to ensure that the establishment or expansion of higher education programs, facilities, and institutions are aligned with the educational goals and economic needs of the state.

HOUSE COMMITTEE ON JUDICIARY

- Study the issue of municipal sovereign immunity for damages to citizens' private property, and recommend any necessary statutory changes.

HOUSE COMMITTEE ON BUSINESS AND INDUSTRY

- Study the original purposes, development, and current need for the Subsequent Injury Fund and determine whether this fund should be continued or altered.
- Monitor the Texas workers' compensation system, and the continued implementation of the reforms of HB 7, 79th Legislature, Regular Session, by the Texas Department of Insurance and other state agencies. Specifically evaluate the recent decision by the Texas Supreme Court in *Entergy v. Summers* in terms of its impact on the system. (Joint Interim Charge with the House Committee on Insurance)

HOUSE COMMITTEE ON GOVERNMENT REFORM

- Research, investigate, and make recommendations regarding litigation brought by school districts receiving state funds under Chapter 46, Education Code, for defective construction of instructional facilities and the state's interest in ensuring the use of such funds for the repair or reconstruction of defective facilities or the return of state funds.

HOUSE COMMITTEE ON WAYS AND MEANS

- Monitor the receipts of the franchise tax.

ABOUT THE AUTHOR

Mike Toomey is the longtime ABC of Texas lobbyist and has the distinction of being the only individual in Texas history to have served as chief of Staff for two Texas Governors. He is a former State Representative from Houston and was voted in Texas Monthly magazines "Top Ten Legislators". Mr. Toomey is a strong supporter of Tort Reform in Texas and is widely acknowledged as one of the most respected and effective lobbyists in the State of Texas.

Bankruptcy Law's Affect on Your Lien Rights: Who can you "trust?"

Bankruptcy on a construction project can defeat the protections given by the Texas Construction Trust Fund Act and the Texas lien laws. For example, when a general contractor pays a subcontractor, the subcontractor may decide not to file a lien or may sign a lien release. However, if the general contractor files for bankruptcy within 90 days of the payment to the subcontractor, the full amount of the payment may eventually be taken back by a court-appointed bankruptcy trustee asserting a preference action. By the end of the bankruptcy proceedings, the subcontractor may only receive a fraction of its original payment, if any, based on the number of creditors and the amount of money in the bankruptcy estate. The subcontractor will not usually have any lien rights against the owner's property, because the time for perfecting a lien has long passed or the lien claim was released at the time of the original payment. Even though the original payment was derived from a "trust fund" under the Trust Fund Act, the subcontractor may be left without protection from the bankruptcy court's authority to return the original payment to the general contractor for priority distribution to all creditors. The general contractor's lenders are usually the highest priority creditors and receive the lion's share of the distributions. The subcontractor, who was originally paid, released its lien, and was later forced to return the payment, is usually left holding the empty bag.

The above scenario applies equally to a general contractor, in the case of payment from an owner who later files for bankruptcy, and downstream in the subcontractor-supplier context. The Associated Builders and Contractor's Houston Chapter will attempt to propose legislation to address this recurring problem in the Texas Trust Fund Act and Texas lien laws.

THE TEXAS CONSTRUCTION TRUST FUND ACT


The Trust Fund Act designates payments to upstream parties as funds held in trust for the benefit of downstream parties. The Act defines a "trustee" (whom we will call the "construction trustee") as any contractor, subcontractor, or owner who receives "trust funds" (or has control over or direction of them). What are "trust funds?" Construction payments become "trust funds" simply when the payments are made to a contractor or subcontractor under a construction contract for the improvement of specific real estate in Texas. Loan receipts are also "trust funds" if the funds are borrowed


by a contractor, subcontractor, or owner for improving specific real estate in Texas and the loan is secured by a lien on the property.

Any artisan, laborer, mechanic, contractor, subcontractor, or materialman furnishing labor or material for the improvement is automatically deemed a "beneficiary" of trust funds paid or received upstream in connection with the improvement. The Act is violated when a construction trustee retains or diverts trust funds without first fully paying all current or past due obligations to the "beneficiaries"; the construction trustee must have done this intentionally, knowingly, or with intent to defraud. The teeth of the Act states the construction trustee in this situation has "misapplied" the trust funds and may be subject to criminal penalties or a civil lawsuit, as may its officers, directors, or agents.



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However, the construction trustee can avoid liability if it proves (among other available defenses) that the trust funds were used instead to pay the construction trustee's "actual expenses directly related to the construction or repair of the improvement." These "actual expenses" have been broadly defined to include overhead and other expenses "necessary to obtaining or completing the job," even though it is recognized that such expenses are not easily traceable to a particular job. This "actual expenses" defense can allow the Trust Fund Act to be severely undermined in the bankruptcy context.

"The proposed legislation would revise the Trust Fund Act to state that trust funds in the hands of a construction trustee are expressly removed from the debtor's bankruptcy estate."

BANKRUPTCY LAW

Two key provisions of the Bankruptcy Code apply here. First, the "preference statute" allows the court-appointed bankruptcy trustee (not to be confused with the "construction trustee") to recover a "transfer" of money made to the debtor 90 days before the debtor filed for bankruptcy. This aims to prevent the debtor from favoring certain creditors, while preventing other creditors from rushing to obtain a judgment against the debtor (the "debtor" is usually the upstream party, such as the general contractor and the "creditor" is usually the downstream party, e.g., the subcontractor).

For our purposes, the most important point the bankruptcy trustee must prove under the preference statute is that the debtor had "an interest" in the funds it "transferred" to the creditor. If the creditor proves the debtor did not have "an interest" in the funds the debtor paid on the project, the bankruptcy trustee cannot recover this "transfer" – the transfer was not from the property of the debtor, thus would not have been part of the bankruptcy estate, and therefore will be virtually untouched in bankruptcy.

However, it is presumed that a transfer from the debtor's general operating bank account is "an interest" of the debtor. Payment from one or a handful of general operating bank accounts is the norm in construction. Surprisingly, the Trust Fund Act does not require separate accounts for each project (except in the residential homestead construction context). The creditor thus has the difficult challenge of "tracing" funds from comingled bank accounts to prove the debtor improperly "transferred" funds it received on a particular project.

The second key Bankruptcy Code provision is that a debtor cannot be discharged from any debt for "fraud or defalcation while acting

in a fiduciary capacity." "Defalcation" is simply the willful neglect of a fiduciary duty. Unpaid creditors often argue the debtor's misapplication of construction "trust funds" was a "defalcation" – because the debt resulted from defalcation, the argument goes, the debt cannot be discharged by the bankruptcy trustee, and thus cannot be taken away from the creditor. However, the Trust Fund Act defense discussed above presents a tough obstacle to this argument - the construction trustee can argue that the funds it paid to non-beneficiaries were merely for "actual expenses directly related to the construction," such as project overhead.

The Bankruptcy Code and courts give additional defenses and arguments to creditors, including the defense that the "transfer" was made "in the ordinary course of business" or was a "substantially contemporaneous exchange for new value." But ABC's proposed legislation would take a more direct approach to lessen the need for creditors to rely on the arguments discussed above.

PROPOSED LEGISLATIVE CHANGES

First, the proposed legislation would revise the Trust Fund Act to state that trust funds in the hands of a construction trustee are expressly removed from the debtor's bankruptcy estate. The second part of the bill would add provisions to the Texas lien laws to allow contractors, subcontractors, and suppliers to revive their lien rights by filing a lien notice and lien affidavit within 30 days after the bankruptcy trustee serves its preference action on the contractor, subcontractor, or supplier; this would pertain only to a payment or payments that would have otherwise been subject to a lien claim. The same type of revival 30-day provision could also be added to the bond claim statutes for bonded projects.

The proposed bill is in its infant stages. The authors, as well as the Houston Chapter ABC Legal Issues Committee, are seeking suggestions and feedback from the membership as to the support that could be gathered for these proposed changes.

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WESTCOTT

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ABC INITIATIVES AROUND THE STATE



ABC Texas Coastal Bend opens a new Multi-Purpose Training Center located in Corpus Christi, Texas.

ABC TEXAS COASTAL BEND CHAPTER

The Associated Builders & Contractors, Texas Coastal Bend Chapter, joined with the Craft Training Center of the Coastal Bend and the Contractors Safety Council of the Coastal Bend in December 2007 to open a new Multi-Purpose Training Center located at 7433 Leopard Street in Corpus Christi, Texas.

The groups joined together to build and operate the state-of-the-art facility to address the critical shortage of skilled labor in the construction and maintenance industry. The new 24,000 sq. ft. facility contains a 68-booth welding lab, classrooms, and labs for electrical, pipefitting, plumbing, instrumentation, and other craft areas as well as office space for administration. The building serves as an assessment site and training center for the National Center for Construction Education and Research (NCCER) programs and certifications.

In addition to the 200+ evening adult students training each semester, three area school districts are currently sending students to the day welding program. Students are earning credit toward high school graduation and working toward NCCER certifications at the same time. More school districts are expected to participate in the craft programs beginning with the fall semester.

Recently, the Craft Training Center site hosted the welding, electrical, carpentry, plumbing, and masonry events for the 60th Annual SKILLS USA State Contest in Corpus Christi, Texas. In addition to the contests, a number of national vendors sponsored exhibits and seminars for area schools and industry during the three-day event. For more information about the Texas Coastal Bend Chapter, please call (361)289-5311.

ABC GREATER HOUSTON CHAPTER

ABC Greater Houston got off to a fast start both with political fund-raising efforts, as well as an energized Legal Issues Committee led by Ben Westcott of Andrews Myers Coulter & Cohen. The highlight of the ABC Political Action Committee Annual lunch in January 2008 was the pledge by the PAC Trustees and Chairman John Marshall of Satterfield & Pontikes, to contribute all of our funds raised in 2008 directly to ABC National for the critical U.S. House, Senate and Presidential races in November. In effect, the Greater Houston PAC will make local and state contributions from funds on hand, ensuring that we are maximizing our National advocacy efforts. The PAC is aiming to raise over \$65,000 for the year and the April 17th Sporting Clay Shoot is a key event to reach that goal.

In addition, the ABC PAC was involved in the March primary election and run-off process, conducting extensive candidate interviews as well as supporting ABC Member Fred Roberts in his race for the House District 144 seat, vacated by Rep. Robert Talton.



ABC Greater Houston Members meet at Cafe Adobe, for the 2008 Annual PAC Luncheon, to discuss initiatives and goals for the year.

The ABC Legal Issues committee is engaged on several fronts, including warding off an effort by the Houston Independent School District to adopt Davis Bacon Wages and all the accompanying regulations that they bring. In a joint initiative with several other trade groups, ABC gathered wage rate data, met with the HISD Superintendent and Construction Manager and submitted proposals in writing to the HISD Board of Trustees. Close monitoring of this situation will continue through the implementation of the approved HISD Bond Construction package.

Ben Westcott, Legal Issues Chairman, is also spearheading efforts to define our chapter goals for the upcoming 2009 ABC Texas Legislative Session, including writing language that would

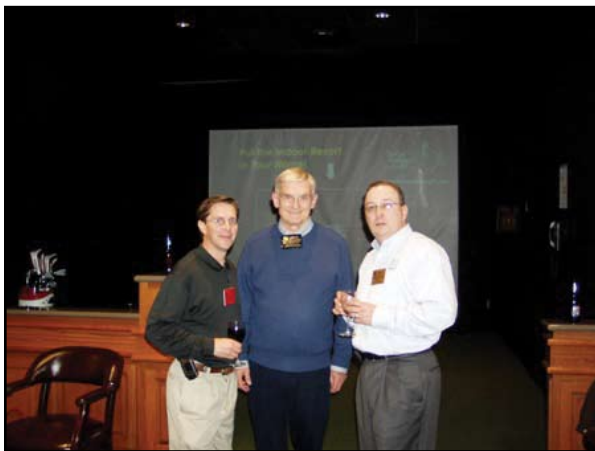
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ABC INITIATIVES AROUND THE STATE

amend the Texas Trust Fund Statutes, as well as restoring the right of a contractor to file liens in bankruptcy cases. For additional information on ABC Greater Houston advocacy activities, please contact Anna Farris at the Chapter office, (713) 523-6222.

ABC NORTH TEXAS CHAPTER

ABC North Texas began 2008 with a clear focus - Promote Merit Shop Philosophy and Free Enterprise Alliance (FEA). Keeping in mind the fast approaching Presidential Election, the necessity for PAC funds prompted the committee's pledge to raise over \$20,000 for their local and \$30,000 for the National PAC in 2008. After the Texas Indoor Virtual Golf Event in February and the standard table at each monthly event thus far, North Texas was well on its way to surpassing its goal with over \$47,000 raised and more than half of the year to go! With no hesitation, the Chapter knew it was time to put its funds to influential use, which proved to be true when the following funded and endorsed candidates Phil King, District 61; Jerry Madden, District 67; Bill Zedler, District 96; Charlie Geren, District 99; Bill Keffer, District 107; Tan Parker, District 63; and Vicki Truitt, District 98, won their races during the March 4th State Primary Elections. Reiterating their support, the Chapter sent additional monies to Randy Dunning, District 112, for his run-off election on April 8th. In addition to these contributions, ABC North Texas chose to sponsor three separate U.S. Chamber Legislative events with U.S. Congressmen Neugebauer, Gohmert, and Conaway. Representing the Chapter, Jayne Williams, 2008 Government Affairs Vice-Chair, attended Congressman Sessions Birthday Blow-Out in Las Vegas after the committee voted to sponsor the Congressman's event, showing North Texas' support of his job well-done.



ABC North Texas Members tee up to play virtual golf in an effort to raise \$50,000 in PAC funds for 2008.

Dedicated to representing the entire membership in the best way possible, the Government Affairs Committee focused to identify the top three issues to North Texas Contractors that will

be faced in the impending 2009 Texas Legislative Session. These issues were determined by polling members at events. The data gathered allowed the Chapter to not only focus at a local level, but also provide insight for our ABC State Representatives when representing the concerns and key issues of the North Texas Construction Industry.

In pursuit of Free Enterprise Alliance goals, the Government Affairs Committee knew awareness was vital. To begin this educative journey, the committee has agreed to send out a variety of informative materials regarding the purpose of FEA, as well as play the new DVD, once finalized, at each monthly event. A specific FEA Event at Lone Star Park has been set for June 2008, where all of North Texas will have the opportunity to learn about and contribute to this cause, to help enhance the quality of the industry in which we work day to day. In addition to this event, ABC North Texas began its fund-raising efforts early, with Dues Check Off on all renewal applications.

ABC North Texas has leaped into 2008 with great enthusiasm and success. Affianced in issues of Prevailing Wage, Worker's Compensation as Sole Remedy, and Immigration, combined with the direct focus of advancing a Merit Shop Workplace and Free Enterprise principles, this Chapter recognizes its responsibility of working together "to cultivate the construction industry through business and personal development," with the upmost importance. During such a significant year, ABC North Texas' prominence in this industry and political arena will be apparent and the members' voices of this Chapter will be heard. For more information about ABC North Texas, please call (972)580-9102.

ABC SOUTH TEXAS CHAPTER

Recognizing the importance of this year's election cycle, the South Texas Chapter's Executive Committee began the year focusing on surpassing the chapter's ABC-PAC goal. On January 3 their efforts paid off, resulting in over \$40,000 in contributions to the national ABC-PAC. The decision was made at the December 2007 chapter PAC meeting to have 100% of funds collected in 2008 submitted to the national PAC to help secure a Free Enterprise majority in the U.S. Senate and House of Representatives, and to help ensure a pro-business Free Enterprise president is elected in 2008. The chapter's government affairs efforts will now focus on getting out the vote for chapter supported candidates, and developing legislative priorities for the 2009 Texas Legislative session. Chapter representatives are also working closely with the City of San Antonio's Development Services Department to improve the plan review, permitting and inspections processes.

ABC INITIATIVES AROUND THE STATE



Members of ABC South Texas celebrate a very early success - already reaching their PAC Goal for 2008 in January.

The South Texas Chapter's education programs are also off to a great start in 2008. The Education Committee and Chapter Education Department staff have developed an education career ladder that includes a Department of Labor approved apprenticeship program, task specific training, blueprint reading courses, superintendent training and project management classes. This career ladder will enable individuals with little or no construction background to gain the skills and expertise needed that could lead to management positions within a construction company. Chapter staff have also become certified to teach a wide variety of safety courses.

On the membership front, the Board has adopted a BHAG ("Big Hairy Audacious Goal") of "300 by 300" - - securing 300 chapter members by October 26, 2008. Critical to reaching this goal is meeting a retention goal of 90%. For information about ABC South Texas, please call (210) 342-1994.

ABC SOUTHEAST TEXAS CHAPTER

In Southeast Texas' the petro-chemical industry is experiencing unprecedented growth, many are calling it the "Second Spindletop", and with this growth, comes opportunities for our young people to get great paying jobs! Therefore, through the dedication, financial support, and direction of the Associated Builders & Contractors Construction Training Center's ("ABC-CTC") Board of Trustees, as well as the many petro-chemical facilities located throughout Southeast Texas, monies have been budgeted to help fund and assist approx. 20 high school Vo-Tech programs in the Region V Educational System. "Build it, they will Come. Train them, they will Stay".

ABC-CTC's goal is to have high school graduates leave school with approx. 1-2 years NCCER craft training and certification. These various School-to-Work programs have been well received,

especially since it's at no cost to the school districts and offers students additional credentials and skills. By implementing new industrial craft training programs in the high schools (i.e., Welding, Pipefitting, Carpentry, Scaffold Builder, Electrical, Millwright and Core), ABC-CTC is not only helping give the graduates an edge on their employability, but is also insuring that Southeast Texas will have a trained workforce to maintain these petro-chemical facilities for years to come. Young people will be able to enter the workforce above the normal entry level position, and continue their education at night, at the ABC-CTC located at 2700 North Twin City Highway in Nederland, Texas.

To accomplish this goal, ABC-CTC's commitment is to provide each school with the needed educational materials (i.e., NCCER textbooks, shop tools, hand tools, materials and consumables). ABC-CTC has also hired a School-to-Work Coordinator to monitor and oversee each of the schools on a routine basis throughout the school year. The Coordinator will not only consult and assist the teachers with the program, but he'll also be a liaison between ABC, the contractors and industry. Additionally, as in years past, ABC-CTC will continue to, i) participate in career fairs and seminars; ii) host welding competitions for the Vo-Tech programs; and iii) offer scholarships to qualified high school graduates to attend ABC-CTC. For more information visit: www.abctex.org.

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