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TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

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RECENT TOXIC TORT CASES OF INTEREST

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INTRODUCTION

This edition of the ENVIRONMENTAL/TOXIC TORT NEWSLETTER contains decisions from the Texas Courts of Appeals and the Texas Supreme Court, as well as general information concerning toxic tort practice.

This paper attempts to analyze and/or provide pertinent excerpts from recent Texas activity and cases which address issues relevant to the environmental/toxic tort area of legal practice. Due to space limitations, every issue, fact or argument cannot be included and, consequently, this paper contains some of the most precedential, defining and/or reinterpreted issues currently at hand. Obviously, many of the decisions may be subject to rehearing, further appeal, or *en banc* consideration and should therefore be used "with caution" in the future. The following are excerpts from opinions which have addressed issues relevant to this topic. Quotation marks have been omitted but the following consists of quotes from the opinions in the form of a summary.

SUMMARY

Since the advent of Chapter 90 of the Texas Civil Practice & Remedies Code, environmental litigation in Texas has continued its sharp decline in Texas. At present, the silica docket remains effectively silent and the asbestos docket continues movement at an extremely slow pace. During the past year, appellate courts, particularly the Texas Supreme Court, have continued their strict application of the requirements of Chapter 90.

Despite the recent landslide victories for Democratic candidates in Harris County judicial races, Judge Mark Davidson, the presiding pre-trial judge of the Asbestos Multi-District Litigation, and Judge Tracy Christopher, the presiding pre-trial judge of the Silica Multi-District Litigation, each remains in their respective positions. While Judge Christopher did not stand for re-election in 2008, Judge Davidson was defeated in his bid for another term as the presiding judge of the 11th Judicial District Court. However, following that loss, he was reappointed as the presiding pre-trial judge of the Asbestos Multi-District Litigation. It is anticipated that Judge Christopher will face similar competition in her 2010 re-election campaign.

Of note, the 2009 Senator Duncan of the Texas Senate introduced a bill to supersede the 2007 ruling in *Borg-Warner v. Flores* which heightened and accentuated the evidentiary requirements for prosecution of such claims and have provided counsel across the state with very specific guidelines as to prosecution of toxic tort claims. Senate Bill 1123 would remove the requirement for mesothelioma claimants "to prove, for any purpose, a quantitative dose, approximate quantitative dose or estimated quantitative dose of asbestos fibers to which the exposed person was exposed" in order to meet the standard of causation. Additionally, the law would allow defendants to establish the liability of other responsible parties under the same causation standards as the plaintiff. The bill recently passed a Senate vote and is, as present, under review by the House Judiciary and Civil Jurisprudence Committee. Governor Perry has, however, indicated a probable willingness to veto the bill if it is, in fact, passed.

As a result of these events, toxic tort litigation in Texas remains only a shell of its former self. Plaintiffs' firms are continuing to pursue toxic tort litigation in other states with less stringent evidentiary requirements such as California, Michigan and Delaware and these states are experiencing a boon in environmental litigation.

IN RE GLOBAL SANTE FE CORPORATION, RELATOR

No. 07-0040

SUPREME COURT OF TEXAS

275 S.W.3d 477; 2008 Tex. LEXIS 1004; 2009 AMC 112

January 16, 2008, Argued
December 5, 2008, Opinion Delivered

ISSUE: Relator employer sought mandamus relief from an order of respondent 295th District Court of Harris County, which, acting as a multidistrict litigation (MDL) pretrial court in a silica and asbestos exposure case brought pursuant to 46 U.S.C.S. § 30104 by real party in interest seaman, ruled that Tex. Civ. Prac. & Rem. Code Ann. ch. 90 was preempted by the Jones Act and remanded the case to the court in which it had been filed.

FACTS: In May 2003, John Lopez sued GSF under the Jones Act, alleging injuries from exposure to asbestos and silica while employed by GSF aboard a vessel. Lopez filed his Jones Act suit in state court, as allowed by federal law, in the 55th district court of Harris County. The employer transferred the case to the MDL pretrial court pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 90.010(b). Lopez filed a motion to remand the case from the MDL, alleging that the Federal Jones Act preempted Chapter 90. The MDL court agreed and remanded the case back to the original trial court. GSF subsequently sought mandamus.

HOLDING: The court conditionally granted the writ of mandamus and directed the MDL pretrial court to vacate its remand order and to conduct further proceedings in a manner consistent with the court's opinion. The court stated that federal maritime law preempted a state law remedy if the state remedy worked material prejudice to the characteristic features of the general maritime law or interfered with the proper harmony and uniformity of that law in its international and interstate relations. The court held that the provisions of Ch. 90 directed at assuring reliable expert confirmation of silica-related illness, which included most of the expert report requirements of Tex. Civ. Prac. & Rem. Code Ann. § 90.004, were not preempted by the Jones Act because federal courts also required reliable expert testimony. The court further held that the provisions of Ch. 90 for consolidating silica-related cases in a single court for pretrial disposition were not preempted by the Jones Act because state venue procedures could be followed in Jones Act cases brought in state court. Because the Jones Act imposed no requirement for a minimal threshold of physical injury or impairment, § 90.004(b)(2), which required proof of impairment, could not be applied to Jones Act claims.

IN RE GENERAL ELECTRIC COMPANY, ET AL., RELATORS

NO. 07-0195

SUPREME COURT OF TEXAS

271 S.W.3d 681; 2008 Tex. LEXIS 1002; 52 Tex. Sup. J. 167

November 14, 2007, Argued
December 5, 2008, Opinion Delivered

ISSUE: Plaintiff mason sued more than 20 defendants in Dallas County, Texas, alleging that as a result of exposure to asbestos at his jobsite in Maine, he developed mesothelioma and that the defendants produced or were involved in furnishing the asbestos. The trial court denied the motion of seven defendants for dismissal based on forum non conveniens. Three defendants petitioned for writ of mandamus.

FACTS: Aside from a period of military service, Austin Richards lived in Maine his entire life. He worked in Maine for over thirty years as a mason handling pipe-covering insulation. In December 2005, he was diagnosed with mesothelioma. Richards filed suit in Dallas County against General Electric and over twenty other companies, three of which are headquartered in Texas. Richards alleged that the defendants mined, processed, manufactured, sold, or distributed asbestos which caused or contributed to his disease. The case was transferred to the asbestos multi-district litigation court in Harris County. Seven defendants moved for dismissal of Richards's suit based on forum non conveniens arguing that the suit had no connection to Texas and that Maine was an adequate alternative forum for the case. Richards responded that the trial court should deny the motions to dismiss because the defendants had not met their burden of proof regarding the section 71.051 factors. He especially emphasized that the defendants had not proved the existence of an adequate alternative forum in which the claim could be tried. Richards asserted that if his case were dismissed and he refiled in Maine, the case would be vulnerable to removal to federal court and if removed, it would be transferred to the federal Multi-District Litigation Court No. 875 (MDL 875) for pretrial proceedings. Richards further argued that cases transferred to MDL 875 do not get tried and "virtually nothing happens to them at all." Richards urged that he was seriously ill from his disease and that if the Texas trial court declined to exercise jurisdiction, MDL 875 would not be adequate because he would not survive long enough to have his case tried.

At the hearing on the motion to dismiss, the judge asked whether the defendants would agree that they would not attempt to remove the case to federal court if he granted the motion to dismiss. Several defendants, including General Electric, did not agree to waive their removal rights. The judge sent a letter to the parties indicating that he would deny the motion to dismiss and expressing concern that if he granted the motion and the case were refiled in Maine, it would be removed to federal court and transferred to MDL 875 where it would "sit . . . for several years."

The judge wrote that his ruling on the motion might have been different if the defendants had waived their right of removal.

The defendants filed a motion to reconsider. They asserted that even if their motions to dismiss were granted and Richards refiled his case in Maine, removal to federal court was speculative, the criticisms of MDL 875 were unfounded as recent activity there refuted any argument that it did not provide an adequate remedy, and the court's ruling should not depend on the defendants' waiver of their removal rights. After another hearing, the trial court granted the motion to reconsider, set aside the letter in which he stated the grounds for his previous ruling, and denied the motion to dismiss without stating a reason.

HOLDING: The court conditionally granted the petition for writ of mandamus and directed the trial court to grant the motions to dismiss, with the writ to issue only if the trial court failed to comply. The court held that all of the factors in the forum non conveniens analysis under Tex. Civ. Prac. & Rem. Code Ann. § 71.051 favored maintaing the action in a forum outside Texas. Therefore, the statute required the trial court to grant defendants' motions requesting that it decline to exercise its jurisdiction. The trial court's denial of defendants' motions to dismiss violated the forum non conveniens statute and was an abuse of its discretion. The court reasoned that Maine, where the mason lived and was allegedly exposed to asbestos, was an adequate alternate forum, even though none of the defendants maintained a principal place of business or were incorporated in Maine, rendering the action vulnerable to transfer to federal court and Multi-District Litigation (MDL) Court No. 875. The MDL scheme was designed to resolve asbestos cases, not deprive injured parties of a remedy. The court also found that maintaining the action in Texas would work a substantial injustice to defendants, that the record presented no reason to consider Maine's long-arm statute further than its plain words, and that public and private interests weighed in favor the case being heard in Maine.

IN RE: ALLIED CHEMICAL CORPORATION, ET AL.

NUMBERS 13-08-00206-CV, 13-08-00678-CV

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI - EDINBURG

2009 Tex. App. LEXIS 557

January 27, 2009, Opinion Delivered
January 27, 2009, Opinion Filed

ISSUE: Defendants, manufacturers and suppliers of chemicals used in pesticide facilities, sought a writ of mandamus to compel a trial court (Texas) to grant their motions for summary judgment, to grant their motion to compel discovery, and to vacate a severance order in a toxic tort case involving hundreds of plaintiffs.

FACTS: In September 1999, hundreds of plaintiffs sued more than thirty defendants, seeking damages for a vast array of injuries allegedly caused by a "toxic soup" of pesticides released into the community from facilities in Mission, Texas, operated by Hayes-Sammons Chemical Co. ("Hayes-Sammons") between 1950 and 1967. Nine years after the suit was initiated, the claims of one plaintiff, Guadalupe Garza, had been severed and set for trial. On June 25, 2002, the defendants filed their first motion to compel, seeking an order compelling the plaintiffs to answer Interrogatories 15 (asking plaintiffs to identify the product or products that caused their injuries), 16 (asking which defendants produced the products that caused their injuries), 17 (asking which facility was the source of the products that caused their injuries), and 20 (the *Able Supply* interrogatory). The trial court granted this motion on October 29, 2002, ordering the plaintiffs "to provide full, complete, and plaintiff-specific answers to Interrogatories 15, 16, 17, and 20" on or before December 2, 2002. On December 2, 2002, the plaintiffs supplemented their answers to the interrogatories. In response to Interrogatories 15 and 16, the plaintiffs provided a general list of products produced by each defendant. The response did not indicate which plaintiffs had been exposed to which products. In response to Interrogatory 17, the plaintiffs identified "the Hayes-Sammons faciliti(es) located in Mission, Texas" as the location from which the products causing their injuries originated. In response to the *Able Supply* interrogatory, the plaintiffs stated that "none of their treating physicians have told them that their health condition(s) are or were attributable to their exposure" to defendants' products. The response to Interrogatory 20 also included an expert report authored by Sandra Mohr, M.D., stating that "most primary care physicians are not prepared by virtue of their clinical training to assign a chemical etiology to the diagnosis of a disease and that Occupational and Environmental Medicine physicians are the most appropriate specialists to determine chemical etiology of a disease." The defendants then filed a second motion to compel on April 26, 2004, again asking the trial court to compel "plaintiff-specific" answers to the *Able Supply* interrogatory. The trial court granted this second motion as well, ordering all plaintiffs to "supplement Interrogatory No. 20 (i.e., the *Able Supply* Interrogatory) . . . in accordance with the Court's October 29, 2002 Order." In response, the

plaintiffs filed supplemental *Able Supply* answers on July 19, 2004, which consisted of a three-page affidavit authored by Michael Wolfson, M.D., a physician trained in occupational and environmental medicine. Dr. Wolfson's affidavit was accompanied by a 1,848-page chart entitled "Exhibit A," which listed each individual plaintiff's symptoms and the pesticides produced at the Hayes-Sammons plant which could have caused those symptoms. The chart included references to academic literature which Dr. Wolfson claimed supported his assertions that the various chemicals could cause the various symptoms. This dispute continued for several years.

Following the 2007 ruling in *Borg-Warner v. Flores*, the defendants propounded an additional interrogatory on plaintiffs on July 2, 2007 in line with the causative requirements of *Borg-Warner*. On October 9, 2007, Garza provided an amended answer to the so-called *Borg-Warner* interrogatory. The response included detailed calculations of the amount of the chemicals to which Garza was exposed. The response included precise estimates as to Garza's exposure to each of the chemicals based on dermal absorption, inhalation, and ingestion of dust and soil, and concluded that Garza had been exposed to the specific doses. On September 12, 2008, the trial court denied the defendants' motions to compel as to Garza and granted Garza's motion for trial setting. By a scheduling order entered on October 6, 2008, the court set Garza's claims for trial on June 15, 2009.

HOLDING: The court conditionally granted mandamus relief, directed the trial court to require the plaintiffs who had not provided adequate answers to the interrogatories to do so within a reasonable time period as determined by the trial court, and directed the trial court to rule on a summary judgment motion filed by a manufacturer that contended it had not sold or delivered any of the pesticides at issue. In so doing, the Court stated:

> Here, Dr. Wolfson's report, unlike the plaintiffs' response in *Van Waters III*, does attribute the possibility of each plaintiffs' injury to specific chemicals. However, the report does not provide the defendant-specific causal link required under *Able Supply*. Dr. Wolfson's affidavit and chart comprise what is essentially a compendium of epidemiological studies linking the plaintiffs' symptoms with chemicals that could have caused them. Such studies cannot, by themselves, establish the actual cause of an individual's injury or condition. *Merrill Dow Pharms. v. Havner*, 953 S.W.2d 706, 715 (Tex. 1997) ("epidemiological studies cannot establish the actual cause of an individual's injury or condition"). That is because "[e]vidence that a chemical *can* cause a disease is no evidence that it *probably* caused the plaintiff's disease." *In re Allied*, 227 S.W.3d at 656 (citing *Havner*, 953 S.W.2d at 714-21) (emphasis in original). Indeed, Dr. Wolfson expressly stipulates that his opinions "are limited to . . . whether a pesticide is *capable* of causing a particular disease, condition or injury . . . and not . . .whether a pesticide, *in fact*, caused a plaintiff's disease, condition or injury" (emphasis added). Additionally, the non-trial plaintiffs' responses do not link specific chemicals to specific defendants; this deprives the defendants of the ability to pinpoint which claims they may reasonably need to defend against and harms their ability to prepare a viable defense. *See id*. at 658.

ROSEMARIE SATTERFIELD, AS REPRESENTATIVE OF THE ESTATE OF JERROLD BRALEY, DECEASED, APPELLANT V. CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, APPELLEE

NO. 03-04-00518-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

268 S.W.3d 190; 2008 Tex. App. LEXIS 7473

August 29, 2008, Filed
As Corrected January 16, 2009.

ISSUE: The issue presented is whether a statute that extinguishes a litigant's right to pursue an accrued and pending common law cause of action – without providing a grace period – transcends the legislature's power. Within that context, does the presumption of a statute's constitutionality survive an express prohibition of the Texas Constitution? Because the Legislature may not make a law that the Texas Constitution prohibits and the Constitution expressly forbids retroactive laws that impair vested rights, the question presented is whether an accrued and pending common law cause of action is a vested right and thus protected by the Texas Constitution.

FACTS: Appellant Rosemarie Satterfield, representative of the Estate of Jerrold Braley, sought damages for injuries that Braley sustained by his exposure to asbestos-containing products. The district court granted summary judgment to appellee Crown Cork & Seal Company, Inc., pursuant to a newly enacted statute that limits the asbestos-related liabilities of certain successor corporations. After Braley sued Crown Cork and others for damages caused by his exposure to asbestos-containing products, the trial court granted partial summary judgment in Braley's favor. Within days, the Texas Legislature enacted – and made immediately effective – the Statute, which effectively barred any recovery from Crown Cork. Crown Cork then filed a motion for summary judgment based on its new statutory affirmative defense under the Statute, arguing that, because it had already paid successor asbestos claims in excess of the liability limit under the Statute, it had no further liability in any asbestos case, including Braley's. The district court granted the motion and severed Braley's claims against Crown Cork from those against the other defendants. This appeal followed.

HOLDING: The Court found that an accrued and pending common law cause of action is a vested right and that therefore the Statute is unconstitutional as applied to Braley's claim because, in the absence of a grace period, the Statute is a retroactive law impairing his vested rights.

PULMOSAN SAFETY EQUIPMENT CORPORATION, Appellant v. WILLIAM LAMB, Appellee

NO. 14-08-00279-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

273 S.W.3d 829; 2008 Tex. App. LEXIS 9132

December 9, 2008, Judgment Rendered
December 9, 2008, Opinion Filed

Petition for review filed by, 03/09/2009

ISSUE: Appellant, a New York manufacturer, appealed the judgment of the 295th Judicial District Court, Harris County, Texas, denying its request for a special appearance in a products liability suit brought by appellee, a Texas resident.

FACTS: During the course of his forty-year career, a Texas resident worked as a painter, insulator, and sandblaster at a paper mill in Evadale, Texas. He claimed that as a result of his sandblasting duties, he contracted silicosis. He sued the manufacturer of a sandblast hood. The manufacturer was a dissolved New York corporation and requested a special appearance in the Texas lawsuit. The manufacturer did not sell directly to end-users; instead, the manufacturer sold its products through distributors. The trial court denied Appellant's special appearance.

OUTCOME: The trial court's order denying the New York manufacturer's special appearance was affirmed. The Court of Appeals of Texas upheld the decision of the trial court denying the special appearance on the basis of specific jurisdiction. By placing a sales representative in the state to call on Texas distributors to sell products, the manufacturer showed an intent to serve the Texas market. This evidence satisfied the purposeful availment prong of the jurisdictional test. There was also a substantial connection between the manufacturer's contacts and the operative facts of the products liability litigation. The trial court was not required to resolve an issue concerning the Texas resident's actual use of the product in a special appearance.

ANTHONY AUTHORLEE, DEXTER BURNETT, ROBERT DEROUSSELLE, JOHN HENRY YOUNG, JEROME STUBBLEFIELD, AND FLOYD MORAN, Appellants. v. TUBOSCOPE VETCO INTERNATIONAL, INC., AMF INCORPORATED, AND MINSTAR, INC., Appellees

NO. 01-06-00719-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

274 S.W.3d 111; 2008 Tex. App. LEXIS 7300

August 28, 2008, Opinion issued
Petition for review filed by, 11/25/2008

ISSUE: Appellants, who were settling plaintiffs in the underlying lawsuit, sought to overturn the trial court's denial of their motion for new trial. Appellants argued that their agreed judgment should be set aside as "void as against public policy" because their trial lawyers did not tell them it was an aggregate settlement and because their trial lawyers, along with the appellees, committed fraud.

FACTS: Plaintiffs, 176 silica workers, brought an action against defendant employers in the 295th District Court, Harris County, Texas, seeking recovery for injuries allegedly caused by the workers' occupational exposure to silica while working for the employers. The workers entered into an agreed judgment with the employers. Over six years later, several of the workers filed a motion for new trial, which was denied. These workers appealed. All of the silica workers were represented by the same trial attorney, who mediated and negotiated a settlement with the employers' attorney. The employers agreed to pay $ 45 million to settle all of the workers' claims; the parties also negotiated a matrix by which individual settlement amounts would be determined, and each worker received a letter explaining the amount the employers were willing to pay that individual worker. Most of the workers entered an agreed judgment, including the appealing workers. The appealing workers, now represented by different counsel, argued that their trial attorney violated Tex. Disciplinary R. Prof. Conduct 1.08(f), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Pamph. 1997) (Tex. State Bar R. art. X, sec. 9), also called the aggregate settlement rule. The trial court found that the rule was violated, but that the violation did not void the judgment.

HOLDING: The court rejected the trial court's finding that there had been an aggregate settlement under Rule 1.08(f). The settlements were based on factors specific to each claim; each case was settled individually; this was the essence of negotiation. The court affirmed the judgment of the trial court denying the workers' motion for new trial.

IN RE: BEIRNE, MAYNARD & PARSONS, L.L.P.

No. 06-08-00062-CV

COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA

260 S.W.3d 229; 2008 Tex. App. LEXIS 7830

July 17, 2008, Submitted
July 18, 2008, Decided

ISSUE: Petitioner law firm sought a writ of mandamus asking the court to order the 71st Judicial District Court (Texas) to vacate its order directing the law firm to allow respondent insurers' discovery of law firm billing records.

FACTS: The law firm had sued insurers, claiming some $ 1.2 million in unpaid legal fees allegedly due from the firm's representation of the insurers' insured. The insurers acknowledged that not all of the billings from the firm were paid, but questioned the veracity of the firm's billing. The insurers maintained that the firm's invoicing would not be supported by the underlying documentation from which those invoices were prepared and sought discovery of the particulars of the billings received. The trial court ordered the firm to produce records from six timekeepers, for a maximum of four days each, for each of the three years between 2004 and 2007. The law firm sought mandamus review.

HOLDING: The court held that the discovery was proper. Under the offensive use doctrine, the firm could not seek affirmative relief and at the same time withhold, on the basis of privilege, the evidence needed by the opposing party. The trial court's order was not a specific order for entry onto the premises pursuant to Tex. R. Civ. P. 196.7, but simply required production where the files were generally maintained or at a mutually agreeable location. Therefore, any entry onto the firm's premises was incidental and avoidable.

2009S0410-2 02/20/09

By: Duncan S.B. No. 1123

A BILL TO BE ENTITLED

AN ACT

relating to the standard of causation in claims involving mesothelioma caused by exposure to asbestos fibers.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 90, Civil Practice and Remedies Code, is amended by adding Section 90.013 to read as follows:

Sec. 90.013. STANDARD OF CAUSATION FOR CLAIMS INVOLVING MALIGNANT MESOTHELIOMA. (a) This section provides the exclusive means of proving causation for claims in which the claimant seeks recovery for malignant mesothelioma allegedly caused by exposure to asbestos fibers.

(b) Notwithstanding any other law, to recover damages on a claim to which this section applies, the claimant must prove:

(1) that a defendant's product or conduct was a substantial factor in causing the injury to the exposed person, as described by Subsection (c);

(2) foreseeability, if the cause of action is one in which foreseeability is an element of causation; and

(3) that the exposed person's cumulative exposure to asbestos fibers was a cause of the person's mesothelioma.

(c) A defendant's product or conduct was a substantial factor in causing the exposed person's injury if the exposure to the asbestos fibers for which that defendant is alleged to be responsible contributed to the cumulative exposure of the exposed person and was more than purely trivial when considering the following qualitative factors:

(1) the frequency of exposure;

(2) the regularity of exposure; and

(3) the proximity of the exposed person to the source of the asbestos fibers.

(d) In a claim to which this section applies, a defendant who seeks a determination of the percentage of responsibility of another person under Section 33.003(a) is required to prove causation in the same manner as is required of a claimant.

(e) Nothing in this section requires a claimant or a defendant who seeks a determination of the percentage of responsibility of another person under Section 33.003(a) to prove, for any purpose, a quantitative dose, approximate quantitative dose, or estimated quantitative dose of asbestos fibers to which the exposed person was exposed.

SECTION 2. The change in law made by this Act applies to all actions pending or commenced on or after the effective date of this Act.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009.