



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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TEXAS JUDICIAL ELECTION UPDATE

Tuesday night's election results saw widespread dissatisfaction resulting in Republican windfalls across the country and Texas' judicial elections were no exception.

Gulf Coast

Harris County Republicans saw a return to dominance after the near sweep by Democratic candidates in November 2008. All Republican candidates for Harris County District Courts, Courts at Law, and Probate Courts won; and Republican Chris Daniel ousted Democrat Loren Jackson for District Clerk. Galveston County Republicans also dominated their races. All Republican judicial candidates in Galveston County won their races. The First and Fourteenth Courts of Appeal in Houston also saw all of the Republican candidates cruise to victory. These Houston-Galveston area trends followed the state-wide trend that saw the Republican Judicial Candidates win in the Texas Supreme Court races.

Of interest in Houston, several Democratic judges swept into office two years ago were swept out of office in this week's pendulum swing. All Republican judges up for re-election in Houston and surrounding counties won.

In Corpus Christi, the Republican sweep sent shock waves over this traditionally Democratic stronghold. On the Corpus Christi Court of Appeals, 17 year incumbent Linda Yanez lost to Republican Greg Perkes. Perkes is a civil appellate specialist from Corpus who started his legal career as a clerk of the Corpus Christi Court of Appeals. On the district court bench, incumbent Marisela Saldana (148th District Court) lost to criminal defense attorney Guy Williams and incumbent Manuel Banales (105th District Court) lost to criminal prosecutor Angelica Hernandez. In County Court at Law #5, incumbent Terry Shamsic lost to Corpus Christi family law attorney Brent Cherney.

North Texas

There was virtually no change on the Dallas trial court benches and the changes on the Dallas Court of Appeals involved Democratic defeats of 2 Republican incumbents.

In the District Court elections, Democratic incumbents Martin Hoffman (68th D.C.), Martin Lowy (101st D.C.), Jim Jordan (160th D.C.), and Craig Smith (192nd D.C.) were unopposed. Democratic incumbents Carlos Cortez (44th D.C.), Gena Slaughter (191st D.C.), Carl Ginsberg (193rd D.C.), and Emily Tobolowsky (298th D.C.) all won re-election over Republican challengers. Democratic candidate Dale Tillery defeated Republican incumbent James Stanton in the 134th D.C. race. Finally, Democratic

candidate Tonya Parker defeated Republican candidate Mike Lee in the race for the 116th D.C. bench that is being vacated by Democrat Bruce Priddy.

In the County Courts, unopposed Democratic incumbents King Fifer (CC#2) and Kent Tapscott (CC#4) were re-elected. Democratic incumbents D'Metria Benson (CC#1), Sally Montgomery (CC#3), and Mark Greenberg (CC#5) defeated Republican challengers.

In the Dallas Court of Appeals, unopposed Republican incumbents Carolyn Wright and Michael O'Neill were re-elected. Democratic challenger Bonnie Lee Goldstein defeated Republican incumbent Lana Myers and Democratic challenger Lawrence Prager defeated Republican incumbent Robert Fillmore.

Central Texas

Texas Supreme Court | Austin and San Antonio Courts of Appeals

Tuesday's election for the three places on the Texas Supreme Court went as expected. As with most of the other statewide positions, the Republican candidates won. Incumbent Justices Debra Lehrmann (appointed last June), Paul Green (running for a second term), and Eva Guzman (appointed last October) all retained their seats. None of their races were close.

In a bit of a surprise in the race for the open seat on the Austin Court of Appeals, Melissa Goodwin (R) defeated Kurt Kuhn (D). Kuhn defeated sitting Justice Jan Patterson in the Democratic Primary. Goodwin was most recently in private practice at Potts & Reilly, and has a strong criminal background. Kuhn, a partner in the appellate practice group at Brown McCarroll, had the endorsements of former Supreme Court Chief Justice Phillips and Justices Brister and Enoch. With Goodwin's win, the court is currently split with two Democrats (Justices Henson and Chief Justice Jones) and three Republicans (Justices Goodwin, Pemberton, and Puryear). Justice Waldrop vacated his seat earlier this year and Governor Perry will appoint his replacement—another Republican—likely by year end. In the races in the San Antonio Court of Appeals, Republican incumbent Justice Marialyn Barnard (appointed in January 2009) defeated her Democratic challenger Rebecca Martinez. Incumbent Justice Sandee Bryan Marion (R) was unopposed. Other than Chief Justice Catherine Stone, the remaining five justices (Justices Angelini, Barnard, Hilbig, Marion, Simmons, and Speedlin) are all Republicans.

Travis County | Bexar County

There was only one contested race for District Judge in Travis County. In the 353rd District Judge race, Republican incumbent Judge Jeff Rose (appointed by the Governor in September 2009 to fill Judge Scott Ozmun's seat) was defeated by Democratic candidate Tim Sulak in a fairly close race by Travis County standards. The following civil judges (all Democrats) ran unopposed: Amy Clark Meachum for Judge Suzanne Covington's 201st District Court bench vacated by her retirement; 250th District Judge John K. Dietz; 261st District Judge Lora Livingston; 419th District Judge Orlinda Naranjo; County Court at Law 1 Judge David Phillips; County Court at Law 2 Judge Eric Shepperd. Notably, almost 60% of Travis County voters voted a straight Democrat ticket.

The results in the Bexar County District Court races were more mixed. In the 224th District Court race, challenger Cathy Stryker (R) defeated incumbent Judge Gloria Saldana (D). Stryker comes from a private litigation practice focusing primarily in the defense of employment, contract and commercial disputes. In the race for the 285th District Court bench vacated by retiring Judge Michael Peden, Richard Price (R) defeated Rosie Alvarado (D). Incumbent Judges Sol Casseb III (R) of the 288th, Judge Renee McElhaney (R) of the 73rd, and Judge Janet Littlejohn (R) of the 150th all retained their seats, defeating their

Democratic challengers. 45th District Court Judge Barbara Hanson Nellermoe (D) and 225th District Court Judge Peter Sakai (D) were both unopposed, as were Judge David J. Rodriguez (D) of County Court at Law 3 and Judge Irene Rios (D) of County Court at Law 10.

INSURANCE CODE DOES NOT CREATE FIDUCIARY DUTY FOR THIRD PARTY ADMINISTRATORS

Recently, in *Southwest Texas HMO, Inc. v. Vista Health Plan, Inc. and IntegraNet Provider Organization, Inc.*, 2010 WL 4260976, the Austin Court of Appeals held that the Texas Insurance Code does not create a general fiduciary duty applicable to third-party administrators.

Under the Texas Medicaid program, the state of Texas contacted with HMO Blue to provide comprehensive health care services to Medicaid-eligible recipients. HMO Blue then entered into a “participating medical group agreement” with Vista and IPO, medical provider groups, to provide Medicaid services to “designated members” within specified Texas Counties. Under the agreement, Vista and IPO were paid on a “per patient” or a “capitation” basis, defined in the agreement as “a payment system which pays to [Vista and IPO] a fixed . . . amount per month . . . for each Designated Member for the provision of Covered Health Services—in lieu of fee-for-service payments.” In turn, the health care service provider received a flat payment per member, per month and agreed to provide all required medical services to the designated member as defined in the agreement instead of being paid based on the number and types of medical services provided.

A dispute arose between HMO Blue and Vista and IPO as to whether Vista and IPO were legally obligated to pay the claims of a special class of patients—newborns weighing 1,200 grams (2 pounds 10 ounces) or less at birth. Vista and IPO stopped providing funds for these patients and accused HMO Blue of paying between \$10 Million and \$12 Million in claims for ineligible Medicare recipients. Vista and IPO sued HMO Blue, the Texas Department of Health, and other state agencies for declaratory and injunctive relief and later filed suit against HMO Blue for breach of contract and breach of fiduciary and statutory duties. HMO Blue counterclaimed for recovery of funds it expended as a result of Vista’s and IPO’s alleged breach of contract. The trial court dismissed the state agencies and granted partial summary judgment in favor of HMO Blue on its counterclaim for breach of contract and awarded it \$6,580,662.55 in damages and \$20,000 in attorneys’ fees. Thereafter, the jury found damages in lost profits for Vista in the amount of \$10,806,250.70 and for IPO in the amount of \$4,631,250.30 and the court entered judgment on the verdict, awarding Vista and IPO lost profits, attorneys’ fees, court costs, and post-judgment interest. The court incorporated into the judgment the partial summary judgment previously granted to HMO Blue, awarding it \$6,580,662.55 in damages and \$20,000 in attorneys’ fees and interest.

HMO Blue appealed the jury award, arguing, among other things, that the evidence was legally and factually insufficient for the jury to find a causal link between Vista’s and IPO’s damages and HMO Blue’s breach of contract. The court, viewing the evidence in a light most favorable to the verdict in accordance with Texas case law, found that the evidence was legally and factually sufficient to support the verdict. The court pointed to testimony provided by Vista’s treasurer and chief financial officer which supported the fact that HMO Blue breached the agreement by failing to “back out” claims Vista funded for patients who, because it was determined they qualified for Supplemental Security Income, no longer were eligible for Medicaid and thus were not “designated members” as defined by the agreement. In addition, Vista’s chief operating officer testified that HMO Blue failed to provide sufficient eligibility and financial data for Vista to assess its risk in providing medical care for particular enrollees.

In addition, Vista and IPO claimed that the trial court erred in granting HMO Blue’s motion for summary judgment as to Vista’s and IPO’s breach of fiduciary duty claims. HMO Blue’s motion argued that there

was no fiduciary duty between them and Vista and IPO. The court upheld the trial court's ruling, explaining that the Texas Supreme Court previously held in *National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 701 (Tex.2007) that the Texas Insurance Code does not create a general fiduciary duty applicable to third-party administrators. Instead, the Texas Supreme Court credited the Legislature with presuming that parties to a written agreement would set out their duties, obligations, and expectations *in such agreement*.

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