

# ELECTRIFYING INDEMNITY: THE DARK SIDE OF THE TEXAS HEALTH & SAFETY CODE HIGH VOLTAGE ACT

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## ABSTRACT

*With an increasing call for utility reform, this Comment highlights an area of law that has largely been ignored. However, the public can no longer stand by and watch utility giants escape liability for tragic events they can prevent.*

*Texas Health & Safety Code Chapter 752 shields utility companies from liability when they fail to properly maintain their lines. Originally enacted to protect worker safety, this statute has been extended unnecessarily to apply to ordinary individuals, creating a loophole that absolves utility companies from egregious misconduct. This Comment looks to the protections already afforded to utility companies that either completely bar or limit recovery to plaintiffs. Then, this Comment takes an in depth look at the statutory scheme of Chapter 752 to show the inherit inequities in the legal framework.*

*Courts have the authority to narrow the statute to apply to specific situations based on general statutory construction principles and the legislative intent behind enacting Chapter 752. With this authority, courts should narrow their interpretation to apply to work-like conduct that is foreseeable. And while this type of analysis will fix the inconsistencies, refusing to let utility companies escape liability where they are also negligent should be the driving force behind a court's decision. And where courts do not employ this analysis, the statute can alternatively be amended to limit the utility companies' immunity.*

*This Comment aims to balance both policy concerns in protecting worker safety while also creating sufficient incentives for line operators to maintain their power lines. And while the policies are the motivation behind the statute, this Comment uncovers how it is really applied and shows the disconnect between the law and the reality of an innocent plaintiff facing an electrical tort claim.*

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## I. INTRODUCTION

James Taylor drives a tractor-trailer for a living, and in between his month-long shifts he gets ten to fourteen days off.<sup>1</sup> During his off weeks, he parks his commercial truck in the local Tractor Supply field next to their parking lot.<sup>2</sup> On an early morning in July, before he was dispatched to another job, Mr. Taylor decided to check on the truck and load up his belongings.<sup>3</sup> As he trudged through the wet grass, he made his way over to his refrigerator truck.<sup>4</sup> As he grasped the handle to open the heavy door, he was suddenly launched across the field.<sup>5</sup> He woke up in a seizure and tried to walk into Tractor Supply to get help, but before he realized what happened, he passed out.<sup>6</sup>

He learned later that his truck antenna was touching a low-hanging wire, and he had been electrocuted with 41,000 volts passing through his body.<sup>7</sup> Mr. Taylor spent months after his accident calling OSHA, the City of Lubbock, South Plains Electrical, and the Fire Marshall to fix the low-hanging line so no one else would get hurt.<sup>8</sup> His accident occurred in 2019, and according to his deposition in 2023, the lines had still not been fixed.<sup>9</sup> Mr. Taylor now has multiple seizures every day, takes a plethora of painkillers, and has no hope that he will ever be employed again.<sup>10</sup>

Mr. Taylor's story is unfortunately one of many, and the law should protect him and victims like him.<sup>11</sup> However, under Texas's current Health & Safety Code, his claims are difficult, if not almost impossible, to bring.<sup>12</sup> The law overprotects utility companies, failing to hold them accountable when they exhibit a complete disregard for public safety.<sup>13</sup> Texas Health & Safety Code Chapter 752 purports to further the safety of individuals and workers; however, the statute acts as a loophole for utility companies to escape liability.<sup>14</sup>

The relevant provisions require individuals to notify a utility company before any work, activity, or function begins within six feet of a

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1. See Oral Deposition at 24, Taylor v. Tractor Supply Co., No. 2020539434 (filed July 26, 2017) (names modified for privacy).

2. See *id.* at 23.

3. See *id.* at 67.

4. See *id.*

5. See *id.* at 78.

6. See *id.* at 78, 121.

7. See *id.* at 63.

8. See *id.* at 158.

9. See *id.* at 157–58.

10. See *id.* at 63.

11. See generally *id.* (telling Mr. Taylor's story).

12. See Presley v. Gulf States Utils. Co., No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.).

13. See *id.*

14. See TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

high-powered line, and failure to notify a utility will result in an individual being responsible for their own damages if they come into contact with the line.<sup>15</sup> So take Mr. Taylor’s situation; because he was technically performing an “activity” near a high voltage power line, i.e., reaching up to open his door, and he was within six feet of the line, he had a duty to notify the line operator to de-energize the line.<sup>16</sup> Because he did not notify the line operator, he is responsible for all of his own damages, and he can even be fined for coming into contact with the line.<sup>17</sup> So while this duty is important when applied to the right contexts, it is illogical to apply it to Mr. Taylor’s situation.<sup>18</sup> First, he did not know the line was touching his truck to even have the ability to notify the line operator, and second, the only reason the line was touching his truck was due to the utility company failing to maintain its own line.<sup>19</sup>

As illustrated, this statute has been construed to apply to ordinary day-to-day conduct, burdening individuals who have no authority to notify a utility company and far exceeding the scope of what this statute has been designed to protect—worker safety.<sup>20</sup> The statute also does not contain limiting language that precludes application when a utility company is also negligent.<sup>21</sup> Therefore, there are alternate solutions that are geared at two different provisions within Chapter 752 that each end with the same result—to protect innocent plaintiffs who are harmed by low-hanging, high-voltage power lines.<sup>22</sup>

Utility company negligence has not been a priority in the decades since creating this act.<sup>23</sup> However, the public is beginning to care about electrical tort claims with the rise of mass grid failures and devastating wildfires, and change is on the horizon to start incentivizing line owners and operators to maintain their lines and protect public safety.<sup>24</sup>

This Comment will first highlight the history of the electrical grid, protections already provided to utility companies in the law, and the difficulty of proving common law tort claims—all to illustrate the extensive protections that insulate utility companies and show that cost allocation back onto the

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15. *Id.*

16. See Oral Deposition at 123, Taylor v. Tractor Supply Co., No. 2020539434 (filed July 26, 2017).

17. See *id.*

18. See *id.* at 154.

19. See *id.* at 71–72.

20. See TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

21. *Id.*

22. *Id.*

23. See Eric Douglas, *Texas Grid Still Vulnerable to Extreme Winter Weather*, TEX. TRIB. (Nov. 29, 2022), <https://www.texastribune.org/2022/11/29/texas-power-grid-winter-ercot-forecast/>; see also Julia Simon, *Old Power Lines Plus Climate Change Mean a Growing Risk of Utilities Starting Fires*, NPR (Mar. 12, 2024), <https://www.npr.org/2024/03/12/1237063598/texas-fire-xcel-energy-climate-change-utility-power-lines> (discussing a Texas wildfire that shows utility company negligence).

24. See Douglas, *supra* note 23 (explaining that utility companies are failing to take measures to reduce the risk of powerline related wildfires).

line owners and operators will not have a negative impact on the consumer.<sup>25</sup> Then, this Comment will focus specifically on Texas Health & Safety Code Chapter 752 with case illustrations and legislative background to show the way courts have been misapplying the statute.<sup>26</sup> Finally, this Comment will explore how to narrow the scope of Chapter 752 looking at the construction and legislative intent behind the statute, and alternatively, how to fix the statute to limit full indemnity by proposing an amendment.<sup>27</sup>

## II. HISTORICAL CONTEXT OF THE ELECTRICAL GRID AND AREAS OF LAW THAT PROTECT UTILITIES

Section A focuses on the history of electricity, the regulatory structure over electricity, and how claims against utilities were brought under common law.<sup>28</sup> Section B introduces a specific statute that improperly protects utility companies and circumvents common law.<sup>29</sup> Section C looks at how courts have applied this statute.<sup>30</sup>

### *A. History of the Regulatory Structure of Electricity, Areas of Law That Regulate Utilities, and Bringing an Electrical Tort at Common Law*

Utility companies have pervasive protections within the law, whether it's through the regulatory scheme, statutory provisions, or governmental immunity that disincentivizes utility companies to maintain minimum safety requirements.<sup>31</sup> And while electricity is an important commodity that does need to be protected and somewhat insulated to keep electricity rates low for an average consumer, utility companies still need to be legally incentivized to maintain their lines in a safe manner.<sup>32</sup> From the increasing number of wildfires that are caused by old power lines and grid failures that can leave thousands of people injured or cause thousands of dollars in property damage, the law either precludes recovery or leaves plaintiffs with an uphill battle to prove causation.<sup>33</sup> By first looking to how the government regulates utility companies and second to the extent other areas of law protect utilities, this

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25. See *infra* Section II.A (explaining the history and regulatory structure of electric utilities).

26. See *infra* Section II.B (explaining Texas Health & Safety Code Chapter 752).

27. See *infra* Part III (explaining how to fix the statute's broad inconsistencies).

28. See *infra* Section II.A (illustrating the history of regulation and law of electricity).

29. See *infra* Section II.B (presenting a statute that protects utility companies).

30. See *infra* Section II.C (analyzing how courts have been misapplying the statute).

31. See *infra* Section II.A.2 (discussing Public Utility Commission (PUC) protections and Electric Reliability Council of Texas (ERCOT) immunity).

32. See *infra* Part III (explaining the disparate impact of letting utilities skirt minimum safety standards).

33. See *infra* Section II.A.2 (showing the difficulty of bringing an electrical tort claim at common law).

Comment illustrates the need for courts to change their focus to start protecting the innocent plaintiff.<sup>34</sup>

### 1. Regulatory Structure of the Electric Grid

The U.S. energy grid is made up of three separate components that power “the largest machine in the world.”<sup>35</sup> The grid is an interconnected web of generators, transmission lines, and distribution centers.<sup>36</sup> High-voltage transmission lines carry electricity across long distances that connect the generation of power to consumers.<sup>37</sup> These high-voltage power lines can either be overhead or underground; however, overhead lines are uninsulated so they are much cheaper to install and maintain than underground lines.<sup>38</sup> They are critical to the infrastructure because they allow massive power to be pushed across the grid at or above 110,000 volts, transmitting up to 765,000 volts, maximizing the electrical current.<sup>39</sup> Transformers allow a high voltage to be converted to a lower voltage that is distributed directly to the consumer.<sup>40</sup> There are more than two million miles of power lines with three separate grids distributing power.<sup>41</sup> High-voltage transmissions are the backbone of today’s grid, and while historically there has not been much change to the way power is distributed, the grid has expanded drastically.<sup>42</sup>

Before the grid expanded, electricity was unregulated and controlled by utility companies from its generation to distribution.<sup>43</sup> As the grid expanded, municipalities, states, and then the federal government started to regulate these different utilities to reign in the monopoly that utility companies had over the sale of electricity to control prices and consumer safety.<sup>44</sup> Now, there are three separate grids: Eastern, Western, and Texas.<sup>45</sup> State agencies like the Public Utility Commission (PUC) typically oversee the transmission and

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34. See *infra* Section II.B.1 (explaining the insulated structure of electricity).

35. James McBride & Anshu Siripurapu, *How Does the U.S. Power Grid Work?*, COUNCIL ON FOREIGN RELS. (July 5, 2022, 11:53 AM), <https://www.cfr.org/backgrounders/how-does-us-power-grid-work>.

36. *Id.*

37. *How the Electricity Grid Works*, UNION OF CONCERNED SCIENTISTS (Feb. 17, 2015), <https://www.ucsusa.org/resources/how-electricity-grid-works#references>.

38. *Id.*

39. *Id.*

40. *Id.*

41. McBride & Siripurapu, *supra* note 35.

42. Markus Heimbach, *History of the Electrical Grid*, HITACHI ENERGY (Dec. 6, 2024), <https://www.hitachienergy.com/us/en/news-and-events/blogs/2024/06/history-of-the-electrical-grid-powering-the-energy-transition-with-high-voltage-technology>; McBride & Siripurapu, *supra* note 35.

43. David P. Tuttle et al., *The History and Evolution of the U.S. Electricity Industry*, UNIV. OF TEX. AT AUSTIN ENERGY INST. 5 (July 2016), [https://energy.utexas.edu/sites/default/files/UTAustin\\_FCe\\_History\\_2016.pdf](https://energy.utexas.edu/sites/default/files/UTAustin_FCe_History_2016.pdf).

44. *Id.* at 3.

45. McBride & Siripurapu, *supra* note 35.

distribution of electricity and set appropriate rates.<sup>46</sup> Whereas, the Federal Energy Regulatory Commission (FERC), a national agency, oversees a broader range of activities such as wholesale electricity transactions and the flow of electricity.<sup>47</sup>

The electric grid is also organized by investor-owned utilities that provide electricity for profit, and publicly-owned utilities that do not operate for profit.<sup>48</sup> Each of these types of utilities can have different market structures.<sup>49</sup> The vertically integrated model is a single monopoly company or state/municipality that oversees everything from production to delivery.<sup>50</sup> With this system, a consumer buys electricity from this one entity and does not have a choice in the competitive market.<sup>51</sup> In restructured or deregulated markets, the generation, transmission, and distribution are separated or “unbundled” to facilitate a competitive market by allowing the consumer to purchase from retail electric providers (REPs).<sup>52</sup>

Texas organizes its grid and market differently.<sup>53</sup> Though it is one of the three U.S. grids, Texas is separate from the federal power grid and as a result, is not subject to federal regulations and oversight.<sup>54</sup> The Electric Reliability Council of Texas (ERCOT) oversees the wholesale market in Texas and manages the flow of electricity powering 90% of the state with transmission lines covering 54,100 miles.<sup>55</sup> Texas also deregulated its market in 1999 to move toward a wholesale competitive market and away from the traditional monopoly-style market.<sup>56</sup> In theory, this means that utility companies that sell electricity will compete with other companies for the best price and services to consumers.<sup>57</sup> In reality, only half of Texans live in areas that employ the wholesale market, and the other half still only have one choice in supplier.<sup>58</sup> Some municipalities still own utilities that generate and distribute electricity, and in rural areas there are cooperatives where generation and transmission are bought in bulk and sold to one supplier.<sup>59</sup>

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46. *How the Electricity Grid Works*, *supra* note 37.

47. *Id.*

48. Tuttle et al., *supra* note 43, at 11.

49. *Id.*

50. *Id.*

51. *Id.*

52. Gaye White, *Energy Regulation*, 57 SMU L. REV. 923, 924 (2004).

53. Alfred Poindexter, *How the Texas Power Grid Works*, POWER WIZARD (Jan. 20, 2023), <https://www.powerwizard.com/blog/how-the-texas-power-grid-works/#:~:text=The%20Texas%20power%20grid%20is%20a%20system%20that%20delivers%20electricity,transmission%20lines%20to%20the%20substations.>

54. *Id.*

55. *About ERCOT*, ERCOT, <https://www.ercot.com/about> (last visited Mar. 31, 2025).

56. White, *supra* note 52.

57. *Id.*

58. *Id.*

59. Kate Galbraith, *Alternating Current*, TEX. TRIB. (July 12, 2010, 5:00 AM), <https://www.texas-tribune.org/2010/07/12/has-electric-deregulation-helped-or-hurt-texans/>.

The market structure is important in understanding tort liability, because, when a city or state runs the utility companies and maintains the market structure, it is really owned by the public.<sup>60</sup> Because consumers “own” electric companies, it is difficult to determine the appropriate remedy for an injured plaintiff; however, as Texas moves to wholesale markets, consumers are less likely to bear the burden of rising costs.<sup>61</sup> The regulatory structure also heavily favors utility company interests because they are protecting an important public good, but as the market becomes more competitive, the focus should shift from heavily protecting the commodity to pushing for public safety.<sup>62</sup>

## 2. PUC Protections and ERCOT Immunity

The Public Utility Commission (PUC) oversees consumer complaints and is given authority through the Public Utility Regulatory Act (PURA).<sup>63</sup> PURA grants exclusive jurisdiction to the PUC to regulate utility “rates, operations, and services.”<sup>64</sup> And while defining the exact boundaries of every claim that first has to be brought to the administrative agency is not in the scope of this Comment, it is still important to consider that many claims plaintiffs bring or violations of PURA have to be adjudicated by the PUC first.<sup>65</sup> Common law claims are typically more appropriately brought within a court’s jurisdiction; however, any claim that operates under a tariff or a sales contract must be approved by the PUC, and the contract can limit the liability of the utility company for negligence and breach of contract claims.<sup>66</sup>

For example, in *In re Oncor Electric Delivery Co.*, the plaintiff sued a utility company for negligence and the utility company claimed the action should first be brought to the PUC.<sup>67</sup> The Texas Supreme Court disagreed, explaining that regulation is the government’s way to ensure fair market practices and prices, protect vital service, and balance the public utility monopoly.<sup>68</sup> Whereas, the tort system is to deter wrongful conduct and reallocate losses to help victims.<sup>69</sup> The court held that an action based in negligence with no connection to a plaintiff’s status as a utility consumer is

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60. See Tuttle, *supra* note 43, at 11.

61. *Id.*

62. Galbraith, *supra* note 59 (“Electric providers are essentially free to offer whatever rates they choose, and change their offers at will, whereas before they would have had to beg the Public Utility Commission for permission.”).

63. See Public Utility Regulatory Act, TEX. UTIL. CODE § 32.001.

64. See *id.*

65. *In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 154 (Tex. 2021).

66. *Id.* at 164; *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002).

67. *In re Oncor Elec. Delivery Co.*, 630 S.W.3d 40, 44 (Tex. 2021) (holding that Chapter 752 violations should be brought in court).

68. *Id.* at 43.

69. *Id.*

not within the exclusive jurisdiction of the PUC.<sup>70</sup> And while this decision limits the PUC's jurisdiction and allows plaintiffs to bring tort-like claims in court, this opinion was only recently released—indicating a possible shift in policy concerns towards protecting individual consumers.<sup>71</sup>

Along with administrative agency protections, the Supreme Court of Texas also held that ERCOT has sovereign immunity as an arm of the state even if claims fall out of the PUC's exclusive jurisdiction, which limits plaintiff's remedies for tort claims.<sup>72</sup> This is seen in *CPS Energy v. Electric Reliability Council of Texas*, where the Texas Supreme Court held that ERCOT provides an essential government service and is entitled to protection even though it is a private entity.<sup>73</sup> This protection is really governmental immunity that does not allow for plaintiffs to sue ERCOT.<sup>74</sup> This decision left plaintiffs, municipalities, and other electrical providers who had widespread blackouts after the 2021 winter storm without remedy.<sup>75</sup> And while these protections are important to have a functioning society, common law based claims asserting utility negligence are already difficult to bring and prove.<sup>76</sup>

### 3. *Bringing a Claim at Common Law*

Utility companies have a general duty to exercise ordinary and reasonable care, and while it is not necessarily a heightened standard, the degree of care must be commensurate with the danger.<sup>77</sup> Because electricity is so dangerous and deadly, the law imposes requirements to comply with regulations and statutes.<sup>78</sup> The failure to protect persons and property from injury will constitute as negligence per se.<sup>79</sup> This includes the duty to properly install, maintain, and inspect power lines to anticipate and prevent injuries.<sup>80</sup> And while there is no absolute way to prevent injuries, a utility company has a duty to act as a reasonably prudent electricity distribution company.<sup>81</sup> Accordingly, an electric company will be held liable for negligent acts or

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70. *Id.* at 49–50 (explaining how Chapter 752 violations are appropriately brought in district courts).

71. *See id.* at 52.

72. *CPS Energy v. Elec. Reliability Council of Tex.*, 671 S.W.3d 605, 611 (Tex. 2023).

73. *Id.*

74. *Id.*

75. *See generally* Erin Douglas, *Texas Grid Still Vulnerable to Extreme Winter Weather, ERCOT Estimate Shows*, TEX. TRIB. (Nov. 29, 2022, 2:00 PM), <https://www.texastribune.org/2022/11/29/texas-power-grid-winter-ercot-forecast/> (explaining the rolling blackouts and probable grid failures in the future).

76. *See Tex.-La. Power Co. v. Webster*, 59 S.W.2d 902, 904 (Tex. App.—Dallas 1933), *aff'd*, 91 S.W.2d 302 (1936).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 163 (Tex. 2021).

omissions that cause or allow lines to fall and letting them remain in that condition.<sup>82</sup>

These common law concepts can be illustrated in *Texas-Louisiana Power Co. v. Webster*, where the plaintiff's son was killed when he came into contact with a sagging power line that had been struck by lightning.<sup>83</sup> The court held that one of the duties required by statute is to construct and maintain lines twenty-two feet above the ground, and it is absolute.<sup>84</sup> The company has to exercise reasonable care to fix dangerous situations after knowledge or notice, and continuous inspection is required.<sup>85</sup> The court noted that a high degree of care and diligence is proportionate to the danger electricity poses because the companies are charged by law to keep the public safe.<sup>86</sup>

Underpinning the argument in this case is the utility company's "knowledge" of the danger.<sup>87</sup> Utility companies are charged with knowledge of the condition if they knew or should have known about a dangerous condition.<sup>88</sup> And while utility companies need to have actual knowledge of the dangerous condition of the lines, either directly or through an agent, the actual knowledge can be inferred from slight circumstances.<sup>89</sup> A utility company can also show contributory negligence as a defense if they can prove that the injured person had knowledge of the dangerous condition.<sup>90</sup>

Historically, while it was still difficult to show duty, breach, and causation, courts were not going to let a utility company escape liability when it failed to maintain its lines properly.<sup>91</sup> Deviating from common law, the Texas Legislature has enacted protections for utility companies and imposed duties on individuals to effectively guard against the inherent danger electricity and high-voltage power lines pose.<sup>92</sup>

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82. *Id.*

83. *Webster*, 59 S.W.2d at 904.

84. *Id.* at 905.

85. *Id.* at 907.

86. *Id.* (quoting *Jacksonville Ice & Elec. Co. v. Moses*, 134 S.W. 379, 385 (Tex. App.—Texarkana 1911, writ ref'd)).

87. *See id.*

88. *Id.*

89. *Denton Cnty. Elec. Coop., Inc. v. Burkholder*, 354 S.W.2d 639, 642 (Tex. App.—Fort Worth 1962, writ ref'd n.r.e.) (noting that the defendant had actual notice when he inspected the pole even if he did not notice the fungus that caused it to fall over).

90. *Kenny v. El Paso Elec. Co.*, 371 S.W.2d 777, 779–80 (Tex. App.—El Paso 1963, writ ref'd n.r.e.) (holding that it was irrelevant that the utility company failed to comply with ordinances that would warn of the dangerous overhead line because plaintiffs already had actual knowledge that the line was dangerous).

91. *See Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 35 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.).

92. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

*B. Texas Health & Safety Code Chapter 752 Basic Statutory Framework  
and Legislative History*

Section B focuses on Chapter 752 of the Texas Health & Safety Code, an act that overprotects utility companies.<sup>93</sup> Section B.1 explains the basic statutory scheme and how each statute in the chapter works together to preclude plaintiffs from recovering when their conduct falls into the scope of the act.<sup>94</sup> Section B.2 explains the act's legislative history and codification as it stands today.<sup>95</sup>

*1. Framework of Chapter 752 Explaining the Indemnity Structure of the  
Statute*

The Legislature codified Chapter 752 of the Texas Health & Safety Code to incentivize individuals, employees, and employers to take some safety measures when working near high-voltage power lines.<sup>96</sup> The statute restricts activities near an overhead power line unless they take some precautionary measures to not get electrocuted.<sup>97</sup> Specifically, the statute requires an individual, employee, or employer to give a forty-eight-hour notice to utility companies that work will be performed near a high-voltage power line so they can come to an arrangement to de-energize the line.<sup>98</sup> Furthermore, the statute imposes criminal liability on the person who fails to notify.<sup>99</sup> The notification provision's main purpose is to enhance public safety and make employers take some measures to protect the job site before their employees start working.<sup>100</sup> This typically looks like a construction site where they are erecting tall machinery that can come into contact with overhead power lines.<sup>101</sup> However, Texas inconsistently applies the statute and has difficulty defining the specific circumstances it should apply to.<sup>102</sup>

When there is a failure to notify, the person—typically an employer—has violated the statute and the utility company will not be responsible for

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93. *See id.*

94. *See* discussion *infra* Section B.1 (explaining steps taken to incentivize safety measures).

95. *See* discussion *infra* Section B.2 (describing the legislative history of Chapter 752).

96. *See Ringo*, 569 S.W.2d at 35 (explaining the purpose behind the statute before it was recodified as Chapter 752).

97. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

98. *See id.* § 752.003 (explaining the notification provision).

99. *See id.* § 752.007.

100. Plaintiff's Response to Defendant's Motion for Summary Judgment at \*15, *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (No. E-180, 794) (quoting testimony from Mr. Saunders who testified in opposition to the proposed amendment to repeal the indemnification provision of Chapter 752).

101. *See* TEX. HEALTH & SAFETY CODE § 752.004.

102. *See Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 35 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.).

any damage that person—typically an employee— has sustained.<sup>103</sup> Courts have difficulty applying this indemnification provision because it should only pertain to situations where an employer could reasonably foresee that an activity or work would bring the employee within six feet of the power line.<sup>104</sup> Otherwise, there would be no actual purpose for the notification provision if this statute applied to situations outside of ones employers could identify as potential safety hazards and protect against.<sup>105</sup>

For example, say a roofer had employees working on the top of a house fixing shingles—that roofer would have a duty to make sure the job site is safe for the workers.<sup>106</sup> If there is an overhead power line within six feet of the roof, they would need to call the utility company to de-energize the power line so the workers would not be accidentally injured if they came into contact with the power line while fixing the roof.<sup>107</sup> If the roofer did not try to get the lines de-energized, then the *roofer* would be responsible for all of the workers' injuries if they happened to be electrocuted.<sup>108</sup> Therefore, the driving force behind this statute is to make employers aware of dangerous situations when they know their workers could possibly come in contact with high-voltage lines.<sup>109</sup> The statute makes employers take precautionary safety measures to reduce the risk of accidents occurring on work sites because they have preexisting knowledge of the job site and the type of work being performed that a utility company would not be aware of.<sup>110</sup>

This statute does have limitations and only applies to specific circumstances.<sup>111</sup> First, the statute only imposes duties to notify for certain types of power lines.<sup>112</sup> These types of power lines are defined in the statute as “high-voltage” and “overhead line.”<sup>113</sup> “‘High-voltage’ means more than 600 volts.”<sup>114</sup> “‘Overhead line’ means a bare or insulated electrical conductor installed above ground.”<sup>115</sup> The statute only applies to these types of lines because they can cause serious injury or death if someone comes in contact

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103. See TEX. HEALTH & SAFETY CODE § 752.008 (indemnification provision).

104. See *id.*

105. See *id.* § 752.003.

106. See generally *Wolfenberger v. Hous. Lighting & Power Co.*, 73 S.W.3d 444 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (modeling an example based the facts of this case).

107. See generally *id.* (using this case to illustrate the burden of de-energizing).

108. See generally *id.* (using this case to illustrate the burden of de-energizing).

109. See generally *id.* (using this case to illustrate the burden of de-energizing).

110. Plaintiff's Response to Defendant's Motion for Summary Judgment at \*15, *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (No. E-180, 784).

111. See TEX. HEALTH & SAFETY CODE § 752.001.

112. See *id.*

113. See *id.* This statute only applies in situations where these lines are present, and unfortunately, they normally are because high-voltage lines run overhead through every telephone pole. *About ERCOT*, *supra* note 55.

114. See TEX. HEALTH & SAFETY CODE § 752.001.

115. *Id.*

with them.<sup>116</sup> Second, it provides exemptions for specific utility company employees defined as “authorized person[s]” who do not have a duty to notify.<sup>117</sup>

The indemnification and notification provisions both provide protections for utility companies that are not notified of activities and functions that bring a person within six feet of an overhead power line.<sup>118</sup> And while this is an important protection that allows individuals and workers to protect themselves against danger and become aware of the safety risks that surround overhead power lines, courts have broadly construed this statute to encompass every activity—even an unforeseeable one—that applies outside of the employer/employee context and overly protects utility companies from their own negligent behavior.<sup>119</sup> They base their reasoning on the public policy for placing the burden on the employer to notify rather than utility companies being forced to “maintain constant surveillance over the thousands of miles of power lines.”<sup>120</sup> However, courts will arbitrarily state that utility companies must still exercise a high degree of care in maintaining their lines, then fail to hold utility companies accountable when they fall far below minimum safety requirements.<sup>121</sup>

The legislature contemplated this very problem and chose to leave the indemnification provision within the statute, not fully understanding the implications this would practically have on utility companies’ behavior—disincentivizing them to maintain their overhead power lines by taking away common law protections.<sup>122</sup>

## 2. Legislative History of Chapter 752

The Texas Legislature put Chapter 752 of the Texas Health & Safety Code in place to restrict certain activities and work being performed near overhead power lines, purporting to protect public safety.<sup>123</sup> This chapter is modeled after the National Electrical Safety Code (NESC), which primarily

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116. See *Tex.-La. Power Co. v. Webster*, 59 S.W.2d 902, 904 (Tex. App.—Dallas 1933), *aff’d*, 91 S.W.2d 302 (Tex. 1936).

117. See TEX. HEALTH & SAFETY CODE § 752.002.

118. See *id.* § 752.008; *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.).

119. See *Presley*, 2010 WL 4264097, at \*6–7.

120. *Kimery v. Pub. Serv. Co. of Okla.*, 622 P.2d 1066, 1071 (Okla. 1980).

121. See *id.*; see also *Simon*, *supra* note 23 (illustrating an example of utilities failing to take care of and replace overhead power lines).

122. See Plaintiff’s Response to Defendant’s Motion for Summary Judgment at \*15, *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.); see also Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment, *Presley*, 2010 WL 4264097 (No. E1800784) (quoting testimony from a debate on the Senate Bill proposed amendments to Chapter 752, which was affirmatively passed but then dropped in the house).

123. See *Texas High Voltage Overhead Lines Act*, ENTERGY, <https://www.entergy.com/safety/tx-law/> (last visited Mar. 31, 2025).

focuses on the safe installation and maintenance of electric power and communication lines.<sup>124</sup> Published by industry leaders, the Code is adopted by every state except California.<sup>125</sup> So while this Comment focuses mainly on the provisions adopted in Texas, most states have substantially the same act codified and applied similarly in courts.<sup>126</sup> The Occupational Safety and Health Administration (OSHA) also follows a similar act that only applies to workers and is enforced federally.<sup>127</sup>

Chapter 752 was originally enacted in 1971 in the now-repealed Texas Revised Civil Statutes.<sup>128</sup> The statute aimed to prevent “[i]njuries and deaths [that] occur every year as a result of contact being made with lines conducting electricity . . . [which] could be avoided with adherence to adequate safety measures.”<sup>129</sup> The stated purpose in enacting this bill was to “[provide] for certain regulations to be observed and followed while operating construction machinery in the v[i]cinity . . . of high voltage lines.”<sup>130</sup> The statute was amended and incorporated into the Texas Health & Safety Code in 1989 to make the codified law more accessible to the public.<sup>131</sup> However, before its incorporation and codification as it is today, there was a debate in 1975 about whether to include the indemnity provision, which allows for utility companies to escape liability for their own negligence.<sup>132</sup> From 1971 to 1989, there were not any substantive changes, and the indemnification provision remained in full effect; however, after the recodification, courts began to construe the new statute under its unambiguous terms.<sup>133</sup>

Before the new provision was adopted, the courts were more likely to view negligence on behalf of utilities to be unacceptable and would deny motions for summary judgment in light of defendant utility companies failing to maintain proper safety standards.<sup>134</sup> Looking at the legislative history and

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124. *National Electrical Safety Code*, WIKIPEDIA, [https://en.wikipedia.org/wiki/National\\_Electrical\\_Safety\\_Code](https://en.wikipedia.org/wiki/National_Electrical_Safety_Code) (last visited Mar. 31, 2025).

125. *Id.*

126. *See* Cent. Me. Power Co. v. Devereux Marine, Inc., 68 A.3d 1262, 1272 (Me. 2013); Whitmire v. Ga. Power Co., 607 S.E.2d 213, 215–17 (Ga. Ct. App. 2004) (showcasing how other courts look to Texas to determine how the material provisions apply in motion for summary judgments).

127. Jennifer L. Howard, *Protect Workers, Others from Overhead Power Lines*, 17 ALA. EMP. L. LETTER 7 (Mar. 2007).

128. TEX. HEALTH & SAFETY CODE §§ 752.001–008.

129. LEGIS. INTENT RSCH., LEGISLATIVE HISTORY CHAPTER 752, TEXAS HEALTH AND SAFETY CODE (Nov. 24, 2009).

130. *Id.*

131. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–008 (explaining the general nature at the beginning of the statute as to why it has been recodified).

132. *See* Plaintiff’s Response to Defendant’s Motion for Summary Judgment at \*15, *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (No. E-180, 784).

133. *Presley*, 2010 WL 4264097, at \*6–7.

134. *Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 35 (Tex. App.—Beaumont 1978, writ ref’d n.r.e.) (enunciating that if the statute was construed in the way it has been routinely applied in courts circa 2000, then we are conferring an advantage to utility companies that they would not otherwise enjoy at common law); *see also* *Hous. Lighting & Power Co. v. Eller Outdoor Advert. Co. of Tex.*, 635 S.W.2d

how courts have applied the statute in light of the recodification, it shows how difficult it is to apply the indemnification provision, resulting in overbroad interpretations and inconsistent standards.<sup>135</sup>

*C. Inconsistent and Overbroad Interpretations That Show the Need for  
Statutory Clarification and Limiting Language in the Indemnification  
Provision*

There are different theories as to how Chapter 752 should be applied within a case, either as an affirmative defense based on circular indemnity or through contributory negligence, and courts are inconsistent to what qualifies as appropriate evidence to grant a motion for summary judgment.<sup>136</sup> There are different standards because the Texas Supreme Court has not addressed the issue as to how to apply Chapter 752 and the indemnity provision, as well as the elements necessary to establish as a matter of law an affirmative defense.<sup>137</sup>

To apply Chapter 752 as an affirmative defense, there must be a clear violation of the statute.<sup>138</sup> Courts disagree as to what is needed to be in clear violation of the statute, but one court laid out clear elements that clarify the basic framework.<sup>139</sup> In *Oncor*, the trial court enumerated four elements: (1) a voltage element; (2) a notice element; (3) a responsibility element; (4) a six-foot element that the defendant had to show.<sup>140</sup> The defendant had to essentially show that the plaintiff was electrocuted by a 600-volt power line, failed to give a forty-eight-hour notice, was responsible for the work, and their work brought them within six feet of the power line.<sup>141</sup> There, the court found a genuine issue of material fact as to who was responsible for the work.<sup>142</sup>

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133, 135 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (holding that the statute did not preclude suit); *Olson v. Cent. Power & Light Co.*, 803 S.W.2d 808, 811–12 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied) (allowing utility company to bring action against the employer—utility companies would settle with plaintiffs because there was a precedent established that would not look favorably on them escaping liability).

135. See *Ringo*, 569 S.W.2d at 35. *But see Presley*, 2010 WL 4264097, at \*6 (highlighting the stark contrast behind each court's analysis of and purpose behind the statute).

136. See *Presley*, 2010 WL 4264097, at \*3, \*5–6; *Chavez v. City of San Antonio ex rel. City Pub. Serv. Bd. of San Antonio*, 21 S.W.3d 435, 438–440 (Tex. App.—San Antonio 2000, pet. denied). Sometimes, employees can use the statute as a negligence per se argument if their employer failed to notify utility companies, so the statute can cut two ways as negligence per se and as an affirmative defense. *Oxy USA WTP LP v. Bringas*, 702 S.W.3d 647, 650 (Tex. App.—Houston [1st Dist.] July 9, 2024, no pet. h.).

137. *Oncor Elec. Delivery Co. v. Quintanilla*, No. 05-19-01331-CV, 2022 WL 9809712, at \*7 (Tex. App.—Dallas Oct. 17, 2022, pet. denied).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

Some courts find that someone, whether it be the employee or employer, was responsible for the work and grant the motion for summary judgment because the utility defendant is not the proper party to sue.<sup>143</sup> When courts find that the plaintiff is in violation of the statute and failed to notify a utility, they will employ the indemnification provision barring plaintiffs' claims completely.<sup>144</sup> Whereas, other courts choose to deny the motion for summary judgment when the utility company defendant is negligent, looking at the failure to comply with the statute as contributory negligence where the company can indemnify the person whose responsibility it is to notify, which is typically the employer in a worksite context.<sup>145</sup> When a motion for summary judgment is denied, Texas proportions liability between all the actors based on the extent they were at fault and caused the injury, taking into consideration the violation.<sup>146</sup> And while this is more attractive than a complete bar of recovery, the inconsistent application between courts highlights why a change needs to be made to the statute to encompass the public policy concerns courts have in letting a utility company skirt liability when it is negligent.<sup>147</sup>

The important “elements” to consider when understanding how to apply Chapter 752, and specifically if indemnification applies, is to focus on who is responsible for the work and what type of work or activity is being conducted near a high-voltage power line.<sup>148</sup> Both of these elements are interrelated and one can lend importance to another in determining if the statute applies—it is important to understand these two basic requirements because it emphasizes how courts are construing the statute beyond its limits.<sup>149</sup>

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143. See *Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*4-6 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.).

144. *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6-7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (using the circular indemnity doctrine).

145. See *Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 35 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.).

146. *City of Austin v. Lopez*, 632 S.W.3d 200, 208 (Tex. App.—Austin 2021, pet. denied).

147. See *Ringo*, 569 S.W.2d at 32 (“[F]or purposes of this Motion for Summary Judgment, it may be assumed that fact issues might have existed establishing negligence. This is of no significance since the statute in question and provisions as to responsibility would not come into play unless there were an issue of negligence on the part of the utility company.”). There are no attempts to even defend the companies' failure to maintain power lines, and to be fair, why would they if they can establish that a plaintiff is required to notify them before they accidentally come in contact with the power line, which is an oxymoron in and of itself. See *Trail v. Friedrich*, 77 S.W.3d 508, 513-14 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Chavez v. City of San Antonio ex rel. City Pub. Serv. Bd. of San Antonio*, 21 S.W.3d 435, 438-40 (Tex. App.—San Antonio 2000, pet. denied); see also *Wolfenberger v. Houston Lighting & Power Co.*, 73 S.W.3d 444, 447 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (explaining how failing to notify when a plaintiff is conducting an activity near a power line is sufficient as a matter of law).

148. See *Hullum v. Skyhook Corp.*, 753 F.2d 1334, 1337 (5th Cir. 1985) (per curiam).

149. See *Presley*, 2010 WL 4264097, at \*2-6; *Trail*, 77 S.W.3d at 513-14; *Chavez*, 21 S.W.3d at 438-40.

*I. Person Responsible for Work*

The person responsible for the work has the duty to notify a utility company before work begins and in determining if, as a matter of law, there has been a statutory violation, courts will look at the “person responsible” for the work being conducted.<sup>150</sup> This typically is the main focus of a court’s analysis when granting or denying motions for summary judgment because if a plaintiff has a legal duty to notify, they cannot recover from a utility company.<sup>151</sup> In determining if an employee is a person responsible, the court will look at the degree of control over the work at the time of the accident.<sup>152</sup> This is a fact-intensive inquiry and fact finders should look at both control and causation when determining who is responsible, considering evidence on who controls the worksite as well as details of the work.<sup>153</sup> The key concern is based on who is responsible for having workers near a power line.<sup>154</sup> These varying definitions are hard to apply and even harder to create consistent results.<sup>155</sup>

Some courts have also defined responsibility as a “desire” to carry out the work.<sup>156</sup> The Fifth Circuit laid out factors to determine the degree of control that include (1) knowledge of the specific proposed location of the work; (2) participation in deciding where the work needed to be performed; (3) presence at the worksite; (4) involvement after hiring a contractor to perform services; and (5) ownership interest in the property where the work was conducted.<sup>157</sup> The justification being if a person has knowledge about the specifics of the worksite and the jobs being performed, the more likely they would know if the lines need to be de-energized, relocated, etc.<sup>158</sup>

This type of analysis is seen in *Presley v. Gulf States Utilities Co.*—there, the court concluded as a matter of law that the plaintiff was a person responsible under the statute because he was working at his own direction.<sup>159</sup> The plaintiff worked as a driver hauling dirt out of construction sites, and while on the job, he realized there was a pin missing from the tailgate latch which affected the way they loaded the dump truck.<sup>160</sup> The plaintiff stopped at the auto parts store to get a replacement pin and drive to a second job, and

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150. *See Hullum*, 753 F.2d at 1337.

151. *See id.*

152. *See id.*

153. *Flores v. Oncor Elec. Delivery Co.*, 697 S.W.3d 465, 484–85 (Tex. App.—Dallas 2024, no pet.).

154. *City of Austin v. Lopez*, 632 S.W.3d 200, 228 (Tex. App.—Austin 2021, pet. denied).

155. *See Flores*, 697 S.W.3d at 485; *Hullum*, 753 F.2d at 1337; *Lopez*, 632 S.W.3d at 228 (declining to follow interpretations from other courts).

156. *See Hullum*, 753 F.2d at 1337.

157. *See id.*

158. *Chavez v. City of San Antonio ex rel. City Pub. Serv. Bd. of San Antonio*, 21 S.W.3d 435, 439 (Tex. App.—San Antonio 2000, pet. denied).

159. *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.).

160. *Id.* at \*1.

while stopped there, he raised the bed of his truck to get better access to the tailgate latch.<sup>161</sup> The bed of his truck made contact with a low-hanging power line, he was electrocuted, and he subsequently died.<sup>162</sup> The court reasoned that the statute was unambiguous, and the plain meaning must be adopted, concluding that the plaintiff was then the person responsible because he decided unilaterally to replace the pin and raise the bed of his truck.<sup>163</sup> By looking at who had control over the details of the work being performed or essentially who could have complied with the notification provision of the statute, a court can conclude as a matter of law the plaintiff had a duty to notify and bar recovery.<sup>164</sup> However, where courts often contemplate who the person responsible is, they rarely discuss the work the statute applies to.<sup>165</sup>

## 2. Defining “Work, Activity, or Function”

A very important consideration, that often is overlooked, is the type of “work,” “activity,” and “function” the statute should apply to.<sup>166</sup> Case law does not define activity, seldom discussing the conduct, and instead focuses the analysis on the person conducting the activity near a high-voltage power line, impliedly construing almost all activities to fall within the statute’s scope.<sup>167</sup>

The Austin Court of Appeals analyzed what type of activity the statute applies in *AEP Texas North Co. v. SPA Pipe*, where the plaintiff was traveling for work transporting two tanks of oil, and while driving on the highway, his truck caught a low-hanging overhead power line.<sup>168</sup> He climbed to the top of his truck and tried to remove the line but accidentally fell into the power line which caused significant injuries.<sup>169</sup> Refusing to define the difference between an ordinary activity and temporary activity within the meaning of the statute, the court concluded that the activity here clearly fell within the purview of the statute based on the policy that “[a] contrary construction would be inconsistent with the . . . interests of imposing liability on the person causing work to be performed near a power line and of minimizing the potentially devastating consequences of performing work near power lines.”<sup>170</sup> The court also noted that the statute applies to unexpected and

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161. *Id.*

162. *Id.*

163. *Id.* at \*6–7.

164. *Id.* (improperly assuming that Presley had authority to enter into an agreement to de-energize the lines).

165. See *AEP Tex. N. Co. v. SPA Pipe, Inc.*, No. 03-06-00122-CV, 2008 WL 5210919, at \*1 (Tex. App.—Austin Dec. 12, 2008, pet. dism’d) (mem. op.).

166. See TEX. HEALTH & SAFETY CODE § 752.003.

167. See *Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*4–6 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.); *Presley*, 2010 WL 4264097, at \*6–7.

168. *AEP Tex. N. Co.*, 2008 WL 5210919, at \*1.

169. *Id.*

170. *Id.* at \*6.

spontaneous work because to hold otherwise would allow employers to direct employees to work within six feet of a powerline and claim the activity was accidental or unexpected.<sup>171</sup>

Similarly, in *Entergy Texas v. Woollen*, two plaintiffs were conducting boat rescues after Hurricane Harvey flooded the area when their boat struck an energized power line.<sup>172</sup> The defendants argued that the rescuers should have notified the utility company to de-energize their power lines before conducting rescue operations.<sup>173</sup> The court agreed and held that the statute barred the plaintiffs' claims because they brought their boat within six feet of a power line.<sup>174</sup> The court reasoned that the statute is unambiguous, using multiple terms to encompass all types of activities, not just work, and therefore applies to employment and nonemployment activities.<sup>175</sup> The court also noted that even though the plaintiffs did not plan nor intend to perform an activity near a high-voltage line, it does not excuse the statutory obligation; they had the obligation because they chose to conduct rescue operations—again reciting public policy of minimizing the potential devastating effects by placing the burden on individuals.<sup>176</sup>

So, while the protections afforded by other areas of law and burdens placed on individuals to ensure a safe working environment are critical to maintain a functioning electrical grid, the Texas Health & Safety Code can be modified to ensure that individuals are being protected as well as the average consumer.<sup>177</sup>

### III. UTILITY COMPANIES ARE OVERPROTECTED AND NEED TO BE INCENTIVIZED TO MAINTAIN MINIMUM SAFETY REQUIREMENTS

The Texas Health & Safety Code has statutory provisions that impose a duty to notify a utility company if work is being performed near an overhead power line.<sup>178</sup> This duty has been extended beyond the bounds of the statute's context and applies to individuals who were not engaged in a work-related activity.<sup>179</sup> This duty is also absolute, in that if it is violated, plaintiffs will

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171. *Id.* at \*5. In part, the reasoning behind this ruling was that it was not the harmed plaintiff against utility, it was employer against utility. *Id.*

172. *See Entergy Tex., Inc. v. Woolen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*1 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.).

173. *See id.* at \*3.

174. *See id.* at \*5.

175. *See id.*

176. *See id.*

177. *See* TEX. HEALTH & SAFETY CODE §§ 752.003, .008.

178. *See id.* § 752.003.

179. *See Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*4–6 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.); *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.).

not be able to recover any portion of their damages even if a utility company failed to properly maintain its lines.<sup>180</sup>

These provisions are rarely discussed and invoked; however, when they are, they completely bar plaintiffs' claims and preclude recovery.<sup>181</sup> Based on the nature of electricity, contact with a high-voltage line often leaves people with severe injuries or families without loved ones with no method of compensation.<sup>182</sup> There are two problems, but both relate to how the legislature and the courts should protect against the danger of electricity, given its prevalence.<sup>183</sup> First, the legislature should protect individuals from being harmed.<sup>184</sup> Second, courts need to give those individuals an opportunity to recover when they are.<sup>185</sup> The broader purpose behind either a narrow statutory interpretation or an amendment to the statute is to make utility companies maintain their lines, knowing that the law will not excuse their duty to exercise reasonable care.<sup>186</sup>

The first solution aims to narrow the meaning of the statute by clarifying what contexts the notification provision applies to.<sup>187</sup> The alternative solution is to amend the indemnification provision to essentially repeal full indemnity and allow for contributory negligence when a utility company fails to properly maintain its power lines.<sup>188</sup> First, courts can follow basic statutory construction principles to apply the statute to worksite conduct, looking at the legislative intent behind Chapter 752 to guide their reasoning.<sup>189</sup> Next, courts can refine their interpretation and limit the statute by looking at the type of person as well as the situations to which the statute should apply.<sup>190</sup> Finally, if courts decline to narrow their interpretation due to a lack of limiting language within the statute, the legislature can amend Chapter 752 to allow for contributory negligence when a utility company is also at fault.<sup>191</sup>

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180. See *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6; *Presley*, 2010 WL 4264097, at \*6–7.

181. See *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6; *Presley*, 2010 WL 4264097, at \*6–7.

182. See *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6; *Presley*, 2010 WL 4264097, at \*6–7.

183. *About ERCOT*, *supra* note 55.

184. See *infra* Section III.C (explaining how the statute can be amended).

185. See *infra* Section III.B (explaining how the courts can narrow their interpretation).

186. See *Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 35 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.).

187. See *infra* Section III.B (explaining how the court can narrow its interpretation of § 752.003).

188. See *infra* Section III.C (explaining how § 752.008 can be amended).

189. See *infra* Section III.A (showing how courts have the authority to narrow the scope of their analysis).

190. See *generally* *Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*4–6 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.) (highlighting how inequitable the statute is when applied out of context); *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (same).

191. See *infra* Sections III.C–D (explaining how to change the statute).

*A. Basic Statutory Construction Principles and the Legislative Intent Behind Chapter 752 Show the Ability for Courts to Interpret the Statute Narrowly*

Courts need to focus on foreseeable, work-like conduct to give full effect to the entire statute and carry out the legislative intent behind enacting Chapter 752.<sup>192</sup> Courts have ignored statutory construction arguments that would allow them to narrow the scope of conduct and not apply this statute to individuals engaged in ordinary day-to-day conduct.<sup>193</sup> Courts have also not taken into consideration the legislative purpose and actual discussions about this act during the amendment process when thinking about the circumstances to which it applies.<sup>194</sup> And while this Comment does not focus on statutory construction arguments to their full extent, it merely points out general policies that a court can use to deviate from the plain meaning of the text that include reading the statute in context as a whole, taking into consideration the criminal penalties imposed, and remembering that when statutes take away rights afforded at common law it should be read narrowly.<sup>195</sup>

*1. Plain Meaning Arguments Do Not Apply Reading the Whole Statute in Context*

Taking only the plain meaning of Chapter 752 and not the entire context of the statute would not give import to all the words used, rendering absurd results.<sup>196</sup> When construing a statute, the primary objective is to ascertain legislative intent by first looking at the plain meaning of the words and their common usage.<sup>197</sup> To be sure, when a statute is unambiguous, plain meaning controls and courts will not look to rules of construction or extrinsic aids.<sup>198</sup> However, the legislature has directed for statutes to be “read in . . . context” in conjunction with the common usage rule looking to the statute as a whole, not based on isolated provisions.<sup>199</sup>

Here, the statute says “work, activity, or function,” which seems to apply to any conduct that brings an individual within six feet of a

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192. See *AEP Tex. N. Co. v. SPA Pipe, Inc.*, No. 03-06-00122-CV, 2008 WL 5210919, at \*6 (Tex. App.—Austin Dec. 12, 2008, pet. dism'd) (mem. op.).

193. See *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6.

194. See generally LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129 (discussing senate and house debate about whether to amend the full indemnity provision).

195. See generally *Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 34 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.) (explaining some of these basic principles).

196. See *id.* at 35.

197. *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747 (Tex. 2012).

198. *Id.*

199. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

high-voltage power line.<sup>200</sup> However, by only looking at the plain meaning, courts ignore other language within the statute.<sup>201</sup> Sub-section (a) specifies that “[a] person, firm, corporation, or association responsible for temporary work or a temporary activity or function closer to a high voltage overhead line than the distances prescribed by this chapter must notify the operator of the line at least 48 hours *before the work begins*.”<sup>202</sup> To construe “work, activity, or function,” to simply any activity completely ignores the emphasis placed on work.<sup>203</sup> By allowing virtually any conduct, it would write the “work” requirement out of the statute.<sup>204</sup> The other statutory provisions in Chapter 752 also stress operations and machinery that are prohibited near a line unless a person notifies, which necessarily implies that the statute pertains to work-like conduct.<sup>205</sup>

Furthermore, allowing any conduct, especially spontaneous activity that could not be anticipated, would not give any import to the notification requirement—ignoring the context of the statute.<sup>206</sup> It is illogical to place burdens on individuals who do not plan to work near a line and essentially require people to notify an operator every time they are near a high-voltage line.<sup>207</sup> By only reading “work, activity, and function” by their plain meaning, the context of the entire statute is ignored.<sup>208</sup>

Taking the entire act in context also imposes criminal liability, which should urge courts to construe the conduct very narrowly to give individuals fair and adequate notice of what conduct is criminal.<sup>209</sup> The act is penal in nature and charges a fine from \$100 to \$1,000 and up to one year’s imprisonment.<sup>210</sup> The Fifth Circuit said that this statute was open to two different constructions—one where the statute imposes criminal liability on a person regardless if the lines are in a lawful place, and another where, as a

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200. See TEX. HEALTH & SAFETY CODE § 752.003(b).

201. See generally *Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*4–6 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.) (showing an example of how courts only look at the plain meaning and construe the statute broadly).

202. TEX. HEALTH & SAFETY CODE § 752.003 (emphasis added).

203. See *id.*

204. See *id.* “When interpreting statutes, courts presume the [l]egislature’s intent is reflected in the words of the statute and give those words their fair meaning. Courts are to analyze statutes ‘as a cohesive, contextual whole, accepting that lawmaker-authors chose their words carefully, both in what they included and in what they excluded.’ Further, courts presume the [l]egislature intended for all the words in a statute to have meaning and for none of them to be useless.” *In re Interest of C.J.N.-S.*, 540 S.W.3d 589, 591 (Tex. 2018) (citations omitted).

205. See TEX. HEALTH & SAFETY CODE §§ 752.004–.005.

206. See *id.* §§ 752.001–.008.

207. See *id.*

208. See *id.*

209. See generally *Olson v. Cent. Power & Light Co.*, 813 S.W.2d 803, 808 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied) (explaining that the statute is not unconstitutionally vague because it can be understood by a person with common intelligence as importing a duty on employers to comply with the statute). This court did not contemplate the entirety of activities it could apply, and it confined the statute to a work context. *Id.*

210. See TEX. HEALTH & SAFETY CODE § 752.007.

prerequisite for criminal or civil liability, the lines must be at minimum height requirements.<sup>211</sup>

The court held that lines must conform to other statutory requirements before any liability can be found.<sup>212</sup> It reasoned that “[t]he evident purpose of the minimum height requirement is protection of the public, and it would defeat this purpose if a utility could disregard its statutory duty without risk of liability and rely solely upon public caution.”<sup>213</sup> The court continued that, where this statute imposes liability to protect worker safety, it was not “convinced that the [l]egislature intended that a person who is injured by contacting unlawfully low lines should face the additional shock of criminal prosecution for an act which would not have occurred but for the illegal suspension of the wires.”<sup>214</sup>

To this point, construing this statute to ordinary conduct would not only take it out of context—leading to absurd results—but in doing so would take away protections that were afforded to electrocution victims at common law.<sup>215</sup> Where a statute deprives a person of a common law right, it must be strictly construed and applied to cases “clearly within its purview.”<sup>216</sup> Any conduct that falls outside of a work-like context, leaning more toward ordinary day-to-day conduct, does not sit neatly in the confines of the statute, and therefore, the statute should not be applied in those cases.<sup>217</sup>

The Texas Supreme Court also commented that when the legislature takes away or alters common law rules, it must be done explicitly and must be clearly intended.<sup>218</sup> Here, the statute takes away an individual’s right to sue a utility company for negligent acts, and it is unclear if the conduct under the statute applies to any conduct or simply to work-like conduct contemplated near a line.<sup>219</sup> And while the statute does not contain limiting language confining the scope of “work, activity, or function,” the legislature clearly intended to apply the statute to individuals who intend to perform work near a power line and to hold a utility liable for its own negligent conduct.<sup>220</sup>

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211. Grayson-Collin Elec. Coop. v. Mercer, No. 19, 246, 1977 Tex. App. LEXIS 3412, at \*8 (5th Cir. Sept. 23, 1977).

212. *Id.* at \*9.

213. *Id.* at \*8.

214. *Id.* at \*9.

215. Ringo v. Gulf States Utils. Co., 569 S.W.2d 31, 34 (Tex. App.—Beaumont 1978, writ ref’d n.r.e.).

216. *Id.*

217. *See id.*

218. *In re Oncor Elec. Delivery Co.*, 630 S.W.3d 40, 52 (Tex. 2021).

219. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

220. *See id.*

## 2. *Legislative Intent Is Not Fully Considered in the Statutory Analysis*

Limiting the statute would not frustrate legislative intent because of the act's stated purpose and the discussions the house and senate engaged in when seeking to amend the statute.<sup>221</sup> And while attempting to ascertain legislative intent, it is irrelevant to look at discussions for bills that did not pass; it is interesting here to see that the reason for leaving the indemnification provision in the statute is because companies said they could still be held liable for their own negligence.<sup>222</sup> Here, it shows that the legislature did not intend to facilitate utility company negligence when it has failed to maintain its lines and someone gets injured.<sup>223</sup> The statute was mainly contemplated in regard to construction sites, focusing on an employer-employee relationship—not individuals performing regular day-to-day activities.<sup>224</sup> The statute is not meant to be a get-out-of-jail-free card for utility companies, which can be seen in the debate prior to the codification about whether to take out the indemnification provision.<sup>225</sup>

The legislature attempted to amend portions of Chapter 752 in 1975 and 1977, which ultimately failed.<sup>226</sup> The proposed bill aimed to strike portions of authorized persons, add requirements for extra safety equipment to the machinery, and repeal the indemnity provision in the statute.<sup>227</sup> The High Voltage Act was originally put in place after three different crane operators hit a power line and either died or suffered serious injuries.<sup>228</sup> And where this statute was originally enacted to place a burden on the construction industry to prevent accidents,<sup>229</sup> it has been misconstrued into something “devious [and] diabolic[al]” allowing utility companies to get away with their own negligence.<sup>230</sup>

During the senate debate in 1975, a few senators and attorneys from the Texas Trial Lawyers Association proposed adding a limitation to the indemnification provision, “[p]roviding however that no violation of this article shall constitute a defense or a bar in whole or in part to recovery of damages from personal injuries resulting from such violation.”<sup>231</sup> Representatives from Houston Light and Power Company argued that this

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221. *See generally* LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129 (discussing whether to amend the indemnification provision essentially repealing full indemnity).

222. *See id.* at 40.

223. *See* Plaintiff's Response to Defendant's Motion for Summary Judgment at \*15, *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (No. E-180,784).

224. *See id.*

225. LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129.

226. *See id.*

227. *See id.* at 38–40.

228. *See id.* at 13.

229. *See id.* at 7–8.

230. *See id.* at 37 (testifying on the house floor advocating for the amendment).

231. *See id.* at 22–23.

language would weaken the statute and allow any wrongdoer who failed to notify to be excused from the violation.<sup>232</sup> They also contended that any limiting language would take away a utility's right of indemnity against the employer.<sup>233</sup> However, the law would still operate to protect utilities, and theories of common law negligence with right of contribution would still apply by taking into account the statutory negligence.<sup>234</sup> The statute simply would not provide blanket immunity to a utility company who was in the wrong.<sup>235</sup> After hearing the testimony, the senate then approved the proposed amendments, and the bill was sent to the house two years later in 1977.<sup>236</sup>

In the house debate, there was still deliberation on how the statute was applied in case law, with Houston Light and Power Company continuing to assert that with or without the proposed legislation it would be held liable for lines that were not in the proper place.<sup>237</sup> One representative testified that "this law is not designed to protect the high line companies [from negligence] . . . [i]t only applies when [lines are in their] proper place."<sup>238</sup> In response to this testimony, Representative Grant pointed out that "[t]here's no place in [this] bill that . . . says . . . if they're negligent that this [statute] is not applicable . . . [i]t's applicable regardless . . . ."<sup>239</sup>

And while the drafters of the original legislation most likely intended for the utility company to have a right of indemnity against the employer when their employee is injured and sues the utility, the lack of limiting language within the statute necessarily precludes this application.<sup>240</sup> Courts will not even touch the issue of utility negligence if a person is within six feet of a line and had a duty to notify—they grant summary judgment as a matter of law.<sup>241</sup>

After the testimony, the bill was sent to a subcommittee and the house took no further actions.<sup>242</sup> Representative Grant refiled his bill along with Senator Clower's companion bill in 1977, and the house again took no further action.<sup>243</sup> The original statute was then recodified in 1989 with no substantive

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232. *See id.* at 22–24.

233. *See id.*

234. *See id.* at 30.

235. *See id.*

236. *See id.* at 36.

237. *See id.* at 44.

238. *See id.* at 48.

239. *See id.* at 53–54.

240. *See id.* at 26.

241. *See Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*1 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.); *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.).

242. LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129, at 55.

243. *See id.*

changes.<sup>244</sup> The proposed amendment was essentially swept under the rug and all the concerns brought up in the discussion are still at issue today.<sup>245</sup>

So while the intent behind the statute was to provide a right to indemnity only in a construction work environment, the legislature allowed a loophole for utilities to fail to maintain their lines while escaping liability based on incorrect and false testimony.<sup>246</sup> Furthermore, even in light of the contradictory testimony, the bill was passed in the senate, indicating that the concerns about this statute were persuasive.<sup>247</sup> Based on general principles of statutory construction and the legislative intent behind Chapter 752, courts have the power to narrow the scope of their analysis, and they should focus on the person who can actually enter into an agreement to de-energize the lines and whether their action is foreseeable work-like conduct.<sup>248</sup>

*B. The Texas Health & Safety Code Is Overbroadly Interpreted to Apply to Average Individuals*

The notification provision needs to be further clarified to what type of person and what type of work or activity to which this statute applies.<sup>249</sup> The statute should first focus on “persons” not in their individual capacity but in an employer-employee context based on who would potentially have authority to de-energize power lines.<sup>250</sup> Then, courts need to limit the notification provision to only apply to activities that are foreseeable, work site conduct.<sup>251</sup> This reading of the statute fully gives effect to the language from the entire statute as a whole and is supported by the legislative purpose and intent behind enacting Chapter 752.<sup>252</sup> The following subsections address this legislative history in depth.<sup>253</sup>

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244. *See id.*

245. *See id.*

246. *See id.* at 48.

247. *See id.* at 30.

248. *See generally* Entergy Tex., Inc. v. Woollen, No. 09-20-00297-CV, 2021 WL 5218550, at \*4–6 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.) (using this case as a demonstration to show the inequities of failing to strictly construe the statute); Presley v. Gulf States Utils. Co., No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.) (same).

249. *See* AEP Tex. N. Co. v. SPA Pipe, Inc., No. 03-06-00122-CV, 2008 WL 5210919, at \*6 (Tex. App.—Austin Dec. 12, 2008, pet. dism'd) (mem. op.); *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6.

250. *See* AEP Tex. N. Co., 2008 WL 5210919, at \*6; *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6.

251. *See* AEP Tex. N. Co., 2008 WL 5210919, at \*6; *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6.

252. *See supra* Section III.A.2 (explaining the legislative history behind Chapter 752).

253. *See supra* Section III.A.1–2 (explaining the legislative history behind Chapter 752).

*1. Properly Defining “Person Responsible for Work” as the Person Who Has Authority to Enter into a Contract*

The person-responsible inquiry heavily turns on the specific facts of a case based on the various definitions each court applies, creating inconsistencies and construing the statute past its natural bounds.<sup>254</sup> To alleviate these issues, courts should add to their analysis a more practical consideration focusing on worker safety.<sup>255</sup> The Fifth Circuit laid out numerous factors explaining that “[p]lacing liability on parties who do not exercise at least some control over the work site . . . lessens the deterrent impact of the statute on those parties who do exercise control over the work site . . . .”<sup>256</sup>

To be sure, the degree of control and knowledge of the worksite is an important consideration; however, in practical application, courts fail to take into account the purpose for defining who is responsible.<sup>257</sup> The focus should be on who has the *authority* to enter into safety agreements with the utility to de-energize, relocate, and take the preliminary safety measures the statute requires.<sup>258</sup> Focusing on who would practically have authority to act on behalf of another and pay costs associated will also help refine the situations in which this statute applies.<sup>259</sup>

For example, in *Presley v. Gulf States Utilities Co.*, the plaintiff lifted the bed of his truck, coming into contact with a low hanging line at an auto parts store.<sup>260</sup> There, the court held that the plaintiff was the person responsible for the work, and he violated the statute, which meant he could not recover any damages even though the utility company had failed to properly maintain its power lines.<sup>261</sup> The court reasoned that “[o]nly Presley controlled the details of his activities at the time of his accident, and only Presley could have complied with the [a]ct by not performing the activity which resulted in his electrocution or by performing it a sufficient distance from the power line.”<sup>262</sup> This illustrates the vague and problematic nature of only asking if someone had a degree of control over the “work”

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254. See *AEP Tex. N. Co.*, 2008 WL 5210919, at \*5–6; *Entergy Tex., Inc.*, 2021 WL 5218550, at \*4–6; *Presley v. Gulf States Utils. Co.*, No. 09-10-00039-CV, 2010 WL 4264097, at \*6–7 (Tex. App.—Beaumont Oct. 28, 2010, pet. denied) (mem. op.).

255. *Hullum v. Skyhook Corp.*, 753 F.2d 1334, 1337 (5th Cir. 1985).

256. *Id.*

257. See *id.*

258. See *Presley*, 2010 WL 4264097, at \*7.

259. See *id.* at \*5.

260. *Id.* at \*1.

261. *Id.*

262. *Id.* at \*7.

they performed because it can be found from extremely slight circumstances.<sup>263</sup>

Instead of asking whether there is a degree of control, it seems more reasonable to ask who had authority to act to de-energize the power lines in conjunction with other factors such as knowledge of the worksite.<sup>264</sup> Under this inquiry, it makes clear that the court improperly focused on whether Presley's supervisor had control over his work.<sup>265</sup> Instead, an authority factor would have them consider how logical it is to confer a duty on an individual to call a utility company to de-energize a power line so a person could continue their ordinary activity.<sup>266</sup>

It is easy for a court to assert that the plaintiff could have simply lifted his bed somewhere else.<sup>267</sup> This callous remark also points to another consideration—that it was obviously an accident—the plaintiff could not guard against the danger because the contact was not foreseeable.<sup>268</sup>

## 2. Defining “Work, Activity, or Function” to Apply Generally to Foreseeable Conduct

The court has not defined or narrowed the scope of the type of activity the statute applies to and, therefore, allows any conduct to satisfy temporary work, activity or function.<sup>269</sup> To be sure, this language is very broad, lacks statutory definitions, and, according to many appellate courts, lacks ambiguity.<sup>270</sup> However, the activities need to be limited to ones that are foreseeable, where a person intentionally comes into contact with a line, to truly effectuate the public policy concerns driving the purpose of the statute.<sup>271</sup> The purpose is to “ensure the safety of persons engaged in activities near high voltage lines,” and have them take action to guard against the danger.<sup>272</sup> To effectively guard against danger, the statute requires a utility to be notified before any activities are performed near a power line; however, the person has to necessarily know beforehand that an activity could bring

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263. *See id.* The plaintiff was not working; he was lifting the bed of his truck, and it happened to come in to contact with a wire. *Id.* at \*1. If the statute applies to this situation, then what is the limit? *See id.*

264. *See Presley*, 2010 WL 4264097, at \*5; *Hullum v. Skyhook Corp.*, 753 F.2d 1334, 1337 (5th Cir. 1985).

265. *See Presley*, 2010 WL 4264097, at \*5.

266. *See id.*

267. *See id.*

268. *See id.*

269. *See AEP Tex. N. Co. v. SPA Pipe, Inc.*, No. 03-06-00122-CV, 2008 WL 5210919, at \*6 (Tex. App.—Austin Dec. 12, 2008, pet. dism'd) (mem. op.).

270. *See id.*

271. *See id.*

272. *Flores v. Oncor Elec. Delivery Co.*, 697 S.W.3d 465, 481 (Tex. App.—Dallas 2024, no pet. h.).

them within six feet of a power line to give notice.<sup>273</sup> To hold otherwise would unnecessarily burden an individual.<sup>274</sup>

This is seen in *AEP Texas North Co. v. SPA Pipe*, where the plaintiff was driving on a highway, and his truck caught a low hanging power line.<sup>275</sup> The driver had to climb on top of the truck to untangle the wire and was electrocuted.<sup>276</sup> The court held that this was “temporary work” within the meaning of the statute because it applies to work that is spontaneous and unexpected to fully carry out public policy.<sup>277</sup> The court then gave an example that “if an employer was unaware of the existence of an overhead line when it ordered an employee to engage in construction work but discovered the existence of the power line during the work, the employer could order the employee to resume the work without any safety measures being taken.”<sup>278</sup> This hypothetical hyperbolizes and improperly compares the two situations.<sup>279</sup> One is an emergency situation where the employee could not possibly anticipate coming into contact with a power line, nor did they intentionally do so, and the other is complete and knowing disregard for worker safety.<sup>280</sup> And while the driver was likely contributorily negligent, that fact should go to a jury to determine if the issue completely bars recovery.<sup>281</sup>

This application is also seen in *Entergy Texas v. Woollen*, where plaintiffs rescued people in their boat during Hurricane Harvey and maneuvered under a low-hanging power line that was supposed to be de-energized.<sup>282</sup> The two plaintiffs accidentally contacted the line sustaining significant injuries as a result.<sup>283</sup> The court held that they were conducting an activity, and it did not matter that the defendants had notified the public that power was shut off and lines were de-energized.<sup>284</sup> The statute did not include any limiting language to prevent indemnity when a utility is at fault, and therefore plaintiffs were left without a remedy.<sup>285</sup> The court again stated that any other interpretation would be inconsistent with public policy interests, but in arbitrarily concluding so, it ignored the entire purpose of the statute—to lessen the burden for utilities who oversee thousands of miles of

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273. See *AEP Tex. N. Co.*, 2008 WL 5210919, at \*6.

274. See *id.*

275. See *id.* at \*1.

276. See *id.*

277. See *id.* at \*6.

278. *Id.*

279. See *id.*

280. See *id.*

281. See *id.*

282. See *Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550, at \*1 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.).

283. See *id.* at \*5.

284. See *id.*

285. See *id.*

powerlines.<sup>286</sup> Here, the defendants already knew the potential issues because of the flood.<sup>287</sup> The plaintiffs were also in an emergency where contact with a power line was not the first concern—it was saving people’s lives—and it should not be at the expense of their own.<sup>288</sup> When a utility company fails to perform its duty, it should not be able to indemnify its actions.<sup>289</sup>

The statute is supposed to be applied to a worksite where work generally is anticipated, not all spontaneous activity that could bring a person within six feet of a power line, especially one that is low-hanging or supposed to be de-energized.<sup>290</sup> This interpretation allows utility companies to indemnify their own negligence, which is exactly what happened in each of these cases.<sup>291</sup> It is also illogical to expect a plaintiff to form an agreement to de-energize the power line and pay for the costs associated with it, when the only reason they came in contact with the wire is because a utility company was not fulfilling its duty of care.<sup>292</sup> And while plaintiffs cannot shield their eyes to the danger, foreseeability is necessary, taking the whole statute in context, to give purpose to the notification requirement.<sup>293</sup> Furthermore, any fact issue about whether plaintiffs could have complied and were aware of danger should go to the fact-finder to determine its weight.<sup>294</sup>

Undercutting theories of foreseeability is the type of conduct each of the plaintiffs were engaged in—ordinary day-to-day activities where being near a power line was not contemplated.<sup>295</sup> Both cases argue the absurdity of holding an individual to this standard and requiring compliance for any activity that could bring an individual within six feet of a high voltage line.<sup>296</sup> Attempting to apply this statute to ordinary activity would lead to truly absurd results because there would be no practical limitations.<sup>297</sup> If courts continue

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286. *See id.*

287. *See id.* at \*3.

288. *See id.* at \*1.

289. *See id.*

290. *See id.* at \*6.

291. *See id.*

292. *See id.*

293. *See id.*

294. *See id.*

295. *See* AEP Tex. N. Co. v. SPA Pipe, Inc., No. 03-06-00122-CV, 2008 WL 5210919, at \*4 (Tex. App.—Austin Dec. 12, 2008, pet. dismiss’d) (mem. op.) (“Accordingly, SPA Pipe insists that it *was not engaged in a type of work* that would have allowed for prior notice to be given to AEP or for an opportunity to ask AEP to make appropriate safety arrangements, such as de-energizing or raising the overhead lines.”) (emphasis added).

296. *Id.* at \*5 (“Finally, SPA Pipe argues that applying [C]hapter 752 to the circumstances in this case will lead to the absurd result that individuals who plan on traveling on a highway but do not plan on engaging in temporary work near a power line will nevertheless be required, prior to traveling, to inform utilities of their travel plans 48 hours in advance if the top of the individuals’ vehicles or loads that they will be carrying will come within six feet of overhead lines and that the failure to notify will constitute a [C]hapter 752 violation and will subject the individuals to criminal sanctions even if they were able to safely navigate under the lines.”).

297. *See id.*

to ignore the intent behind the statute, the indemnification provision can be amended to account for both policy concerns.<sup>298</sup>

*C. Alternative Solution Is to Modify the Statute to Allow for Contributory Negligence*

An alternative solution to protect innocent individuals is to amend Chapter 752 by placing limiting language in the indemnification provision that will allow for contributory negligence against the line owner or operator or other parties involved.<sup>299</sup> In theory, plaintiffs will bring a claim for negligence and the defendant will assert the statutory defense and has the burden of proof to show that the plaintiff was injured due to their failure to notify.<sup>300</sup> Essentially, failing to exercise the degree of care commensurate with the risk will be taken into consideration when plaintiffs are in violation of the statute.<sup>301</sup>

The purpose behind the statute is to encourage efficiency, promote worksite safety, and still provide incentives to utility companies to maintain a high degree of care.<sup>302</sup> To help effectuate these purposes, the model legislation is designed to provide procedural clarity on how the statute is invoked, allowing the trier of fact discretion to apportion liability due to each party's own negligence, whether it be the utility, employer, or employee.<sup>303</sup>

*1. Looking at Other States' High-Voltage Statutes to Reform Chapter 752*

A few minority states have similar high voltage safety requirements but include limiting and qualifying language that operate differently than Chapter 752.<sup>304</sup> Mississippi, Missouri, and Alaska's high voltage statutes allocate fault between the parties instead of barring plaintiffs' claims entirely.<sup>305</sup>

Both Mississippi and Missouri's language, while utilizing a contributory negligence theory of recovery, add limitations to the statute that make it a harder defense for utilities to assert.<sup>306</sup> Mississippi's relevant language provides procedural clarity but unnecessarily limits the scope of the

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298. *See generally id.* (showing how courts are unlikely to shift their position because they do not want to overstep the separation of powers).

299. *What Is an Indemnification Clause?*, ZUVA (May 9, 2024), <https://zuva.ai/contract-central/indemnification-clause/#:~:text=It%20may%20also%20disqualify%20certain,losses%20incurred%20in%20bad%20faith.>

300. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

301. *Id.*

302. *Id.*

303. *Id.*

304. *See* MISS. CODE ANN. § 45-15-13 (1972); MO. REV. STAT. § 319.085 (1991); ALASKA STAT. § 18.60.685 (2023).

305. *See* MISS. CODE ANN. § 45-15-13 (1972); MO. REV. STAT. § 319.085 (1991); ALASKA STAT. § 18.60.685 (2023).

306. *See* MISS. CODE ANN. § 45-15-13 (1972); MO. REV. STAT. § 319.085 (1991).

defense against would-be violators.<sup>307</sup> The indemnification provision provides “remedies” or a right of contribution for a utility company against anyone that violates the statute and “whose negligence is a proximate contributing cause of such injury or death.”<sup>308</sup> The indemnification provision continues, “[T]he electric utility may not recover any portion of such sum which is attributable to its own negligence . . . and violations of this chapter shall not be considered negligence per se but may be considered as evidence of negligence.”<sup>309</sup> The statute specifically precludes violations from being considered as negligence per se which weakens the statute when there is a clear violation.<sup>310</sup> The statute emphasizes the high degree of care needed when constructing, maintaining, and supplying electricity, explaining that this statute in no way limits the liability if that duty is breached.<sup>311</sup> And while this provision is very helpful in understanding liability, it heavily favors plaintiffs who fail to notify.<sup>312</sup>

Similarly, Missouri’s statute provides utility companies a right of contribution against violators and creates a rebuttable presumption of negligence.<sup>313</sup> And while the statute does not have complete indemnity allowing plaintiffs to recover when a utility company has failed to maintain its lines, the company only has the presumption of negligence when the sole cause of contact was due to a failure to notify.<sup>314</sup> Where the language of Texas’s Chapter 752 is a complete bar of recovery, Mississippi and Missouri’s statutes dilute the main purpose behind enacting the statute, which is to place burdens on the construction industry to promote worker safety.<sup>315</sup>

Alaska’s statutory language is similar to Texas’s Chapter 752; however, it has been interpreted differently within case law.<sup>316</sup> It includes “for all liability incurred by the owner or operator *as a result of the unlawful activities.*”<sup>317</sup> The Supreme Court of Alaska interpreted this provision and italicized language to mean that the violator will be held liable only to the extent their own violations caused the accident—i.e., failing to notify.<sup>318</sup> Therefore, this allows plaintiffs to recover from a utility company who also acted negligently.<sup>319</sup> The court called this a comparative causation that does

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307. See MISS. CODE ANN. § 45-15-13 (1972).

308. *Id.* § 45-15-13(2).

309. *Id.*

310. *See id.*

311. *Id.*

312. *Id.*

313. See MO. REV. STAT. § 319.085 (1991).

314. *Id.*

315. *See id.*; MISS. CODE ANN. § 45-15-13 (1972).

316. ALASKA STAT. § 18.60.685 (2023).

317. *Id.* § 18.60.685(b) (2023) (italicized language being the only difference between Texas’s high voltage statute and Alaska’s) (emphasis added).

318. *Atwater v. Matanuska Elec. Ass’n*, 727 P.2d 774, 777 (Alaska 1986).

319. *Id.*

not allow utility companies to skirt their own unlawful activities.<sup>320</sup> The court also emphasized the policy behind this approach, saying:

This policy would not be served by interpreting the statute as requiring indemnification for the utility's own negligence . . . if the utility shirks its duty of due care there may be tragic consequences. Placing a strong incentive on the utility, as well as on would-be violators, to exercise due care will maximize public safety. This incentive is best provided by an interpretation of the statute which requires indemnification of the utility only for that portion of the total liability caused by the violator's unlawful activities and not for that portion caused by the utility's negligence.<sup>321</sup>

Alaska's statute essentially provides the interpretation courts need to have to arrive at the just result for all parties involved in an action of this nature.<sup>322</sup> However, the proposed legislation will also incorporate the procedural clarity both Mississippi and Missouri use in their statutes.<sup>323</sup> Using all of these statutes in conjunction with each other will support the specific goals the statute is designed to protect.<sup>324</sup> The statute's purpose is to create an efficient way to protect unknowing utility companies and place the burden on employers to guard against danger for their employees.<sup>325</sup>

## 2. Texas's Proportional Responsibility Approach to Contributory Negligence

Texas does not use traditional contributory negligence; however, Texas uses proportional liability that still retains the same concept.<sup>326</sup> Contributory negligence acts as an affirmative defense, but proportional responsibility simply acts as a defensive issue where the defendant bears the burden of proof.<sup>327</sup> Defendants must show that the plaintiff was negligent and that negligence caused the injury that rises above mere conjecture or possibility.<sup>328</sup> And where violations of the statute occur and proximately cause the injury, the act will be contributory negligence as a matter of law.<sup>329</sup>

To illustrate how proportional responsibility operates, in *Andrews v. DT Construction*, the plaintiff fell off a ladder while at work and sued the general

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320. *Id.*

321. *Id.* at 777–78.

322. *See id.*

323. *See* MISS. CODE ANN. § 45-15-13 (1972); MO. REV. STAT. § 319.085 (1991).

324. *See* MISS. CODE ANN. § 45-15-13; MO. REV. STAT. § 319.085; ALASKA STAT. § 18.60.685 (2023).

325. *See* *Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 35 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.) (explaining the purpose behind the statute before it was recodified as Chapter 752).

326. Russell J. Davis, *Present Role of Contributory Negligence*, in 53 TEX. JUR. § 68 (3d ed. 2024).

327. *Id.*

328. *Id.*

329. *Id.*

contractor instead of the subcontractor.<sup>330</sup> The court held that the general contractor did not have a duty to maintain a safe working environment because they had no control over the worksite.<sup>331</sup> The court affirmed the trial court's judgment, finding the plaintiff 75% responsible and the defendant 25% responsible.<sup>332</sup> Because the plaintiff was more than 50% responsible, he recovered nothing.<sup>333</sup> The court reasoned that the general contractor's involvement was minimal and noted that under proportional responsibility the fault would have to be apportioned among all responsible parties, including the subcontractor and Andrews himself.<sup>334</sup> Using these theories, the model statute will work the same way with the proposed amendment.<sup>335</sup>

Chapter 33 of the Texas Civil Practice & Remedies Code (CPRC) explains how a plaintiff or other parties recover damages according to their own respective fault, the types of actions, how to determine the percentage, and third-party liability.<sup>336</sup> This framework is integrated in many Texas statutes, and accordingly, the model statute will incorporate language from the CPRC to further clarify the procedure and provide limitations on indemnity.<sup>337</sup>

### 3. Proposed Amendment to the Chapter 752 Provision

Taking from other states' high voltage acts and incorporating proportional responsibility, the proposed amendment to § 752.008 adds part (b).<sup>338</sup> The new statute will read:

(a) If a violation of this chapter results in physical or electrical contact with a high voltage overhead line, the person, firm, corporation, or association that committed the violation is liable to the owner or operator of the line for all damages to the facilities and for all liability that the owner or operator incurs as a result of the contact. (b) A violator is liable only to the extent the violation caused the injury by which the court reduces the judgment based on the percentage of responsibility determined by the trier of fact under § 33.003, Texas Civil Practice and Remedies Code.<sup>339</sup>

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330. 205 S.W.3d 4, 6 (Tex. App.—Eastland 2006, no pet.).

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *See id.*

336. TEX. CIV. PRAC. & REM. CODE § 33.003.

337. *See id.*

338. *See* TEX. HEALTH & SAFETY CODE § 752.008.

339. *See id.*

#### 4. *The Proposed Amendment Model Application*

Applying the proposed amendment and theories of proportional responsibility, plaintiffs now can recover when a utility company fails to maintain its power lines.<sup>340</sup> As illustrated in *Woollen*, plaintiffs were rescuing individuals during Hurricane Harvey and came into contact with an overhead power line while they were driving their boat.<sup>341</sup> There, the court held that the plaintiffs, as a matter of law, violated the statute because they were persons responsible for work near the vicinity of a power line and were not exempted by the plain language of the statute.<sup>342</sup> Plaintiffs' claims were therefore extinguished, and they were left without a remedy.<sup>343</sup> The court in part reasoned that "since [§] 752.008 does not contain qualifications limiting its applicability to situations in which the utility is without fault, Chapter 752's indemnity provision applies regardless of any alleged negligence on Entergy's part."<sup>344</sup>

The proposed amendment is aimed to fix this issue and places limitations on indemnity applying only to the extent the plaintiff causes the injuries.<sup>345</sup> In this case, the two plaintiffs would only be precluded from recovering if the jury determined that they were 51% at fault for failing to notify.<sup>346</sup> This proposed amendment therefore accounts for a utility company's negligence and does not allow it to escape liability.<sup>347</sup>

#### *D. Effect of a New Interpretation and Proposed Amendment on Future Litigation*

Both solutions aim to balance worker safety, placing burdens on employers to maintain safe environments while also incentivizing utility companies to maintain minimum safety requirements.<sup>348</sup> Each solution will still preclude recovery for plaintiffs when (1) the statute is applied to the proper context, a construction site or something similar, where someone plans to do work near a high-voltage line, and (2) a utility company is not at fault and has maintained its lines properly.<sup>349</sup>

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340. See generally *Entergy Tex., Inc. v. Woollen*, No. 09-20-00297-CV, 2021 WL 5218550 (Tex. App.—Beaumont Nov. 10, 2021, no pet.) (mem. op.) (using this case an example).

341. See *id.* at \*6.

342. See *id.*

343. See *id.*

344. See *id.*

345. See *id.*

346. See *id.*

347. See *id.*

348. See *supra* text accompanying notes 294–96 (explaining the inequities when the policies are not the main consideration).

349. See *supra* notes 248, 319 and accompanying text (explaining the policies behind each solution).

Another contention is that this would spur unnecessary litigation, where any plaintiff could say the utility company was negligent, and contributory negligence would be applied to claims that were meant to be precluded.<sup>350</sup> And while a rise in litigation is inevitably true because utilities essentially have immunity and cannot be sued under the current statute, the important consideration is that utilities would only be responsible under the law to the same extent everyone else is.<sup>351</sup> A jury would not allocate money damages where a utility company was not negligent.<sup>352</sup>

Minimum safety standards are already the driving force behind utilities maintaining their lines properly.<sup>353</sup> However, the law should not protect utility companies when they fall below that standard, and that is what the change is designed to promote—line operators cannot walk away when they have violated the law and someone gets seriously injured.<sup>354</sup> This points back to the original purpose for enacting the statute, which is to protect crane operators who are working on a construction site and whose employer does not take any safety measures to make sure high-voltage power lines are de-energized.<sup>355</sup> The law will still protect the utility companies when an employer fails to notify in those situations, and allow the utility company to recover damages against the employer.<sup>356</sup>

#### IV. CONCLUSION

Chapter 752 of the Texas Health & Safety Code was enacted to protect worker safety and place burdens on the construction industry to safeguard its employees.<sup>357</sup> And while the statute has a noble purpose, it has been extended far beyond its bounds, barring innocent plaintiffs from recovery and disincentivizing utility companies from maintaining their high-voltage lines.<sup>358</sup> In light of recent events such as wildfires and rolling blackouts, society demands recourse—not only to hold utilities liable for the damage they cause but to make sure it does not happen in the first place.<sup>359</sup>

Narrowing court interpretations of § 752.003 to situations the statute should apply to, or alternatively placing limiting language in § 752.008 to allow for contributory negligence, will help not only the innocent plaintiffs who are harmed by illegally placed high-voltage lines, but will also

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350. LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129, at 43.

351. *Id.*

352. *Id.*

353. Howard, *supra* note 127.

354. LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129, at 15.

355. *Id.*

356. *See supra* Sections II.B.1, III.D (discussing the notification provision in the statute).

357. LEGISLATIVE HISTORY CHAPTER 752, *supra* note 129.

358. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

359. Douglas, *supra* note 23.

incentivize line operators to maintain them properly.<sup>360</sup> It is time to stop allowing utility giants to indemnify their misconduct and re-calibrate electrical tort claims to ensure justice and accountability.<sup>361</sup>

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360. *See* TEX. HEALTH & SAFETY CODE §§ 752.001–.008.

361. *See id.*