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A Brief Description Of Bills That TLR Opposes

The Texas Legislature has passed a series of prudent and effective tort reforms over the past fifteen years. The reforms have largely restored balance and fairness to the Texas civil justice system, which had been subject to condemnation and ridicule throughout the world in the 1970s and 1980s.

The civil justice reforms have restored integrity to the law and engendered wider trust among our citizens in the fairness of our litigation system. They have also strengthened the Texas economy, enabling our people to innovate, our businesses to expand, our citizens to have jobs, and our government entities to have strong tax revenue to support education, health care and other government programs and activities. Health care throughout our State is much more accessible due to tort reform, and doctors are coming to Texas in record numbers.

This session, the plaintiff trial lawyers are vigorously attacking several of the reforms that have been enacted, are seeking to overturn important rulings of our appellate courts, and are seeking new opportunities for litigation. These efforts, if successful, would damage our legal system and our economy's ability to compete, innovate, grow, and produce jobs for Texans.

SB 1119 (BY HINOJOSA) AND HB 1956 (BY SMITHEE): THE "PAID OR INCURRED" PROVISION OF HB 4.

Section 41.0105 of the Civil Practice and Remedies Code sensibly limits recovery of medical or health care expenses to the amount actually paid or incurred by or on behalf of a claimant. This was part of the Omnibus Tort Reform Act of 2003 (HB 4). Section 41.0105 recognizes the reality of medical provider billing, in which the full amount billed by a provider, such as a hospital, is almost never the amount actually due or paid. The plaintiff's lawyers would now like to return to the days when they could obtain a judgment for amounts that were charged by a provider, but have not been paid and never will be paid by anyone – that is, "phantom damages." Plaintiffs, under current law, can get verdicts for amounts actually paid or owed to a healthcare provider, including all estimated future medical expenses. That is as the law should be. HB 1956 is in the House Judiciary & Civil Jurisprudence Committee.

Governor Perry wisely vetoed the "paid or incurred" bill of last session.

**HB 520 AND HB 1657 (BOTH BY GIDDINGS):
THE *ENTERGY* DECISION, WORKERS COMPENSATION, AND STATUTORY EMPLOYER.**

HB 520 and HB 1657, both of which are in the House Business & Industry Committee, seek to overturn the unanimous Texas Supreme Court decision in *Entergy Gulf States vs. Summers*, which basically holds that a premises owner can act as its own general contractor and provide a workers' compensation policy for all workers on the worksite, which then allows injured workers to be compensated for lost wages and medical expenses through the workers compensation system rather than through tort lawsuits. The *Entergy* decision is well reasoned and correctly decided. Workers' compensation systems have been in place throughout the nation for many decades. The policy allows injured workers to obtain immediate compensation for wages and medical expenses without the time delay, expense and uncertainty of a lawsuit. The injured worker gets full benefits even if the worker's own negligence contributed partly or entirely to his or her injury.

If the 81st Legislature decides to address the issues raised by *Entergy*, then TLR suggests that the best approach would be to enact a statutory employer statute that would place all workers at a worksite under a single workers' compensation policy, thereby eliminating the large frictional costs of third-party lawsuits. The substantial savings to the workers compensation system could be invested in better safety programs for workers and increased compensation benefits to the most seriously injured workers. It would be a mistake to pass HB 520, HB 1657 or other anti-*Entergy* bills. If there is a problem in this area of public policy, it would best be solved by a comprehensive reform such as statutory employer.

**SB 1123 (BY DUNCAN) AND HB 1811 (BY EILAND): ASBESTOS LITIGATION –
CAUSATION & EVIDENTIARY MATTERS RELATED TO MESOTHELIOMA CASES.**

In 2005, the Legislature passed SB 15, which is the most effective solution in the nation to the abusive asbestos litigation that has destroyed tens of thousands of American jobs and bankrupted over seventy companies. SB 15 has proven effective in achieving its laudable goals. First, the mass x-ray screening and bundling of claims for unimpaired persons has ended. Secondly, the truly sick are getting redress through the courts. SB 1123 deals with causation and evidentiary issues in asbestos claims involving mesothelioma, a rare cancer that can be caused by inhaling asbestos. The bill would reverse two well-reasoned appellate opinions, *Borg Warner v. Flores* (Texas Supreme Court, in an 8-0 decision) and *Georgia Pacific v. Stephens* (1st Court of Appeals, in a 3-0 decision). These decisions establish standards of causation and evidence that are consistent with traditional tort law and evidentiary principles. SB 1123 would decimate those standards (as well as the sensible "junk science" standards established by Texas courts) and create what may be the weakest causation and evidentiary standards in the United States in mesothelioma cases. HB 1811 is in the House Judiciary & Civil Jurisprudence Committee.

SB 496 (BY WENTWORTH): QUI TAM.

Qui tam is a Latin legal term describing a civil action brought by a private party on the government's behalf. In a *qui tam* suit, an individual having knowledge of false or fraudulent claims on the government can sue on behalf of the government and receive a bounty from any recovery. Due to federal requirements in the funding of Medicare/Medicaid, Texas adopted a *qui tam* statute for fraud in those areas.

SB 496 would create a general-purpose *qui tam* law in Texas. The experience with the federal general-purpose *qui tam* statute shows that it can be badly abused, causing businesses unproductive expenditures to defend against cases that are not meritorious. One mass tort law firm in Texas that was notorious in mass-asbestos claims (now foreclosed by SB 15) has recently opened a *qui tam* practice. If there is concern about fraud against state government, a better, pro-active approach is to have a state inspector general focused on preventing and uncovering fraud, rather than enacting a new statute that invites litigation and causes the State to share recoveries with outside lawyers. SB 496 is in the Senate State Affairs Committee.

SB 222 (BY WEST): ARBITRATION.

Trial lawyers are attacking arbitration throughout the nation. SB 222 would destroy the right to contract for arbitration as an alternative form of dispute resolution in many kinds of cases, even among sophisticated parties. It also would destroy many of the benefits of arbitration, such as time efficiency and finality. The right to contract is a keystone to a free society and a vigorous economy. Texas has recognized arbitration as an alternative to litigation throughout our State's history. Forty-three years ago, the Texas Legislature explicitly allowed enforcement of agreements to arbitrate future disputes. There is no reason to reverse course now. SB 222 is in the Senate Jurisprudence Committee.

SB 767 (BY WEST): ANTITRUST – AN ATTACK ON ILLINOIS BRICK V. ILLINOIS

This bill would negate the U.S. Supreme Court ruling cited above, which holds that only direct purchasers (and not others in the chain of distribution, such as indirect purchasers) can bring an action under the federal antitrust laws. The bill would expand antitrust litigation when there is no need to do so. SB 767 is in the Senate State Affairs Committee.

SB 152 (BY ELLIS): EMERGENCY ROOM PROTECTIONS.

Prior to the enactment of HB 4 in 2003, emergency room (ER) physicians were quitting the practice of medicine and hospitals were either closing their ERs, had plans to close them or were downgrading the trauma level of their facilities. HB 4 requires plaintiffs to prove willful and wanton negligence, a well-established gross negligence standard, as a predicate to imposing liability on ER medical providers. After the HB 4 reform, seventy-six Texas counties have experienced gains in ER physicians, including 21 counties that previously did not have any ER physicians. SB 152 would roll back ER liability protections, which would substantially reduce our citizens' access to health care. There has been no demonstrated need to change a liability provision that has had the beneficial effect of substantially increasing access to ER care. SB 152 is in the Senate State Affairs Committee.