

# ADVOCATE

TEXANS FOR LAWSUIT REFORM: MAKING TEXAS A BEACON FOR CIVIL JUSTICE IN AMERICA

WINTER 2013

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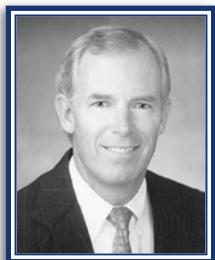
## OUR MISSION

Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action, legal, academic, and market research, and grassroots initiatives. The common goal of our more than 17,000 supporters is to make Texas the Beacon State for Civil Justice in America.

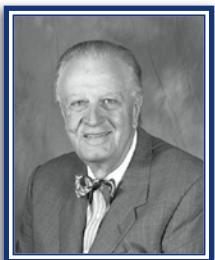
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## Reflections



Richard W. Weekley



Leo Linebeck, Jr.



Richard J. Trabulsi, Jr.



Hugh Rice Kelly

As we in TLR contemplate the last twenty years of success at the ballot box and in the legislature, we should heed the age-old adage that “every success has in it the seeds of failure and every failure the seeds of success.” Napoleon observed that the greatest danger is at the moment of victory. So while all of us in TLR are pleased at our role in helping change Texas from the “Wild West of Litigation” to the state that has accomplished the most comprehensive civil justice reform, we know that we are one of many travelers on the road of tort reform and that there is much left to do. We appreciate the elected officials who have enacted the legislative reforms, the wise judges who have adopted sound rules to implement the reforms, and the business and professional associations and citizens across Texas who have joined with TLR in moving our state toward a more balanced, fair and predictable civil justice system.

Although we have accomplished much in reforming our civil justice system in the past two decades, our work is far from done. Therefore, we must not rest or tarry. In politics and public policy, as in sports, a team that sits on a lead is likely to lose it. We must be vigilant to preserve what has been gained and diligent in dealing with new challenges. (You can read about several areas of interest on Page 7.)

We recognize that the mass-tort and personal injury plaintiff lawyers are relentless in their attacks on tort reform and its proponents. Further, several of the wealthiest and most entrepreneurial plaintiff law firms are clever in their efforts to game the system for personal profit. We did not know until a month prior to the 2007 session that a few lawyers had used a venue loophole to bring lawsuits that threatened, literally, to shut down dredging in Texas waters, which would have had devastating consequences for our state’s economy (the legislature closed the loophole). Nor could we have expected the large-scale attack the plaintiff lawyers launched against salutary Texas Supreme Court decisions and statutory reform in the 2009 session (their efforts were fruitless on every front). In the last legislative session, we expended major resources to help our legislative allies reform the Texas Windstorm Insurance Association because of manipulation by one lawyer that resulted in huge windfall fees to him (perhaps \$150 million or more) from this insolvent, quasi-governmental body.

*Continued on page 2*

You will read in this *Advocate* of the long list of state reforms recommended by the U.S. Chamber's Institute for Legal Reform. And you will read with satisfaction that Texas has enacted almost the entire list of those reforms, while most other large states are still struggling to do so. One reason that Texas has had so much success in lawsuit reform is the leadership of Governors George W. Bush and Rick Perry, Lt. Governors Bob Bullock, Bill Ratliff and David Dewhurst, and House Speakers Tom Craddick and Joe Straus, as well as the hard and effective work of the numerous Senators and House Members who have sponsored and advocated the legal reforms. In John Cornyn and Greg Abbott, Texas has had outstanding Attorneys General. Additionally, in recent years, the Texas Supreme Court has been occupied by men and women of integrity, intellect and competence.

We are mindful that the name "Texans for Lawsuit Reform" has never appeared on a ballot, and we are grateful to the men and women who stand for election, serve in public office, enact the tort reforms and make the hard decisions on the judicial bench.

An important reason for the longevity and sustainability of Texas tort reform is that we have been

exceedingly careful not to overreach, and to craft laws that are fair, clear and commonsensical. Largely, what we have accomplished is the *restoration* of the law to where it was prior to the corruption of the Texas litigation system in the 1970s and 1980s. Thus the reforms have withstood judicial review and attempts to undermine or repeal them in the legislature. In every poll in every year, the people of Texas say they approve of the reforms and think more are needed.

As we enter our third decade of advocacy for a better civil justice system, we do so with gratitude for all those who have joined us to make the Texas dispute resolution system more fair, reasoned and balanced and with a renewed dedication to TLR's mission. We also recognize that there are a variety of public policy issues of great importance to our state and we, as individuals, may engage in some of those issues. We look forward to the future with enthusiasm and optimism, mindful of the words of Charles de Gaulle: "History does not teach fatalism. There are moments when the will of a few free men open up new roads." ■



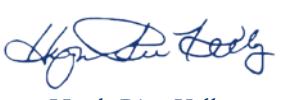
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*Senior Chairman*



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*President*



Hugh Rice Kelly  
*General Counsel*

"The fairness of a law does not consist in its effect being actually felt by all alike, but in its having been laid down for all alike."

— SENECA



TEXANS FOR LAWSUIT REFORM

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## Ten Years Later: The Promises and Predictions of Prop. 12 Have Come True

By Jon Opelt, Executive Director  
Texas Alliance For Patient Access

Ten years ago, Texas voters approved Proposition 12, a constitutional amendment that affirmed the Legislature's authority to set damage caps in health care lawsuits.

Supporters and opponents spent more than \$17 million in making Proposition 12 the most expensive constitutional campaign ever.

Both sides made a number of promises and predictions as to what would happen if the measure prevailed. Ten years later the results are in: The healthy benefits tort that reformers had predicted have come to pass, while the allegations and dire prophecies of the trial lawyers have proven to be wrong.

Prior to the passage of Proposition 12, doctors were leaving or limiting their practice due to soaring liability costs. Roughly 20% of the state's physicians had been non-renewed by their insurance carriers and were in jeopardy of losing hospital privileges. Many doctors who still maintained liability coverage refused to accept patients with complex or high-risk problems, referring them to an increasingly shrinking pool of specialists. Emergency room services for head injuries, childbirth and trauma involving small children were in shorter supply. All blamed the state's hostile medical liability climate.

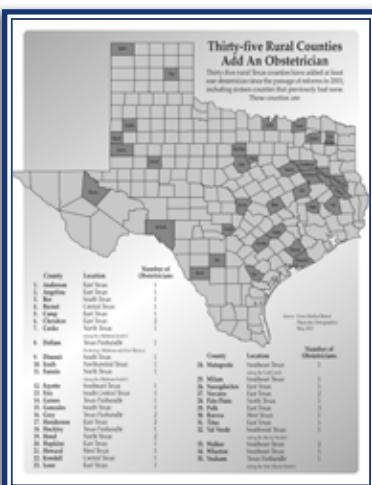
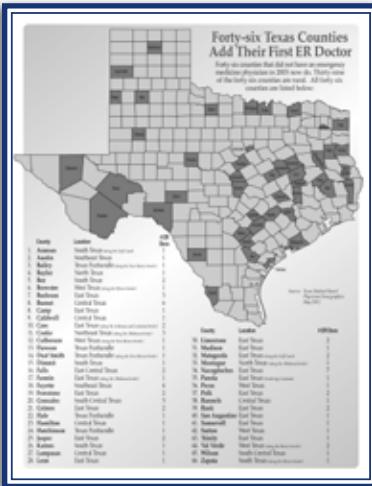
Tort reform advocates made the following promises:

- Doctors would start taking ER calls again. They have.
- More high-risk specialists would be available to the public. They are.
- We would be able to recruit much-needed specialists to our state, particularly in rural Texas. We have

In the run-up to reform, 55 Texas counties saw a net loss of physicians and another 50 failed to add a single physician. Some 99 counties lost a high-risk specialist

and an estimated 5,000 high-risk specialists restricted their practice due to liability concerns.

- Since 2003, the ranks of high-risk specialists have grown twice as fast as the state's population.
- The number of rural obstetricians has grown nearly three times faster than the state's rural population.
- Forty-six counties that did not have an emergency medicine physician now do. Thirty-nine of those counties are rural.



During the crisis years Texas fell to 41st nationally in patient care physicians per capita. From 2006 forward, the state has climbed into a tie for 24th. That is an incredible accomplishment given our meteoric growth in population.

At the passage of Prop. 12, doctors, hospitals and nursing homes were paying exorbitant liability insurance rates. Proponents argued that rate relief was desperately needed, but those premium reductions would not occur until and

unless the damage cap was ruled constitutional. The trial lawyers countered that lawsuit reforms don't produce liability savings and that Texas doctors would never see their rates reduced. Roughly 30 rate cuts and more than \$2 billion in liability savings later, the trial lawyers are wrong. Most Texas doctors have seen their liability rates cut in half.

The *Beaumont Enterprise* put it succinctly: "Any doubter should ask where he thinks malpractice rates would be if voters hadn't restored some sanity to the system."

*Continued on page 14*



## A Doctor's Story: Why I Practice in Texas

By Jackelinne Villalobos, D.O.

*This article originally appeared in the Odessa American*

In 2003, doctors in both Texas and New York faced a crisis. Excessive, costly and often baseless litigation was forcing physicians to limit their practices or shut their doors altogether. Hospitals were spending increasing amounts for lawsuits rather than investing in patient care.

Leaders in Texas, encouraged by physicians across the state, took action to curb lawsuit abuse. In New York, on the other hand, efforts to pass lawsuit reforms stalled.

Nine years later, the climate for practicing medicine in the two states couldn't be more different. Texas is where physicians want to practice; our hospitals are able to invest liability savings into patient care, safety programs and charity care. In New York, meanwhile, doctors are retiring early and declining to take high-risk patients while hospitals are forced to choose between adding more care providers and paying their medical liability premiums.

The success of reforms in Texas cannot be denied. Of the more than 27,000 physicians licensed to practice in Texas since 2003, nearly 2,000 did their training or had an active practice in New York. Like me, many came here because of the reformed legal climate.

This is great news for Texans: more doctors mean greater access to care for Texas patients. Remember, at the height of the liability crisis in Texas, many patients went without access to critical health care services. I've heard the stories: heart patients forced to brave long trips to the closest cardiologist; trauma patients in hospitals with no doctors to care for them; and expectant moms who traveled hundreds of miles to find a doctor to deliver their babies. Lawsuit reforms changed these harsh realities in Texas.

In New York, on the other hand, doctors are finding it harder than ever to care for their patients. Today, the average obstetrician in New York stops practicing by age 48, largely due to out-of-control medical liability costs. One New York hospital went so far as to close its

obstetrics practice altogether out of fear of lawsuits. Yet, New York remains unable to pass lawsuit reforms.

As an obstetrician who left New York for Texas due to high liability costs, I know firsthand that medical liability reform can make a difference. In New York, I worked at a clinic that catered to pregnant women and was one of the few bilingual doctors who could communicate with our Spanish-speaking patients. The work was challenging and rewarding, but, like many doctors in New York, the liability climate made it impossible for me to continue practicing medicine.

My practice partner and I knew something had to change in 2009, when we were billed \$168,000 each for our liability insurance and then told to expect a 5 to 12 percent rate hike the following year. I couldn't see enough patients or deliver enough babies to absorb that cost and I was already delivering ten babies a day. Additionally, I had an unblemished practice without a single lawsuit payment made to a patient. My partner and I tried splitting our practice, with him taking care of the office practice and me handling all deliveries. We even tried taking the drastic step of eliminating all high-risk pregnancies from our practice, but still nothing worked to lower our liability premiums. Finally, we extended our office hours and opened on Saturdays to generate additional revenue to try to offset our spiraling liability costs but to no avail.

I witnessed many frivolous suits being filed only to be dismissed years later, but still leaving a permanent impact on our lives and records. Physician morale was low.

By 2010, I simply couldn't afford to practice in New York. Leaving Brooklyn and my practice was a sad day for me and my patients, but the legal climate forced me to pack my bags and move to Texas.

My story is a tale of two states: one whose leaders stood up and did what was right and necessary to help patients and their doctors, and one whose leaders can't break free from the grip of the personal injury trial bar.

*Continued on page 14*



## UPDATE: Battle for Tort Reform Continues in Texas and Nationwide

By Sherry Sylvester, TLR Senior Communications Advisor

A small group of mega-wealthy mass tort trial lawyers continue to be relentless in their efforts—both in Texas and nationwide—to stop the tort reform effort. Because public sentiment against trial lawyers is negative, much of their work over the past few years has been to disguise who they are. In 2006, for example, the Association of Trial Lawyers of America (ATLA) changed their name to the American Justice Association (AJA).

In Texas, groups backed by trial lawyers, including Texas Watch and Texans for Public Justice, characterize themselves as “consumer groups” in an effort to camouflage their true mission – to overturn tort reform. Similarly, trial lawyer backed political action committees funded by liberal Democrats use deceptive names including Texans for Family Values and Conservative Voters of Texas.

The most high-profile national move in this campaign occurred in 2011 with the release of a multi-million dollar film, “Hot Coffee,” presented as a “documentary” despite the fact that the producer/director is a personal injury trial lawyer.

These state and national efforts reflect millions in spending, but none of them has been successful. States continue to enact lawsuit reforms, often modeled after the reforms that have revitalized the Texas economy and assured access to doctors and healthcare. In fact, support for lawsuit reform is at an all-time high.

A poll conducted by the American Tort Reform Association (ATRA)\* last summer found that 78% of Americans believe there are too many lawsuits in the United

States, and over half worry they will be victimized by an abusive lawsuit.

In Texas, polling consistently shows that Texans in both political parties support lawsuit reform, and most believe we need to do more to rein in lawsuit abuse.

Perhaps in response to this data, AJA recently launched an extensive media campaign that will utilize films, television advertising, the internet, and social media to push their message that tort reform should be rolled back.

Led by two Dallas trial lawyers, Mary McLarty, who serves as president of AJA, and Lisa Blue Baron, who serves as Vice President, AJA’s campaign appears to be a multi-million dollar effort.

A similar internet and social media attack against tort reform was launched in Texas last year. Funded by Houston hurricane attorney Steve Mostyn, this phony campaign falsely represents itself and employs deceptive messages in an effort to undermine support for tort reform in Texas. Predictably, this latest advertising effort ignores the economic growth and increased access to healthcare in Texas that tort reform has generated. We expect these trial lawyer propaganda campaigns will continue. We urge supporters to always consider the source when encountering information on the Internet or in social media about tort reform. ■

**THE BATTLE  
for  
LAWSUIT  
REFORM**

### Some of the groups that use deceptive names to mask their support from personal injury trial lawyers include:

- Conservative Voters of Texas
- Back to Basics
- Texas Watch
- Texas Progress Council
- Texans for Individual Rights
- Texans for Public Justice
- Texans for Family Values
- STOP TLR
- Texans for Insurance Reform
- Texas Values in Action Coalition

\*The ATRA survey is based on a national telephone survey of 1,013 U.S. registered voters conducted by Luce Research from July 11-19, 2012. The interviews included both landline and mobile telephone numbers. The data were weighted by age, ethnicity and region to ensure a representative sampling of voters by all demographics, including gender, education and political party identification. The sampling error for this study is ± 3.1 percentage points at the 95 percent confidence interval.



## TLR Supports Higher Compensation For Texas Judges

By Lee Parsley, TLR Outside Counsel

In the 20 years since TLR was formed, Texas has lead the nation in moving toward a fair and balanced civil justice system. The strides made over the past two decades are beyond impressive. But all that work can be rendered meaningless unless Texans devote themselves to the task of selecting and keeping a competent, fair, and honest judiciary.

As the Judicial Compensation Commission (JCC) notes, Texas is the second largest state in our nation, in both area and population. "The judiciary of a state of the size and stature of Texas must be equipped to handle not only the number of cases filed, but also the complexity and importance of the cases needing adjudication."

Texas's state-court judges have not received a pay raise since 2005. According to a report filed with the Legislature late last year by the JCC, Texas's judges now earn less than they made in 1990, after adjusting for inflation. (The report of the JCC is available at [www.tortreform.com](http://www.tortreform.com).)

Not only do they earn less than they did in 1990 in real terms, Texas judges earn less than first-year lawyers working at major law firms in Texas.

We simply cannot expect to have a strong and independent judiciary if our judges are not fairly compensated. Inadequate compensation forces experienced judges to move to private practice and discourages qualified candidates from seeking judicial positions. Virtually all of TLR's work for the past two decades rests on the shoulders of a strong, capable and independent judiciary, which Texas cannot expect without providing adequate compensation to its judges.

The JCC has recommended salary increases for all Texas judges. Their recommendations are supported by comparisons to other states and are well reasoned. The revenue needed to adequately fund the judiciary is a tiny fraction of the State's \$200 billion budget.

TLR supports the JCC's recommendation to increase judicial compensation. ■



## Philip K. Howard Speaks to TLR Supporters in Houston

Philip K. Howard, author of *The Death of Common Sense* and *Life Without Lawyers*, spoke to a group of TLR supporters in Houston recently about what he sees as a "broken legal system."

According to Howard, "We've been taught to believe that law is the foundation of freedom. But somehow or another, in the last couple of decades, the land of the free has become a legal minefield."

Howard believes that our complex and unpredictable legal system not only hampers progress but also contributes to a breakdown of trust in our society, something that is essential to maintaining our freedom. "Life is complicated enough without legal fear," he said.

Specifically looking at the costs of lawsuit abuse, he points to medical liability and the cost of defensive medicine performed by doctors due to the fear of being sued, saying that reliable estimates put it anywhere from \$45 billion to over \$200 billion per year. He proposes the cre-

ation of specialized health courts to eliminate this unnecessary wasteful spending.

Howard believes in general that law needs to move away from complexity and be simplified to general principles and goals. "The Constitution is only 16 pages long and has worked pretty well for 200 years."

Ultimately, Howard believes that legal reform is essential to stop the erosion of our freedom. "What people can sue for establishes the boundaries for everybody else's freedom. If someone brings a lawsuit over, 'A kid fell off the seesaw,' it doesn't matter what happens in the lawsuit, all the seesaws will disappear."

Howard is a prominent civic leader in New York City and also Vice-Chairman of the law firm Covington & Burling, LLP. In 2002, he formed Common Good, which works with leading judges, scholars, and policymakers to restore reliability to civil justice and bring common sense to government. He writes periodically for the *Wall Street Journal*, the *Washington Post*, and the *New York Times*. ■

# Possible Civil Justice Issues in the 83rd Texas Legislature

In every legislative session, there are issues impacting civil justice, and this year will be no exception. Here, listed in alphabetical order, are some of the items that may be considered this year in the 83rd Legislature.

## ASBESTOS LITIGATION.

While the Texas reform of asbestos and silica litigation (SB 15 passed in 2005) has greatly reduced abusive asbestos-related litigation in our state, the plaintiffs' asbestos bar still is able to game the claims system related to the many special bankruptcy trusts that have been established to deal with asbestos claims. A solvent defendant who pays a settlement or judgment should be able to receive a credit for all awards to the plaintiff from the various asbestos trusts. On a second issue in asbestos litigation, a mechanism should be adopted to allow for the dismissal of the tens of thousands of inactive cases on the asbestos court's docket in a way that improves judicial efficiency and does not prejudice any future legitimate claims by the persons whose cases are dismissed. As a matter of public policy, the judicial system should not leave pending indefinitely citizens' lawsuits that cannot be taken to trial. Asbestos and silica cases filed before September 1, 2005 are the only kinds of cases Texas trial courts cannot dismiss when they become old and inactive.

## ATTORNEY-CLIENT PRIVILEGE.

A recent Texas Supreme Court decision requires clarification concerning the scope of the attorney-client privilege in workers' compensation cases. The Court held that the insurance company's lawyer's communications with the employer are not privileged from discovery, which is contrary to what lawyers have believed for years. There should be either legislation or a Supreme Court Rule to make sure that the attorney-client privilege exists in all appropriate circumstances so that attorney communications cannot be subject to inappropriate discovery.

## CRIMINALIZATION OF CIVIL CONDUCT.

In federal law and in the law of many states, criminalizing civil conduct, such as in the application of environmental or safety laws and regulations, is a growing, and disturbing, trend. We must be sure that Texas does not follow this trend.

## EMPLOYER PROTECTION.

One goal of the criminal justice system should be the rehabilitation of criminals and their re-incorporation into society after release. Many employers are reluctant to hire convicted felons because of the greater likelihood of lawsuits. There is a proposal that applies to non-violent offenders who have not committed sex offenses, which provides that the offender's conviction prior to employment does not create a cause of action against the employer for negligent hiring. Lawsuits could still be brought for negligent supervision or other negligence by an employer. The evidence is strong that employed ex-offenders who have jobs are less likely to commit another crime.

## EXORBITANT PENALTIES AND EXPANSIVE GOVERNMENT POWER.

Over the years, exorbitant penalties and expansive government powers have crept into Texas law in certain areas. While it is important for government to have adequate enforcement authority and that meaningful penalties may be imposed for wrongful conduct, high, unlimited, per-violation penalties that are unrelated to intentional conduct or to actual harm are not necessary or reasonable.

## JUDICIAL COMPENSATION.

Attracting and retaining qualified men and women to the judiciary is fundamental to a fair, efficient, and independent judicial system. Texas judges have not had a raise since 2005. The Texas Legislature created the Judicial Compensation Commission in 2007 to advise the Legislature about the salaries that should be paid to judges. The Commission recommends pay increases for Texas' trial and appellate court judges to make their compensation closer to what a qualified attorney can earn in the private sector. The salary of district court judges would rise from \$125,000 to \$151,909; the salary of an intermediate appellate judge would rise from \$140,000 to \$169,000; and the salary of justices on the state's two high courts would rise from \$150,000 to \$182,291.

## JUDICIAL CONDUCT COMMISSION.

This Commission is up for sunset review, which means that it will be given careful scrutiny. This Commission investigates and takes action on allegations of judicial misconduct or incapacity.

# Texas Senate Adds Five Strong Advocates of Lawsuit Reform



*Larry Taylor*



*Charles Schwertner*



*Ken Paxton*



*Kelly Hancock*



*Donna Campbell*

Five new Texas senators were elected in 2012, bringing a wide range of business, legislative and professional experience to the upper house.

**Senator Larry Taylor** served in the Texas House from 2002 until he was elected to the Senate in 2012. He was a leader in the fight against lawsuit abuse in the Texas House including the critical battle to rein in attorney fees in the 2011 TWIA reforms. In the House, he served on the Property & Casualty Insurance Legislative Oversight Committee, the House Select Committee on Hurricane Ike Devastation and the Select Committee on Property Tax Relief and Appraisal Reform. He received his B.B.A. from Baylor University and currently owns Truman Taylor Insurance Company.

**Senator Charles Schwertner** served one term in the Texas House where he supported the passage of the 2011 Omnibus Tort Reform Bill as well as the much needed reform of the Texas Windstorm Insurance Association (TWIA). He is a managing partner and practicing physician at Georgetown Orthopedics PLLC, which employs 40 people and provides annual care for 20,000 patients. He received his medical degree from the University of Texas Medical Branch and also holds a pharmacy degree from the University of Texas.

**Sen. Ken Paxton** was elected to five terms in the Texas House where he co-authored and voted for the historical 2003 medical liability reforms. In the House he served on the House Ways and Means and Land and Resource Management committees and is a former vice chairman of the State Affairs Committee. Senator Paxton has authored bills to reduce government spending, reduce state taxes, and promote transparency in government. Paxton earned his bachelor's and master's degrees in business from Baylor University and his law degree from the University of Virginia Law School.

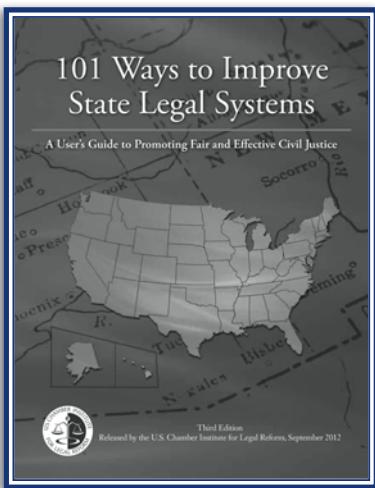
**Senator Kelly Hancock** is a wholesale distributor from North Richland Hills who served in the Texas House beginning in 2006 where he supported the maritime venue reforms of 2007 as well as the Omnibus Tort Reform Bill of 2011. Senator Hancock noted that, "Over the years, the legislature has enacted several key tort reform measures that are improving the state's economy and accessibility to quality medical care. As a result, frivolous lawsuits have been reduced and employers can focus on creating jobs rather than costly litigation." Senator Hancock brings a wealth of business experience to the Senate.

**Senator Donna Campbell** was elected to the Texas Senate in 2012. She is an emergency room physician who is also certified in ophthalmology. Sen. Campbell earned her Masters of Nursing from Texas Woman's University, and her M.D. from Texas Tech University. She completed her residency at the University of Texas Medical Center in Houston. As a physician, Dr. Campbell has a solid commitment to the lawsuit reforms that assure that every Texan has access to doctors and health care. Dr. Campbell has performed hundreds of eye surgeries as a volunteer for Christian Eye Ministry, an organization which has brought sight back to thousands in Africa. ■

"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."

— JAMES MADISON

# Texas Tort Reforms are National Model: A Look at the Institute for Legal Reform's Recommendations



American businesses believe that a state's litigation environment is important to business decisions made at their companies, such as where to locate or do business. Certainly, this is borne out by Texas's experience in the past twenty years of tort reform. Texas is consistently ranked as the best place in the nation to do business by Site Selection Magazine, and the Bureau of Labor Statistics shows that Texas continues to lead the country in job creation—all of which is consistent with Texas advancing 10 places among states on ILR's list in the last decade.

The Institute for Legal Reform's companion publication, "101 Ways to Improve State Legal Systems," cites numerous ways to improve a state's civil justice system. (The full report is posted at [www.tortreform.com](http://www.tortreform.com).) We in TLR can be proud that Texas has dealt with the vast majority of the issues raised by the ILR. Here is the ILR "wish list" and where Texas stands on each one.

## ILR SUGGESTION NO. 1:

**Provide Transparency in Hiring of Private Lawyers by State Officials.**

**Texas Status: Accomplished in 1999.**

Following the scandalous award of \$3.3 billion to five lawyers by former Texas Attorney General Dan Morales from the tobacco litigation settlement, Texas passed a law requiring state officials to approve the hiring of contingent-fee lawyers and requiring that legal fees paid to the lawyers be based on a reasonable hourly rate multiplied by the hours actually worked by the lawyers, with appropriate caps on the hourly rate and percentage of the recovery that can be paid to the

The U.S. Chamber's Institute for Legal Reform's 2012 State Liability Systems Survey, entitled "Lawsuit Climate," explores how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses. (The full report is posted at [www.tortreform.com](http://www.tortreform.com).) Senior attorneys for

lawyers (SB 178). Had this law been in place at the time of the tobacco settlement, it is estimated that the five lawyers would have received under \$100 million in fees, not \$3.3 billion. In 2007, the Texas Legislature expanded this law to apply to most local governments as well (HB 3560).

## ILR SUGGESTION NO. 2:

**Prevent Double Dipping in Asbestos Litigation.**

**Texas Status: Partly addressed in 2005 and 2007.**

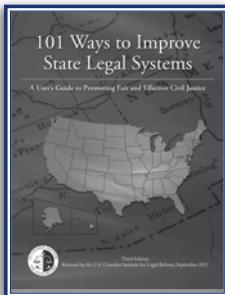
In 2005, Texas led the nation in comprehensive reform to cure the worst abuses in asbestos litigation (SB 15). The law became the model for similar reforms throughout the Nation. Passage of the asbestos-reform bill in 2005 was followed by a historic decision by the Texas Supreme Court in 2007, where the Court ended the asbestos-litigation exception to the rules prohibiting the use of junk science in Texas courts. When the 2005 legislation was coupled with the 2007 Court decision, there was a dramatic, positive change in asbestos litigation in Texas. More work, however, could be done regarding asbestos litigation. Approximately 70 companies that historically had been defendants in asbestos litigation have established trust funds under federal bankruptcy law to pay claimants suffering from asbestos-related diseases. Plaintiff lawyers in asbestos litigation sometimes wait to file claims against these trusts until after the plaintiffs have received a settlement or judgment through litigation against solvent defendants. In this way, the plaintiffs do not have to offset the bankruptcy trust recovery against the settlement or judgment – which is what the ILR accurately describes as "double dipping." The 2005 statute does not specifically address "double dipping," and this is expected to be an issue considered by the Legislature in 2013.

## ILR SUGGESTION NO. 3:

**Stop the Spread of Lawsuit Lending that Encourages Prolonged Litigation.**

**Texas Status: Needs to be addressed.**

There are two problems in lawsuit lending. One is related to consumer-type lending, in which the lender makes loans directly to the plaintiff, but collects its principal and interest only if the plaintiff prevails. In these transactions, the interest rates are extraordinarily high and can consume the entire recovery by the plaintiff in the lawsuit, thus reducing the plaintiff's incentive to resolve the case for a reasonable sum of money. The other problem is large lending of a kind



similar to venture capital investing, where the lender loans money to the plaintiff attorneys to fund litigation and is paid a percentage of the ultimate recovery if the plaintiff prevails. This is like buying an interest in the lawsuit, and can have the result of encouraging specious mass-tort claims. While there is some authority for the position that this venture-capital-type lending is unlawful in Texas, there is no statutory prohibition. And there is no regulation of either type of lending provided by Texas law. The Legislature appropriately will consider these matters this year.

**ILR SUGGESTION NO. 4:**  
**Ensure that Damages for Medical Expenses Reflect Actual Costs.**

**Texas Status: Accomplished in 2003.**

Texas solved this problem through the “paid or incurred” provision of the Omnibus Tort Reform Bill of 2003 (HB 4). The 2003 law provides that only those medical expenses that actually have been paid or are still owed can be claimed as damages in a lawsuit. This prevents the award of “phantom damages” for amounts that were billed by the medical-service provider, but have not been paid and are not owed by anyone.

**ILR SUGGESTION NO. 5:**  
**Losers Pay for Filing Frivolous Lawsuits.**

**Texas Status: Accomplished in 2011.**

In Governor Rick Perry’s Omnibus Tort Reform Bill of 2011 (HB 274), the Legislature passed a bill instructing the Texas Supreme Court to establish a “motion to dismiss” procedure that would allow the early dismissal of a lawsuit and the award of attorney’s fees to the prevailing party. A lawsuit will be dismissed if it has no basis in law or no basis in fact. The prevailing party in the motion to dismiss must be awarded attorney’s fees against the losing party. The loser pays. This new procedure complements the work done by the Legislature during the 1995 legislative session (the first in which TLR was engaged), when it established sanctions that a judge can impose against a plaintiff who files a frivolous lawsuit (SB 31).

**ILR SUGGESTION NO. 6:**  
**Ensure that Juries Represent the Entire Community, Not Just Select Segments.**

**Texas Status: Largely Accomplished.**

The ILR notes that laws of some states exempt certain professionals, making it easier for citizens to avoid jury service, and provide inadequate compensation for working jurors to

serve. Texas already has accomplished the reforms advocated by the ILR. In 2005, for example, the Legislature increased compensation paid to jurors from \$6 per day to \$40 per day (SB 1704) and implemented provisions regulating attempts to avoid jury service. And Texas does not exempt any professions from jury service. Other jury-related reforms, however, might be accomplished, as is detailed in the report on juries published by the Texans for Lawsuit Reform Foundation in 2007 (“The Civil Jury in Texas, Recommendations for Reform”), which you can access on the web at [www.tlrfoundation.com](http://www.tlrfoundation.com) or by calling 713.963.9363 to have a copy mailed to you.

**ILR SUGGESTION NO. 7:**

**Reduce Forum Shopping.**

**Texas Status: Accomplished in 1995, 1999, 2003 and 2005.**

Prior to TLR’s attention to civil justice reform, Texas was known as the “Lawsuit Capitol of the World.” Plaintiffs from all over the nation – and all over the world – came to Texas to file lawsuits because Texas’s venue statutes were exceedingly inviting. Putting an end to such “forum shopping” was one of TLR’s top priorities. The Legislature passed forum shopping reform in 1995 (SB 32) and further refined it in later sessions (SB 220, 1999; HB 4, 2003; HB 755, 2005), thereby ending forum shopping abuses in our state.

**ILR SUGGESTION NO. 8:**  
**Safeguard the Right of Appeal.**

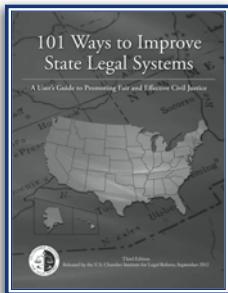
**Texas Status: Accomplished in 2003.**

The ILR notes that in order for a defendant to stay the execution of a judgment and protect its assets, it must post an appeal bond, which can be as high as 150% of the judgment in some states. Long ago, TLR recognized that if a defendant is unable to appeal a verdict from a trial court, that person is denied justice. Therefore, we advocated, and Texas enacted, legislation providing that an appeal bond should be the total compensatory damages awarded to the plaintiff in the judgment, but not to exceed the lesser of: (i) \$25 million, or (ii) one-half of defendant’s net worth (HB 4, 2003). There is also a “saving” provision allowing for a reduced bond if the amount provided by this law will cause the defendant to suffer substantial economic harm.

**ILR SUGGESTION NO. 9:**  
**Support Sound Science and Expert Evidence in the Courtroom.**

**Texas Status: Accomplished in 1995, 1997 and 2003.**

In the seventies and eighties, “junk science” was prevalent in Texas courtrooms. Not anymore. A series of excellent Texas Supreme Court decisions assure that any competent and hon-



est state judge will allow only sound expert testimony and scientific studies into evidence. Trial judges that allow questionable expert testimony or scientific evidence are likely to be overturned by Texas appellate courts.

In 2003, Texas enacted legislation (HB 4) requiring expert reports in medical negligence cases to meet certain standards and required the experts rendering those reports to have actual experience in the field of study about which the opinion was issued. Similar provisions have been applied to architects, engineers and other professions.

But the trial lawyers remain persistent. In 2009, TLR and its allies successfully fought-off trial lawyer attempts to legislatively re-introduce junk science into asbestos cases.

#### **ILR SUGGESTION NO. 10:**

##### **Stop Class Action Abuse.**

##### **Texas Status: Accomplished in 2003 and before.**

Class action reform was one of TLR's first proposals. Now, abusive class actions under Texas law are a thing of the past because: (i) the Texas Supreme Court has jurisdiction to correct erroneous trial court certification orders (HB 4), (ii) class actions within the jurisdiction of a state agency must be addressed by that agency before proceeding in court (HB 4), (iii) awards of attorney fees may be challenged by members of the class or the defendant, and must be based on the number of hours actually worked by the lawyer multiplied by a reasonable hourly rate, (iv) when class actions are settled using coupons, the lawyers must also be paid in coupons in the same proportion as the plaintiffs (HB 4), and (v) the Texas Supreme Court, through case law and rulemaking, has imposed strict standards on certification of classes.

#### **ILR SUGGESTION NO. 11:**

##### **Promote Fairness in Judgment Interest Accrual.**

##### **Texas Status: Accomplished in 2003.**

The purpose of awarding a prevailing party interest on its judgment is to compensate the party for the often-considerable lag between the event giving rise to the cause of action and the actual payment of damages. Before 2003, however, the statutory pre-judgment and post-judgment interest required an award of above-market interest to the prevailing party and a prevailing party could be awarded pre-judgment interest on damages that would arise after judgment (like future medical expenses awarded in the judgment). Texas resolved both of these issues in 2003, by providing that interest rates on judgments should be market rates, with a 5% floor and a 15%

ceiling, thereby eliminating windfalls; and by providing that pre-judgment interest could not be awarded on future damages (HB 4).

#### **ILR SUGGESTION NO. 12:**

##### **Protect the Rights of Consumers of Legal Services.**

##### **Texas Status: Accomplished in part.**

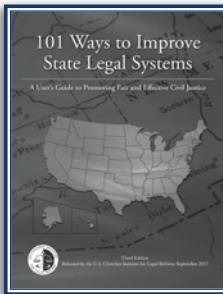
The ILR advocates something akin to a "consumers' bill of rights" for clients of lawyers, which would include anti-barratry provisions (i.e., provisions against unethical solicitation of lawsuits), restrictions on lawyer advertising, full and clear explanations of fees, requiring all lawyers (including contingency fee lawyers) to keep detailed time and expense records, and several other transparency requirements. In 2011, the Texas Legislature passed a significant anti-barratry bill, allowing a client who was subject to barratry to recover from the offending lawyer all fees the client paid to the lawyer (SB 1716). Reforms in this area also have come in the form of Texas Supreme Court decisions and rules. The Court has implemented rules governing lawyer advertising. And, starting in 1997, the Court has handed down a series of common-sense decisions that, among other things, require that attorney fee awards be based on detailed time records. But, so far, there is not a "consumers' bill of rights" for legal clients of in our state. This is a task the State Bar of Texas should undertake.

#### **ILR SUGGESTION NO. 13:**

##### **Encourage Compliance with Government Regulations.**

##### **Texas Status: Partly accomplished in 2003.**

The ILR advocates the sensible idea that if a party complies with government regulations concerning a product, process or service, it should receive some protection from liability concerning that product, process or service. Product liability reform was on TLR's original agenda and great progress was made in 2003, with these results: (i) in pharmaceutical cases, a rebuttable presumption exists in favor of the defendant in cases alleging failure to provide adequate warning about the product's risk if the defendant provides the government-approved warnings with the product; (ii) in other product liability cases, a rebuttable presumption is established in favor of manufacturers who comply with federal standards or regulatory requirements applicable to a product, provided the government standard was mandatory, applicable to the aspect of the product that allegedly caused the harm, and adequate to protect the public from risk (HB 4).



### **ILR SUGGESTION NO. 14:**

#### **Prevent Lawyers from Circumventing Product Liability Requirements.**

#### **Texas Status: Accomplished 1993.**

The ILR report finds that plaintiff lawyers sometimes rely on legal theories – such as common law nuisance or statutory consumer protection provisions – to avoid the limitations found in many product liability laws. The ILR notes that only about 20 states' product liability laws are statutory. The ILR therefore suggests that states codify their product liability laws or update their existing statutes to ensure that those who claim injury from a product fulfill the basic elements of proof necessary to recover. Texas accomplished this goal in 1993 when Texas codified its product liability laws.

### **ILR SUGGESTION NO. 15:**

#### **Protect Innocent Product Sellers.**

#### **Texas Status: Accomplished in 2003.**

The ILR advocates that the seller of a product not be held liable for defects in the product if the seller merely sold the product. Texas accomplished this goal in 2003 by enacting an "innocent seller" defense to a product liability lawsuit (HB 4). Under Texas law, a seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the seller had some actual responsibility for the condition of the product that caused the claimant's injury.

### **ILR SUGGESTION NO. 16:**

#### **Recognize Product Liability Ends at the Expiration of a Product's Useful Life.**

#### **Texas Status: Accomplished in 1993.**

The ILR recommends adoption of a statute of repose by which a state recognizes that, after a certain number of years, the useful life of a product ends and an injury allegedly stemming from use of that product does not result from a defect at the time of sale. Texas adopted a 15-year statute of repose in 1993.

### **ILR SUGGESTION NO. 17:**

#### **Prioritize Recovery for Sick Litigants in Asbestos Litigation.**

#### **Texas Status: Accomplished in 2005.**

Texas led the nation on asbestos litigation reform in 2005 with SB 15, envisioned and advocated by TLR. That statute: (i) creates strict, medically sound criteria to be used by courts to determine the viability of asbestos claims, (ii) provides for the transfer of asbestos lawsuits (old and new) to a single multi-district court, so that all asbestos cases receive fair and consistent treatment, (iii) provides that asbestos cases

cannot proceed to trial until the claimant shows through a medical report written by a qualified doctor that the injured person actually has an asbestos-related disease, (iv) prohibits the infamous "bundling" of plaintiffs into massive lawsuits that intimidated defendants into unjustified settlements, (v) limits or prevents the use of questionable diagnostic materials, (vi) moves the cases of persons having a malignant asbestos-related disease to the front of the line and guarantees these claimants a quick trial, and (vii) extends the statute of limitations to allow claims to be filed within two years after diagnosis of actual impairment or the death of the person exposed to asbestos so that truly injured Texans can have their day in court, without regard to how long it took for that person to contract the disease. This legislation ended the flood of non-meritorious asbestos cases into Texas and served as a model for other states struggling with their own avalanche of asbestos cases.

Currently in Texas, there are thousands of claims by unimpaired persons that have been on the "inactive docket" since 2005, and TLR advocates a fair process to dismiss those pending, inactive claims.

### **ILR SUGGESTION NO. 18:**

#### **Stop Unwarranted Expansion of Liability to Trespassers.**

#### **Texas Status: Accomplished in 2011.**

For over 100 years, Texas law has recognized that a landowner does not owe a duty of care to a person trespassing on his or her property. In 2011, the Legislature enacted a law (SB 1160) governing the liability of landowners to people who trespass on their property to counter an insidious recommendation by the American Law Institute to replace historic trespass law with a new duty to exercise reasonable care as to all entrants on land, including trespassers other than "flagrant trespassers."

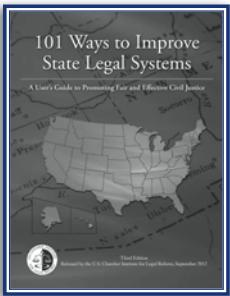
### **ILR SUGGESTION NO. 19:**

#### **Restore Common Sense in Consumer Protection Laws.**

#### **Texas Status: Accomplished in 1995 and 2011.**

In 1995, TLR advocated the reform of the Texas Deceptive Trade Practices Act, and the Legislature enacted a series of amendments to that Act which restored it to its original purpose of a consumer protection statute to allow a consumer to have adequate processes and remedies against product sellers and service providers (HB 668). The reform eliminated or amended aspects of the Act that had led to many abusive lawsuits.

In addition, certain trial lawyers manipulated "prompt pay" provisions in the Insurance Code to raid the Texas Windstorm Insurance Association (TWIA) following Hurricanes Rita and Ike. TWIA is a quasi-governmental body providing



fees to a few lawyers.

#### **ILR SUGGESTION NO. 20:**

**Create Transparency as to When Legislatures Create New Ways to Sue.**

**Texas Status: Accomplished in part by case law.**

In the seventies and eighties, the Texas Supreme Court was dominated by politicians-turned-jurists who were supported by the personal injury trial lawyers. When the business and professional community started paying attention to judicial elections and after Governor George W. Bush and Governor Rick Perry appointed excellent judges to fill vacancies on the Supreme Court, the Court moved from being one of the worst state high courts to one of the best – perhaps, the best. The Texas Supreme Court now is a strict constructionist court that does not create new causes of action (i.e., new ways to file lawsuits) by interpreting legislation. Nevertheless, Texas would benefit from a statute that instructs state courts that they are not to interpret a statute to imply a private right of action or affirmative duty in the absence of express language in the statute.

#### **ILR SUGGESTIONS NO. 21 AND NO. 22:**

**Comparative Fault: Fairly Allocate Fault Between Plaintiff and Defendant.**

**Joint and Several Liability: Fairly and Proportionately Allocate Liability Among Parties.**

**Texas Status: Accomplished in 1995 and 2003.**

The tort reforms advocated by TLR have established a clear and effective system of proportionate responsibility in Texas. A defendant is liable for only its own percentage of fault unless it is more than 50% responsible, in which case that defendant may be required to pay the entire judgment. Conversely, a plaintiff found more than 50% responsible for its own injury is barred from any recovery (SB 28, 1995). The fact finder in a trial (judge or jury, as the case may be) must assign percentages of fault to each potentially responsible person (or entity), whether or not that person is actually before the court as a litigant and whether or not that party can pay its share of responsibility (HB 4, 2003). This assures that if a jury assigns only, say, 25% of fault to a defendant, that defendant is responsible for no more than 25% of the judgment. A defendant found to be more than 50% responsible who

pays the entire judgment may obtain contributions from co-defendants for their respective shares of the judgment.

#### **ILR SUGGESTION NO. 23:**

**Place Reasonable Bounds on Subjective Noneconomic Damage Awards.**

**Texas Status: Accomplished in healthcare cases in 2003.**

In 2003, in medical liability lawsuits, Texas placed a cap on non-economic damages, such as pain and suffering and mental anguish, which has encouraged thousands of doctors – especially much-needed specialists – to come to our state (HB 4). A state constitutional amendment was passed in 2003 to assure that the statute would withstand constitutional review by the courts; the constitutional amendment allows the Legislature to cap non-economic damages in all lawsuits.

#### **ILR SUGGESTIONS NO. 24 & NO. 25:**

**Prevent Excessive Punitive Damage Awards.**

**Protect Due Process in Punitive Damages Determinations.**

**Texas Status: Accomplished in 1995 and 2003.**

Texas took care of these issues in the first wave of TLR-advocated reforms in 1995 (SB 25), which were enhanced in 2003 (HB 4). Now, punitive damages are limited to the greater of: (i) \$200,000 or (ii) two times economic damages plus an amount not to exceed \$750,000 for non-economic damages. Punitive damages are permitted only upon a showing of “clear and convincing evidence” rather than merely a “preponderance of the evidence.” Punitive damages can be awarded only if the plaintiff proves the defendant committed fraud, acted with malice, or was “grossly negligent” (a rigorous standard that is conceptually similar to a stringent “reckless disregard” standard). A unanimous jury verdict is required for the award of punitive damages.

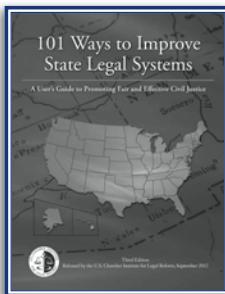
#### **ILR SUGGESTION NO. 26:**

**Provide Juries with Full Information on the Plaintiff's Actual Losses.**

**Texas Status: Mixed.**

The “collateral source rule” prohibits admission of evidence that all or some of plaintiff’s damages will be or have been paid by a source other than defendant, such as through insurance or previous settlements. As a result, the plaintiff may receive double recovery. Texas has employed the collateral source rule since it joined the Union. But, importantly, Texas does allow judgments for plaintiffs to be offset by settlements and payments from some other sources, such as a workers’ compensation award.

Since 2003, Texas has required claims for “lost earnings,” “lost earning capacity” and “loss of inheritance” to be reduced



by the amount of taxes that would have been paid on those lost amounts.

Prior to 2003, a plaintiff could present a cost estimate for future medical loss and recover that estimate in a judgment even if the future medical loss was never incurred because the service was not needed or the plaintiff died before the time the service would have been provided. In medical negligence cases after the enactment of HB 4 in 2003, future medical losses as found by the jury are to be paid as the loss is actually incurred. Future medical losses included in a jury award that are not actually paid are not owed by the defendant.

**Prop 12: Ten Years Later, *continued from p3***

These liability savings are being used to help patients. Monies that used to go to lawyers and lawsuits are now being reinvested in patient safety, new technologies, electronic medical records and expanded charity care.

In 2003, during the same legislative session that medical liability reforms were passed, the legislature gave more money, staff and clout to the medical board to investigate and punish bad practice. Today, unethical, incompetent and addicted doctors are being identified, retrained or rooted out due to the aggressive actions of a beefed up medical board. The net result: the public is better protected than ever by a system that doesn't reward bounty-seeking personal injury lawyers. Despite these strengthened patient protections, trial-lawyer funded groups have continued their efforts to weaken the medical board's disciplinary power.

Critics claimed if voters passed Prop. 12, lawmakers would quickly move to expand cap protections to drunk drivers and industrial polluters. Four legislative sessions later, that

**ILR SUGGESTION NO. 27:**

**Protect Access to Health Care Through Medical Liability Reform.**

**Texas Status: Accomplished in 1995 and 2003.**

Texas enacted comprehensive, historic medical liability reform in 2003 (HB 4), building on what was accomplished in 1995 (HB 971). These reforms have allowed hospitals to put savings from lower insurance premiums into enhanced facilities and patient care. Texas's medical liability reforms have improved access to health care to all Texans because doctors are staying in Texas, doctors from other states are moving to Texas, and emergency facilities – which were closing because of liability issues – are now plentiful in Texas. ■

has not occurred nor has anyone even filed such a bill.

Perhaps the most flawed argument against imposing a cap was levied by so-called "consumer groups" Public Citizen, Consumers Union and Texas Watch who in March of 2003 jointly released a study contending that capping on pain-and-suffering-type awards would have little effect in lowering premiums.

They were totally, completely and undeniably wrong. While medical and economic damages remain unlimited, imposition of the cap on pain and suffering has dramatically reduced liability costs for health care providers, increased critical care services for patients and been a magnet for attracting a record number of new doctors to this state. ■

*Jon Opelt is the Executive Director of Texas Alliance For Patient Access, a statewide healthcare coalition that lobbied for the passage and preservation of Texas' landmark medical lawsuit reforms.*

**A Doctor's Story, *continued from p4***

As long as New York suffers from out-of-control litigation and skyrocketing liability costs, doctors will be wary of practicing there and patients will suffer.

The Texas reform story is a model for the nation. As we approach the tenth anniversary of the passage of medical lawsuit reforms, it's important to remember how far we have come, and make sure we protect the reforms that have improved access to care for so many Texans. ■

*Dr. Jackelinne Villalobos is a Houston obstetrician.*



## JUDICIAL SELECTION.

Every session sees a variety of proposals concerning the judicial selection process. A bill that has already been filed in the 83rd Legislature is one by Senator Dan Patrick (R-Houston) prohibiting straight-ticket voting in judicial races, which is aimed at preventing the partisan “sweeps” in judicial races that impact our large urban counties. Senator Bob Duncan (R-Lubbock) usually proposes changing our election of judges to a system of merit appointment, followed by a partisan election, followed by periodic retention elections. This would require a constitutional amendment as well as legislation.

## LAWSUITS LENDING.

Lawsuit lending is a growing business and has serious ramifications to the litigation system. In consumer-type lawsuit lending, the lender makes a non-recourse loan directly to the plaintiff in return for very high interest; the lender typically collects its principal and interest only if the plaintiff prevails. But the interest rates are extraordinarily high, and can consume the entire recovery by the plaintiff in the lawsuit. Such loans can reduce the plaintiff's incentive to resolve a case for a reasonable sum of money. In another type of lawsuit lending, venture-capital type firms will finance major lawsuits in return for a percentage of the recovery, which raises serious issues about control of the lawsuit and the respective roles of lawyers, their clients, and the lenders.

## MISUSE OF PRODUCTS.

Recently, the leading manufacturer of gasoline cans went out of business because of lawsuit liability. Most of the injuries giving rise to this business-killing litigation arose from the misuse of the cans – namely, by pouring gasoline from the can onto an open fire. This is one of several examples in which product manufacturers have been found liable even though it is improper use of the product that causes the injury.

## NET WORTH DISCOVERY.

Until a plaintiff-friendly Texas Supreme Court handed down a decision in 1988, Texas had never allowed evidence of a defendant's net worth to be discovered in pretrial proceedings, or admitted into evidence at trial, to support a plaintiff's request for exemplary damages. Net worth evidence was not discoverable or admissible because of the very good reason that a defendant's net worth is not relevant to the wrongfulness of its conduct or the extent of the plaintiff's injury. Plaintiff lawyers appreciated the Supreme Court's 1988 decision because of the



**“Since the recovery began,  
38 percent of all the jobs created in  
America have been created in the state of  
Texas...the most important thing that has  
happened to us is tort reform.”**

-Dallas Federal Reserve President and CEO  
Richard Fisher June 7, 2011

prejudicial impact on a jury of introducing a defendant's net worth. Today, net worth evidence remains discoverable and admissible, even though Texas has capped the amount of exemplary damages that may be recovered. A defendant's net worth was never relevant to the issues underlying an award of exemplary damages, and is even less relevant today when exemplary damages are capped.

## PROBATE CODE.

There are current injustices in the probate court system, impacting estates of all sizes. Texas is more liberal than many other states concerning legal fees in will contests, by requiring the estate to pay the attorneys' fees of a will contestant even if the estate successfully defends the lawsuit and the contestant loses. In addition, the legal fees of the losing contestant are paid ahead of many other expenses of the estate. Finally, a forfeiture clause in a will states that any person who brings a court action contesting a will forfeits his or her interest in the will (this clause, of course, is placed in a will by the maker of the will to discourage estate contests by his or her heirs). HB 1969 passed in 2009 makes such clauses unenforceable in Texas if: (i) probable cause exists for bringing the court action by a will contestant and (ii) the action was brought and maintained in good faith (this is a low bar for the contestant to hurdle). The statute dramatically undermines the effectiveness of forfeiture clauses, and, when coupled with the “winner pays” provision discussed above, creates an incentive for lawyers to pursue cases contesting wills.

We will keep you updated on these and other critical civil justice issues that arise during the legislative session through our website, [www.tortreform.com](http://www.tortreform.com) and through email. ■

# Two New Justices Join Texas Supreme Court

**Justice Jeffrey F. Boyd** was appointed to the Texas Supreme Court by Gov. Rick Perry in December to fill Justice Dale Wainwright's unexpired term. Justice Boyd was the governor's chief of staff beginning in September 2011. Before that he was Gov. Perry's general counsel.



*Chief Supreme Court Justice Wallace Jefferson swears in Justice Jeffrey S. Boyd on Dec. 3, 2012. His wife Jackie holds the Bible.*

Boyd is a graduate of Abilene Christian University and earned his law degree summa cum laude from Pepperdine University, where he graduated second in his law school class. After graduation he clerked for Judge Thomas M. Reavley on the Fifth Circuit U.S. Court of Appeals.

He spent 15 years with Thompson & Knight L.L.P. in two stints, leaving first in 2000 to join then-Texas Attorney General John Cornyn as deputy attorney general for general litigation and continuing with Attorney General Greg Abbott. He rejoined Thompson & Knight as senior partner in 2003.

In January, 2011 he left Thompson & Knight to join the Governor's Office. He and his wife, Jackie, have twin daughters, Hanna and Abbie, and a son, Carter.

**Justice John Devine** was elected to the Supreme Court of Texas in November 2012. He previously served for seven years as the Civil Trial Judge of the 190th State District Court of Harris County and for nine years as an appointed Special Judge for the Harris County Justice of the Peace Courts.

During his seven year tenure on the 190th State District Court, Devine tried nearly 350 jury trials and presided over more than 500 bench trials. In 1998, he was voted "Well Qualified" by the Houston Bar Association. Justice Devine reduced his court's case backlog by more than 40 percent during his two terms. In his private litigation practice since 2002, Justice Devine represented both plaintiffs and defendants in state and federal court, which included both Texas District Courts and the U.S. District Court for the Southern District of Texas. Justice Devine has been happily married for twenty-three years to Nubia Piedad Gomez, formerly of Venezuela, and the couple has six children. ■



*Justice John Devine*

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