

★ JUNE, 2005 ★

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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 12,000 supporters is to make Texas the Beacon State for Civil Justice in America.

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Texas Asbestos and Silica Litigation Reform Becomes Law!

After years of work, thousands of grassroots messages to Austin, and hundreds of meetings with legislators before and during the 2005 session, asbestos litigation reform legislation was enacted by the Texas Legislature and signed into law by Governor Rick Perry in separate Houston and Beaumont ceremonies on May 19, 2005.

"I am proud to sign Senate Bill 15 into law because it ensures that every person made sick by asbestos exposure has his or her day in court while reducing the junk lawsuits that have forced dozens of innocent employers into bankruptcy," Perry said.

"Every TLR supporter can be proud that Texas has again crafted and enacted model legislation that should serve as an example to other states and the United States Congress," said TLR Chairman and CEO Dick Weekley. "Texas demonstrated that one of the worst abuses of the civil justice system

lawsuits on behalf of the unimpaired was undermining respect for the law, denying the truly ill timely and full compensation for their illnesses, and wreaking havoc with large segments of our economy. This new law benefits all of the victims



Photograph by Rohn Wenner

can be solved with compassion, fairness, and common sense. All of Texas owes a debt of gratitude to Governor Perry, Lt. Governor Dewhurst, Speaker Craddick, the SB 15 sponsors — Senator Kyle Janek and Rep. Joe Nixon — and Senator Robert Duncan, who played a key role as Chairman of the Senate State Affairs Committee."

"Asbestos litigation reform was the top legislative priority for TLR because the practice of filing

of asbestos and silica litigation abuse: the persons who are ill because of exposure to asbestos or silica, as well as the employees and owners of the businesses that have been financially harmed or are threatened by bankruptcy because of lawsuits filed on behalf of hundreds of thousands of persons who have no discernible impairment," observed TLR's General Counsel, Hugh Rice Kelly.

TLR's lead outside counsel, Alan Waldrop, who headed up the legal drafting and advocacy for both the 2003 Omnibus Tort Reform Bill (HB 4) in 2003 and SB 15 in 2005, summarizes the asbestos/silica litigation reform as follows:

"SB 15 distinguishes between the claims of people who are physically impaired or sick due to

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SENATE BILL 15

Continued from front cover

exposure to asbestos or silica and those who are not experiencing any physical impairment relating to asbestos or silica. The new law allows those claimants who are actually impaired to pursue their claims in the judicial system and defers the claims of those who are not impaired. The law does this by establishing medical criteria that a claimant must meet to demonstrate impairment before proceeding with a lawsuit.”

Waldrop added that “SB 15 also protects those who have been exposed to asbestos or silica but who do not show signs of illness by extending the point at which the statute of limitations begins to run to ensure that if an unimpaired claimant ever becomes sick, he or she will be able to pursue a claim. The law addresses other specific abuses in asbestos and silica litigation by preventing the ‘bundling’ of claims of different people for trial, which means that plaintiff lawyers can no longer

end of the 2003 session, when TLR met with several key legislators who supported asbestos litigation reform but had concerns about aspects of the bill that had been introduced in the 2003 session. TLR then opened discussions with Senator Janek, the Senate sponsor, Rep. Nixon, the House sponsor, as well as Lt. Governor Dewhurst and other members of legislative leadership. Those discussions expanded to include the Texas Asbestos Consumers Coalition (“TACC”), which is a coalition of many companies and organizations that have long been concerned about abuses in asbestos and silica litigation. TACC managed the asbestos reform effort in the 2003 session, while TLR handled the legislative advocacy that led to the sweeping reforms of HB 4 in 2003.

During the interim between sessions, Alan Waldrop and Hugh Rice Kelly worked closely with legislators, legislative staff members, the TACC bill

“I am proud to sign Senate Bill 15 into law because it ensures that every person made sick by asbestos exposure has his or her day in court while reducing the junk lawsuits that have forced dozens of innocent employers into bankruptcy.” — Governor Rick Perry

put hundreds or thousands of claimants in one lawsuit. Further, the law applies the current rules relating to multi-district litigation (MDL) to most asbestos/silica cases currently pending and all such cases filed in the future, which will add efficiency and predictability to the litigation. Finally, SB 15 puts limits on the use of testing materials generated by plaintiff lawyer-sponsored mass screenings in order to prevent the kind of blatant misreadings of x-rays that have resulted in hundreds of thousands of lawsuits by people who have no impairment.”

TLR Senior Chairman, Leo Linbeck, Jr., observed that work on SB 15 began shortly after the

drafting committee, and lawyers who are active in asbestos and silica litigation. This resulted in a unified legislative proposal that TLR and TACC presented to the bill sponsors and legislative leadership. This proposal formed the core of the law that was eventually signed by Governor Perry, known as SB 15. But between the formulation of the legislative proposal and the signing of SB 15 into law, there were many twists and turns on the road to success.

“The credit for SB 15 goes to the legislators who considered, debated, and passed this law into being,” suggested Linbeck. “All of us in TLR appreciate the hard work of the legislators and the

careful approach they gave to this important and complex matter. The result of their efforts is a law that does, in fact, correct the abuses of asbestos/silica litigation while assuring that any person who ever becomes ill as a result of asbestos or silica exposure will be able to seek redress in our courts.”

TLR President Dick Trabulsi commended the state’s executive and legislative leaders who were re-

filed against his company. Chip spent an entire day at the Capitol, waiting until late at night to testify before the Senate State Affairs Committee to tell his story of lawsuit abuse. After his effective testimony, Chip drove home to Corpus Christi to tend to his business affairs the following morning.

Weekley also thanked the TLR team of lawyers, lobbyists, consultants, and staff members who

“Every TLR supporter can be proud that Texas has again crafted and enacted model legislation that should serve as an example to other states and the United States Congress.” — TLR Chairman and CEO Dick Weekley.

sponsible for the enactment of this reform: “Governor Perry placed and kept asbestos litigation reform on the public agenda for years. Lt. Governor Dewhurst once again immersed himself in the details of complex legislation, mastered the intricacies of the bill, and provided leadership at key junctures. Senate State Affairs Chairman Duncan, an experienced litigator, brought a keen legal mind to bear on the major provisions of the bill. Senate sponsor Kyle Janek, a practicing physician who has worked diligently for two sessions on this matter, focused on making sure that anyone who is impaired because of asbestos or silica gets an opportunity to be made whole for the harm done. Speaker Cradick and House sponsor Joe Nixon were insistent that the legislation be fully effective in stopping the abuses of mass screening and bundling of claims that had so corrupted this area of the law.”

Dick Weekley observed that once again the TLR volunteers from across Texas participated in force, just as they have in previous sessions. They provided support at committee hearings, participated in TLR Day at the Capitol, wrote and called their legislators – they did everything that citizens can and should do to favorably influence needed public policy. One of many examples of TLR volunteers who actively helped this effort for reform is Chip Hough of Corpus Christi, a small businessman who has had several abusive asbestos lawsuits

worked tirelessly and effectively to help achieve enactment of SB 15. Dick Trabulsi, who coordinated TLR’s legislative efforts in both 2003 and 2005, also praised his colleagues: “Our TLR team was awesome – after months of research and discussions, we drafted a detailed proposal for asbestos/silica litigation reform; we worked with world-class physicians to make sure that the medical criteria in the bill were fair and comprehensive; we crafted a careful legislative advocacy plan that included media, grassroots and direct lobbying; we worked night and day to execute the plan; we adapted to contingencies as they arose; and we worked seamlessly with a broad coalition that included small business men and women who were facing bankruptcy because of non-meritorious lawsuits, various associations and organizations such as the Texas Asbestos Consumers Coalition, the Texas Oil & Gas Association, the Texas Chemical Council, the American Insurance Association, and many employers of all sizes who have been greatly harmed by asbestos and silica litigation abuses.”

The result of this effort by citizens and legislators was an important reform to our civil justice system that was passed in the Texas Senate by a vote of 30–0 (with one member absent) and in the Texas House by acclamation on a voice vote.

Texas No Longer the World's Courthouse

Because of an initiative by TLR, an important but little noticed reform of the civil justice system in Texas won enactment this session. Passage of HB 755 by Rep. Dan Gattis corrects an anomaly in the Texas statute by allowing our state's judges to send lawsuits filed in Texas by residents of other states back to their home-state courts. The legal doctrine that permits a Texas judge to hold that a citizen from another state or another country should not be allowed to pursue a lawsuit in Texas is known as *forum non conveniens*. This doctrine allows a court to dismiss a case if the judge finds that in the interest of justice and for the convenience of the parties the lawsuit should be heard in a forum other than Texas. The policy behind this doctrine is to protect Texas courts from being compelled to hear cases when doing so would be fundamentally unfair to the defendants or the public, or both.

Years ago, Texas was known not only as the "Lawsuit Capitol of the World" but also as the "World's Courthouse." That's because the ability of Texas judges to refuse to hear out-of-state and even out-of-country lawsuits was severely limited both by statute and by key decisions of the Texas Supreme Court, which at that time was dominated by plaintiff lawyers.

Plaintiff lawyers from all over looked for any tenuous connection to Texas because certain Texas courts were considered "slam dunk" forums for the plaintiff, regardless of the merits of the case. Defendants who were unfortunate enough to find themselves hauled into these courts were well advised to settle their cases, regardless of the merits of their defenses, because the deck was so stacked against them that they would almost definitely be found liable, often for gargantuan damage amounts. That is one reason that Lloyds of London insurance syndicates in the 1980s and early 1990s actually placed a "Texas surcharge" on premiums for companies doing business in Texas.

Reforms advocated by TLR over the years, however, have corrected the worst abuses in forum shopping. These reforms largely gave Texas judges the discretion they should

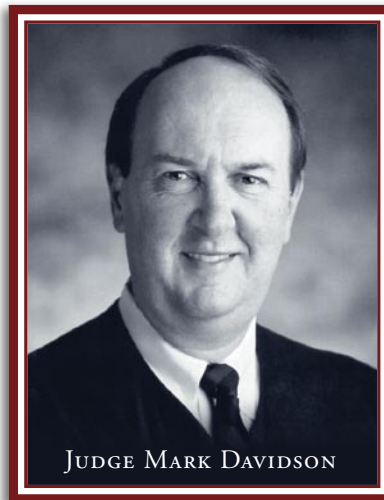
have in determining when it is inappropriate for a non-Texan to pursue a lawsuit in a Texas court. But last year, state district judge Mark Davidson of Harris County detected a defect in the Texas statute on this matter. Judge Davidson noted that the statute declares that a Texas trial court may not dismiss a lawsuit if the plaintiff makes a simple allegation (with very little proof required) that an act or omission

that was a cause of an injury or death occurred in Texas. The trouble is that the statute, as written, requires a Texas judge to keep a lawsuit in Texas even if there is very little connection to Texas and the judge would otherwise conclude that the case would more fairly and efficiently be litigated in courts elsewhere.

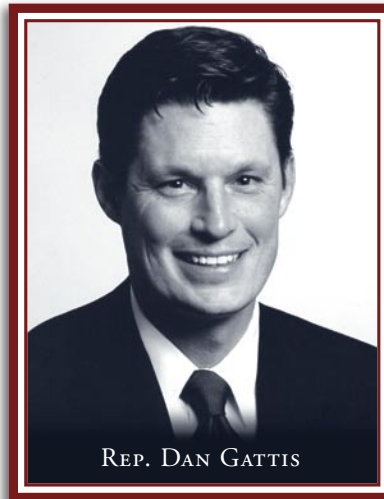
Judge Davidson eloquently illustrated how the current statute sometimes creates an absurd outcome: "The plaintiff lives in Michigan. He has his entire life. All of his jobs have been in Michigan... He has been treated exclusively by Michigan doctors. The coworkers and family members that will join his physicians in testifying in this trial all live in Michigan." Nevertheless, the plaintiff filed his asbestos-related lawsuit in Wharton County, Texas. Because the plaintiff's lawyers alleged that a glove the plaintiff may have worn thirty years ago in his work career in Michigan may have been manufactured in Texas, Judge Davidson concluded that his hands were tied by the anomaly in the Texas statute

and he had to keep the lawsuit in Texas even though justice demanded that the case be pursued in Michigan.

HB 755 by Representative Dan Gattis, now enacted into law, repealed the offending section of the statute so that henceforth Texas judges will be able to make a more sensible and fair determination of whether a lawsuit by a non-Texan belongs in a Texas court. Now, a Texas judge will continue to consider whether an act or omission in Texas may have caused an injury or death, but that will be just one of several factors to be considered and balanced as the judge determines whether justice requires the lawsuit to be pursued in Texas or another state or nation.



JUDGE MARK DAVIDSON



REP. DAN GATTIS

Buses, cars, and airport taxi cabs carrying TLR supporters from all over Texas arrived one after another as TLR Tort Reform Day kicked off on February 14th at the Four Seasons Hotel in Austin. Toting TLR briefcases, armed with legislative briefing papers, and united with purpose and obviously high spirits, TLR supporters mixed camaraderie with serious legislative communications as they assembled to advocate reforms to our civil justice system.

TLR DAY BRINGS ★★★★★★★★★★ ★★★★★ GRASSROOTS MESSAGE to AUSTIN

“It was truly awesome to know that not only does my vote count, but so do my opinions and beliefs,” said TLR supporter Betsy Blau from San Antonio, in describing her feelings about participating in Tort Reform Day at the Texas State Capitol. “TLR Day was a chance for community leaders to talk with their legislators and staff, and it was a good chance for TLR supporters to meet each other and see that citizens from all over Texas were united in their efforts to do something about lawsuit abuse,” said TLR Chairman Dick Weekley.

The full day of activities started early, when members of TLR’s Speakers Bureau and TLR’s Regional Chairmen from 22 different regions in Texas attended a working breakfast with Attorney General Greg Abbott. At lunch, TLR’s Senior Chairman Leo Linbeck, Jr. introduced Lt. Governor David Dewhurst, who emphasized the importance of legislative reform of the rampant abuses in asbestos and silica litigation. He complimented those attending for their participation in good citizenship by petitioning their government for the redress of grievances. House Civil Practices Committee Chairman

Joe Nixon, House sponsor of last session’s HB 4, received a standing ovation from tort reformers grateful for what many experts have described as the most comprehensive civil justice reform enacted by any state in America.



Lunch participants were serenaded by the Bar & Grill Singers, a melodic vocal group of lawyers who often poke fun at their own profession. The group includes TLR legal counsel Alan Waldrop. Lunch participants also heard from TLR General Counsel Hugh Rice Kelly about the state of the Texas civil justice system and TLR’s proposals to remedy problems.

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TLR DAY 2005

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TLR DAY

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After lunch, nearly 500 tort reformers from every corner of Texas fanned out across our magnificent State Capitol. Each grassroots supporter brought a message of personal or local concern to his or her legislators about lawsuit abuse and the need to enact asbestos/silica litigation reform.

At the end of Tort Reform Day, Governor Rick Perry, Speaker Tom Craddick, and numerous Senators and Representatives attended the TLR Reception for legislators. The Governor and the Speaker each addressed the assembly and were warmly received and loudly cheered for their career-long efforts for civil justice reform in Texas.

Weekley commended TLR Director of Community Affairs, Mary Tipps, who headed up the planning and execution of Tort Reform Day. “Everyone at TLR recognizes that communication with legislators is serious business, but that our Tort Reform Day should be fun as well as educational,” Weekley said. “Mary Tipps and her TLR teammates put together an event that combined the serious business of legislative advocacy with the fun of good fellowship in a common cause. The TLR team of Matt Welch (TLR’s PAC Director), Ken Hoagland (TLR’s Communications Director), Beverly Kishpaugh, Glenda Hovey, Beth Coffey, and Kristie Vasquez worked night and day with Mary to make this the best TLR Tort Reform Day ever.” Tipps observed that “everyone had a good time and we know that TLR supporters did a lot of good, helping to focus legislators’ attention on important issues.” The proof of that was in the pudding – with the passage of SB 15, which addresses the abuses in asbestos and silica litigation in Texas.

BEVERLY KISHPAUGH HONORED

When Lt. Governor David Dewhurst cites his assistance to the Texas tort reform movement in general, and Texans for Lawsuit Reform in particular, he always begins with Beverly Kishpaugh. A long-time TLR organizer, Kishpaugh was actually “loaned” to TLR way back in 1994 by Dewhurst to help identify local community leaders who would help spread the word about civil justice reform. At that time, she was a paid advisor to then private-citizen Dewhurst. She has since become a permanent part of the TLR team, and is well known – and loved – by TLR supporters across Texas.



Beverly Kishpaugh with Dewhurst & Weekley

TLR Chairman Dick Weekley refers to Beverly as “TLR’s secret weapon.” Kishpaugh’s self-effacing, low key approach took a hit when Dewhurst and Weekley surprised her with TLR’s Lifetime Achievement Award during lunch ceremonies at TLR’s Tort Reform Day in Austin.

“I call her ‘Tiger’ Kishpaugh,” said TLR Communications Director Ken Hoagland. “She appears mild-mannered and grandmotherly but in reality she is one of the most talented, tenacious, and effective organizers I have ever worked with,” said Hoagland.

Kishpaugh recruits TLR speakers, arranges speaking opportunities with community organizations, helps with grassroots initiatives, and provides TLR planners with invaluable advice on the local political scene.

Legislative Monitoring

While TLR is known for its affirmative advocacy of specific civil justice reforms such as HB 4 in 2003 and SB 15 in 2005, it is less well known for actively supporting good legislation initiated or authored by others and opposing legislation that would harm our civil justice system.

Because of our expertise in civil litigation issues and because our team of legislative advocates and lawyers has earned the trust of so many legislators, we are often asked to review bills by bill sponsors. There were several legislators who sought this kind of help from TLR on a wide variety of bills related to civil justice, and we were responsive to each request.

ample from the 2005 session is a bill that dealt with lawsuits by landowners against mineral producers and transporters concerning environmental clean-ups. Some of TLR's supporters favored the bill, while others opposed it. We worked quietly with our supporters to try to bridge the gap in order to assist the bill's sponsor in passing the legislation. We were not successful. We will work with the bill sponsor and the interested parties in the interim to see if mutually agreed positions can be established.

To further illustrate the kind of statutory provisions that concern us, there were several bills that contained a provision to make a losing defendant pay the legal fees of

While TLR always has its own significant legislative agenda, we also devote huge resources in the form of time, talent, and finances to monitoring all legislation impacting our civil justice system.

There were many bills introduced this year aimed in various ways at protecting consumers. Unfortunately, as these bills worked their way through the legislative process, many of them added provisions that would create new causes of action or that might be exploited by certain members of the plaintiffs' bar who actively look for statutory opportunities to create lawsuits. Our legal team worked closely with the various bill sponsors and other interested parties to either remove the problematic language or to refine the language to prevent harmful or unnecessary future litigation. There were several bills in this consumer protection category that we impacted favorably by offering specific drafting suggestions to the interested parties, and these bills became law. One or two of the bills, however, had drafting problems so problematic that the bills could not be fixed during the session, and died in one chamber or the other.

Sometimes, in the midst of a legislative session, we are asked to play the role of an informal mediator when bills have provisions concerning civil litigation that are favored by some of our TLR supporters and opposed by others. One ex-

ample from the 2005 session is a bill that dealt with lawsuits by landowners against mineral producers and transporters concerning environmental clean-ups. Some of TLR's supporters favored the bill, while others opposed it. We worked quietly with our supporters to try to bridge the gap in order to assist the bill's sponsor in passing the legislation. We were not successful. We will work with the bill sponsor and the interested parties in the interim to see if mutually agreed positions can be established.

In every session certain elements of the plaintiffs' bar try to undermine, erode, or eliminate arbitration as an alternative to litigation. This session was no exception. We had to engage actively in many bills to prevent unnecessary restrictions on Texas' arbitration statute. One bill, which would seem harmless to some, could have undermined arbitration because it would have prevented parties from voluntarily agreeing to private arbitration proceedings. The bill passed the Senate, but our lobbying efforts in the House helped to prevent its passage into law.

There are many practicing plaintiff attorneys in the Legislature, especially in the House of Representatives. Some of these attorney-legislators introduce legislation that would

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LEGISLATIVE MONITORING

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undermine the civil justice reforms that have become law or would violate TLR's basic principles concerning our litigation system. For example, a bill was introduced that would have removed a particular class of cases from the jurisdiction of the Multi-District Litigation ("MDL") court. The establishment of a statewide MDL procedure was one of the most important elements of HB 4, and any erosion of the MDL process would be a serious setback to civil justice reform. TLR vigorously and successfully opposed the bill.

In the 2005 session, TLR strongly supported a much needed pay increase for all Texas judges, which unfortunately failed passage on the final day of the session because of issues unrelated to the substance or merits of the pay raise. We also supported a needed increase in the administrative budgets of the Texas courts of appeal, which unfortunately

did not get appropriated at a level that we believe to be adequate for the best administration of justice. In the interim, we will work with the state's judiciary and with the Legislature to achieve a judicial pay raise and adequate judicial administration funding in the 2007 legislative session.

These are just a few of the bills and a few of the areas in which TLR's legal team, lobby team, and volunteers actively engaged in the 2005 session. While TLR always has its own significant legislative agenda, such as asbestos/silica reform, it also devotes huge resources in the form of time, talent, and finances to monitoring all legislation impacting the civil justice system – supporting favorable bills, opposing problematic bills, and being a resource to legislators who seek our help in crafting and passing legislation. We believe these efforts are an important and valuable part of our mission.

Phillip Johnson, Newest Supreme Court Justice

The ninth member of the Texas Supreme Court was recently sworn into office by Chief Justice Wallace B. Jefferson. Johnson was appointed by Gov. Rick Perry to the Court to fill the vacancy left by former Justice Michael H. Schneider, who became a federal district judge in Tyler. Johnson was chief justice of the Seventh District Court of Appeals in Amarillo. Johnson's appointment was confirmed 31-0 by the Texas Senate.

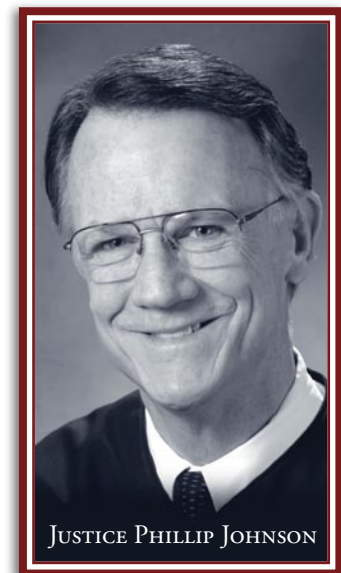
Hugh Rice Kelly, TLR's General Counsel, praised Phil Johnson's appointment to our state's high court: "Justice Johnson not only brings broad experience to the court, he also adds an exceptional ability to approach decisions on both a practical and a scholarly level. His appointment will strengthen the Supreme Court and reinforce its dedication to the traditional legal principles of Texas jurisprudence."

Johnson had led the Amarillo appeals court as chief justice since January 2003. Before that, he was an associate justice on the court, taking his seat in January 1998. Justice Johnson attended Texas Tech University School of Law, where he was a member of the law review and graduated with honors in 1975. He has served on numerous committees of the State Bar, is a member of the College of the

State Bar, is a Life Fellow of the Texas Bar Foundation and the American Bar Foundation, and has served as president of the Lubbock County Bar Association. He is board certified in civil trial law and personal injury trial law. From 1965 until 1972, he served in the U.S. Air

Force as a pilot, and is a Vietnam veteran. Justice Johnson is married to Carla Jean Johnson and has five children.

"Phillip Johnson is a good man, an experienced lawyer, and a distinguished judge," noted TLR President Dick Trabulsi. "Governor Rick Perry has again shown his commitment to an honest, hard-working, competent, and conservative judiciary in his appointment of Phillip Johnson to our state's highest court," Trabulsi said.



**“IN AMERICA, EVERY MAN KNOWS THAT HE HIMSELF IS
PART OF THE GOVERNMENT, BOUND BY DUTY AS WELL
AS SELF INTEREST TO DEVOTE PART OF HIS TIME AND
THOUGHTS TO IT.”**

**— James Bryce,
*The American Commonwealth***

A Profile in Citizenship

If there is one clear ingredient in the success of TLR's mission to restore fairness, common sense, and balance to the Texas civil justice system, it is the involvement of citizens throughout our state. TLR is, and always has been, volunteer led and volunteer based, with over 12,000 Texans forming its supporter base.

Typical of the kind of citizen who steps forward to volunteer his talent, time, and effort is Dr. Burton Dickey, head of pulmonology at M.D. Anderson, and one of America's most noted and respected pulmonologists. Dr. Dickey volunteered his time and expertise to work with our legal team in refining the medical criteria sections of SB 15, the asbestos litigation reform bill. Dr. Dickey spent numerous hours consulting with our lead counsel, Alan Waldrop, the Lt. Governor, the Senate and House sponsors, and various interested legislators. Dr. Dickey's dedication was such that he cut short a family vacation in Big Bend to fly to Austin to appear before the Senate State Affairs Committee at a critical junction for the bill.



DR. BURTON DICKEY

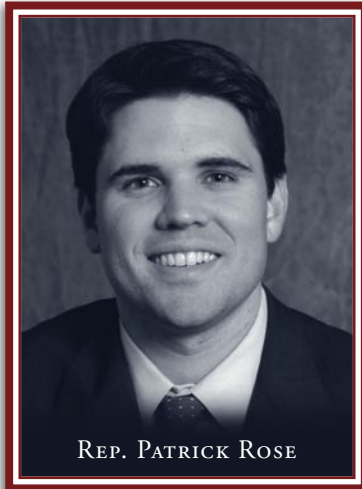
The bill sponsors and legislative leadership wanted to make sure that any person who is actually sick from exposure to asbestos or silica is able to pursue legal remedies. To accomplish that objective, TLR was asked to propose a medical provision that would recognize that, although rare, a person could have an asbestos related illness but not meet the medical criteria that were in SB 15 as originally filed. The goal was to establish a “safety net” criterion that would give a judge some discretion to allow a lawsuit by a person who fell outside of the normal medical criteria, but that would still be definite enough to achieve the bill's purpose of preventing lawsuits by those who are not ill. This was a tall order, but Dr. Dickey, in consultation with our legal team and the legislative leadership, produced a “safety net” provision that will accomplish the dual purposes of assuring that every sick person can pursue a legal claim and that persons who are not ill are excluded from asbestos-related lawsuits until such time that they become ill.

Dr. Dickey is one example of numerous persons who made sacrifices in 2005 to spend time in Austin as part of the most essential ingredient in a sustainable Republic – the involvement of citizens in the workings of government, giving truth to the founding concept of our nation...the citizen is sovereign.

Permissive Appeal Scuttled

An important initiative by TLR in the 79th Legislature that failed to win passage would have enabled Texas judges to allow immediate appeals of disputed points of law before the litigants went through the expense and anxiety of a trial.

TLR proposed that Texas adopt a practice known as “permissive appeal,” which allows an interlocutory appeal of a controlling question of law and has been used successfully in federal courts for half a century. HB 1294 included provisions that would have enabled a Texas trial judge to permit an appeal from a pre-trial order issued by that judge if: (i) the order involves a controlling question of law (ii) as to which there is a substantial ground for difference of opinion and (iii) an immediate appeal from the interlocutory order may materially advance the ultimate determination of litigation. The appeal is available to any party in a lawsuit, plaintiff or defendant.



REP. PATRICK ROSE

Unfortunately, several plaintiff lawyers who are Members of the Texas House of Representatives mounted a vigorous opposition to HB 1294 on the House floor, led by Rep. John Smithee (R. Amarillo), Rep. David Liebowitz (D. San Antonio), Rep. Bryan Hughes (R. Mineola), and Rep. Craig Eiland (D. Galveston). These plaintiff lawyer-legislators alleged that permissive appeal would be routinely abused by defendants who would use the process merely for delay. This and other equally spurious allegations caused several lay legislators to be concerned or confused about how the proposed appeal process would affect lawsuits, with the result that the plaintiff lawyers succeeded in adding floor amendments to HB 1294 that would have diminished or perhaps destroyed the benefits of the proposal.

There were effective safeguards in HB 1294 that would have prevented permissive appeal from being used for delay or other dilatory purposes. HB 1294 allowed discretion to the trial judge to certify the appeal. It also made acceptance of the appeal by the appellate court discretionary. Therefore, the trial judge and at least two of the three judges on the ap-

pellate panel would have to agree that the interlocutory appeal concerned an unsettled, controlling question of law (not of fact), the resolution of which would materially advance the ultimate determination of the lawsuit. It is improbable in the extreme that three or four Texas judges would agree to a permissive appeal that was being used for any unethical or inappropriate purpose. Moreover, permissive appeal has been part of the federal court process since 1958, and litigants have not abused the procedure.

Rep. Patrick Rose (D. Dripping Springs) energetically led the effort to enact permissive appeal into law. He was ably assisted in a lively floor debate by several lawyer-legislators, including Rep. Bill Keffer (R. Dallas), Rep. Larry Phillips (R. Sherman), Rep. Dan Gattis (R. Georgetown), and Rep. Joe Nixon (R. Houston). HB 1294 recognized that when there is a critical and unsettled question of law at issue in a pre-trial motion, it is plain common sense and good legal practice to allow the trial judge to grant an interlocutory appeal so the issue can be resolved before the parties go through the time, expense and emotional drain of a trial.



REP. BILL KEFFER

The floor amendments so undermined the permissive appeal provisions of HB 1294 that the bill's sponsors removed permissive appeal from the bill, at TLR's urging. Now that we know the types of unmerited allegations that the plaintiffs' bar makes against permissive appeal, we will work with legislators in the interim to fully educate them on the benefits of an interlocutory appeal of a controlling question of law, with the expectation that an effective permissive appeal process will be enacted into law in the 2007 session of the Texas Legislature, adding fairness and efficiency to the Texas litigation process.