SPRING 2011

# TLR ADVOCATE

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

★ SPRING 2011 ★

## IN THIS ISSUE



## 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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MAKE TEXAS A BEACON for CIVIL JUSTICE in AMERICA

## Fighting for Civil Justice Reform in Austin

This is a busy legislative session for civil justice issues. You recently received TLR's report on TWIA, the state-created Texas Windstorm Insurance Association that insures coastal residents for wind damage. The report details the questionable and excessive legal fees that resulted from Hurricane Ike. TLR is working with legislators to make sure that in future windstorms, the insurance claims in TWIA are handled fairly, but without the huge transactional costs associated with litigation.

This *Advocate* highlights two other civil justice bills that are important to Texans. Sen. Joan Huffman (R-Houston) and Rep. Brandon Creighton (R-Conroe) have omnibus tort bills that contain initiatives advocated by Governor Rick Perry. The bills are intended to increase the efficiency of litigation, to encourage settlement of legitimate lawsuits, and to discourage non-meritorious lawsuits.

The omnibus tort bill (SB 13 and CSHB 274) has five elements: First, it instructs the Texas Supreme Court to write rules to replace Texas' archaic "special exceptions" practice with a true "motion to dismiss" practice, allowing lawsuits that have no merit to be disposed of quickly. Second, it provides for the prompt resolution of lawsuits up to $100,000, so that litigants may have their cases resolved without excessive time and expense. Third, it provides that only statutes which expressly create a cause of action do so and judges cannot imply causes of action from statutes. Fourth, the bill provides for a pre-trial appeal of trial court rulings on issues of law that will determine the outcome of the lawsuit if the trial court and the appellate court agree that the appeal has merit. Fifth, it amends our current offer of settlement rule to make it more effective by establishing cost-shifting incentives to encourage parties to put reasonable and full settlement offers on the table early in lawsuits.

We also discuss CSHB 1426 by Rep. Tryon Lewis, and its Senate companion, SB 1207 by Sen. Bob Deuell. These bills are an important protection of statutes of limitation. There are several other bills supported by TLR, which are listed inside.

We may call on you in the next several weeks to communicate with your legislators about these bills. Thank you.

Sincerely,

Leo Linbeck, Jr.
Senior Chairman

# The 2011 Omnibus Tort Reform Bills

CSHB 274 *by Rep. Brandon Creighton, R-Conroe,* SB 13 *by Sen. Joan Huffman, R-Houston*

*The Omnibus Tort Reform Bill contains five civil justice reforms designed to discourage non-meritorious lawsuits and increase the efficiency of litigation. Briefly, the proposed reforms:*

» Replace Texas' archaic "special exceptions" practice with a true "motion to dismiss" practice, allowing lawsuits that have no merit to be disposed of quickly.

» Provide for the prompt and fair resolution of lawsuits up to $100,000, so that litigants have a chance to have their cases resolved without excessive time and expense.

» Pass a law stating that only statutes which expressly create a cause of action do so and judges cannot imply causes of action from statutes unless the words of the statute explicitly create a cause of action.

» Allow a pre-trial appeal of trial court rulings on issues of law that will determine the outcome of the lawsuit, rather than having the parties incur the expense and time of a full trial before the dispositive issues of law are resolved on appellate review.

» Amend our current offer of settlement rule to make it more effective. Amend it to put in place the proper incentive to encourage parties to put reasonable and full settlement offers on the table early in lawsuits. This will benefit all parties as well as the civil justice system by having lawsuits settle more quickly, be less expensive, and consume fewer resources.

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## ALLOCATION OF LITIGATION COSTS

Lawsuits are unpleasant activities for plaintiffs and defendants alike. Unfortunately, litigation in America has become a form of warfare that consumes excessive time, money and emotion. Our civil justice system needs dispute resolution mechanisms that will help resolve lawsuits equitably at the earliest possible time. Cost-shifting mechanisms can help this process in appropriate cases.

**The Omnibus Tort Bill** proposes an amendment to the offer of settlement rule that will create a more effective incentive for parties to put reasonable offers on the table at the earliest possible time and encourage opposing parties to accept those reasonable offers. The amendment would correct an imbalance in the current offer of settlement rule that creates more risk for defendants if the rule is invoked than for plaintiffs. The amended rule would work as follows:

(i) if a plaintiff rejects an offer and ultimately recovers less than 80% of defendant's offer, then plaintiff must pay for defendant's litigation costs from the time defendant's offer was rejected,

(ii) if a defendant rejects a counter-offer by plaintiff and the plaintiff ultimately recovers more than 120% of that offer, then defendant must pay for plaintiff's litigation costs from the time plaintiff's offer was rejected,

(iii) if both defendant's offer and plaintiff's counter-offer are rejected and plaintiff's ultimate recovery is more than 80% of defendant's offer and less than 120% of plaintiff's counter-offer, then there is no cost-shifting and each party pays its own litigation costs.

This is a common sense idea which is likely to be used often and widely. It will create incentives for parties to resolve lawsuits early, with greater net recovery by plaintiffs, less net cost to defendants, less time and emotion expended by all parties, less risk to the parties, and less burden on judges and citizens who serve as jurors. In contrast, under our current system, defendants often delay too long in making a thorough and realistic determination of potential liability and plaintiffs often prolong litigation in hopes of unreasonable recoveries because they can pursue the lawsuits largely without risk. An effective offer of settlement rule will alter this dynamic by creating incentives in line with the parties' actual interests in litigation. The Omnibus Tort Bill will encourage early and fair resolution of lawsuits.

**The Omnibus Tort Bill** also amends our statute providing for the award of attorney's fees for claims for breach of an oral or written contract to make such awards available to whoever prevails in the lawsuit. Today, only the plaintiff can recover fees under the statute if the plaintiff prevails. In many contract disputes this can create an incentive for a "race to the courthouse" in order to be the "plaintiff." Many contract disputes involve claims going both ways and all involve contract language as part of the dispute. There is no sound reason to reward whoever files a lawsuit first or to reward only the plaintiff with fees in the event the defendant was right about what the contract provided. Contracts that contain a fees' provision usually provide that the fee shifting goes both ways. In cases where the contract is silent, fee awards should go both ways as well.

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## EARLY DISMISSAL OF MERITLESS LAWSUITS

**The Omnibus Tort Bill** directs the Texas Supreme Court to "adopt rules to provide for the dismissal of certain causes of action that the Supreme Court determines should be disposed of as a matter of law on motion and without evidence."

Federal courts and the majority of states have a procedure to address the early dismissal of lawsuits that are meritless on their face – that is, lawsuits that do

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not even state or allege legitimate legal theories or valid causes of action. The procedure is commonly called a "motion to dismiss practice," and allows courts to evaluate and rule on certain legal issues that do not require discovery or factual development early in the life of a lawsuit. Today, Texas does not have a motion to dismiss practice that will allow courts to make these evaluations early in the lawsuit. The lack of such a procedure makes legally meritless cases in Texas more expensive and time-consuming than they should be.

*It is time for Texas to modernize its procedural rules concerning lawsuits that do not present legitimate claims on their face.*

Forty-two states have adopted a motion to dismiss practice that is the same or similar to the federal procedure that allows dismissal of lawsuits that fail to "state a claim upon which relief may be granted." Only eight states – one of them Texas – do not have a motion to dismiss practice similar to the federal rule. In Texas, we still rely on an archaic system of "special exceptions" developed in the 19th Century to address all pleading defects, including defects that should require dismissal of a lawsuit. It is time for Texas to modernize its procedural rules concerning lawsuits that do not present legitimate claims on their face.

Plaintiffs sometimes name multiple defendants in a lawsuit with little or no connection to the case, either to conduct a "fishing expedition" to see if they can find something to base a claim on or in the hope that the defendants will settle just to escape from the time and expense of defending the lawsuit. Lawyers refer to this sort of practice as trying to get "nuisance value" out of a named defendant. A motion to dismiss practice will allow a defendant who truly has no real legal connection to a lawsuit an opportunity to get out of the lawsuit before having to expend significant time, energy, and money participating in discovery and defending against it. This will have the effect of lowering the "nuisance value" of certain meritless lawsuits and reducing the cost of such suits for everyone involved in the civil justice system.

**The Omnibus Tort Bill** will also allow trial courts to award fees as are "equitable and just" to parties that prevail on a motion to dismiss. This will provide incentives for defendants not to file meritless motions to dismiss and for plaintiffs to take legitimate motions to dismiss seriously.

**The Omnibus Tort Bill** leaves the task of writing the details of a Texas motion to dismiss practice to the Texas Supreme Court. When dealing with matters of civil procedure, the Legislature regularly instructs the Supreme Court to write rules because the Court, in its traditional rule-making capacity, is in the best position to write a rule that is consistent with Texas jurisprudence.

## EXPEDITED CIVIL ACTIONS

**The Omnibus Tort Bill** directs the Texas Supreme Court to "adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions in which the amount in controversy … is more than $10,000 but does not exceed $100,000…. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system."

Texas has an effective and relatively inexpensive system for handling "small claims" in our justice of the peace courts. This system works for claims up to $10,000. However, it can sometimes be difficult to successfully prosecute smaller claims that must be filed and litigated in district courts or county courts at law, where the full breadth of the rules of civil procedure and evidence apply and are available for litigants to use against each other. The prosecution of such claims, those above $10,000 and up to $100,000, can sometimes be hard to justify due to the time and expense of litigation. People who have legitimate claims want to get their day in court in the shortest amount of time and with legal expenses that don't eat up most or all of their eventual recovery.

Extensive discovery, with written interrogatories, multiple depositions, unlimited requests for documents, and expert witness reports, are largely a phenomenon of the last forty years. Even large, complex cases used to go to trial with much less discovery, delay, and expense. Lawsuits have become so expensive in America today that it is hard to get

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a satisfactory recovery for a relatively small claim if the litigation is protracted. We need procedures that allow all sizes of civil disputes to be effectively and efficiently litigated.

Several jurisdictions around the country have procedures which allow smaller cases to be resolved more quickly than the larger, more complex matters that require the availability of expensive procedural tools such as elaborate discovery. The Texas Supreme Court will have several models to look to for information in drafting appropriate rules to truly expedite smaller cases and keep them from being too expensive.

## NO IMPLIED CAUSE OF ACTION

**The Omnibus Tort Bill** states that a "statute may not be construed to create a cause of action unless the statute by clear and unambiguous language creates a cause of action." This is simply a common-sense rule for the appropriate interpretation of statutes by our courts.
The purpose of this provision is to prevent activist judges from implying or judicially creating a cause of action from a statute that does not, in fact, expressly create a cause of action. Judges should not decide that the Legislature intended to create a cause of action in statutes that do not contain "clear and unambiguous language" reflecting the Legislature's intent to do so.

This provision in no way interferes with the development of case-driven common law in Texas. It does not apply to the common law or common law causes of action such as negligence per se at all. It is a rule of statutory construction that applies only to statutes passed by the Legislature to determine whether those statutes create new causes of action. It simply recognizes a well-accepted rule of statutory construction that is time-honored in American jurisprudence.

The provision is a legislative declaration of what conservative courts already know. The function of a judge in construing a statute is to give effect to the intent of the Legislature as expressed in the actual words of the statute. If the words in the statute do not create a cause of action, then judges should not imply or judicially create a cause of action that the Legislature did not explicitly create. This is what is meant by strict construction of written enactments, such as constitutions, statutes and regulations.

This provision should meet with the approval of any legislator who believes in judicial restraint.

## INTERLOCUTORY APPEAL OF CONTROLLING QUESTION OF LAW

**The Omnibus Tort Bill** amends our current interlocutory appeal statute to provide that trial courts may allow an immediate, interlocutory appeal of an order that involves a controlling question of law on which there can be a substantial basis for difference of opinion. Examples would be legal questions that have not yet been decided by appellate courts or legal questions on which the intermediate appellate courts disagree. A resolution of these types of legal questions by the courts without the necessity of costly pretrial discovery and the enormous expense of a trial will greatly reduce the burden on the civil justice system when the real issue in the case is the controlling question of law. In appropriate cases, this will allow our courts to deal with these cases in a more just and efficient manner, saving judicial resources, time, and the resources of the parties in the litigation. The result will be a refinement of our civil justice process that will make litigation in our State more fair, less costly and more efficient.

*Judges should not decide that the Legislature intended to create a cause of action in statutes that do not contain "clear and unambiguous language" stating the Legislature's intent to do so.*

Opponents of the interlocutory appeal provision of The Omnibus Tort Bill argue that it will clog our appellate courts and be used by defendants to delay litigation or to harass plaintiffs by adding time and expense to a lawsuit. These arguments are unfounded because the interlocutory appeal process cannot be used unless: (i) the trial court agrees that the interlocutory appeal is appropriate and allows it, and (ii) the appellate court agrees

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# Eliminating Abuses in the Responsible Third Party Practice

HB 1427 *by Rep. Tryon Lewis, R-Odessa*

**HB 1427** repeals Section 33.004(e) of the Civil Practice and Remedies Code because it frustrates the sound public policy embodied in statutes of limitation and is used to undermine the administration of justice by providing a means to circumvent limitations periods.

Section 33.004(e) allows claims that are barred by applicable statutes of limitation to be revived if a party is designated as a "responsible third party" in a lawsuit. This means that a party against whom limitations has run and who would have a legitimate defense to a suit can find itself subject to suit again simply because a defendant decides to designate that party as a "responsible third party."

Responsible third parties (RTPs) may be designated by the defendants in a lawsuit to allow the jury to allocate fault for the purposes of applying the proportionate responsibility rules to every person or entity that may have contributed to the plaintiff's damages. The RTP designation itself does not make the RTP a party to the lawsuit or make it liable. However, once a party is designated as an RTP under Sec. 33.001(e), the plaintiff can file a lawsuit against that RTP even if that RTP has a legitimate statute of limitations defense against the plaintiff.

> Statutes of limitation prevent fraudulent and stale claims from arising after evidence has been lost or after facts have become obscure through the passage of time or the death, disappearance or defective memory of witnesses.

The following are just two of many illustrations of how Section 33.001(e) is being misused:

- In *Ream v. Biomet, Inc.*, a plaintiff sued a hospital concerning a therapy system. The plaintiff had not sued the five manufacturers of the therapy system within the limitations period applicable to them. To overcome the manufacturers' limitations defense, the plaintiff settled with the hospital for a small sum and the hospital designated the five manufacturers as RTPs, thereby abrogating the manufacturers' limitations defense.
- In *Flack v. Hanke,* the plaintiff and defendant entered into a settlement agreement whereby the defendant would designate as RTPs two law firms against whom the plaintiff's claims were barred by limitations, and plaintiff would then dismiss the defendant. The Court's holding confirms that Section 33.001(e) allows collusion between a plaintiff and a defendant to override another party's limitations defense.

Statutes of limitation prevent fraudulent and stale claims from arising after evidence has been lost or after facts have become obscure through the passage of time or the death, disappearance or defective memory of witnesses. They provide a degree of certainty to the threat of litigation and to encourage the resolution of legal claims within a reasonable amount of time. **Sec. 33.004(e) undermines statutes of limitation and should be repealed.**

# A Fair Process for Handling TWIA Claims in the Future

In TLR's report, *The TWIA Problem: Why You Should Care,* you read about the questionable and excessive legal fees paid by the Texas Windstorm Insurance Association (TWIA) in the settlement of lawsuits after Hurricane Ike. Because TWIA is a state-created agency and grossly undercapitalized, any future large hurricanes or series of hurricanes that hit the Texas coast will have a direct impact on Texas taxpayers and all Texans' homeowner's insurance rates. Therefore, it is essential that the huge transactional costs of entrepreneurial litigation be eliminated from the windstorm claims process.

TLR believes the following process would resolve disputes in a fair, prompt and inexpensive manner:

If a person who has suffered wind damage and filed a claim with TWIA is not satisfied with TWIA's estimate of the cost to repair or replace the structure, the claimant can appeal to a panel of appraisers. The claimant would choose one appraiser, TWIA would choose one, and if these two appraisers cannot agree on an amount they would choose a third appraiser to break the deadlock. If the claimant is unhappy with the decision of the panel, the claimant can appeal to state district court in Travis County in the same manner as an appeal would be taken from an agency decision. The court would determine whether there is substantial evidence in the record to support the decision of the appraisal panel. If there is, the appraisal panel decision will be affirmed. If not, the court may render a decision or remand the case, as appropriate.

If a person who has suffered wind damage and filed a claim with TWIA is not satisfied with TWIA's determination of how much of the damage was caused by wind versus how much was caused by flooding, then the claimant can request a review of the decision by TWIA. If the claimant is not satisfied with the results of the review by TWIA, the claimant can appeal TWIA's determination to a panel of three independent reviewers; one reviewer will be chosen by claimant, one by TWIA, and those two will choose the third. Each such panel will have the benefit of an expert panel established by the Texas Department of Insurance, which will prepare a map of the areas impacted by the windstorm, showing the likely damage caused by wind in specific areas. The map will be guidelines for the independent review panels to apply unless there is clear and convincing evidence to the contrary. If the claimant is not happy with the decision of the independent review panel, the claimant may appeal to state district court in the same manner as an appeal would be taken from an agency decision.

Even for claims after a large storm like Hurricane Ike, over 90% are typically resolved in the normal claims process without further dispute. For claims where the claimant and TWIA cannot come to an agreement, the independent review and appraisal processes will provide policyholders a fair remedy, including recovering costs and attorneys' fees, without the risk, time delay and expense of a full-blown lawsuit. Further, TWIA will be able to manage and pay claims without the massive drain of funds required to satisfy entrepreneurial lawyers.

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to accept the appeal. Since this appeal provision applies only to controlling questions of law, must be approved by the trial court, and is discretionary with the appellate court, this appellate process will only be available in cases where it can be used appropriately to lessen the time and expense of the judicial process rather than increase it. ■

# TLR Also Supports These Bills Impacting the Texas Civil Justice System

**CSHB 2661 by Rep. Tim Kleinschmidt, R-Lexington. Offer of Settlement Cost-Shifting.**

Litigation in America has become a form of warfare that consumes excessive time, money and emotion. Our civil justice system needs dispute resolution mechanisms that help resolve lawsuits equitably at the earliest possible time. This proposed amendment to the offer of settlement rule would create a more effective cost-shifting incentive for parties to put reasonable offers on the table and encourage opposing parties to accept those reasonable offers.

**CSHB 2846 by Rep. Jerry Madden, R-Richardson. Attorney General's Penalties in Deceptive Trade Practice Act (DTPA) Actions.**

This bill seeks to improve the balance between the enforcement authority of the Texas Attorney General in DTPA actions with the due process rights of the businesses being investigated in DTPA actions. The bill seeks reasonableness in penalties and the investigative authority of the AG but does not alter the AG's ability to seek full restitution to harmed consumers, nor the AG's capacity to seek injunctions to stop harmful practices. The bill also does not amend any aspect of the law allowing individuals to file civil causes of action to recover damages under the DTPA.

**SB 1160 by Sen. Kel Seliger, R-Amarillo and HB 1971 by Rep. Jim Jackson, R-Carrollton. Trespasser Liability.**

Texas has long maintained clear and sound rules regarding the liability of property owners to those who trespass on their property. Texas common law provides that a property owner owes no duty of care to a trespasser, except in very narrow and well-defined circumstances. These bills would codify these traditional common law rules to preempt courts from adopting liberal provisions of the new Restatement Third of Torts, which would dramatically expand trespasses' rights to sue landowners and impose costly burdens on property owners.

**SB 21 by Sen. Tommy Williams, R-Woodlands and CSHB 2031 by Rep. Jerry Madden, R-Richardson. Voluntary Compensation Plans.**

These bills enable businesses to establish voluntary compensation plans following an incident that does harm and provides that the establishment of such a plan is not considered "an admission of guilt" in litigation proceedings.

**HB 2034 by Rep. Doug Miller, R-New Braunfels and SB 1202 by Sen. Dan Patrick, R-Houston. Asbestos Litigation.**

This allows the judge assigned to the asbestos docket to dismiss without prejudice the tens of thousands of cases that have been pending for years without any action because the claimants have not shown medical impairment. It also would prevent "double dipping" by plaintiffs who apply to asbestos bankruptcy trusts only after trial against solvent defendants as a way of avoiding "settlement offsets."

**HB 3327 by Speaker Pro Tem Beverly Wooley, R-Houston. Hiring of ex-offenders.**

Under this bill, which gives employers reasonable protection against lawsuits based on the hiring of a nonviolent ex-offender, employers could still be sued for negligent supervision of an employee but could not successfully be sued for the mere act of hiring a nonviolent ex-offender. Ex-offenders who have jobs are much less likely to offend again or to have their probation or parole revoked.

**CSHB 1890 by Rep. Allen Fletcher, R-Tomball and Rep. Connie Scott, R-Corpus Christi and CSSB 1716 by Sen. Bob Duncan, R-Lubbock. Barratry.**

Barratry, commonly known as ambulance chasing or case running, is a persistent problem in Texas. It erodes trust in our courts and often produces abusive lawsuits. These bills authorize private causes of action against those who pursue barratry.