JANUARY 2017

TLR ADVOCATE

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

JANUARY 2017

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 18,000 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

Finally, A Common Goal?

As we have done frequently over the past 22 years, TLR will ask the Texas Legislature to change state law to fix a lawyer-driven abuse of our civil justice system. We already know we will be opposed—once again—by the Texas Trial Lawyers Association (TTLA).

TTLA is a professional association whose members are, by and large, hardworking, ethical attorneys. So why does TTLA continue to defend the worst actors in the legal profession?

In 2005, TLR worked with the Legislature to enact landmark reforms to end abusive asbestos and silica litigation—at the time, the worst abuse of Texas' civil justice system.

Asbestos litigation was driven by a few personal injury trial lawyers who recruited clients by the tens of thousands, most of whom were never diagnosed with an asbestos illness. Their model was to recruit as many plaintiffs as possible, sue as many defendants as possible, and settle the cases in bulk. A few Texas lawyers reaped a fortune from this blatant litigation abuse.

The Legislature's solution was a common-sense antidote: simply require a scientifically valid diagnosis of an injury before an asbestos or silica case could proceed to trial.

The abusive litigation instantly dried up.

Who defended these lawyers at the Texas Capitol? The Texas Trial Lawyers Association.

In 2007, a single Texas lawyer started filing personal injury lawsuits for individuals who worked on dredging vessels, long after the injury allegedly occurred and without prior notice to the defendants. Exploiting a loophole in venue statutes, the lawyer pursued these cases in South Texas counties because—as he was bold enough to say in public—the judges would let him pick juries that guaranteed his victory.

The Legislature's solution? Simply close the loophole that allowed this lawyer to file lawsuits in his venue of choice.

The abusive litigation ended immediately.

Who defended this single lawyer's abusive practice at the Capitol? The Texas Trial Lawyers Association.

Today, the worst lawsuit abuse in Texas is carried out after hailstorms by a handful of lawyers actively soliciting clients who—until recruited—do not think they have a problem that needs fixing. Like the asbestos cases, this litigation model is to recruit, sue and settle in bulk.

Who is defending these lawyers at the Capitol? The Texas Trial Lawyers Association.

TTLA claims to be against case running, but why does it continue defending lawyers who throw aside professional ethics and manufacture tens of thousands of unnecessary lawsuits?

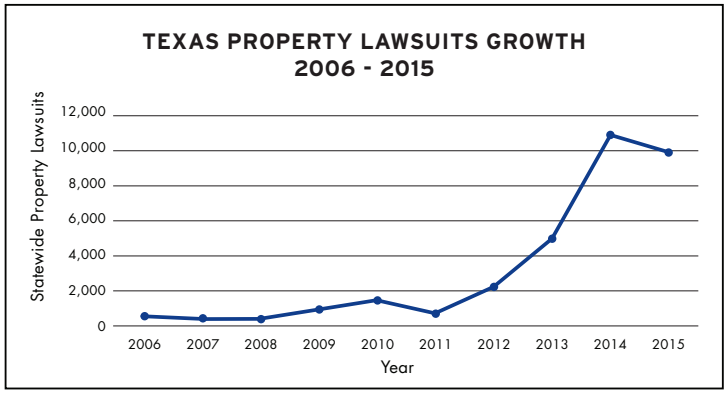
This session, we ask TTLA not to turn a blind eye to this bad behavior, and to join TLR in the effort to end the latest lawsuit abuse in Texas. We truly hope that this time TTLA will see our common goal. ■

Lee Parsley
TLR General Counsel

Breaking the Mass-Litigation Model: TLR's 2017 Legislative Proposal

Hail litigation is the worst lawsuit abuse in Texas today. TLR will work with the Texas Legislature to put an end to this lawyer-driven abuse while protecting the right of every Texas consumer to sue his or her insurance company if it does not settle a legitimate claim fairly and timely.

Storm chasing is the new ambulance chasing, as certain lawyers partner with unethical roofers or public adjusters to recruit homeowners and other property owners to file unnecessary lawsuits after a hailstorm—all for the lawyers' financial gain. This exploitation of our court system has real consequences for Texans. Every lawsuit abuse produces a "tort tax" that is ultimately paid by consumers. In this case, all Texans who purchase property and casualty insurance will ultimately see their insurance costs increase through higher deductibles or premiums, or they may even see reduced or lost coverage. Already, thousands of Texans in the Rio Grande Valley have lost their insurance coverage as their carriers have withdrawn from the market, and they are struggling to replace their insurance. Texas homeowners pay some of the highest insurance premiums in the country because of our severe weather, and the last thing we need is a few dozen plaintiff lawyers exacerbating that by ginning up litigation for their own enrichment.



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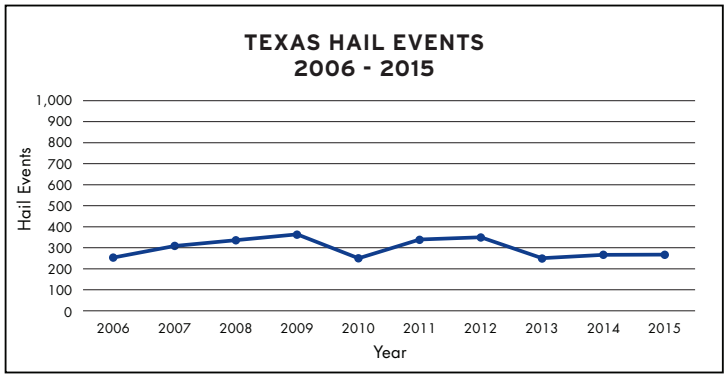


Select Counties (Source: AnythingWeather)

The storm-chasing lawyers exploit the Texas Insurance Code by using a mass-litigation model that revolves around recruiting thousands of homeowners and vastly inflating the alleged damages in every case to extort mass settlements. One particularly insidious aspect of their model is that they will sue individual insurance adjusters, agents or employees merely for tactical litigation purposes and not because those people actually did anything wrong. This burdens those individuals with personal and financial hardship.

The normal insurance claims process routinely puts funds for repairs into a policyholder's hands quickly. Litigation, on the other hand, can take years to resolve, and the expenses of litigation can significantly deplete the funds provided to the policyholder.

The abusive mass-litigation model used by storm-chasing lawyers can be stopped while protecting property owners' strong statutory bargaining position with their insurance carriers, including a clear path to the courthouse when needed. The TLR reform proposal includes these elements:

First, maintain the Insurance Code's strict liability provision, which means a property owner can receive penalty interest from his insurance company, in addition to having the company pay his attorney fees, when the insurance company fails to pay a legitimate claim timely and fully. The property owner need not show that the insurance company acted negligently, intentionally or in bad faith.

Second, require the plaintiff's attorney to file a pre-suit notice that includes a realistic demand for the amount needed to repair or replace the damaged property and a statement of the attorney fees incurred to that time. Often in this abusive litigation, an insurance carrier does not even know it has a disgruntled policyholder until it is served with a lawsuit. Requiring pre-suit notice gives the insurance carrier an opportunity to resolve the dispute before a lawsuit is filed, and the policyholder receives money for repairs far sooner than she would if she had to await a trial verdict.

Third, allow the insurance company to irrevocably assume the liability of any individual named as a defendant in the lawsuit, thus allowing the individual to be dismissed from the lawsuit. These storm-chasing lawyers often sue insurance adjusters, agents or employees even though the lawyer never really intends to get a judgment against these individuals. This abusive conduct creates serious costs and anxiety for the individuals being sued. Imagine how you would feel if you were sued for no good reason.

Fourth, change the current 18 percent penalty interest rate to a market-based rate, floating between 8 and 18 percent. In today's economic environment, 18 percent is exorbitant, and does nothing but create a powerful incentive for lawyers to engage in this kind of abuse. A market rate that has a floor of 8 percent, along with the risk of having to pay the plaintiff's legal fees, provides plenty of incentive for the insurance company to resolve a claim in a fair and timely manner.

Fifth, maintain the one-way grant of attorney fees for the property owner who needs legal representation, but at the same time, discourage the abuse of the one-way fee provision by plaintiff lawyers. In their attempt to extort mass settlements in the thousands of cases they have filed, these lawyers make wildly inflated claims for damages. They hope some element of their claim will be deemed valid, which then supports an award of attorney fees.

To address this abuse, TLR proposes that if an attorney recovers for her client at least 80 percent of the damages demanded in the pre-suit notice, then the attorney can be awarded all of her reasonable and necessary attorney fees. If she gets less than 20 percent of the claimed damages, then she gets no attorney fees. For any award between 20 and 80 percent of the amount demanded in the pre-suit notice, she would get her prorated share of attorney fees. For example, if the award is for 50 percent of damages demanded, the attorney would be awarded 50 percent of her attorney fees. The widespread abusive weather-related litigation is primarily driven by the greed of a few plaintiff lawyers, and no reform can put an end to the abusive litigation without addressing the attorney fees provision of the Insurance Code.

Sixth, recognize that many of the thousands of abusive weather-related lawsuits are gathered through solicitation of clients by individuals acting on behalf of lawyers. This kind of solicitation is widely known as "ambulance chasing" and is contrary to legal ethics and the law of barratry. Unfortunately, the ethical rules against solicitation and the barratry laws are inadequately enforced. Therefore, the Legislature should provide an affirmative defense to defendants in these cases—if a defendant can prove that the plaintiff's attorney used an illegal method to sign up his client, then that lawyer will receive no legal fees.

Finally, break the irrational link between the Deceptive Trade Practices Act (DTPA) and the Unfair Claim Settlement Practices Act in the Texas Insurance Code by requiring the plaintiff's lawyer to sue under either the DTPA or the Insurance Code, but not both. The relevant DTPA provisions really apply to marketing practices, not claim-settlement practices, and the link between the DTPA and the Insurance Code makes no sense. ■

"One of the great mistakes is to judge policies and programs by their intentions rather than their results."

— MILTON FRIEDMAN

Storm-Chasing Lawyers Hurt Real People

By Mary Tipps, *TLR Executive Director*

Storm-chasing trial lawyers are constantly evolving their tactics. While these efforts have proven lucrative for the handful of lawyers willing to push the boundaries of lawful practice and professional ethics, they have widespread consequences for the Texans being caught in the maelstrom of their litigation tactics.

In 35 to 40 percent of hail and wind-related lawsuits filed in Texas since the beginning of 2013, an agent, adjuster or employee has been named as a defendant along with the insurance company. This level of litigation against adjusters is unprecedented. The lawsuits against these individuals are not filed because the plaintiffs' lawyers actually think the individuals did something wrong. Instead, these individuals are sued for tactical purposes.

One small Texas-based adjuster does business in Texas and 19 other states. He has been sued 407 times in recent years, and 404 of those suits were in Texas. He gave this testimony to the Legislature:

"Although I have been in insurance adjusting for many years, it was the rare day that an independent adjuster was sued in a disputed claim. In fact, it was the rare day that one of our claims ended up in litigation. Claims got amicably resolved. That was the norm.

"My adjusters—good, talented and honest people—are getting sued for no reason whatsoever.

"Despite all these lawsuits and allegations of bad conduct levied against us in boilerplate lawsuits, not once—never—have we ever been asked to pay a dime for settlement or had our allegedly bad conduct taken to a jury."

A person who manages a nationwide adjusting firm says this about his recent experience in Texas:

"The allegations made against our adjusters are very serious. They are accused of committing fraud, being deceptive, dishonest and intentionally trying to deny or underpay claims. This affects their morale, their ability to earn a living and occasionally their credit ratings.

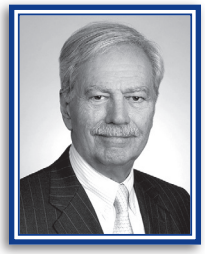
"There is no jurisdiction like Texas… This is a Texas problem that requires a Texas solution."

In many cases, the plaintiff's lawyer has sued the agent, adjuster or employee to avoid having the case removed from state to federal court. Naming an individual as a defendant, along with an out-of-state insurance company, makes it difficult for the insurance company to move the case to federal court under the U.S. Constitution's diversity of citizenship provision. And because suing the individual also makes the litigation more cumbersome and expensive, the trial lawyer's leverage over the insurance company is enhanced because it adds length and cost to the lawsuit, whether or not the lawsuit is against an in-state or out-of-state defendant.

Recently, the most prolific of the storm-chasing trial lawyers, Steve Mostyn, added a new wrinkle to his mass-litigation model. He began sending letters to the lawyers representing the individual defendants (usually adjusters) saying their alleged liability to his clients could not be resolved through the out-of-court appraisal process. So even if the plaintiff's claim against the insurance company is dismissed after an appraisal award is paid by the insurance company, Mostyn attempts to keep the claim alive against the individual defendant.

Mostyn concludes his letter by saying: "In an effort to resolve this matter [against the individual] without lengthy discovery and litigation, the Plaintiff is willing to settle her claims against you, and only those claims against you, for $5,000.00." He doesn't bother to say what he thinks the agent, adjuster or employee did wrong to warrant a $5,000 payment to Mostyn and his client.

These obscenely abusive lawsuits against adjusters will be particularly problematic when the next catastrophic event occurs (like another hurricane or a series of tornadoes), as it is common for adjusters to come to Texas from other states to help resolve the sheer volume of insurance claims quickly and efficiently. Faced with the near-certain prospect of becoming a defendant in multiple unnecessary lawsuits, adjusters will have to decide if they are willing to take on the amplified risk of becoming entangled in this mass-litigation scheme through no fault of their own. ■



The Cobra Effect

By Richard J. Trabulsi Jr., *TLR President*

In colonial India, the British were concerned about the number of venomous cobras in Delhi, so the government offered a bounty for each dead cobra. This had the desired effect of encouraging people to kill cobras. Trouble was, enterprising people started breeding cobras so they could reap more from the bounty. When the government became aware of this, it ended the bounty program—which caused the cobra breeders to let loose their now-worthless cobras, making Delhi more dangerous than ever. Thus "cobra effect" has become the term used to describe a perverse incentive—one that has adverse consequences, often harming the very people it was intended to help.

The cobra effect is at play in the abusive, lawyer-driven, hail-related litigation against property insurers in Texas today. The Insurance Code's unique combination of strict liability (no showing of fault or bad faith against the insurance company is required), excessive penalty interest (a fixed 18 percent rate even in this low-interest-rate environment), and one-way award of attorney fees (available to the prevailing plaintiff but not to the prevailing defendant) produces the incentive for unscrupulous lawyers to solicit clients and manufacture unnecessary lawsuits after weather events, rather than help clients resolve legitimate disputes quickly and fairly. Starting in 2012, a few "enterprising" law firms decided to enrich themselves by exploiting the perverse incentives in the Insurance Code to pursue a mass-tort model intended to extort insurance companies into mass settlements.

It is good policy to incent insurance carriers to pay legitimate claims fully and timely, but it is bad policy to incent lawyers to pursue needless litigation. For decades, hail events in Texas were handled in the normal claims-adjustment process—a property owner would notify the insurance company of damage, an adjuster would estimate the cost of repair or replacement, and the insurance company would issue a check to the policyholder. The system worked so well that there were few policyholder complaints about insurance companies to the Texas Department of Insurance (the complaints remain low even though lawsuits have increased exponentially). Historically, the lawsuit-to-claims ratio following major weather events was in the range of one to two percent. Recently, that has changed dramatically.

Today we see a lawsuit-to-claims ratio as high as 20 to 30 percent. The litigiousness encouraged by the code has already disrupted the insurance market in South Texas, impacting deductibles and premiums and making coverage harder to afford for many families. This "tort tax" is an unfortunate consequence of lawsuit abuse. We will all have to pay this tax unless the Texas Legislature acts to reform the Insurance Code.

TLR proposes to amend the code in ways that will continue to protect consumers by incentivizing insurance companies to pay claims fairly and timely, while removing the incentives for lawyers to file needless lawsuits. Our proposal will retain strict liability against insurers for failure to pay a claim fully and on time, as well as penalty interest that will float with market conditions, with a floor of 8 percent and a ceiling of 18 percent. It will also allow the recovery of attorney fees by any plaintiff who makes a sensible demand for damages. The revised code will still provide policyholders with plenty of leverage over their insurance carriers.

At the same time, our proposal will deter abusive litigation by requiring advance notice to the insurance company of an impending lawsuit and an opportunity for the insurer to resolve the dispute. It will also remove the unnecessary joinder of innocent parties to the lawsuit and incent the plaintiff's lawyer to make a reasonable—rather than bogus and excessive—demand for damages.

In a legitimate dispute over an insurance claim, a lawsuit should be the last resort, not the first. Let's make smart changes to the Insurance Code to return balance to the process, protect insurance policy holders, and end this widespread lawsuit abuse in Texas. ■

Texans Have Extraordinary Remedies Against Their Insurers

By Lisa Bowlin Hobbs, *TLR Outside Legal Counsel*

It is important that Texas law provide ample leverage for consumers against an insurance company that acts in bad faith or fails to pay claims in full and on time. Unfortunately, storm-chasing lawyers are exploiting provisions in the Texas Insurance Code in their latest money-making scheme. This lawyer-driven lawsuit abuse will produce serious adverse consequences that will ultimately harm all consumers of insurance policies.

Texas policyholders have a number of remedies available to them in the event of non-payment, late payment or underpayment of a claim following a hailstorm.

- Under Texas' Prompt Payment of Claims Act, a policyholder can recover 18 percent per year penalty interest plus attorney fees. The statute creates deadlines for acknowledging, investigating and paying a claim. It imposes strict liability on the insurance company—meaning the penalty and attorney fees are owed if a claim is paid a day late, without regard to whether the company did anything wrong in settling the claim.
- Under Texas' Unfair Claim Settlement Practices Act, a policyholder may recover "actual damages" plus attorney fees if an insurance company fails to investigate a claim fully, to pay it within a reasonable time after the company's liability becomes clear, or otherwise to treat the policyholder properly. If the company knowingly violated the act, it may also owe the policyholder up to three times the actual damages as a penalty.
- If the insurance company fails to comply with its common-law duty to deal with the policyholder fairly and in good faith, the insurance company may owe the policyholder actual damages, and for significantly improper conduct, punitive damages.
- In all circumstances in which a claim is not fully paid, a policyholder may pursue a breach of contract action and recover the amount due under the contract, plus attorney fees.

When one compares the Texas Insurance Code to the statutes of other major states, it is clear that Texas law—which was drafted by the plaintiffs' lawyers—is out of step with the rest of the nation. Texas provides a private cause of action under its Prompt Payment of Claims Act, while most other states do not. Other states typically enforce their prompt payment statutes administratively, and then only if the insurance company has repeatedly or intentionally failed to pay claims on time.

In most states, a policyholder can recover for an insurance company's failure to pay a claim timely under the state's unfair claim-settlement practices statute (as opposed to its prompt-payment of claims statute) or its generally applicable consumer-protection statute. But the statutes in other states typically require that the insurance company has acted unreasonably or in bad faith. In Texas, however, the policyholder needs merely to show that the insurance company violated the statute to recover damages and attorney fees, and if the insurance company acted "knowingly," Texas law appropriately imposes treble damages against the insurance company.

Texas' penalty interest rate for late payment of claims—a fixed 18 percent per year—is among the highest in the nation. Most other states either have a market-based floating rate or a much lower fixed rate.

The Texas Insurance Code is unique among the most populous states in the degree to which it incents unscrupulous lawyers to file bogus or greatly exaggerated lawsuits against insurers. The law must be amended to eliminate the perverse incentives that encourage unnecessary litigation, while still preserving the bargaining position of policyholders and ensuring their ability to prosecute lawsuits against insurers that have acted improperly. ■

Lisa Bowlin Hobbs is a board-certified civil appellate lawyer and founding member of the premier appellate boutique, Kuhn Hobbs PLLC. She previously served as the Texas Supreme Court's (first ever) general counsel and practiced in the appellate section at Vinson & Elkins. She often teaches Texas Civil Procedure at the University of Texas School of Law.

Discouraging Strife in Society

By Hugh Rice Kelly, *TLR Senior General Counsel*

In his "Notes on a Law Lecture," written on July 1, 1850, Abraham Lincoln implored his fellow lawyers:

> *Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.*

Lincoln was discouraging barratry, which is the legal term for the conduct commonly called "ambulance chasing" or "case running"—the unlawful solicitation of clients by an attorney.

Lawsuits are expensive, time-consuming, risky and anxiety-producing events. They should be the last resort for resolving a dispute, not the first. Litigiousness—the overuse or misuse of litigation—causes divisiveness in society and imposes non-productive costs on our economy. In fact, the root words for litigiousness are ones that are defined as "contentious," "quarrelsome" and "strife." American jurisprudence has always discouraged the direct solicitation of clients by lawyers to avoid the "manufacture" of lawsuits.

Historically, it was both unlawful and unethical for a lawyer to advertise for or solicit business from potential clients. About the only things excepted from the prohibition were customary communications with relatives, friends and clients, a listing in a telephone directory and a sign on the front of the attorney's office.

Over the years, the laws prohibiting attorney advertising have been relaxed, largely because the U.S. Supreme Court held in 1977 (*Bates v. State Bar of Arizona*) that attorney advertising was protected speech under the First Amendment. Nevertheless, even after viewing the ad on TV or hearing it on the radio, the client must still initiate contact with the attorney, which is a hallmark of legal ethics.

Direct solicitation of clients by lawyers remains unlawful. Under Texas law, it is a third-degree felony for an attorney "with intent to obtain an economic benefit" to solicit employment, either in person or by telephone, for himself or for another, or to give another person money or anything of value to solicit employment for him.

Barratry is a hot topic today because it plays a central role in the mass-litigation model used by storm-chasing lawyers in the weather-related lawsuits filed in Texas in the past four years. Since 2012, over 34,000 of these lawsuits have been filed in courthouses all over Texas, and the number keeps growing. Almost 11,000 of these lawsuits were filed in 2014 alone, compared to fewer than 400 lawsuits filed in 2007. This 27-fold increase is largely attributable to lawyers unlawfully soliciting clients.

Texas law allows both public insurance adjusters and construction contractors to directly solicit business, and they have historically canvassed for clients door to door following storms. What recently changed, however, is that some of them are now soliciting clients for attorneys. These contractors and public insurance adjusters actually procure an attorney-client contract on behalf of the lawyer for whom they are working.

Because barratry is a criminal offense, a barratry prosecution must be pursued by a district attorney. Often, district attorneys—who also are responsible for prosecuting violent crimes—lack the time, resources or willingness to pursue barratry prosecutions. The State Bar of Texas can also punish lawyers who unlawfully solicit clients, but unfortunately, the State Bar's weak enforcement efforts have had little effect on stopping unethical solicitation by lawyers.

And so the illegal solicitation of clients continues to feed the storm-chasing lawyers' appetite for money. Some will insist that barratry laws are the solution to the problem of the explosion in weather-related lawsuits. But the lack of enforcement of barratry laws has convinced TLR that the only way to stop the abuse is to take away the incentives for attorney misconduct currently built into parts of the Texas Insurance Code. ■

TLR
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Leadership Spotlight

By Lucy Nashed, *TLR Communications Director*

Texas is blessed to have the leadership of dedicated public servants at every level in our communities—from our school boards to nonprofit organizations to the Legislature and the Governor's Office. TLR is proud to benefit from the guidance and support of many of these outstanding citizens who sacrifice their time and treasure to make our state the best place to live, work and raise a family.

This fall, some of these principled leaders were honored by their respective universities for their tremendous service and impact on our state, our nation and the world.

Gov. Greg Abbott, center (Photo by Matt Valentine)

TLR Co-founder and Chairman Dick Weekley, center (Photo by SMU Office of Alumni Relations and Engagement)

Many members of the TLR team were proudly in attendance as our co-founder and chairman, **Dick Weekley** (BA '67), was honored by his alma mater, Southern Methodist University (SMU), for his contributions to our civil society through his Naval service in Vietnam, business endeavors and public policy efforts. Through the establishment of TLR, Weekley's impact on Texas' civil justice system and economic growth is unmatched. He was one of four alumni honored by SMU this year, including **Sarah Fullinwider Perot** (BA '83). Fullinwider Perot is an active philanthropist, a member of the SMU Board of Trustees and the Meadows School, and an executive board member of Dedman College and the Tower Center for Political Studies. She is also the wife of Ross Perot Jr., who has been involved with TLR for over a decade.

Sarah Fullinwider Perot, center (Photo by SMU Office of Alumni Relations and Engagement)

Gov. Greg Abbott (BBA '81) was honored by The University of Texas at Austin. Gov. Abbott has provided principled vision and steadfast leadership over a lifetime of public service as a trial judge, Texas Supreme Court justice, Texas Attorney General and now governor of our state. He understands deeply the importance of fair courts in our civil society, and TLR has been closely associated with Gov. Abbott throughout his public career.

TLR supporters **Woody Hunt** (BBA '66, MBA '70) and **Bobby Stillwell** (BBA '59, LLB '61) were also honored this year as distinguished University of Texas alumni. In addition to their accomplishments in the business and philanthropic communities, Hunt and Stillwell are both deeply committed to serving their alma mater: Hunt is a past member of the University of Texas Investment Management Company, Stillwell serves on the UT Law School Foundation Board of Trustees, and both men have previously served on the University of Texas Board of Regents.

Woody Hunt (Photo by Matt Valentine)

Bobby Stillwell, center (Photo by Matt Valentine)

Additionally, **Wroe Jackson** (JD '10), chief of staff to Sen. Joan Huffman (chair of the Texas Senate State Affairs Committee and a stalwart tort reformer) was honored as a distinguished young alumnus by the St. Mary's University School of Law. Jackson is a committed and professional public servant who served as chief of staff to three Texas Secretaries of State before joining Sen. Huffman's staff.

Wroe Jackson, second from left
(Photo by St. Mary's University Law Alumni Association)

These individuals represent the servant leadership that has guided Texas throughout our history of growth and achievement. We are grateful for their passionate dedication to improving public life, and hope their example will serve to inspire generations of groundbreaking leaders in the future. ■