SUMMER 2007

TLR ADVOCATE

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

★ SUMMER 2007 ★

IN THIS ISSUE

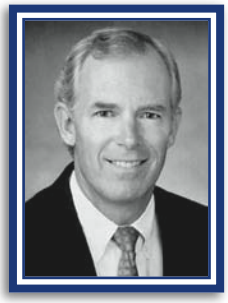
OUR MISSION

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 15,000 supporters is to make Texas the Beacon State for Civil Justice in America.

1701 Brun Street, Suite 100
Houston, Texas 77019
www.tortreform.com
tlr@tortreform.com

MAKE TEXAS A BEACON for CIVIL JUSTICE in AMERICA

Our Seventh Session and Counting



Richard W. Weekley

We have just finished the 80th legislative session, the seventh in which TLR has engaged. And while every session is different, some things don't change. Our supporters all over the state stay in touch with lawmakers between sessions. Our Political Action Committee engages in judicial, legislative and statewide elections. Our legal team researches issues extensively and drafts our proposals meticulously. Our consultants and lobbyists carefully think through strategy and tactics. And the entire TLR team works patiently and persistently throughout the session.

As you will read in this *Advocate*, we had a successful session, with the passage of a critical reform and our active participation in improving good bills and defeating bad ones. Our major disappointment was that the Court Modernization Bill, SB 1204 by Senator Bob Duncan (R-Lubbock), did not become law. The bill contained several proposals recommended by TLR Foundation in its exhaustive paper on the Texas court system. Senator Duncan and his able general counsel, Lisa Kaufman, worked tirelessly on this bill and carefully consulted with the stakeholders – TLR, various lawyer organizations, judges, and legislators. As a result, SB 1204 passed the Senate by a 24-6 margin. It then went to the House, where it easily passed out of the House Judiciary Committee. There was widespread bi-partisan support for the bill in the House and it would have passed by a comfortable margin, in part because there was no organizational opposition to the bill.

Tragically, this legislation, which would have gone a long way toward making our courts more modern and user friendly, was killed by a point of order raised by Rep. Senfronia Thompson (D-Houston) at the request of Rep. Kino Flores (D-Mission). Apparently, the trial judges of Cameron and Hidalgo counties asked Mr. Flores to kill the bill. It is noteworthy that the American Tort Reform Association includes these two counties in their list of "judicial hellholes" in America, where it is difficult for a defendant in a trial to get a fair outcome. It also is telling that Cameron and Hidalgo counties are where a small group of lawyers chose to file abusive lawsuits against dredging companies, as discussed elsewhere in this *Advocate*.

SB 1204 was just one of many significant bills that fell in the House due to highly technical – and often questionable – points of order. Most of the points of order concern a parliamentarian's construction of language in the often arcane analyses of bills prepared by committee staff. Hopefully, the House will adopt a materiality rule and other checks and balances for points of order so that they can no longer be used routinely by Members who want to kill bills but do not have the votes to defeat them on the merits.

Sincerely,

Richard W. Weekley

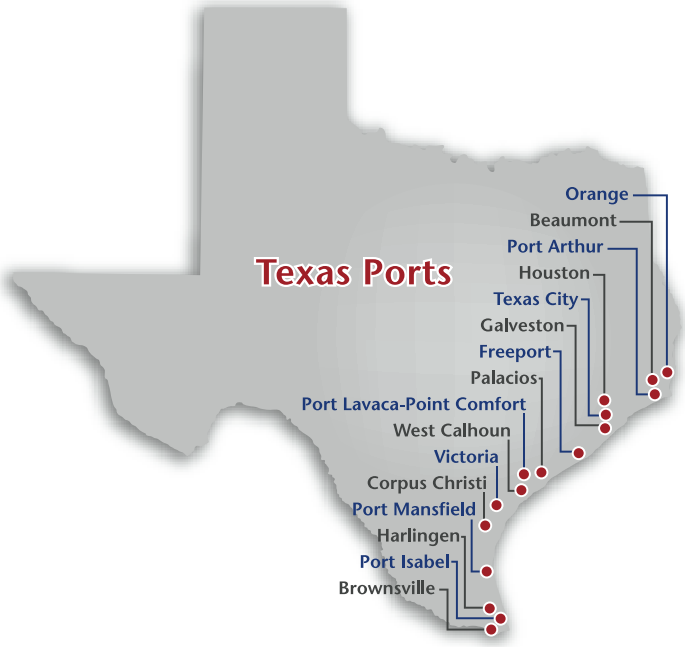
Richard W. Weekley
Chairman & CEO

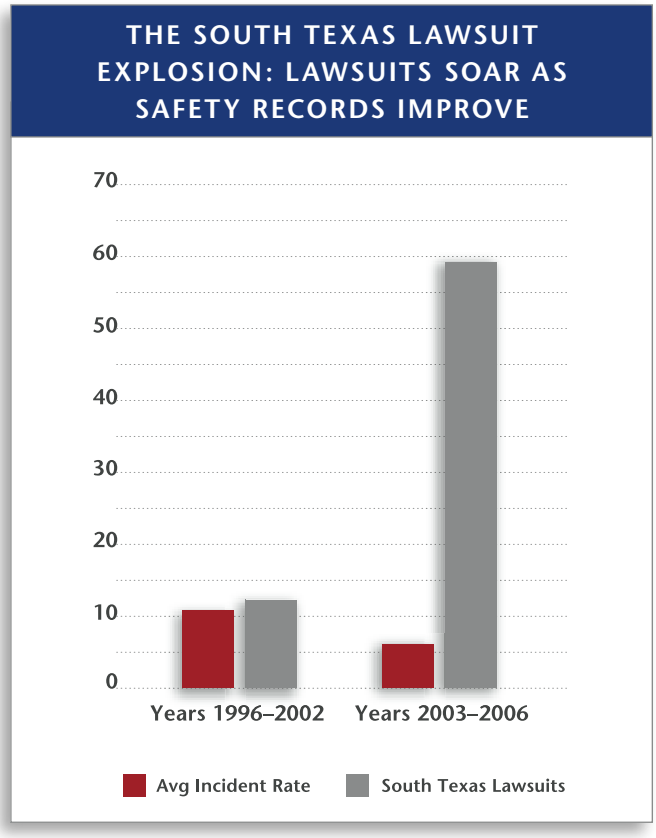
The Fight for the Texas Maritime Industry: Why HB 1602 is Critical

In passing HB 1602, the Texas Legislature moved decisively to curtail abusive litigation by a handful of plaintiff trial lawyers, based in Houston and Galveston, who were filing personal injury lawsuits against the dredging companies that are essential to keeping our ports and waterways clear and open. The lawyers were using a venue loophole to file their cases in four South Texas counties that the American Tort Reform Association describes as "judicial hellholes."

TEXAS MARITIME INDUSTRY IS KEY TO THE TEXAS ECONOMY

Texas has no natural deepwater ports, so dredging is essential to keep the waterways open. Texas maritime commerce accounts for a full ten percent of our state's gross domestic product. More than 300 million tons of cargo passes through Texas ports each year – automobiles and fuel, agricultural and manufactured products, military equipment and personnel – producing more than $178 billion in business sales. Scores of major port facilities are located along a thousand miles of channel maintained by the U.S. Army Corps of Engineers. Texas ports handle almost 15,000 vessels – 20% of the national total. Marine and related transportation also provides billions of dollars in local and state tax revenue. A million Texas jobs are tied to the maritime industry.





DREDGING LAWSUITS THREATENED TEXAS MARITIME INDUSTRY

Only about half a dozen dredging companies have taken on projects in Texas in recent years. As a result of the explosion of lawsuits against them, several of those companies chose not to work in Texas as long as the lawsuit abuse continued. Of the four companies currently dredging in Texas, two are Texas based and faced bankruptcy if the lawsuits continued. Two worldwide companies that dredge in Texas were questioning whether they could continue to hire Texas workers or work on Texas projects.

The U.S. Army Corps of Engineers contracts for most of the dredging work on Texas ports and waterways. Lawsuits against dredgers kept some of them from bidding on Texas projects and forced those who did bid to include a "lawsuit surcharge" in their cost estimate. When the U.S. Corps' budget would not cover the cost increases, they began canceling dredging projects

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A PATTERN OF LAWSUIT ABUSE

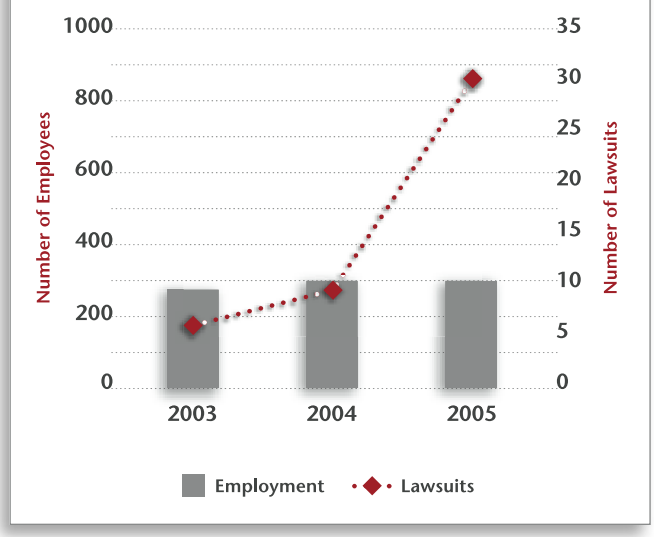
Beginning in 2003, a pattern of lawsuit abuse became apparent when almost 60% of the Jones Act personal injury lawsuits against dredgers nationwide were being filed in Hidalgo, Starr, Zapata and Cameron counties. There was no logical reason for the increased litigation. The companies being sued had experienced a much smaller number of lawsuits in the past. Their safety records had improved during the same period the lawsuits exploded and the number of South Texans employed by the dredgers had remained fairly constant.

As further evidence of lawsuit abuse, many of these lawsuits were filed by workers who did not report an injury at the time the incident allegedly occurred. In many cases, the first time an employer became aware that the worker was claiming an injury was the day on which the company was served with the lawsuit. On those occasions when a claimant had reported an injury, it was moderate and did not require a hospital stay or lost work days. Yet most of these lawsuits sought damages in excess of $2,000,000.

A VENUE LOOPHOLE ENCOURAGED THE LAWSUIT ABUSE

Most Texans can file a lawsuit in his or her home county only when the defendant has no place of business in Texas and the accident did not occur within this state. Unfortunately, a political concession made by a legislative leader to plaintiff trial lawyers in 1995 made an exception for seamen who are covered under the federal Jones Act.

SOUTH TEXAS EMPLOYMENT REMAINS STEADY: LAWSUITS EXPLODE



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Plaintiffs' Lawyer Explains Why He Files Jones Act Lawsuits in Certain South Texas Counties

Mr. Tony Buzbee, the plaintiffs' lawyer who has been filing most of the recent Jones Act lawsuits against the maritime industry in Starr, Zapata, Hidalgo and Cameron counties, explained why he chooses those venues in a May 2006 speech at the Annual Marine and Energy Seminar. The complete transcript of his presentation is available at TLR's website, www.tortreform.com. A few of his comments are as follows:

"Obviously there is great influence on the case if we file in the Valley versus, say, Houston. As a plaintiff's lawyer I'm going to get a case probably worth at least 60 to 70 percent more if it is filed in the Valley."

"Cases filed in Starr County, which is traditionally the best venue in the State of Texas. That venue probably adds about 75% to the value of the case."

"Maybe in Harris County, Galveston County, we need to show here's what the company did wrong, all right? But when you're in Starr County, traditionally, you need to just show that the guy was working, and he was hurt. And that's the hurdle: just prove that he wasn't hurt at Wal-Mart, buying something on his off time, and traditionally, you win the case. That's how we win those cases." [*In legal terms, Mr. Buzbee is saying that in Starr County he does not have to show fault or negligence by the employer, even though the Jones Act does require fault or negligence for there to be a legitimate cause of action.*]

"But generally speaking, Hidalgo County is a more sophisticated county, for those of you who haven't spent a lot of time there. Generally you'll get – and John can correct me if I'm wrong – a lot of school teachers on the jury [i.e., the prospective juror panel]. Most of the people that you are going to get as jurors in Hidalgo County are people that have some relationship to some government entity; that the biggest employer: schools, I guess hospitals, and it is very easy for me as representative of the plaintiff to knock out all those jurors that will be good for your [defendant's] interest. Very easy. Generally speaking, if the judge will give me two hours, which I can generally get from the particular judge in Hidalgo County, I can knock out all those jurors. [Inaudible.] I've busted several panels, by that I mean knocked out jurors that are favorable to your [defendant's] case, that are against me. And the Hidalgo County judge is going to give me my two hours; that's enough to knock out jurors and then you're left with a jury who is favorably disposed to the [plaintiff's] case."

"Understand the situation, where you [defendant] are in the venue and pay the case. Just pay the case. Because at some point, traditionally, on rare occasions, you'll win the case, but at some point you'll have to pay the case anyway."

Venue Choices under HB 1602

A. INJURY IN TEXAS – ashore, on inland waters including waters seaward to the COLREG demarcation lines, and beach reclamation projects:

(i) in the county in which the cause of action accrued, or
(ii) in the county of defendant's principal office in Texas at the time the cause of action accrued

B. INJURY IN LOUISIANA, MISSISSIPPI, ALABAMA AND FLORIDA – ashore and beach reclamation projects:

(i) in the county of defendant's principal office in Texas at the time the cause of action accrued if the office is in a coastal county, or
(ii) in Harris county if plaintiff lives in Harris county, or
(iii) in Galveston County if plaintiff lives in Galveston county, or
(iv) in either Harris county or Galveston county if plaintiff does not live in either of those counties, or
(v) in the county of plaintiff's residence at the time the cause of action accrued if the defendant does not have a principal office in a Texas coastal county.

C. INJURY ON THE INLAND WATERS, including waters seaward to the COLREG demarcation lines, of Louisiana, Mississippi, Alabama, Arkansas, Tennessee, Missouri, Illinois, Kentucky, or Indiana or of Florida along the Gulf of Mexico shoreline of Florida from the Florida-Alabama border down to and including the shoreline of Key West, Florida (not including the Great Lakes):

(i) in the county of defendant's principal office in Texas at the time the cause of action accrued if that office is in a coastal county, or
(ii) in Harris county if plaintiff lives in Harris county, or
(iii) in Galveston County if plaintiff lives in Galveston county, or
(iv) in either Harris county or Galveston county if plaintiff does not live in either of those counties, or
(v) in the county of plaintiff's residence at the time the cause of action accrued if the defendant does not have a principal office in a Texas coastal county.

D. INJURY ANYWHERE ELSE IN THE WORLD:

(i) in the county of defendant's principal office in Texas at the time the cause of action accrued, or
(ii) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred, or
(ii) in the county of plaintiff's residence at the time the cause of action accrued.

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Those workers were allowed to file a personal injury negligence lawsuit in their county of residence. It is this specific exception to the Texas general venue statute which generated the explosion of lawsuits against dredgers.

The reason why a hugely disproportionate percentage of personal injury lawsuits against dredgers were filed in the Valley is colorfully explained by the attorney filing most of those lawsuits. (See the sidebar entitled "Plaintiff's Lawyer Explains Why He Files Lawsuits in South Texas" on page 3.)

In a report published in the *Wall Street Journal,* personal injury trial lawyer Anthony Buzbee is quoted saying he files lawsuits against dredging companies in the Rio Grande Valley because he doesn't have to prove the company did anything wrong when he goes to trial there. Here's how he explained it:

> *"Maybe in Harris County, Galveston County, we need to show here is what the company did wrong, all right? But when you are in Starr County traditionally you need to just show that the guy was working and he was hurt. And that is the hurdle, just prove he wasn't hurt at Wal-Mart, buying something on his off time, and traditionally, you win the case. That's how we win those cases."*

In a succinct summation of his strategy, Buzbee advised the maritime industry to "…understand the situation, where you are in the venue and pay the case, just pay the case."

HB 1602 ADDRESSED THE VENUE ISSUE IN JONES ACT CASES

After thorough hearings before the House Civil Practices Committee and the Senate State Affairs Committee, HB 1602 passed both chambers of the Legislature without a dissenting vote (see the article entitled "How HB 1602 Became Law"). Governor Perry signed the bill on May 24, and the law took effect immediately upon his signature. For the details of the venue choices for Jones Act plaintiffs filing lawsuits in Texas state courts under HB 1602, see the sidebar entitled "Venue Choices Under HB 1602." ■

How HB 1602 Became Law

HB 1602, which closed the venue loophole that was being exploited by a handful of lawyers against a key segment of the Texas business community, passed both chambers of the Texas Legislature without a dissenting vote. Sound easy? It wasn't.

HB 1602 was designed to end the lawsuit abuse that was being practiced by only a few plaintiffs' lawyers, but the bill was vigorously opposed by the Texas Trial Lawyers Association ("TTLA"). To overcome this politically powerful lobby, TLR led a coalition of the maritime industry, Texas ports and waterways, and the larger business community to overcome the entrenched opposition of the plaintiff lawyers' cadre of friendly legislators.

Representative Corbin Van Arsdale, House Sponsor

TLR briefed the Governor, Lt. Governor, and House Speaker and their staffs about the problem and TLR's proposed solution, which we had developed after extensive research and consideration. Our proposal was legally sound and elegantly simple: repeal the unjustified statutory exception to the Texas general venue statute that enabled the small group of lawyers to target an industry by filing Jones Act lawsuits in counties where they were certain of a highly favorable outcome. This proposal would give Jones Act seamen the same state court venue choices for personal injury negligence lawsuits as other Texas workers.

Senator Troy Fraser, Senate Sponsor

Representative Corbin Van Arsdale (R-Houston), a former maritime lawyer, sponsored the bill in the House. Senator Troy Fraser (R-Horseshoe Bay), long a stalwart supporter of tort reform and chairman of the Senate Business and Commerce Committee, sponsored the bill in the Senate. TLR followed its usual practice of providing extensive research materials on the legislation to every Member of the Legislature early in the session and we also gave personal briefings to many Members and their staffs.

The Committee Hearing in the House

The public hearing before the House Civil Practices Committee, chaired by Rep. Byron Cook (R-Corsicana), started in the evening and ended about 3:00 a.m. the following morning. Twenty-five persons, including representatives from every dredging company doing business in Texas, spoke in favor of the bill, giving powerful and sometimes moving testimony about the terrible impact of the abusive lawsuits filed in South Texas courts.

Waymon Boyd, vice president of King Fisher Marine and a second generation Texas dredger, told the committee that when he left his home in Port LaVaca to drive to Austin that day, there were 15 lawsuits pending against his company. While driving up, he got a phone call informing him that a 16th lawsuit had been filed. When he arrived in Austin, he was told by his attorney that a 17th had been filed. Boyd then provided the committee with a history of lawsuits against Kingfisher Marine: "From 1999 to 2001, we had four Jones Act cases. Four! In 2002 we had none. In 2003 we had none. In 2004 we had none. In 2005, from March of 2005 to October of 2006, we have 17 lawsuits, four of them that we didn't even know happened. They're not major [injuries]…nobody even spent the night in the hospital. Now, can you imagine that? Seventeen lawsuits with nobody spending the night in the hospital… . In my eyes this is pretty corrupt."

Linda LaQuay, Vice President of T.W. LaQuay Dredging, Inc., also based in Port LaVaca, provided lawmakers with the cold costs of liability insurance. Mrs. LaQuay said that in 2000, she was paying under $7,000 for annual Jones Act liability insurance for each of her employees. By 2006, that figured had jumped to almost $23,000 per employee per year – a 288 percent increase because of the explosion in Jones Act lawsuits against her small company.

Representatives from two of the nation's largest dredging companies, Weeks Marine and Great Lakes Dock and Dredging, explained to committee members that their workforce included a number of second and third generation family members from South Texas who had worked with their companies for decades. Historically, these Texans were productive and valued employees

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of the dredging companies and had never been part of a lawsuit problem until a few years ago, when the small group of Houston plaintiff lawyers targeted the dredging industry. When anti-reform legislators indicated that the easy answer to the dredgers' litigation problems was simply not to employ Texans, the dredgers were incredulous. Never did they imagine that any Texas legislator would propose a course of action that would actually *discourage* good job opportunities for the citizens of our state, especially in counties with high unemployment.

The Trial Lawyers Association gave only cursory testimony against the bill. The heavy lifting against the bill was done by three Committee Members, Rep. Robert Talton (R-Pasadena), Rep. Richard Raymond (D-Laredo) and Rep. Trey Martinez Fisher (D-San Antonio), who grilled the pro-reform witnesses. They were joined by Rep. Craig Eiland (D-Galveston), who was the bill's primary opponent in the Legislature and who was allowed to question witnesses during the hearing.

From the Committee to the House Floor

Following the committee hearing and in anticipation of a contested vote on the House floor, TLR's legal and lobby teams visited with lawmakers, laying out the threat to the Texas maritime industry and our broader economy. We exposed the questionable practices of the attorneys and emphasized the policy importance of assuring that venue law for every Texan is clear, consistent and fair.

The professional advocacy was made more effective by direct lobbying by the maritime industry, business associations, community leaders and TLR supporters around the state. The best lobbying is always done by the lawmakers' own constituents, which is why TLR, with its legion of active supporters, is effective in the Legislature.

The House Committee Substitute, which was changed from the bill as originally filed, was reported out of the Civil Practices Committee on a 6 to 3 vote. Democrat Vice Chairman Mark Strama joined Republicans Byron Cook, Phil King, Jerry Madden, Sid Miller and Beverly Woolley in voting the bill out of committee, with Representatives Talton, Raymond and Martinez Fisher voting against the bill.

In the weeks following the Civil Practices Committee hearing, a "compromise" bill was proposed by Chairman Cook and assented to by bill sponsor Corbin Van Arsdale and the lead opponent to the bill, Rep. Craig Eiland. That bill was voted on the House floor on April 26 and received unanimous approval. While the House compromise was not the clean and comprehensive fix that was originally proposed by TLR, we knew that it would help end the South Texas lawsuit abuse against the dredging companies. We also knew we had a chance of improving the bill in the Senate.

On to the Senate

When HB 1602 arrived in the Senate, the Lt. Governor referred it to the State Affairs Committee, chaired by Senator Bob Duncan (R-Lubbock), who has been instrumental in every civil justice reform passed in the Texas Legislature in the past seven sessions. The committee heard the bill on April 30, where the pro-reform advocates presented a convincing case for the Senate Committee Substitute of HB 1602, which was an improvement over the compromise bill that was voted out of the House.

Enrique Elizondo, who grew up in Los Fresnos, Texas and is a project manager for Great Lakes Dock and Dredging, spoke about his father's lifelong career with Great Lakes. His father was proud that he had worked his way up the career ladder in Great Lakes and had seen Rickie and his three sisters graduate from college. Mr. Elizondo bemoaned the fact that the abusive lawsuits, if allowed to continue, would prevent Texans like his father from getting good-paying jobs in the dredging industry – jobs that would allow a father to send his children to college, as Rickie's dad had.

The dredging companies stressed that the salaries they pay to their workers who reside in the "judicial hellhole" counties where their companies were being targeted for lawsuits are as much as four times the average household income in those counties. Many dredging employees were earning close to six figures after working with the companies for several years. This information prompted Senator Rodney Ellis (D-Houston), whose statements were otherwise hostile to the reform, to ask, "can you come and do business in my district!"

Scott Forbes, speaking for the Port of Houston, explained the urgency of keeping Texas ports open in order to maintain Texas's standing in the global marketplace.

Texas Land Commissioner Jerry Patterson appeared before the committee to discuss the critical need for the dredging companies to do beach reclamation projects in Texas. He stressed that our beaches, which are constantly eroding, are essential to Texas tourism and pointed out to lawmakers that redistributing sand from the dredging

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process to beaches is much cheaper and environmentally more prudent than trucking new sand across land.

The Enrolled Bill Goes to the Governor's Desk

After the Senate committee hearing, TLR's team of lawyers and lobbyists, along with dredgers and other maritime and waterway representatives, started meeting with each Senator. As it became clear to the Texas Trial Lawyers Association and their legislative allies that we had strong bipartisan support in the Senate for an improved version of the House Bill, serious discussions were entered into by the legislative advocates for reform – Senators Fraser and Duncan and Representatives Van Arsdale and Cook – and the primary legislative opponent of the bill – Rep. Eiland. The bill that emerged from those discussions was an improvement to the House bill and it passed overwhelmingly in the Senate. The House "concurred" in the Senate version of HB 1602 without opposition.

Because our state leaders knew of the seriousness of the lawsuit abuse and the pervasive threat posed to the Texas economy, the leadership in both legislative chambers made sure that the bill would reach the Governor's desk at the earliest possible time. The Governor's staff, when they received the bill, processed it as quickly as humanly possible, and the Governor signed the bill on May 24, 2007. The bill took effect immediately upon his signature since it had passed each chamber with more than two-thirds vote.

TLR President Dick Trabulsi observed: "HB 1602 is imperfect because it creates several different venue choices for Jones Act lawsuits, depending on where the alleged injury occurred, inserting complexity where none is needed, in our estimation. TLR believes that the bill that was originally filed by Rep. Van Arsdale and Senator Fraser would have been better law. Nevertheless, HB 1602 as enacted will cure the worst current abuses in Jones Act cases filed in Texas state courts, and the Legislature is to be commended for its passage of the bill." ■

Special Thanks

to these associations for their continued support and help in the 80th Legislative Session

The depth and breadth of the civil justice reforms that have been achieved in Texas are the result of a broad based effort and the work and support of numerous organizations that represent millions of Texans.

Associated General Contractors – Texas Building Branch

Association of Chemical Industry of Texas

Dredging Contractors of America

Greater Houston Partnership

Gulf Intracoastal Canal Association

Lumberman's Association of Texas

Maritime Jobs for Texas

National Federation of Independent Business – Texas

Property Casualty Insurers Association

Rio Grande Valley Sugar Growers Association

Texas Aggregates and Concrete Association

Texas Alliance for Patient Access

Texas Apartment Association

Texas Association of Builders

Texas Association of Business

Texas Association of Manufacturers

Texas Chemical Council

Texas Civil Justice League

Texas Construction Association

Texas Farm Bureau

Texas Hotel & Lodging Association

Texas Medical Association

Texas Oil & Gas Association

Texas Ports Association

Texas Retailers Association

Texas Waterway Operators Association

TX Chapter – American Shore
& Beach Preservation Association

Eternal Vigilance in the Legislature: The Price of a Fair Civil Justice System

TLR expends enormous effort in each legislative session to preserve the fair and reasonable aspects of our civil justice system, to correct abuses, and to improve the overall administration of justice. Over the past 15 years, Texas has become a national model for lawsuit reform, reducing lawsuit abuse and fueling a thriving economy that fosters job creation, innovation and productivity. In 1995, the worst abuses in our venue laws were changed to prevent the rampant venue shopping for which Texas was infamous. In 2003, medical malpractice reform made Texas the first state to win removal from the American Medical Association's "medical crisis list" and thousands of new doctors have opened practices in our state. In 2005, Texas enacted the nation's most effective statute to end meritless asbestos and silica lawsuits while preserving access to our courts for those with legitimate claims, which has saved businesses and jobs and helped restore public trust in our civil justice system. These are just a few of the myriad reforms that have been made in Texas in the last twelve years.

Trial Lawyers Work To Reverse Reforms

These reforms are constantly attacked by the Texas Trial Lawyers Association, which persistently seeks to return Texas to its former status as "lawsuit capital of the world." In the recent session of the Texas Legislature, TLR closely monitored nearly 400 pieces of legislation. Many of these bills contained provisions that would have undermined tort reforms or created new, unnecessary causes of action.

TLR and our allies devote meaningful resources each session to help lawmakers understand the potential impact that their legislation may have on the civil justice system. We believe this vigilant monitoring of legislation is as important as advocating our own legislative proposals.

Bills With Adverse Consequences

There were scores of bills that were intended to change civil justice in ways that would undermine fairness and balance. The tort reform coalition makes a frontal assault on such bills to prevent them from becoming law, and for the last seven sessions of the Legislature, no such bill has been enacted into law. More difficult situations arise when well intended bills would have consequences that TLR considers to be adverse to sound legal policy.

For example, two able legislators with exemplary tort reform records introduced legislation which they thought would assist the state in uncovering fraudulent activities against the state and recovering damages for such activity. Called "qui tam," this legislation would have authorized private citizens and their attorneys to be "private attorneys general." Unfortunately, experience with similar legislation in other states and in federal law has clearly shown that a "bounty" system which promises huge financial rewards and allows entrepreneurial lawyers to prosecute lawsuits "in place of the state" is a tantalizing temptation to file abusive lawsuits. The Texas Attorney General currently has adequate authority and tools with which to prosecute fraud against our state and there is no need to establish a private bounty litigation system to deal with fraud against the state. TLR and the broad business community opposed the qui tam bill, and it did not pass.

Many bills are introduced each session with worthy goals, but with problematic language or provisions that create new causes of action where none are needed. In many cases, we are able to work with the authors of the bills to eliminate the troublesome provisions so that the legislation can move forward on its merits. When we are not successful in eliminating or amending the problems, we oppose the bill.

TLR will always fight against legislation that would misuse our civil justice system and create a potential for lawsuit abuse.

TLR Seeks To Improve Reforms

We are also alert to any developments concerning our previous reforms that indicate problems which should be corrected. In 2005, TLR was the lead proponent of SB 15, the asbestos and silica litigation reform bill. Our goal was to end the litigation abuse of suing on behalf of claimants who have no illness while assuring full access to court for those persons who are impaired.

Recently, we learned that there are judges who were assigned asbestos cases for trial by the multi-district litigation (MDL) judge who were not setting those trials

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Judge Upholds Texas FDA Defense in Vioxx Cases

Are juries of lay people better qualified than doctors and scientists at the U.S. Food and Drug Administration to decide what a drug warning label should say? When it comes to drug labeling, a Houston district court recently ruled the decisions of the FDA must prevail. In a landmark decision based on a reform that had been proposed and advocated by TLR and adopted by the Legislature in HB 4 in 2003, the court threw out a "failure to warn" claim in a ruling that is expected to control the resolution of over 1000 pending Vioxx cases in Texas.

Houston District Judge Randy Wilson, appointed by a Texas Supreme Court panel to preside in pretrial proceedings in all Texas Vioxx cases, cited both the language and the intent of Texas litigation reforms in ruling that FDA approval of pharmaceutical warnings may not be second-guessed by local judges and juries.

In his scholarly written opinion, Judge Wilson ruled that when claims are made that FDA approval resulted from misrepresentation or withholding of important information, Texas courts must still look to the FDA, not to juries, to settle the point. If the federal agency itself has not found misrepresentation or withholding of important information, the failure to warn claim must be dismissed. Despite widespread allegations to the contrary, Judge Wilson ruled, "there is no question…the FDA has not made a determination that material and relevant information was either withheld or misrepresented concerning Vioxx."

This special FDA defense gives effect to simple common sense: that it is inefficient and unfair to allow lay jurors to second-guess safety determinations made by more expert and accountable government regulators. This is particularly relevant in the area of pharmaceuticals, where the FDA administers a pervasive and comprehensive system of regulation in which it is required to balance risk and benefit as guided by the agency's own medical and scientific expertise.

Vioxx, a prescription pain relief medicine, was voluntarily withdrawn from the market by Merck & Co. in 2004 after studies disclosed unacceptable levels of cardiovascular risk.

This decision does not directly affect the notorious Vioxx verdict rendered in a state district court in Brazoria County in 2005 – which attracted front-page media coverage worldwide – because that case was not included in the multidistrict proceeding in Judge Wilson's court. The verdict in that case was an incredible $253 million, although it was substantially reduced due to another TLR reform – the cap on punitive damages, enacted in 1995. Legal observers agree that the Brazoria County Vioxx verdict is unusually vulnerable on appeal, which may explain why plaintiff attorney Mark Lanier and plaintiff-friendly Judge Ben Hardin allowed more than a year to run before necessary formal rulings were made, finally allowing the defendant to begin its appeal to a Houston court of appeals. ■

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on a timely basis. A timely trial is particularly critical for claimants suffering from mesothelioma, since the disease is fatal.

TLR worked successfully this session with Lt. Governor Dewhurst and Senator Kyle Janek (R-Houston), who was the Senate sponsor of SB 15, and other interested parties, including 11th Civil District Court Judge Mark Davidson, the asbestos MDL judge, to correct this problem. With the support of TLR, the Legislature has now empowered the MDL judge to seek mandamus relief against trial judges who do not timely set asbestos cases for trial, thereby better assuring the timely resolution of legitimate disputes.

"We think it important to the proper administration of justice and to the durability and continued credibility of tort reforms to correct any unintended consequences that may develop as the civil justice reforms are implemented."

— Leo Linbeck, Jr.,
Senior Chairman of TLR

Careful Defense Strategy Aids Litigation Reform

Hugh Rice Kelly, TLR General Counsel

The defense of Vioxx and Baycol—drugs withdrawn from the market when their makers recognized unacceptable side effects—has proven the worth of carefully planned lawsuit defense strategy. Rather than scrambling to settle risky cases at any cost, these manufacturers adopted a balanced policy: establish settlement criteria, settle fairly with people injured by their drugs—and take those who will not accept reasonable settlements to trial.

Their success proves that courts and juries, though dysfunctional in some places, can still function as intended. Successful defense of tort cases demands fortitude and strategic thinking as to both settlement and trial strategy, which includes a willingness to hire and stick with the best defense lawyers available. Lawyers whose abilities match or exceed those representing plaintiffs can win their fair share of verdicts. It is an open secret in the legal profession that many litigation disasters can be traced to weak or ill-conceived legal defense work. Top defense lawyers, properly supported, even have a chance of winning in "hell hole" counties, while their expertise preserves crucial appellate points in cases with bad trial court outcomes. This kind of lawsuit strategy also requires the defendant to stay the course rather than collapsing in panic after a runaway verdict or two.

Vioxx is proving the value of this strategy. Rather than changing course after the outrageous $253 million verdict by a jury in the court maintained by State District Judge Ben Hardin in Brazoria County, pharmaceutical company Merck stuck to its guns. It has gone on to successfully try Vioxx jury cases nationwide in the face of fierce attacks by the plaintiffs' bar. A major milestone marking Merck's long-term success is the recent ruling by Houston Judge Randy Wilson throwing out a "failure to warn" Vioxx test case. TLR believes this ruling will lead to outright dismissal or successful defense of thousands of cases governed by Texas law.

Bayer, the famed German creator of Bayer aspirin, is proving the same rule in its defense of Baycol, a cholesterol-lowering medication. After learning that the drug produced serious and sometimes fatal side effects, it took the medicine off the market, interviewed top defense lawyers, and formulated an intelligent long term defense strategy.

In an early test, Bayer took a Baycol case to trial in Corpus Christi, known as a plaintiff-friendly jurisdiction, and made national news by winning the case before the jury. The victory was crucial not only as a test case, but also because the case had been selected as a winner by well-known Corpus Christi plaintiff attorney Mikal Watts. With 1400 Baycol clients, Watts was counting on a big initial win to trigger what he hoped would be a typical mass-tort defense capitulation. Instead, the jury left Watts empty-handed—and facing a client irate when he learned that Watts had rejected Bayer's $250,000 settlement offer.

Bayer, Merck and an increasing number of other defendants have realized that there is no way to buy off lawsuit problems, because every ill-considered settlement drives up both the cost and the number of claims filed. When defendants take good cases to trial rather than settling, they will both win their fair share of jury cases and send a valuable message: that plaintiffs need to take care in filing cases and evaluating settlements. This is the message delivered by the Vioxx-Baycol defense strategy. It works if defendants offer fair and prompt settlements in cases presenting real liability problems, but it also demands that defendants go to trial when liability is doubtful or where plaintiffs persist in unreasonable settlement demands.

These companies also know that top defense work does not come cheap. For example, the defense lawyer in the Corpus Christi Baycol case, Phil Beck of Chicago, is one of the most expensive defense lawyers in the United States. A key player in the trial of both Baycol and Vioxx cases, Beck has obviously saved his clients far more than his fees. Similar results could be produced by many top defense-oriented trial attorneys in Texas—most of whom have long rejected the paltry fees and case micro-management imposed by some large corporations and insurance companies. These leading defense lawyers have largely dropped the general defense of tort cases in favor of business-only litigation, including plaintiff's work. Hiring weak defense lawyers, or micro-managing good ones, guarantees plaintiff dominance in the courtroom. This is a penny wise but pound foolish practice.

Also self-defeating is the practice of many insurers of throwing money at every claim brought by strong plaintiff lawyers while offering nickel-and-dime settlements to claimants not represented, or nominally represented, by attorneys. This feeds the plaintiffs' bar, and feeding the problem is no way to curb lawsuit abuse. Nor will litigation reforms survive legislative attack over the long term if defendants routinely fail to offer fair and prompt settlements of legitimate claims, particularly small claims. Voters don't like lawsuit abuse, but they are equally if not more resentful when big companies refuse to pay what they owe.

TLR and many observers within the legal community believe that the decline of the civil justice system can be traced, in part, to the failure to employ the kind of strategies exemplified by the defense of Vioxx and Baycol—both in mass torts and ordinary claims. The plaintiffs' bar did not become the richest and most powerful special interest group in America on their own. They got help along the way from defendants. ■

2007 TLR Day Shows Texans Committed to Lawsuit Reform

Nearly 500 Texans from Abilene to Harlingen descended on the State Capitol February 21st for the seventh TLR Day, which has been held in every legislative session starting in 1995.

TLR SUPPORTERS met with lawmakers, legislative staff and statewide officials to communicate the importance of TLR's 2007 legislative agenda. They also encouraged legislators to resist attempts by the Texas Trial Lawyers Association to roll back tort reforms that have helped build the state's thriving economy, reduced skyrocketing medical liability costs and ended outrageous asbestos and silica lawsuit abuses.

TLR supporters, many of whom attend TLR Day every session, say it is important that lawmakers continue to see that support for lawsuit reform is a priority for Texas voters.

Gov. Rick Perry addressed TLR supporters at lunch, stressing the important role he believes tort reform has played in building the state's strong business climate and the creation of hundreds of thousands of new jobs for our citizens.

At breakfast, House Speaker Tom Craddick provided TLR's Regional Chairmen with an overview of the legislative session and stressed the improvements in access to medical care that have been achieved in Texas since passage of HB 4.

Lt. Governor David Dewhurst spoke at the evening reception and observed that SB 15, the asbestos and silica litigation bill, has been a boon to job and economic growth in Texas, while assuring redress in the courts to any person who has been impaired by exposure to asbestos or silica.

"TLR Day not only allows us to see our supporters from all over the state in one place, it also sends a strong message to lawmakers and statewide officials that Texans want our civil justice system to be fair, balanced and predictable," said TLR's Mary Tipps.

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TLR Day Activity During Session '07