TEXAS CIVIL JUSTICE LEAGUE JOURNAL

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TEXAS CIVIL JUSTICE LEAGUE JOURNAL | LEADING THE FIGHT FOR TORT REFORM SINCE 1986
WINTER 2006

TEXAS CIVIL JUSTICE LEAGUE JOURNAL
Winter 2006

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SPECIAL INSERT: Business Law and Liability Issues Survey

On the cover: Bronze trimmed from the casting of the Lone Star at the Bob Bullock Texas State History Museum was used to make the scale replicas presented as awards at the Texas Civil Justice League's 20th Annual Meeting in November 2005. The museum's monumental Lone Star bronze, which is thirty-five feet tall and weighs 20,000 pounds, was installed by Kasson's Castings of Austin, Texas.

Texas Civil Justice League
Leading the Fight for Lawsuit Reform Since 1986

The Texas Civil Justice League Journal is published by the Texas Civil Justice League. Since 1986, the Texas Civil Justice League has led the fight to create a strong business climate by restoring fairness and stability to the civil justice system.

For more information, contact the **Texas Civil Justice League,** 401 West 15th Street, Suite 975, Austin, Texas 78701, 512-320-0474, 512-474-4334 fax, *info@tcjl.com.*

MESSAGE FROM THE PRESIDENT

Despite tremendous progress in civil justice reforms in recent years, some Texas courts can't seem to get the message.

In the recently released 2005 edition of its annual *Judicial Hellholes*® study, the American Tort Reform Foundation (ATRF) found that trial courts in southeast Texas and the Rio Grande Valley continue to build their well-deserved reputation as some of the most plaintiff-friendly jurisdictions in the United States.

Although the Ninth Court of Appeals in Beaumont has stepped up its efforts to restore balance and fairness in the southeast Texas judicial system, Jefferson County trial courts continue to be the deepest and darkest of the nation's judicial hellholes. ATRF points out that class action filings in the county continue to far outpace the national average, and the staggering backlog of asbestos cases in the county (many of which come from other states) will take years to clear up, even under last year's asbestos reform legislation.

But Beaumont is not the only Texas county in which plaintiff's judges and their trial lawyer cronies dispense home-cooked, frontier justice. In nearby Brazoria County, the nation's first Vioxx lawsuit resulted in a jury verdict of more than $250 million, almost $230 million of which consisted of a punitive damages award against the drug manufacturer, Merck. Here plaintiff's lawyers convinced the jury to "send Merck a message," although there was no evidence in the case that Vioxx had anything to do with the plaintiff's injury.

Thanks to the Texas Civil Justice League's punitive damages reform bill in 1995, the $230 million punitive damages award was reduced to $1.6 million. Merck is nevertheless appealing what appears to be a completely irregular and improper verdict. As ATRF reports, the fact that the judge allowed the plaintiff's lawyer to make highly inflammatory and prejudicial statements during trial and during his jury argument demonstrates a blatant disregard for the judicial process.

Unfortunately, Jefferson and Brazoria Counties aren't the only judicial danger zones in our state. Ever since ATRF began its reporting on judicial hellholes in 2002, the Rio Grande Valley has led the way in every report. In some trial courts in South Texas, if a jury renders a verdict for a defendant, the judge automatically grants a new trial to the plaintiff, regardless of the evidence in the case. Defendants who are courageous enough to take a case to trial in these courts face what amounts to an extortion racket run by the local plaintiff's bar and some members of the judiciary.

Until every trial and appellate judge takes his or her judicial responsibilities as seriously as the vast majority of Texas judges do, Texas will continue to be plagued by problem jurisdictions, outrageous jury verdicts, and cozy relationships between judges and plaintiff's lawyers.

Legislative reforms of our tort system can only do so much to restore fairness to the law. If judges don't apply those laws in an impartial and disinterested manner, all the tort reforms we have achieved in the past two decades will come to nothing. And that is exactly what the plaintiff's lawyers want.

Ralph Wayne

ANNOUNCING THE

TEXAS CIVIL JUSTICE LEAGUE BUSINESS COUNCIL

Legal reform is a business issue.

A fair and balanced judicial system improves the state's position in a global marketplace. To remain competitive, Texas must address emerging public policy issues that affect economic growth and curb an entrepreneurial trial bar.

The Texas Civil Justice League (TCJL) Business Council brings together the state's top corporate leaders to determine legislative strategy on up-and-coming economic issues. This model builds on the success of previous TCJL coalitions, which tackled asbestos lawsuit reform (2005/2003), statute of limitations and venue (2001), and Y2K (1999).

The TCJL Business Council meets twice a year to discuss and make recommendations for legislative drafting and political strategy. Planning and preparation are already underway for the 80th Regular Session of the Texas Legislature in 2007.

TCJL Business Council Meetings
March 30, 2006
September 7, 2006
November 9, 2006 (Annual Meeting)

For TCJL Business Council membership opportunities, contact:

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20TH ANNUAL MEETING
Austin, Texas

Texas Civil Justice League (TCJL) directors and members participated in the 20th Annual Meeting, Monday, November 14, 2004, in Austin, Texas. U.S. Senator John Cornyn (R-Texas) was the keynote luncheon speaker. The morning membership meeting included legislative briefings and election analysis from Lieutenant Governor David Dewhurst, Dr. George S. Christian, TCJL General Counsel; Robert S. Howden, former Texas Asbestos Consumers Coalition Coordinator; TCJL legislative consultant and former Lieutenant Governor Bill Ratliff, and Olan Brewer of Associated Research. Six new members were elected to the TCJL Board of Directors, including George B. Allen, Texas Apartment Association; Steven B. Hantler, DaimlerChrysler Corporation; Sherman Joyce, American Tort Reform Association; Ruben Martin, Martin Resource Management Corporation; Bill Summers, Rio Grande Valley Partnership; and David Young, Union Pacific Railroad Company.

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(1) New board member Ruben Martin visits with legislative consultants Thomas Ratliff and former Lieutenant Governor Bill Ratliff.

(2) Lieutenant Governor David Dewhurst comments on the successful efforts to pass asbestos and silica litigation reform.

(3) TCJL General Counsel George S. Christian and Chief Justice Tom Gray of the 10th Court of Appeals in Waco

(4) Cullen M. "Mike" Godfrey of Jackson Walker and Dr. Louis J. Goodman, executive vice president and CEO of the Texas Medical Association and a TCJL executive committee member, review materials during the 20th Annual Meeting's morning session.

(5) Dr. George S. Christian, TCJL general counsel, outlines potential issues for the 2007 legislative session.

(6) Former Texas Asbestos Consumers Coalition coordinator Robert S. Howden thanks TCJL members for supporting Senate Bill 15. Howden currently serves as the staff director for Governor Rick Perry's Texas Tax Reform Commission chaired by John Sharp.

(7) Dr. Louis J. Goodman presents Lieutenant Governor David Dewhurst with a TCJL Appreciation Award for his efforts on behalf of civil justice reform.

(8) Bill Ratliff, TCJL legislative consultant and former lieutenant governor, discusses the negotiations and successful outcome of asbestos and silica litigation reform legislation.


Thomas Ratliff
Bill Ratliff
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George E. Christian
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20TH
ANNUAL MEETING!
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(9) Lieutenant Governor David Dewhurst thanks TCJL members for their work on civil justice reform issues.

(10) Olan Brewer of Associated Research analyzes the 2006 elections.

(11) U.S. Senator John Cornyn (R-Texas) greets TCJL member Pati McCandless of Unicare and State Representative Carter Casteel (R-New Braunfels).

(12) Senator Cornyn visits with Hayes Fuller and David Chamberlain of the Texas Association of Defense Counsel.

(13) Senator Cornyn delivers the 20th Annual Meeting keynote luncheon address.

(14) Kay Andrews of Brown McCarroll, L.L.P. and Congressman Michael McCaul (R-Texas) listen to Senator Cornyn's presentation.

(15) Dr. Louis J. Goodman presents State Senator Kyle Janek (R-Houston) with a 2005 TCJL Top Legislator Award.

(16) Dr. Louis J. Goodman presents State Senator Tommy Williams (R-The Woodlands) with a 2005 TCJL Top Legislator Award.

(17) Dr. Louis J. Goodman presents State Representative Joe Nixon (R-Houston) with a 2005 TCJL Top Legislator Award.

(18) Dr. Louis J. Goodman presents State Representative Corbin Van Arsdale (R-Tomball) with a 2005 TCJL Top Legislator Award.

(19) Dr. Louis J. Goodman presents State Representative Patrick Rose (D-Dripping Springs) with a 2005 TCJL Top Legislator Award.

(20) Dr. Louis J. Goodman presents Kay Andrews of Brown McCarroll, L.L.P. with a TCJL Appreciation Award for her work on asbestos and silica litigation reform.

(21) TCJL President Ralph Wayne recognizes Martha Miller, retiring executive director of the Texas Association of Defense Counsel.

(22) Texas Supreme Court Justice Don Willett

(23) Texas Supreme Court Justice Paul Green

(24) TCJL member Jack Wu of Formosa Plastics greets Texas Supreme Court Justice Dale Wainwright.

(25) Justice Paul Green, Dr. George S. Christian, Ed Pickle of Shell Oil Company, and Chief Justice Wallace Jefferson talk after the 20th Annual Meeting luncheon.

(26) Kevin Cooper of U.S. Senator Kay Bailey Hutchison's staff and lobbyist Joey Park discuss civil justice reform.

TEXAS CIVIL JUSTICE LEAGUE
Political Action Committee

Red McCombs, Chairman

Since 1988, the Texas Civil Justice League Political Action Committee (TCJL PAC) has worked to elect qualified judges and pro-business lawmakers. Texas is no longer the "world's courthouse" and the state's business climate and economy are better for it.

In addition to the judicial candidates listed below, the TCJL PAC has also endorsed Governor Rick Perry, Lieutenant Governor David Dewhurst, Attorney General Greg Abbott, Land Commissioner Jerry Patterson, Railroad Commissioner Elizabeth Ames Jones, Susan Combs for Comptroller, and Todd Staples for Agriculture Commissioner. Additional legislative and appeals court endorsements will be forthcoming and available online at *www.tcjl.com*.

Courts of Appeals

The fourteen Texas Courts of Appeals are the "courts of last resort" for more than 95 percent of all civil and criminal cases appealed from the trial court level. They are critically important to the administration of justice in Texas. Courts of appeals justices must adhere to the highest standards of judicial integrity, impartiality, and scholarship in order to preserve the public's confidence in the fairness of the judiciary. To the extent that any appellate judge is perceived to be unduly influenced by one side of the bar or the other, the entire system is compromised.

For this reason, the TCJL PAC closely scrutinizes courts of appeals candidates, both incumbents and challengers, for evidence of judicial bias in their decisions. The TCJL PAC relies on input from its members across the state to endorse candidates worthy of support. Please take a moment to review the following courts of appeals endorsements for 2006.

You be the Judge
On March 7, 2006

Voter registration deadline
February 6, 2006

Early voting
February 21–March 3, 2006

Statewide Primary Election
Tuesday, March 7, 2006

TCJL PAC ENDORSEMENTS

TEXAS SUPREME COURT STATEWIDE REPUBLICAN PRIMARY

CHIEF JUSTICE
Wallace Jefferson*

PLACE 2
Don Willett*

PLACE 4
David Medina*

PLACE 6
Nathan Hecht*

PLACE 8
Phil Johnson*

2ND COURT OF APPEALS

CHIEF JUSTICE
John Cayce*

10TH COURT OF APPEALS

CHIEF JUSTICE
Tom Gray*

3RD COURT OF APPEALS

PLACE 2
Alan Waldrop*

PLACE 5
David Puryear*

PLACE 6
Bob Pemberton*

4TH COURT OF APPEALS

PLACE 3
Rebecca Simmons*

PLACE 5
Karen Angelini*

PLACE 7
Phylis Speedlin*

6TH COURT OF APPEALS

PLACE 2
Bailey Moseley

9TH COURT OF APPEALS

PLACE 3
David Gaultney*

PLACE 4
Hollis Horton*

*Incumbent

COURTS IN CRISIS

Karl Rove, Deputy White House Chief of Staff

Excerpts from a speech to the Federalist Society, November 10, 2005, Washington, D.C.

My name is Karl, and I'm not a lawyer. I say that with no sense of superiority. Instead, I offer it as a reminder of what must be a painful point for all of you with a J.D. Believe it or not, 99.7 percent of all Americans are not lawyers. We may not have the power, but we are the majority. And it is clear today that many ordinary men and women—non-lawyers—believe our courts are in crisis, and their concerns are well grounded.

I've seen this phenomenon myself for several decades. In the 1980s, in my home state of Texas, our Supreme Court was dominated by justices determined to legislate from the bench, bending the law to fit a personal agenda.

Millions of dollars from a handful of wealthy personal injury trial lawyers were poured into Supreme Court races to shift the philosophical direction of the court. It earned the reputation, as the Dallas Morning News said, as, quote, "the best court that money could buy." Even *60 Minutes* was troubled, and it takes a lot to trouble CBS. In 1987 it did a story on the Texas Supreme Court titled "Is Justice for Sale."

Ordinary Texans had had enough, and they took it upon themselves to change the court. In a bipartisan reform effort, they recruited and then elected to the Texas Supreme Court distinguished individuals like Tom Phillips, Alberto Gonzales, John Cornyn, Priscilla Owen, Nathan Hecht, and Greg Abbott.

And for those of you who know something about Texas politics, this is pretty significant, because all of whom were Republicans. After all, Texas had gone for a mere 120 years without electing a single Republican to our Supreme Court, and then all of a sudden we were blessed with these extraordinarily able people.

I saw this public reaction to judicial activism again in Alabama.

The state legislature passed tort reform legislation in 1987. However, activist judges on the Supreme Court—the trial lawyer-friendly Supreme Court—struck it down, prompting a period of jackpot justice in Alabama through the mid-1990s, where the median punitive damage award in Alabama reached $250,000, three times the national average. *Time* magazine labeled Alabama "tort hell." Like in Texas, this led to a popular revolt against judicial activism.

It began in 1994, when Republican Perry Hooper challenged sitting chief justice and trial lawyer-favorite Sonny Hornsby. Hooper pulled off a stunning upset. Outspent, outworked, he won by 262 votes out of over 1.2 million votes cast. And then, the day after the election, several thousand absentee ballots mysteriously surfaced, none of them witnessed nor notarized, as required by Alabama law, and Sonny Hornsby tried to have them counted. It took a year of court battles before Hooper was finally seated. His groundbreaking victory would not have been possible without the work of many Alabamians, including a young, dynamic lawyer I got to know by the name of Bill Pryor. And isn't he doing a terrific job?

Today, the Alabama Supreme Court is once again committed to the strict interpretation of the law, led by justices like Harold See, who's here with us tonight. We've seen similar court reform efforts in Mississippi, Ohio, West Virginia, Michigan, and other states. And, of course, all America saw the popular response to the activism of the Massachusetts Supreme Judicial Court in its Goodrich decision in its conviction that marriage is an evolving paradigm. My wife asked me if I shared that conviction. Four judges in Massachusetts, by forcing same-sex marriage on an unwilling public and rebuking the legislative power, provoked a national grassroots effort to defend marriage by amending state constitutions and passing statewide initiatives.

But this we know—the will of the American people cannot be subverte provoking a strong counter-reaction. The public will eventually insist o insist that government return to its founding principles.

But the judicial activism about which Americans feel most deeply is to be found in our federal courts. For decades, the American people have seen decision after decision after decision that strikes them as fundamentally out of touch with our Constitution.

Let me offer just a few recent examples of a trend I'm confident each of you could explain more powerfully and more eloquently than I can.

The Ninth Circuit has declared the phrase "under God" in the Pledge of Allegiance to be unconstitutional, arguing that it is the establishment of religion to require children to recite it in a public school. Earlier this year, a federal district court judge dismissed a ten-count indictment against hard-core pornographers, alleging that federal obscenity laws violated the pornographers' right to privacy, despite the fact that popularly elected representatives in Congress had passed the obscenity laws and that the pornographers distributed materials with simulations where women were raped and killed.

Just a few months ago, five justices on the U.S. Supreme Court decided that a national consensus prohibited the use of the death penalty for murders committed under the age of eighteen. In its decision, the majority ignored the fact that at the time, the people's representatives in twenty states had passed laws permitting the death penalty for killers under eighteen, while just eighteen states—or less than 50 percent of the states allowing capital punishment—had laws prohibiting the execution of killers who committed their crimes as juveniles.

These attempts, and many, many more over the past decades, have led to widespread concern about our courts. While ordinary people may not be able to give you the case number or explain in fine detail the legal principles they feel are being bent and broken, they are clearly concerned about too many judges too ready and eager to legislate from too many benches.

Why do ordinary Americans have such an instinctive reaction to judicial activism? I suggest there's an easy explanation. It's called the fourth grade. In the first civics course any of us ever take, we learn about the separation of powers—the doctrine that constitutional authority should be shared by three distinct branches of government—the legislative, the executive and the judicial. Each has a role, and that of the judiciary, we're taught in the first class we ever have on the subject, is to strictly apply the law and to defend the Constitution as written.

The Founders' theory was a simple one—that by dividing power, the three branches of government would be able to check the powers of the others. This separation of powers makes so much sense even to young minds, because in devising our system of government, the Founders took into account the nature of man. They understood we needed a government that was strong but not overbearing; that provided order but did not trample on individual rights.

"If men were angels," James Madison famously said, "No government would be necessary." But men are not angels, and so government is necessary. Mr. Madison and his colleagues did not take utopia as their starting point. Rather, they took human beings as we are and human nature as it is. Scholars of American government have pointed out the Founders were determined to build a system of government that would succeed because of our imperfections, not in spite of them. And this was the central insight and the great governing genius of America's Founders.

And in all this, the Founders believed the role of the judiciary was vital, but also modest. They envisioned judges as impartial umpires charged with guarding the sanctity of the Constitution, not as legislators dressed conveniently in robes. In *Federalist 78*, Alexander Hamilton described the judiciary as the branch of government that is "least dangerous" to political rights.

Because it was to have "no influence over either the sword or the purse," the judiciary was "beyond comparison, the weakest of the three departments of power." As a result, Hamilton concluded, "liberty can have nothing to fear from the judiciary alone."

But Hamilton's optimism has not been borne out. I don't have to tell anyone in this audience that we've traveled a long, long distance from where we began and from what the Founders envisioned. In the 1770s we saw, within just a few hundred miles from here, the greatest assemblage of political philosophers since ancient Athens. Yet today, the counsel of Madison and Hamilton and the other Founders too often goes unheeded, at least in influential law schools and among too many of our judges. And this failure has led to an increasingly political atmosphere around our judiciary and increased activism on the part of many of its members.

At the end of the day, though, the views of the Founders will prevail, because the core defects of judicial imperialism, including the mistaken assumption that our charter of government is like hot wax—pliable, inconstant and easily shaped and changed.

ed in case after case, on issue after issue, year after year, without n reclaiming their rights as a sovereign people, and they will further

America's 43rd president believes as you do—that judges should base their opinions on strictly and faithfully interpreting the text of our Constitution, a document that is remarkable and reliable. William Gladstone called it, "The greatest work ever struck off at a given time by the brain and purpose of man" — not bad, for an Englishman.

Critics of constitutionalism say it is resistant to social change, our Constitution. But if the people want to enact or repeal certain laws, they can do so by persuading their fellow citizens on the merits through legislation or constitutional amendment. This makes eminent good sense, and allows for enormous adaptability. The difficulty for those who do not anchor judicial decisions in the words and meaning of the Constitution is that those decisions are anchored in nothing at all.

In the compelling words of Justice Scalia, "*Panta rhei*"—everything is constantly changing—"is not a sufficiently informative principle of constitutional interpretation." What is it the judge must consult to determine when and in what direction evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume or of John Rawls or of John Stuart Mill or of Aristotle?

"As soon as the discussion goes beyond the issue of whether the Constitution is static," said Justice Scalia, "the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that it is inevitably so, which means that evolutionism is simply not a practical Constitutional philosophy."

Another defect of judicial imperialism is that it undermines self-government. The will of the people is replaced by the personal predilections and political biases of a handful of judges. The result is that judicial imperialism has split American society, politicized the courts in a way the Founders never intended, and it has created a sense of disenfranchisement among a great many people who believe issues not addressed by the Constitution should be decided through elections, rather than by nine lawyers in robes.

One of the strengths of constitutionalism is that it produces results that both sides may not agree with, but which are seen as legitimate outcomes of a fair and free debate. And constitutionalism offers the promise and possibility of compromise, as well. In the words of a recent *Wall Street Journal* editorial, the court has hijacked social disputes from democratic debate, preventing the kind of legislative compromises that would allow a social and political consensus to form.

But this we know—the will of the American people cannot be subverted in case after case, on issue after issue, year after year, without provoking a strong counter-reaction. The public will eventually insist on reclaiming their rights as a sovereign people, and they will further insist that government return to its founding principles. We have seen the court overreach in the past, in *Dred Scott, Lockner* and in many other cases, and corrective measures usually follow.

We will see one of two things come to pass. The courts will, on their own, reform themselves and return to their proper role in American public life, or we will see more public support for constitutional amendments and legislation to rein them in. It will be one, or it will be the other. Will we see the kind of self-restraint those of you in this room and those of us who work in this administration want? I believe we will. I say this because we are now seeing the fruits of your good works and the good works of many others.

More than 200 exceptionally well-qualified nominees, many of whom have found intellectual sustenance and encouragement from the Federalist Society, have been confirmed as federal judges since 2001—not easily, not quickly, but confirmed after a hard effort.

On the Supreme Court, we've seen individuals such as Chief Justice John G. Roberts, Jr., who conducted himself brilliantly before the Senate Judiciary Committee. And soon, Chief Justice Roberts will have as his colleague a proud member of the Federalist Society, Judge Sam Alito, Jr.

The willingness of these brilliant legal minds to put aside lucrative careers in private practice to serve a greater public good should make us all optimistic and hopeful. Our arguments will carry the day because the force and logic and wisdom of the Founders—all of them are on our side. We welcome a vigorous, open and fair-minded—and high-minded—debate about the purpose and meaning of the courts in our lives, and we will win that debate.

JUDICIAL HELLHOLES® 2005
American Tort Reform Foundation

Judicial Hellholes® 2005
American Tort Reform Foundation

1. Rio Grande Valley and Gulf Coast, Texas
2. Cook County, Illinois
3. West Virginia
4. Madison County, Illinois
5. St. Clair County, Illinois
6. South Florida

Dishonorable Mention: Wisconsin Supreme Court

HELLHOLE #1
Rio Grande Valley and Gulf Coast, Texas

Areas of Texas, specifically the Rio Grande Valley and Gulf Coast, continued to be considered unfair to civil defendants, even after the state's enactment of comprehensive tort reform in Texas in 2003. This area's inclusion at the top spot in the Judicial Hellhole list is a reminder that legislation can help, but it does not always quench the fires of Judicial Hellholes. Judicial Hellholes most often are characterized by unfair day-to-day practices by individual courts—in class certification, in discovery, in evidentiary rulings, and in jury instructions—that routinely disfavor civil defendants, especially out-of-state employers.

Jefferson County: A History of Litigiousness, Classless Actions, and Good Living for Personal Injury Lawyers

Jefferson County courts have a reputation for astounding awards, such as last year's $1.013 billion verdict for one family in a fen-phen lawsuit against Wyeth. The court also attracts an inordinate amount of litigation: class actions, medical malpractice lawsuits, silica and asbestos lawsuits, and on and on.

"There are few places in the country that offer lawyers a better opportunity to make a lot of money than Beaumont, an industrial town of 114,000."
—Nathan Koppel, *American Lawyer*

An American Tort Reform Foundation (ATRF) report released last year looked closely at Jefferson County's Hellhole status. According to the report, in 2002, there were 117 civil lawsuits for every 10,000 people in Jefferson County, the highest per capita total among Texas counties with populations over 200,000. The number of personal injury lawsuits over the period from 2003 to 2004 was the highest in Texas, as well. Of the personal injury claims filed between September 1, 2002 and August 31, 2003, nearly half were claims alleging medical malpractice or asbestos or silica related injuries. Plaintiffs' lawyers are also naming more defendants in each lawsuit. In 1996, the average number of defendants per lawsuit was 2.4. In 2004, the average number of defendants per lawsuit increased to 6.37. "Adding defendants is cheap for personal injury lawyers," according to the ATRF report. "But for defendants, the cost of defending a lawsuit—even a frivolous one—can cost tens of thousands of dollars."

Jefferson County is a notorious class action magnet. Between 1998 and 2002, the number of class action lawsuits filed in Jefferson County increased by 82 percent. Only 13 percent of defendants and 64 percent of the named plaintiffs in these class actions were residents of Jefferson County. Trial courts regularly grant class certification in these cases when it is improper. In the last year alone, the Texas Court of Appeals for the Ninth District reversed at least four class certifications in Jefferson County. One class action involved insurance policy renewals, one involved a particular model of desktop computers, another involved late charges at a rent-to-own store, and the fourth involved warranties for laptop computers.

In the class action involving desktop computers, the proposed class consisted of approximately three million people from all over the United States; the class alleged breach of warranty. Plaintiffs' lawyers guessed correctly that a Jefferson County trial court would be willing to certify this national class. A Texas appellate court, however, found that the trial court abused its discretion by granting class certification because there existed substantial conflicts between Texas law and the law of other states; common issues did not predominate over individual issues. In the class action involving late charges at a rent-to-own store, the appellate court reversed the trial court and found that "[i]ndividual damage issues 'will be the object of most of the efforts of the litigants and the court.'"

The real winners of Jefferson County's litigation bonanza are the plaintiffs' lawyers. About every quarter-mile in the West End neighborhood of Beaumont, the Jefferson County seat, there is a massive home belonging to a plaintiffs' lawyer. "They're not homes," according to plaintiffs' lawyer Wayne Reaud of Reaud, Morgan & Quinn, "They're mansions." Nathan Koppel of *American Lawyer* reports that "[s]ome practically look like campuses, with a main building backed by miniature replicas that serve as guest houses or pool houses." One Beaumont lawyer has a gymnasium, complete with an indoor basketball court.

Reaud himself owns a Gulfstream G-4 jet and homes in Santa Fe, New Mexico; Beaver Creek, Colorado; and Austin, Texas. Reaud's Beaumont-based firm of thirteen lawyers alone "earned over $100 million in revenue in 2003 and was on track to bring in a similar amount in 2004 from cases spanning from asbestos, to medical malpractice, to product liability class actions."

Beyond Jefferson County

Aside from Jefferson County, several other counties in the Rio Grande Valley and Gulf Coast merit special attention because of their reputation for uneven justice. Some have expressed concern over the ability of defendants to receive a fair trial in counties including Brazoria, Cameron, Hidalgo, Nueces, and Starr. Each of these counties, with the exception of Brazoria, has been featured in past *Judicial Hellholes®* reports. Improvement in the Texas litigation climate, including the enactment of comprehensive civil justice reform legislation in 2003, led ATRF to leave only Jefferson County, the worst Lone Star offender, among its Judicial Hellholes last year. Yet, the other counties continue to be named as a source of concern, reminding readers that Judicial Hellholes are primarily a result of unbalanced rulings by judges, a factor that cannot be completely remedied through legislation.

Last year, in the first ever Vioxx case to go to trial, a Brazoria County jury awarded a single plaintiff $253.5 million—$24.5 million in economic damages and a whopping $229 million in punitive damages. Members of the jury declared that they wanted to "send a message" to Merck, the manufacturer of the painkiller. Under Texas law, which places limits on punitive damages, the $229 million punitive damage award must be reduced to $1.6 million, putting the total award at $26.1 million. Merck has indicated that it will appeal the verdict.

"If there's one thing Mark Lanier knows, it's where to find a receptive audience. Seldom do they come any friendlier than on the fourth floor of the Brazoria County Courthouse." *Houston Chronicle*, October 3, 2004

The extraordinary award came after plaintiffs' attorney in the case, Mark Lanier, reportedly was permitted by the judge to make highly prejudicial and improper statements during the trial and in his summation to the jury, such as "let 'em know you can think Merck money." This first Vioxx case was widely regarded as weak, since the plaintiff's husband died of cardiac arrhythmia, a condition not linked to Vioxx. Merck was not given an opportunity to cross examine in person the primary defense witness, the coroner who initially attributed the plaintiff's cause of death to an irregular heartbeat, but then changed her story to pin responsibility on the drug. Mr. Lanier was able to track her down in the United Arab Emirates and introduce her videotaped deposition. One juror admitted finding the medical evidence confusing. "We didn't know what the heck they were talking about." According to Merck, the plaintiff did not take the drug long enough to have an increased risk and did not die from a heart attack or stroke—the conditions for which taking Vioxx increases the risk. Lanier indicated that his team was "just getting warmed up."

Not surprisingly, the case had almost nothing to do with Brazoria County: the plaintiff lives almost 300 miles north in Keene, near Fort Worth and Merck's only facility in Texas is in Dallas. The complaint originally named a Brazoria County researcher and his company because they did some studies on Vioxx. Naturally, they were dropped as defendants as the lawsuit got underway and the case was allowed to continue in state court. Recently, a federal appeals court in another state refused to allow use of such tactics to keep a case in another plaintiff-friendly state court when it should have been heard in a neutral federal forum.

Lanier knew that Brazoria County was the right place to sue. "If there's one thing Mark Lanier knows, it's where to find a receptive audience. Seldom do they come any friendlier than on the fourth floor of the Brazoria County Courthouse," according to the *Houston Chronicle*. In 1999, Lanier filed suit in Brazoria County on behalf of 21 Alabama steelworkers who had been exposed to asbestos. "He left with a $115 million damage award, one of

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TEXAS CIVIL JUSTICE LEAGUE
POLITICAL ACTION COMMITTEE

You're Invited to a

SOUTHWESTERN INSURANCE INFORMATION SERVICE AND TEXAS CIVIL JUSTICE LEAGUE PAC PUBLIC POLICY FORUM

with Texas Supreme Court and Third Court of Appeals Candidates

Wednesday, February 15, 2006

Texas Medical Association
Thompson Auditorium (first floor)
401 West 15th Street
Austin, Texas

11:30 A.M.

$10 per person

RSVP by Friday, February 10, 2006
512-795-8214 or *siissray@aol.com*

Candidates for the Texas Supreme Court and Third Court of Appeals have been invited to participate in the second SIIS/TCJL Public Policy Forum, Wednesday, February 15, 2006, in Austin, Texas. The luncheon event will begin at 11:30 a.m. in the Thompson Auditorium (first floor) of the Texas Medical Association Building (401 West 15th Street). Parking is available for a nominal fee in the Wells Fargo Bank Building garage (located between 15th and 16th Streets on Guadalupe Street).

the largest ever given in an asbestos case." Pleased with the lucrative result, Lanier is now leading a group of personal injury attorneys trying to replicate the award by filing Vioxx cases in favorable state courts around the country. The federal judge who is trying to impartially resolve those claims in a coordinated manner commented that such an effort is "counterproductive" and will allow litigation to "linger for years." It is interesting to note that on November 3, 2005, a New Jersey jury found that Merck was not liable for the heart attack of an Idaho postal worker that occurred after he took the painkiller. The jury found that Merck had not failed in its duty to warn. This is a stark contrast to the Texas decision.

Texas Appellate Courts must continually overrule questionable decisions and excessive verdicts from these counties. For example, the Texas Supreme Court reversed an $18 million award from Cameron County in October 2004. The plaintiff in the case claimed that a bank maliciously prosecuted him by complaining to Texas authorities about a debt the plaintiff owed to the bank. The bank only complained to authorities after the plaintiff had sold a substantial amount of the collateral for the debt and kept the money for himself. Texas authorities indicted the plaintiff, but later dismissed the charges. The Texas Supreme Court reversed the $18 million award, finding that "[a]s a matter of law, [the plaintiff] owes the Bank, not the other way around."

Last year, an appellate court found that a Hidalgo County trial court improperly certified a class action in a case involving a dispute between teachers and their insurer over interest rates paid on an annuity. The court ruled, "individualized determinations of reliance would not predominate over common questions of law or fact." A Nueces County trial court also was reversed on appeal after it awarded damages for medical expenses and pain and suffering despite a lack of evidence to justify such a payment. At the hearing, the "appellees did not provide an expert to establish the reasonableness and necessity of the past medical expenses. . . ." And "[t]he only evidence presented by appellees to establish mental anguish was a 'yes' response to counsel's questions to the respective appellees: i.e., 'did [plaintiff/appellee] endure mental anguish in the past' and 'will [plaintiff/appellee] continue to suffer mental anguish in the future?" This was clearly insufficient under Texas law.

To read the entire *Judicials Hellholes*® 2005 report, visit *www.atra.org*.

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SECURITIES LITIGATION FAST FACTS

From The Economic Reality of Securities Class Action Litigation and The Unintended Consequences of Securities Litigation, U.S. Chamber Institute for Legal Reform, October 2005

Securities Class Action Settlement Data

Settlements from securities class actions totaled $25.4 billion for 755 cases settled between December 1995 and August 2005. By contrast, in 1994—the year before Congress Enacted the Private Securities Litigation Reform Act (PSLRA)—total settlements from all securities class action lawsuits were $899 million.

Five law firms in the 755 cases examined in the report were involved in more than 70 percent of the final settlements of securities class actions involving alleged fraud from 1995 to 2005. Those settlements resulted in more than $10 billion in settlement dollars of which $2.75 billion went to lawyers' fees and expenses.

Of these 755 class action settlements, the Milberg Weiss (New York) firm alone handled 43 percent, generating $1.7 billion in legal fees and expenses. Its next closest competitor, Shriffin & Barroway (Philadelphia), handled just 7.8 percent of settlements from 1995—2005, collecting more than $191 million in fees and expenses.

The size of securities class action settlements and new filings is growing dramatically. In 2002, there were four settlements of $100 million or more. That number grew to six in 2003 and nine in 2004. In 2003, the average size of a new filing was $350 million. One year later, in 2004, the average size had grown to $883 million.

Key Findings from The Economic Reality of Securities Class Action Litigation

Large institutional investors generally break even from their investments in stocks impacted by fraud allegations because financial losses resulting from ill-timed purchases of inflated shares of one stock are, over time, largely or completely offset by financial gains generated from well-timed sales of inflated shares of a different stock.

Large institutional investors are often overcompensated for alleged securities fraud as a result of litigation. Out of 2,394 institutional investors eligible to participate in securities class action litigation, 31 percent realized a net benefit before taking any settlement proceeds into account. That number rises to 40 percent once settlement is included.

The net trading losses realized by large institutional investors from alleged fraud pale in comparison to the losses claimed. Large institutional investors' claimed (gross) trading losses surpassed net losses by more than 400 percent.

To the extent that trading losses do result from alleged securities fraud, they arise primarily from the issuance of new common shares while the alleged fraud is ongoing. When a company issues no new shares during a class period, there will be no net harm to investors as a whole.

Undiversified investors are at greater risk to lose money as a result of securities fraud litigation because they lack the robust portfolios of diversified institutional investors that can offset those losses.

Conclusions from The Unintended Consequences of Securities Litigation

The mere filing of a securities class action lawsuit on average results in a 3.5 percent drop in the defendant company's equity value. In the context of firms examined in The Economic Reality of Securities Litigation, this implies that at least $24.7 billion in shareholder wealth was wiped out just due to litigation.

The wealth destroyed for defendant companies is not commensurate with the gains of plaintiffs; defendant companies lose far more than the settlement dollars they pay to plaintiffs. They suffer ongoing losses in equity, capital investment, and development opportunities. These losses are compounded for smaller defendant firms with fewer resources.

Firms invest capital when stock prices are high and substitute capital investment with cost-cutting measures when stock prices are low. Hence, the lowering of a firm's stock price due to litigation could result in lower capital investments by firms, which has obvious implications for job creation and economic growth.

Complete copies of the U.S. Chamber Institute for Legal Reform's securities litigation reports are available online at www.instituteforlegalreform.com.

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