

TEXAS
CIVIL
JUSTICE
LEAGUE

JOURNAL



ISSUE HIGHLIGHTS

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Chief Justice Thomas R. Phillips Retires, Governor Perry Appoints Wallace Jefferson to Supreme Court's top spot. Page 3.

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TEXAS CIVIL JUSTICE JOURNAL

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

The Texas Civil Justice Journal is published quarterly 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.

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MESSAGE from the President

Ralph Wayne is president of the Texas Civil Justice League and former chairman of the American Tort Reform Association. A former member of the Texas House of Representatives, he also served as the chief deputy comptroller for the State of Texas.

The 79th Regular Session of the Texas Legislature convenes in less than four months. Lawmakers will face many important public policy issues when they return to Austin, including civil justice reform.

The Texas Civil Justice League has been called the “**state’s premier tort reform organization.**” We have earned that credibility and reputation by working for eighteen years to restore balance and fairness to the state’s judicial system.

Despite claims to the contrary, **our work is not done.** Those who say Texas has passed “all the tort reform it needs,” are either naïvely optimistic or spreading the assertion to divide pro-business interests.

Consider the Tillinghast-Tower Perrins findings in *U.S. Tort Costs: 2003 Update.*

At current levels, U.S. tort costs are equivalent to a 5 percent tax on wages. The U.S. tort system cost \$233 billion in 2002, which translates to \$809 per person. Tort costs could approach \$1,003 per U.S. citizen by 2005—representing a new quadruple-digit benchmark.

When viewed as a method of compensating injured parties, the U.S. tort system is highly inefficient, returning less than fifty cents on the dollar to the people it is designed to help and returning only twenty-two cents to compensate for actual economic loss.

The high tort cost growth experienced in 2001 and 2002 suggests another period of high tort cost growth in the U.S., akin to what was last experienced in the 1970s and 1980s.

The single largest contributor to the rise in tort costs in 2002 was a significant upward reassessment of liabilities associated with asbestos claims, whose numbers continue to mushroom. Of the \$27 billion increase in tort costs in 2002, roughly \$11 billion is attributable to an increase in insurance reserves for future payments associated with asbestos claims, resulting largely from a surge in claim filings beginning in 2000.

If you doubt personal injury trial lawyers will stop at nothing to rollback civil justice reform, consider the millions of dollars raised and spent to nearly defeat Proposition 12 last year. Trial lawyers have hired the same high-dollar public relations firm that spearheaded efforts to defeat Proposition 12 to oppose asbestos litigation reform during the next session.

The Texas Civil Justice League and its members must counter the trial lawyers’ redoubled efforts to dismantle historic business gains. If unopposed, **trial lawyers will turn back the clock on a state where justice was for sale.**

Regards,



Ralph Wayne

CHIEF JUSTICE THOMAS R. PHILLIPS

Leaves Legacy of Leadership



“Tom Phillips leaves a judicial legacy unmatched in Texas history. His leadership restored balance and fairness to the state’s civil justice system.”

Ralph Wayne, President
Texas Civil Justice League

Chief Justice Thomas R. Phillips resigned his Texas Supreme Court seat in early September to accept the Spurgeon Bell Distinguished Visiting Professorship at the South Texas College of Law for the 2004–2005 academic year. Governor Rick Perry appointed Justice Wallace Jefferson to succeed Phillips as chief justice.

“Tom Phillips leaves a judicial legacy unmatched in Texas history. His leadership restored balance and fairness to the state’s civil justice system. Texans owe Chief Justice Phillips and his family a debt of gratitude for more than two decades of public service,” said Ralph Wayne, president of the Texas Civil Justice League.

Phillips’s reputation extends beyond deciding cases and writing opinions. The Texas Supreme Court’s accomplishments during his tenure included:

Strengthened the Code of Judicial Conduct, placing limits on when judges can raise campaign contributions while requiring judges to resign to run for non-judicial offices, and mandating more comprehensive reporting of campaign activities.

Strengthened the ethical rules governing Texas lawyers, including restrictions on lawyer advertising.

Wrote the first statewide voluntary code of professionalism for lawyers.

Increased public access to the operations and decisions of Texas courts, such as requiring the disclosure of court-approved fees to lawyers.

Revised the Texas Rules of Appellate Procedure to eliminate unnecessary and wasteful steps.

Created the Citizen’s Commission on the Texas Judicial System, which recommended a thorough modernization of the Texas court structure.

Appointed a Foster Care Task Force, which has helped improve child placement in Texas.

Studied and recommended laws and procedures to enhance jury service and the jury system in Texas.

Revised the Texas Rules of Civil Procedure to streamline the pretrial discovery process.

Implemented improved methods for equalizing appellate court dockets.

Created the Judicial Committee on Information Technology to increase judicial efficiency through the use of modern technology.

In 1987, Governor William P. Clements Jr. appointed Phillips to the Texas Supreme Court, making him the first Republican chief justice since Reconstruction. He served Texas with distinction since his appointment and subsequent election in 1988, and re-elections in 1990 and 1996. Prior to being appointed by Governor Clements, he served seven years as a district judge in Harris County. From 1975 to 1981 he was an attorney with the law firm of Baker & Botts in Houston. Phillips graduated as class valedictorian in 1968 from Woodrow Wilson High School in the Dallas public school system. In 1971, he graduated summa cum laude from Baylor University and in 1974 he received a juris doctor Harvard Law School. He is married to Lyn B. Phillips, Ph.D., and has a son, Daniel, and a stepson, Thomas Kirkham.

GOVERNOR PERRY NAMES JEFFERSON Chief Justice of Texas Supreme Court



Chief Justice Wallace Jefferson at the Texas Civil Justice League's 2002 Annual Meeting. **Jefferson is the first African-American to serve on the Texas Supreme Court.** He was appointed to the state's highest civil court by Governor Rick Perry in 2001 and was elected to fill an unexpired term in 2002. Governor Perry appointed Jefferson chief justice in September 2004.

“Chief Justice Wallace Jefferson will continue the work of his predecessor, Tom Phillips, making the Texas Supreme Court a national model for the efficient and fair administration of civil justice.”

Ralph Wayne, President
Texas Civil Justice League

Wallace Jefferson made Texas history in 2001 as the first African-American ever to serve as a justice on the Supreme Court of Texas. Governor Rick Perry appointed Justice Jefferson to the Court to fill the vacancy created when Justice Al Gonzales left the Court to serve as White House Counsel to President George W. Bush. Jefferson makes history again as the first African-American to serve as chief justice.

“Chief Justice Wallace Jefferson will continue the work of his predecessor, Tom Phillips, making the Texas Supreme Court a national model for the efficient and fair administration of civil justice,” said Ralph Wayne, president of the Texas Civil Justice League. “The Texas Civil Justice League looks forward to working with Chief Justice Jefferson and the beginning of a new era in the Supreme Court's history.”

Jefferson is the son of William and Joyce Jefferson of San Antonio, Texas. He graduated from John Jay High School in 1981 and received a Bachelor of Arts in Political Philosophy from Michigan State University

in 1985. He earned his Juris Doctor degree in 1988 from the University of Texas School of Law. Jefferson developed an early interest in civil appellate law as a student of the late constitutional scholar, Charles Alan Wright. In 1989, he joined the appellate section of Groce, Locke and Hebdon in San Antonio. He founded his own appellate law firm with Tom Crofts and Sharon Callaway in 1991. Crofts, Callaway and Jefferson soon became one of the preeminent appellate practices in Texas. He successfully argued two cases before the United States Supreme Court, a rare distinction for any lawyer. Decisions in those cases have guided courts nationally in complex areas of civil rights litigation. His experience—arguing before the highest court in the land, combined with his advocacy before the Supreme Court of Texas, intermediary Texas appellate courts, and the Court of Appeals for the Fifth Federal Circuit—brings a unique and valuable perspective to the bench.

Jefferson's wife, Rhonda, is a former school-teacher. The couple has three young sons.

TEXAS ASSOCIATION OF DEFENSE COUNSEL

Interim Testimony before the House Civil Practices Committee

April 22, 2004



ROB ROBY

Former president of Texas Association of Defense Counsel, makes a presentation at the Texas Civil Justice League Annual Meeting last year.

Chairman Nixon and members of the committee, my name is Rob Roby.

I am immediate past president of the Texas Association of Defense Counsel, an organization representing more than 2,000 attorneys across the state engaged primarily in the defense of civil lawsuits. I appreciate the opportunity to appear before you today on behalf of the association.

In preparation for this testimony, we asked our members what experiences they have had in dealing with House Bill 4. As you might expect, most report a large spike in filings immediately prior to the September 1, 2003 effective date of the bill. Only now are we seeing a growing trickle of filings under the new law, and most of those lawsuits are not far enough along in the process to show any trends.

However, we are beginning to see a few potentially significant issues emerge with respect to certain changes House Bill 4 effected.

First and foremost, those of us who are regularly involved in multi-defendant lawsuits are experiencing a major problem with the new settlement credit. House Bill 4 rightly abolished the old sliding scale settlement credit, but it also eliminated the dollar-for-dollar credit that has been part of Texas law for many, many years. For some reason, House Bill 4 retained the dollar-for-dollar credit in medical liability cases, but not for other tort actions. This change in the law has put non-settling defendants at a serious disadvantage and in many cases will allow claimants to recover more than 100 percent of their damages. It is also creating substantial conflicts between defendants and making it much more difficult to coordinate the defense of mass actions, especially in the toxic tort arena.

We urge the Committee to correct this problem at the earlier opportunity. The fix is simple: restore the optional dollar-for-dollar credit and allow the non-settling defendant to elect the appropriate credit after verdict. This solution would both preserve the claimant's recovery and allow defendants the full benefit of a settlement before trial.

Another issue we are beginning to see involves changes in the statute of repose as it applies in asbestos litigation. Under the previous law, a maker of manufacturing equipment received the benefit of the fifteen-year statute of repose, but House Bill 4 includes a new

exception for products that may cause long-latency diseases, such as asbestos. While this latency exception is surely appropriate for a product such as asbestos, it should not apply to manufacturing equipment that hasn't contained any asbestos for the last thirty years. Nevertheless, because of the new law, we are seeing pump manufacturers being added to asbestos lawsuits solely because they once manufactured a product that contained asbestos, even where there is no evidence that the product had anything to do with the exposure. In other words, these companies are being targeted because they are solvent. We recommend that the old law be restored with respect to manufacturing equipment.

A third issue is the multi-district litigation process enacted by House Bill 4. We think this could be a good mechanism for resolving mass torts, and we applaud the Texas Supreme Court for moving so expeditiously to implement this provision. However, we continue to be concerned that the lack of resources in our judiciary will make it extremely difficult to make the MDL system work properly. We would urge the Committee to work toward better funding for our courts in general, and for the additional staff and resources necessary to realize the full benefits of the MDL process.

Fourth, the Committee should be aware that the \$250,000 cap on non-economic damages in medical liability cases is already producing a significant shift in the way economic and non-economic damages may be characterized. We are seeing increasing indications that plaintiff's attorneys are retaining economists, life planners, and other experts to build models of economic damages that in effect convert some capped "soft" damages into hard, uncapped damages. How much success they will have remains to be seen, but trial courts will soon have to decide whether they will accept this type of evidence. If they do, we believe that the long-term effect of the cap could be significantly diminished. We will monitor this situation very closely, and let you know how this trend is developing.

That is about all I have to share with you this morning, but I expect we will see additional issues and problems crop up as lawsuits under the new law begin working their way through the process. Thank you for inviting us to appear today, and I will be happy to answer any questions you may have.



Governor Rick Perry

MEDICAL LIABILITY REFORMS Heal Healthcare in Texas

In a late August news conference, Governor Rick Perry lauded the success that medical liability reforms—enacted almost a year ago—have had on improving Texans’ access to healthcare.

“One year after the Legislature and voters acted, we have good news: Texas patients are experiencing better access to healthcare, communities are recruiting new physicians, insurance costs are down significantly for many hospitals and some doctors, and healthcare lawsuits have declined dramatically,” Perry said. “The medical insurance reforms we passed last year are working.”

Speaking at Baylor’s Our Children’s House in Dallas, Perry said, “Simply put, our reforms are healing healthcare and protecting patients. And the prognosis for continued improvement is very good once the courts are unclogged from the avalanche of lawsuits filed just before the new law took effect on September 1 of last year.”

Perry designated medical malpractice reform an emergency issue in 2003, and the legislature passed major changes to medical liability insurance laws, which voters approved in a September constitutional amendment. Today a doctor in a malpractice case is liable for no more than \$250,000 in non-economic damages, and total non-economic damages are limited to \$750,000, including hospitals. Patients harmed by medical malpractice may still recover unlimited monetary rewards for actual damages such as medical expenses and lost wages.

At the same time the legislature enacted the lawsuit reforms, it also gave the State Board of Medical Examiners new authority to crack down on the small percentage of bad doctors, which Perry said is another important step in protecting patient access to quality care.

The Texas Hospital Association released results of a recent survey that shows hospitals all across the state have seen insurance rates drop 17 percent since the new law took effect and that many hospitals are pouring millions of dollars in insurance cost savings into expanding indigent and charity care or purchasing new medical

technology needed to better treat patients. By comparison, premiums increased by an average of more than 50 percent in 2003 prior to the new laws going into effect.

Perry cited several direct benefits that the new law has had in Texas, including:

The largest policy writer in Texas for hospitals, Healthcare Indemnity, Inc., has reduced rates by 20 percent.

The Texas Medical Liability Trust, the largest policy writer for physicians, reduced rates by 12 percent at the start of the year.

Ten different carriers are seeking entry into the Texas market to write physician policies, increasing the likelihood that doctors’ rates will continue to drop as competition increases.

Lawsuits against hospitals are down 70 percent from last summer, and lawsuits in Harris County have declined by seven times.

“The net effect of fewer lawsuits and declining liability costs is greater access to care and better services for Texas patients,” Perry said. “Doctor recruitment efforts in medically underserved regions are finally yielding results.”

For example, between 2000 and 2003, Corpus Christi lost four neurosurgeons, ten general surgeons, one infectious disease specialist, and one-third of obstetrician stopped delivering babies. Today, Perry noted, a turn-around is well under way.

A survey released Monday by the Texas Medical Association showed that more healthcare providers are finding it easier to recruit physicians. Ninety-seven percent of those claiming recruitment is easier said the medical liability climate was a factor.

“The medical insurance reforms we passed last year are working.”

“The facts are simply indisputable: Voter-approved medical liability reforms are healing the practice of medicine by reducing insurance costs and frivolous lawsuits, making it easier for communities to recruit new doctors, and expanding patient access to needed care,” Perry added.

Medical Liability Reform Fact Sheet

“In the one year since we passed major medical liability reforms, patients are experiencing better access to healthcare, communities are recruiting new physicians, insurance costs are down significantly for many hospitals and some doctors, and lawsuits filed against healthcare providers have declined dramatically.” Governor Rick Perry

Medical Liability Reforms are improving patient access to the healthcare delivery system all across Texas. Statewide and local data show a stunning reverse in recent trends with hospitals and communities experiencing much greater success in recruiting physicians, lower insurance costs for hospitals leading to an expansion of indigent and charity care in some instances, a tremendous decrease in lawsuits against healthcare providers, and lower rates for some doctors compared to skyrocketing increases in previous years.

Here are the facts:

Lower Insurance Costs

Texas Hospitals are reporting a 17 percent decrease in professional liability premiums for 2004-2005 (Texas Hospital Association Survey with responses from 172 acute-care hospitals, 8/23/04.) In 2003 premiums rose more than 50 percent.

Ten new carriers are seeking entry into the Texas market (Texas Department of Insurance report 8/5/04), and the largest carrier, the Texas Medical Liability Trust, has reduced physician rates 12 percent. In the years prior to medical liability reform, 13 carriers left the state and 6,000 physicians had to scramble for coverage.

The largest hospital writer in Texas, Healthcare Indemnity, Inc. has reduced rates by 20 percent (TDI report 8/5/04.)

Lawsuits Down Dramatically

Medical liability lawsuits in several counties considered high-risk for physicians have decreased dramatically since the new law took effect on 9/01/03:

Harris County: 105 lawsuits were filed from 9/01/03 to 7/31/04, compared to 746 lawsuits filed in the three months prior.

Bexar County: eighty-one lawsuits were filed from 9/01/03 to 4/30/04, compared to 304 lawsuits filed in the three months prior.

Nueces County: thirty-two lawsuits were filed from 9/01/03 to 4/30/03, compared to 108 lawsuits filed in the three months prior.

Cameron County: seventeen lawsuits were filed from 9/01/03 to 4/30/04, compared to twenty-eight lawsuits filed the three months prior.

Hidalgo County: seventeen lawsuits were filed from 9/01/03 to 4/30/04, compared to ninety-six lawsuits filed the three months prior.

Lawsuits filed against hospitals declined 70 percent in the first ten months since House Bill 4 took effect (9/1/03–6/30/04.) In the month prior to the new law some hospitals reported a 300 percent increase in lawsuits filed.

Patient Access to Care Improves

Since medical liability reforms took effect, the number of physicians maintaining or enhancing services has increased dramatically, with 9 percent providing new services in addition to maintaining existing ones, and 73 percent making no changes to services they offer (Texas Medical Association Survey, 8/23/04.) Since 9/1/03, 13 percent of doctors have reduced their services, compared to 51 percent who reduced services in the previous two years.

The number of physicians who have found it easier to recruit new physicians to their practice, hospital or community is now higher than the number of physicians who have indicated it is more difficult (TMA survey, 8/23/04.) Of those who indicated it is easier, 97 percent indicated the professional liability climate was either very important or somewhat important in their ability to recruit.

“The net effect of fewer lawsuits and declining liability costs is greater access to care and better services for Texas patients.”

Reports from several communities show patients have access to additional physicians and specialists:

Corpus Christi: Driscoll Children's Hospital has experienced a one-year savings of \$204,000 on its liability premiums, plus an additional \$250,000 that would have otherwise been allocated to its self-insurance trust fund. The hospital has hired close to a dozen pediatric specialists since September 2003 (including two cardiologists, three neonatologists, a hematologist, a plastic surgeon, an anesthesiologist, and a general surgeon).

Corpus Christi: Christus Hospitals, which are saving nearly \$21 million statewide in liability costs, are saving millions of dollars at Christus Spohn in Corpus Christi. The hospital has experienced a net gain of twenty-two physicians. After losing four neurosurgeons in the three years prior, Corpus Christi recently recruited a new neurosurgeon.

Rio Grande Valley: Driscoll Children's Hospital has built new pediatric specialty clinics in McAllen and Brownsville in partnership with Valley Baptist Medical Center. Rio Grande Regional estimates \$750,000 in liability savings and has recruited two neonatologists.

San Antonio: Christus Santa Rosa has saved \$935,000 in liability costs and expanded specialized care services.

Beaumont: Christus St. Elizabeth has yielded \$1.372 million in savings. Beaumont has also recruited four new anesthesiologists. It was just two years ago that Christus St. Mary's in Port Arthur canceled a dozen surgeries over an eight hour period because their anesthesiologists lost their insurance.

Austin: Austin has gained sixteen new obstetricians in a year after losing the same amount over the preceding two and a half years.

Dallas: Baylor Hospital reports that seven reinsurance companies are bidding for their insurance renewal, compared to just one company a year ago. They estimate liability savings in "the seven figures," and doctors insured by the Baylor Health Care System "Health Texas" group can expect a premium decrease of more than ten percent (*Dallas Morning News*, "Hospitals find healthy savings," 8/23/04).

Fredericksburg: Two obstetricians placed an ad in the paper thanking voters for passing Proposition 12 and announced they would resume their obstetrics practice.

2005 TCJL Program of Work

Asbestos and Mixed Dust Litigation Reform Texas Asbestos Consumers Coalition

Establish an inactive docket for unimpaired asbestos and mixed dust claims.

Judicial Selection

Support merit selection of judges, especially appellate judges. Avoid the appearance of impropriety fostered by partisan elections and political contributions.

Statutory Employer

Adopt same exclusive remedy for workers' compensation third party claims as exist in forty-nine other states.

Anti-indemnity Legislation

Oppose legislative efforts to invalidate contractual indemnity provisions.

Fast-food litigation

Bar "obesity" claims against fast-food businesses, except where fraud is involved.

Contingency Fees

Require contingency fees to meet certain statutory standards for fairness and conscionability through full disclosure.

Jury Service

Make jury service easier for citizens by establishing a fund to help supplement lost wages for jurors who serve more than ten days in civil cases.

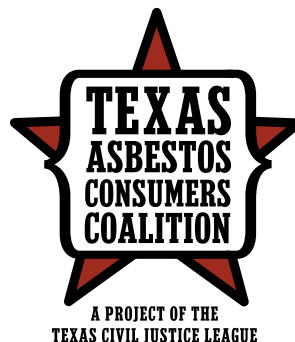
House Bill 4 Clean-up

Make necessary clean-up changes to House Bill 4, particularly in the area of settlement credits (restore defendant option for dollar-for-dollar or percentage credit).

FORMER SENATOR
BILL RATLIFF
Joins TCJL Lobby Team



Former Lieutenant Governor and State Senator Bill Ratliff and the Ratliff Company have joined the Texas Civil Justice League and Texas Asbestos Consumers Coalition lobby team to work on asbestos and mixed-dust litigation reform.



**TEXAS
ASBESTOS
CONSUMERS
COALITION**

The Texas Asbestos Consumer Coalition (TACC) was a sponsor for three legislative conferences this past summer-American Legislative Exchange Council, National Conference of State Legislatures, and the Southern Legislative Conference-in addition to providing regular news updates to state lawmakers. The goal is to ensure that asbestos litigation reform remains an important economic development issue that must be addressed next session. In an August letter to TACC Coordinator Robert Howden, House Speaker Tom Craddick (R-Midland) wrote, "Thank you for your recent letters regarding the need for asbestos lawsuit reform in Texas. As you know, I have been, and remain, an advocate of such reform."

"Senator Ratliff's expertise and knowledge will add immensely to our efforts in the upcoming session," said Robert Howden, Texas Asbestos Consumers Coalition coordinator.

Bill Ratliff was elected to represent Senate District 1 in northeast Texas in 1988. In December 2000, Ratliff was elected lieutenant governor by fellow members of the Texas Senate marking the first time in state history that the Senate selected one of its members to serve as lieutenant governor and president of the Senate. Ratliff chaired the Senate Education Committee from 1992-1996 and chaired the Senate Finance Committee from 1997-2000. He has been named one of Texas's Best Legislators by Texas Monthly magazine a record six times. Ratliff also received the Texas Civil Justice League's Legislator of the Year Award in 2003.

Lieutenant Governor David Dewhurst and Senator Kyle Janek (R-Houston) continue to provide Senate leadership on the asbestos issue. Senator Janek sponsored Senate Bill 496 during the last Regular Session. Governor Dewhurst, Senator Janek, and State Affairs Chairman Robert Duncan (R-Amarillo) have been meeting with coalition participants regularly to draft meaningful reform measures.

In an effort to increase public awareness about asbestos lawsuit reform, Red McCombs wrote an editorial that was distributed to media outlets statewide. An aggressive education campaign is planned for the remaining months before the 79th Regular Session. The coalition will work closely with Chairman Joe Nixon (R-Houston) and the House Civil Practices Committee on an interim study.

Please mark your calendar...

**19th Annual Meeting
Texas Civil Justice League**

November 3, 2004

Keynote Luncheon Speaker
The Honorable Wallace Jefferson
Chief Justice Texas Supreme Court

Texas Medical Association Building
Thompson Auditorium (First Floor)
401 West 15th Street

For information or reservations,
contact Kristin Park (512-320-0474 or kristin@tcjl.com)



- (1) Texas Insurance Commissioner José Montemayor briefs Texas Asbestos Consumers Coalition steering committee members in a March 4, 2004 meeting. Montemayor provided an insurance perspective on the asbestos litigation crisis.
- (2) Robert S. Howden, coalition coordinator, outlines legislative and public awareness developments at the steering committee meeting in March.
- (3) Shannon Ratliff, TCJL counsel, reviews legislative proposals at the March 2004 Texas Asbestos Consumers Coalition steering committee meeting.
- (4) G. Edward Pickle, senior government affairs counsel at Shell Oil Company, informs steering committee members about national asbestos litigation reform efforts.
- (5) Robert L. Looney, president of the Texas Oil & Gas Association and TCJL executive committee member, visits with Bill Messer, Texans for Lawsuit Reform lobbyist, at the asbestos coalition steering committee meeting.
- (6) Senator Kyle Janek (R-Houston) advises Texas Asbestos Consumers Coalition steering committee members on pending legislative proposals.



I've been doing business in Texas for most of my life and faced my fair share of lawsuits.

RED MCCOMBS is a San Antonio businessman and chairman of the Texas Civil Justice League Political Action Committee.

ASBESTOS LAWSUIT ABUSE Threatens Texas Economy

by Red McCombs

Most judges and lawyers do their jobs with honor and integrity. As a matter of fact, it's impossible for our state's economy to grow without a fair and strong judicial system. It protects our freedom, makes sure people do what they promise, and compensates people injured by the negligence or misconduct of others.

Lawsuit abuse gives Texas a "black eye" and undermines faith in our judicial system. It endangers the state's business climate and hurt my employees and customers. That's why I've supported civil justice reform efforts for nearly 20 years.

Let me tell you about one of the worst abuses: asbestos lawsuits. Texas courts face more asbestos claims than all of the other states combined, upwards of 200,000 (an exact count is impossible because nobody keeps those kinds of records). It's likely that half of those claims came from other states, brought mostly by people who never set foot in Texas.

I'm not a big fan of providing courts, judges, and public resources for people who ought to be using the courts in their home states. I might put my scruples aside if there were some compelling reason for having all these lawsuits filed in Texas. Unfortunately, the fact is these cases are here because a few Texas lawyers brought them here and found a few judges willing to take them. Why?

Asbestos litigation is modern-day gold rush. Nearly \$50 billion has already been paid out by businesses and insurers. Another \$200 billion or more is expected to be paid out in the future. More than sixty companies, including the original manufacturers of asbestos, have gone bankrupt and are no longer able to pay claims. This leaves businesses that used asbestos decades ago to fireproof plants and buildings holding the bag. These businesses have seen hundreds of thousands of lawsuits, skyrocketing legal liabilities, plummeting stock values, and diminished pension funds despite never having made the product and removing it from their facilities when the U.S. government determined the health hazards back in the early 1970s.

There's another problem that makes our state unique. Texas law allows a person to claim that he or she is injured even if the person has no symptoms of an illness. No medical evidence of sickness is required to file a lawsuit and receive compensation. It is estimated that as many as 90 percent of all asbestos claims are brought by people who aren't sick. That rips off the people of Texas and takes money away from the truly sick people who need it. Those suffering from asbestos-related cancer often receive only pennies on the dollar for their injuries, while thousands of unimpaired claimants and their lawyers walk off with the bulk of the money.

Do the math.

If half the claims are in Texas, it stands to reason that about half the compensation being paid flows through Texas lawyers, who skim off 40 percent of the proceeds (the system eats up another 25 percent or so). That means that a few asbestos firms are reaping billions of dollars in profits. That money belongs to Texas workers, shareholders, and retirees. It belongs to consumers forced to foot the bill for asbestos litigation.

It's time for the Texas Legislature to fix this problem. Legislation has been proposed that would allow the sickest asbestos claimants to go to the head of the line, while putting unimpaired claims aside until the claimants actually became sick. This is a common sense solution that doesn't take away anybody's right to access the court system. It also restores some semblance of balance and rationality to a system gone haywire.

Unfortunately, the political might and bottomless pockets of the asbestos plaintiff's lawyers has prevailed so far. Nothing has been done. This is one Texan who doesn't plan to stand by and allow the court system to become an ATM machine for a few opportunistic lawyers.

Red McCombs

Red McCombs, born in Spur, Texas, attended Southwestern University and The University of Texas at Austin School of Business and School of Law. He left law school in his second year and began his career as a salesman in the automobile business in Corpus Christi in 1950. In 1958, he relocated to San Antonio where he became a partner, then sole owner of Red McCombs Automotive. In addition to his auto interests, he is co-founder of Clear Channel Communications and of McCombs Energy in Houston, and is active in a variety of other businesses.

McCombs has served leadership roles in many national, state, and local organizations including Chamber of Commerce, United Way, and San Antonio's World Fair. He formerly served as chairman of the Board of Trustees of Southwestern University where he has been honored as Distinguished Alumnus. He is past chairman of the Board of Visitors of University of Texas M.D. Anderson Cancer Center in Houston. McCombs has been honored as Distinguished Alumnus of The University of Texas at Austin. He has also been honored with numerous local, state, and national recognitions including the San Antonio Business Hall of Fame, the National Automobile Dealers Hall of Fame, the Texas Business Hall of Fame, and the National Football Foundation/College Hall of Fame.

McCombs is owner of the Minnesota Vikings, an NFL franchise based in Minneapolis/St. Paul. In the past, he has owned the San Antonio Spurs, a National Basketball Association team, which he secured for San Antonio in 1972. He also owned the NBA Denver Nuggets, which he sold in 1985. At age twenty-five, he purchased his first professional sports team, the Corpus Christi Texas Clippers in the Big State Baseball League.

McCombs married the former Charline Hamblin in Corpus Christi in 1950. Their daughters Lynda McCombs, Marsha Shields, and Connie McNab and eight grandchildren all reside in San Antonio.

FACTS **About Asbestos Claims**

Approximately 600,000 asbestos claims are currently pending in U.S. courts. About half of these claims are pending in Texas state courts, more than in all other state courts combined. Tens of thousands of new claims are being added to this total each year.

About half of the pending claims in Texas courts are filed by non-resident claimants who were exposed in other states.

Texas is one of only about five states, and the only major jurisdiction, to equate exposure to asbestos to injury from asbestos. This is what makes Texas courts so attractive for asbestos claims generally, and for out-of-state asbestos claims particularly. Numerous jurisdictions, most notably in Pennsylvania, Massachusetts, Illinois, Maryland, and South Carolina have adopted inactive dockets for unimpaired asbestos claims.

More than \$50 billion have already been paid in asbestos claims, with estimates of another \$150 to \$200 billion still to be paid. Asbestos is the biggest insurance disaster in U.S. history, far larger than any other mass litigation or even the September 11, 2001 tragedy.

Approximately sixty cents of every dollar paid in asbestos claims goes to attorney's fees and transaction costs. In other words, about \$30 billion was lost to the system before the claimants received their first dollar of compensation.

Unimpaired claimants make up between 80 and 90 percent of all pending asbestos claims. This means that they may have been exposed to asbestos at some point in the past, but have not yet developed any physical impairment. Yet these unimpaired claimants are receiving the vast majority of the compensation ultimately paid-at the expense of seriously ill claimants.

More than seventy businesses, including several with Texas operations, are bankrupt because of asbestos litigation. In fact, severely ill claimants are now receiving less than ten cents on the dollar for their claims because of the swelling number of unimpaired claims and the growing incidence of asbestos-related bankruptcies.

Because every original manufacturer of asbestos is now bankrupt, the new wave of asbestos defendants includes hundreds of large, medium, and small businesses that never manufactured an asbestos-containing product. Every segment of U.S. industry is now affected by asbestos litigation, even the retail and service sectors.

X-RAYING AN ASBESTOS QUAGMIRE

Chicago Tribune
August 16, 2004

That exposure to asbestos, particularly over time, can cause deadly illnesses is a fact. It shows up on the chest X-rays of plaintiffs in those hundreds of thousands of asbestos lawsuits clogging the nation's courts, after all, and that proves it—or does it?

A study published in the August issue of *Academic Radiology* casts considerable doubt on expert witness testimony in asbestos litigation. The study compared the findings of physicians who interpreted X-rays for plaintiffs in asbestos lawsuits with those of independent radiologists interpreting the same X-rays.

The study by Dr. Joseph Gitlin and Dr. Elizabeth Garrett-Mayer of the Johns Hopkins School of Medicine in Baltimore compared interpretations of 492 chest X-rays. Physicians working for the plaintiffs detected evidence of possible asbestos-related lung damage in 95.9 percent of them. Yet evidence of disease was detected in only 4.5 percent of the cases when they were reviewed by the independent radiologists.

That is a shocking difference and one that calls into question the reliability of such testimony. Do doctors hired to be expert witnesses by plaintiffs' lawyers need better eyeglasses, or is something more nefarious going on here? An accompanying editorial in the magazine calls the data "as disquieting as it is startling" and raises the question of whether plaintiffs' witnesses can be depended on to provide testimony that is "nonpartisan and clinically accurate."

These findings are yet another reason that the "elephantine mass" of asbestos litigation, as U.S. Supreme Court Justice David Souter has described it, must be moved out of the court system. The avalanche of litigation has caused more than sixty otherwise healthy U.S. compa-

nies to file for bankruptcy protection as the only way to deal with asbestos claims. That in turn has resulted in the loss of tens of thousands of jobs and reduced the pension and retirement savings plans of many workers. More than 8,400 companies are being sued today, and the number of claims just keeps rising. Currently, there are more than 730,000 claims. The Rand Institute for Civil Justice predicts another 500,000 to 2.4 million lie ahead.

Nobody disputes that those who are sick and dying from asbestos exposure should be compensated. But the present jackpot justice system of endless litigation rewards the lucky few—some of whom show no signs of illness—while denying even a penny to other claimants who truly are suffering. The main beneficiaries of the current system are the plaintiffs' lawyers. They get more than fifty cents of every dollar spent on asbestos litigation. Congress has tried repeatedly and unsuccessfully to resolve this crisis. But Senate leaders haven't given up the fight, and a no-fault trust fund funded by business and insurance companies that would compensate claimants who actually show signs of illness may yet be passed this session.

"There is widespread agreement that the current litigation system is disastrous for victims, for jobs and for the economy," Senate Majority Leader Bill Frist (R-TN) said in late July. Senate leaders from both sides of the aisle are trying during the August recess to resolve remaining thorny issues. They are within shouting distance on the size of the fund—\$140 billion or \$145 billion. But the issue of whether pending claims would be included in the trust fund may yet scuttle the deal. Frist rightly insists that business can't be expected to pay \$140 billion into this fund and still be liable for the massive costs of ongoing litigation. That's no solution at all. It would cost even more billions and perpetuate the worst abuses of the current system, including the outrage of so-called expert doctors insisting they see problems on X-rays where none exists.



A SEMINAR YOU JUST CAN'T AFFORD TO MISS!

The Texas Association of Defense Counsel Presents "Contemporary Issues in Personal Injury Litigation"

November 4–5, 2004

Westin City Center
Dallas, Texas

An exceptional faculty of legal and medical professionals has been assembled!

Who should attend?

Civil Defense Litigation Attorneys, in all specialties
Physicians of all specialties
Registered Nurses
Hospital & Insurance Risk Management Professionals
Insurance Adjustor Professionals

Seminar Objectives/Program

Detail the changes brought about by HB 4, the 2003 Texas Tort Reform legislation; Specifically in the areas of the Discovery Process, Offers of Settlement, Class Actions, Mass Torts and Products Liability, Damage Claims and Physician and health care billings

Discuss HIPAA and other confidentiality issues arising from personal injury litigation

Recognize issues that may arise when dealing with chronic pain patients

Examine problematic issues in the diagnosis and treatment of neck and back injuries, especially in the litigation context

Discuss Informed consent in situations of drug and medical product usage

Visit www.tadc.org or call the Texas Association of Defense Counsel at 512-476-5225 for detailed program & registration information.

CLE: This seminar has been approved for 10.25 hours of Continuing Legal Education by the State Bar of Texas

CME: TMLT is accredited by the Accreditation Council for Continuing Medical Education (ACCME) to provide continuing medical education for physicians. TMLT designates this educational activity for a maximum of 6 category 1 credits toward the AMA Physician's Recognition Award. Each physician should claim only those credits that he/she actually spent in the activity. This course has been designated by TMLT for 1 hour of education in Medical Ethics and/or Professional Responsibility. **TMLT policyholders who complete this program will earn a 3% discount (maximum \$1,000) that will be applied to their next eligible policy period.

CE: An application has been made with the Texas Department of Insurance for Continuing Education Credit

CNE: Nursing contact hours have been applied for through the Texas Nurses Association, an accredited provider of continuing nursing education by the American Nurses Credentialing Center's Commission on Accreditation.

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REMARKS BY U.S. SECRETARY OF THE TREASURY JOHN W. SNOW

American Tort Reform Association's Annual Membership Meeting Washington, DC March 16, 2004



John W. Snow, U.S. Secretary of the Treasury

First, let me say that I applaud the members of ATRA for your tireless lawsuit abuse reform efforts. This group is doing work that is critically important to our economy. Your effort to bring common sense and fairness to the system is valuable to every American, but particularly to every American who is looking for work and can't find it.

After all...there are few things that create a greater disincentive to job creation than an atmosphere where little stands between every business owner, every manager, every doctor and professional of almost any kind...and the next frivolous lawsuit.

At a time when our economy needs to be expanding, this is unacceptable.

Because **a frivolous lawsuit has never created a single job-except jobs for personal injury lawyers-but baseless and excessive suits have killed many.**

Our economy is resilient. Thanks to the ingenuity and productivity of the American worker and President Bush's tax cuts, we are quickly recovering and growing our economy after events that would have set many countries back several years. And we have continued to grow, be creative and productive, even in the face of a constant threat of lawsuit abuse that seems to impact more people and products every year.

We know that the current tort system is costing America well over \$200 billion each year...that's a tort tax—paid in the form of lower wages, higher product prices, and reduced investments—of \$809 for every individual and more than \$3,200 for a family of four.

I want you all to know the priority that lawsuit abuse reform is to President Bush and his Administration. We are deeply committed to ensuring that victims are compensated fairly when they are injured due to the fault of another person, but we also know that key job creators—the top ones being small-business owners—live in fear of frivolous suits that can damage or destroy their businesses and all the jobs they support.

We know that the current tort system is costing America well over \$200 billion each year...that's a tort tax—paid in the form of lower wages, higher product prices, and reduced investments—of \$809 for every individual and more than \$3,200 for a family of four. And this is a regressive tax, imposed indiscriminately across our economy

To make the situation even less fair, less than fifty cents of each dollar of those tort costs go to victims...and, of that, only twenty-two cents goes to compensate them for actual economic losses they have suffered...meanwhile the personal injury lawyers profit enormously.

There are a few simple truths about how to grow an economy. Tax cuts work. Excessive litigation does not. Letting the free market operate freely...works. Burdening entrepreneurs does not. This country's free market system is strong, and the envy of the world. Imagine if we freed it from frivolous suits.

It speaks to the strength and optimism of our health care system, for example, that we have been able to invent so many life-saving and life-enhancing procedures and drugs...that we offer the best health care in the world...in spite of the fact that, as of 2002, 58 percent of physicians reported that they had been the target of a lawsuit, and their malpractice insurance typically rose between 30 and 75 percent over three years, from 2000 to 2002.

Many doctors I know have thrown in the towel. Retired early. Taken their life-saving abilities out of the medical system, because the risks of staying in are just too high, and because they've had enough.

Does anyone really believe that 58 percent of doctors are negligent? Of course not. Some members of any profession are going to turn out to be bad apples...but when 58 percent of them are being sued...well, that explains why the term “ambulance chaser” is part of our national vocabulary.

This fear of frivolous, unnecessary litigation hits especially hard at our small businesses and entrepreneurs. As I said, small businesses are the engines of job creation and the engines cannot work effectively when they are slowed by the headwinds caused by frivolous litigation.

New and creative business ventures are often among the least able to absorb the unfair, indiscriminate tort tax, yet are among its easiest targets.

Some personal injury lawyers are taking advantage of a broken system for personal enrichment. They are taking in billions of dollars in profits each year. Some individuals in this industry are known to collect fees of \$30,000 an hour.

They have found jurisdictions where they can extract settlements or win jury awards worth millions, and their clients are simply the means to an end for them.

The civil justice system was meant to help people, to ensure fair compensation for injuries and losses. Not to make personal injury lawyers wealthy.

The American people are dismayed by all of this. Hard working men and women know that there is no free lunch, and believe it's wrong to hold businesses and individuals hostage with lawsuits or even just the threat of lawsuits.

The lack of personal ethics and responsibility, the excesses of greed, is similar to what we saw when corporate scandals erupted two years ago—something that the Congress and the President acted swiftly and successfully to correct and deter through the Sarbanes-Oxley Act of 2002—but something that also requires the vigilance of individuals both public and private to prevent from happening again.

In spite of popular sentiment against frivolous suits and a system that causes the most cautious and responsible business owners, professionals and private citizens to live in fear...civil justice reform is hard to achieve.

There is a great financial incentive for personal injury lawyers to maintain the status quo...and those lawyers have many legislator allies.

We also face the logistical problem of so many battlegrounds: federal, state, and local.

States have made great strides in bringing common sense to their civil justice systems. Laws have been passed to control lottery-type damage awards, reducing the incentive for unethical attorneys to make something out of nothing. States have taken the lead in passing “forum fairness” laws limiting the ability of personal injury lawyers to “forum shop” class action lawsuits to friendly trial court judges.

But time and time again, state courts, often elected officials themselves with the active support of the trial bar, have struck down these reforms.

ATRA faces this challenge, bravely and steadfastly, every day. And you take on the battles, one at a time.

Please know that you have the President's full support in your efforts to rein in these abuses that have put a heavy chain on our job creators and our health-care system.

Civil justice reform is a huge issue...but if tackled one step at time, we can reach success. An incremental approach is slower, but it's more permanent. That's why we've narrowed our federal focus this year to just a few bills: class action reform, medical malpractice reform, asbestos, gun manufacturer liability, and most recently the fast food bill that passed the house last week.

Those last two are a great example of how simple common sense and civil justice reform go hand-in-hand.

If the so-called cheeseburger bill passes the Senate, it will protect restaurants from being sued over the ridiculous claim that they are responsible for obesity. Common sense tells us that eating too much and exercising too little is what leads to obesity. The bill was written to ensure that common sense prevails and restaurants are protected from what everyone recognizes as little more than attorney scams.

Similarly, we need to protect gun manufacturers from being sued when their products-made and sold legally-are used in a violent act.

Another bill that we need the Senate to pass is class action reform. The Class Action Fairness Act is a critically important bill because it would help put an end to one of the most grotesque abuses of the civil justice system today...something referred to as “forum shopping”

Our judicial system was designed to give typical class action plaintiffs a variety of places where a suit can be brought in order to get a fair trial in a convenient location. But **personal injury lawyers shop for legal forums in places they refer to as “magic jurisdictions” and ATRA refers to as “judicial hellholes.”**

Let me read you a quote from a well-known personal injury lawyer: “What I call the ‘magic jurisdiction’ is where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected.... They've got large populations of voters who are in on the deal; they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places.”

Well, we're sick and tired of seeing that type of personal injury lawyer bring class-action lawsuits to trial in these judicial hellholes. They gather up hundreds or thousands of claimants together, put huge pressure on defendants to settle, and walk away with millions. And the claimants? They are really just the attorney's ticket to get

into court. In the end they may typically receive a coupon or check worth a few pennies in the mail.

For example, in a recent case, *Schwartz v. Citibank (South Dakota), N.A. et al.*, checks for as little as seven cents were mailed to cardholders, while the personal injury lawyers received \$7.2 million for their services.

The Class Action Fairness Act would give defendants the right to move these types of suits from state to federal court when a substantial number of the plaintiffs are not residents of the state in which they are filed.

Now that's common sense, and a strong step toward stopping the lawyers from playing their crooked game.

The pending Medical Malpractice reform bill would encourage alternative dispute resolution, require clear and convincing evidence for punitive awards, and control punitive and non-economic damages. Again, this is a common-sense approach that would go a long way toward protecting our health-care system from baseless suits that are ultimately robbing patients of the quality and convenience that they are paying dearly for.

Asbestos legislation pending on the Hill is another reform that seeks to compensate victims without killing businesses and jobs. **While it is very important to take care of those who develop cancer from asbestos exposure, an estimated 90 percent of asbestos lawsuit plaintiffs don't have cancer and may never develop cancer.** Again, the solution needs to be about helping people, not making personal injury lawyers rich. So common-sense reform at the federal level has the President's full support.

There is a reason why the President's six-point plan for economic growth includes bringing common sense to our civil justice system. **Lawsuit abuse is the ultimate disincentive for hiring new people. The cost of doing business is substantially increased by a litigious environment.** For example, the cost of health insurance and liability insurance goes up for every business customer with every suit that is filed, and those are standard costs of doing business. Every additional employee, sadly, is also an additional threat of a lawsuit against the employer. And this fear of legal exposure hits us hardest in precisely those areas of innovative and creative products and services where America needs most to excel.

Please know that this Administration is committed to helping you get the word out about how we can stop the jackpot justice and bring back common sense, and we're committed to helping you win this battle, one bill at a time.

I look forward to working with you on changing our civil justice system to one where victims are compensated and justice is served without killing the jobs that our economy needs.

John W. Snow **Secretary of the Treasury**

President George W. Bush nominated John William Snow to be the 73rd Secretary of the Treasury on January 13, 2003. The United States Senate unanimously confirmed Snow to the position on January 30, 2003 and he was sworn into office on February 3, 2003. As Secretary of the Treasury, Snow works closely with President Bush to strengthen economic growth and create jobs.

Snow was Chairman and Chief Executive Officer of CSX Corporation, where he successfully guided the transportation company through a period of tremendous change. During Snow's twenty years at CSX, he led the Corporation to refocus on its core railroad business, dramatically reduce injuries and train accidents, and improve its financial performance.

Snow's previous public service includes having served at the Department of Transportation as Administrator of the National Highway Traffic Safety Administration, Deputy Undersecretary, Assistant Secretary for the Governmental Affairs, and Deputy Assistant Secretary for Policy, Plans and International Affairs.

Snow's knowledge of international industry stems from his tenure as chairman of the Business Roundtable, the foremost business policy group comprised of 250 chief executive officers of the nation's largest companies. During his tenure as Chairman from 1994 through 1996, he played a major role in supporting passage of the North American Free Trade Agreement.

Snow is also recognized as a leading champion of improved corporate governance practices. He is a former co-chairman of the influential Conference Board's Blue-Ribbon Commission on Public Trust and Private Enterprise. He also served as co-chairman of the National Commission on Financial Institution Reform, Recovery and Enforcement in 1992 that made recommendations following the savings and loan crisis.

John Snow was born in Toledo, Ohio, on August 2, 1939, and graduated in 1962 from the University of Toledo. He later earned a Ph.D. in economics from the University of Virginia where he studied under two Nobel Prize winners. Snow graduated with a law degree from the George Washington University in 1967 and then taught economics at the University of Maryland, University of Virginia, as well as law at George Washington. He also served as a Visiting Fellow at the American Enterprise Institute in 1977 and a Distinguished Fellow at the Yale School of Management from 1978 until 1980.

ESTABLISHED IN 1986, THE TEXAS CIVIL JUSTICE LEAGUE IS THE STATE'S OLDEST AND MOST-SUCCESSFUL LAWSUIT REFORM COALITION.

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The Texas Civil Justice League is a non-partisan and non-profit organization under IRS Code Section 501(c)6. Membership dues (up to 65%) are deductible as a charitable contribution.

19th Annual Meeting Registration Texas Civil Justice League

Register online at www.tcjl.com

November 3, 2004

Keynote Luncheon Speaker

**The Honorable Wallace Jefferson
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For information or to pay by credit card, contact Kristin Park (512-320-0474 or kristin@tcjl.com)



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