

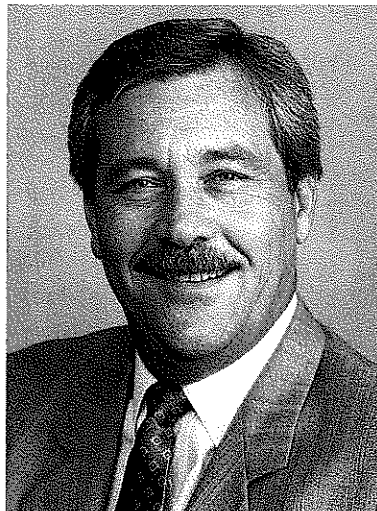
ADVOCATE

THE TEXAS CIVIL JUSTICE LEAGUE

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The avalanche of asbestos litigation could be the biggest threat to Texas businesses that we have ever faced.

Ralph Wayne,
TCJL President



Ron Dipprey, TACC Coordinator

TCJL Coordinates Asbestos Coalition

The growing need for an immediate public policy response to the Texas asbestos litigation lottery has prompted the formation of a broad-based coalition to advocate 2003 legislative reforms. The Texas Asbestos Consumers Coalition (TACC) is already in the process of building membership, collecting data, and drafting potential legislation—a fast start, but none too soon for the upcoming elections and legislative session.

TCJL has agreed to coordinate the TACC's functions and has retained Ron Dipprey, formerly of The Dow Chemical Company, to lead the effort. Dipprey, who served as a government affairs executive for Dow prior to his retirement earlier this year, brings unparalleled experience and ability to this complex and difficult issue.

"The League has handled a lot of major initiatives in the past, including products liability, punitive damages, joint and several liability, venue, and nonresident lawsuits," said Ralph Wayne, TCJL President. "But the avalanche of asbestos litigation could be the biggest threat to Texas businesses that we have ever faced. We are fortunate to have someone like Ron Dipprey to lead the reform effort."

Upwards of 200,000 asbestos claims—most of which involve claimants who manifest no physical illness—are pending in Texas courthouses across the state. More than fifty major companies have already been driven into bankruptcy by these and prior claims, leaving asbestos consumers as prime targets for a new wave of asbestos lawsuits. Experts project that the number of claims is likely to swell to more than one million in the foreseeable future. The potential liability for employers could top \$200 billion, threatening not only their ability to remain in business, but tens of thousands of jobs, investments in pension funds, and the livelihoods of thousands of small business people that depend on a strong manufacturing base.

continued on page 5

TCJL Welcomes New Executive Committee Members

TCJL is pleased to announce two additions to the League's executive committee. Jim Woodrick, president of the Texas Chemical Council, and Rob Looney, president of the Texas Oil and Gas Association, have agreed to join TCJL's leadership. Both TCC and TXOGA have been heavily involved in the League's agenda for many years, but recent issues affecting the statute of limitations, venue, and asbestos litigation have deepened the relationship between the three groups.

"We are extremely pleased that Jim Woodrick and Rob Looney will be there to help us chart a course for the next several legislative sessions," said TCJL President Ralph Wayne. "The era of mass tort litigation is presenting us with new and dangerous challenges. If we don't do something to restore rationality and fairness to the tort system, we could do severe and lasting damage to the Texas business climate."

Jim Woodrick has served as TCC President for eight years. Prior to joining the TCC, Woodrick was a plant manager for DuPont. Rob Looney has headed TXOGA for more than a decade. He played a key role in last session's successful defeat of statute of limitations and venue proposals affecting oil and gas leases, and has been a steadfast tort reform advocate for many years.

THIS ISSUE:

- 2 **Impaired Claims Lining up in Asbestos Litigation**
- 3 **Supreme Court Races Critical to Future of Civil Justice System**
- 3 **Studies Show Judges Just as Likely to Award Punitive Damages**
- 4 **Texas Medical Association Executive to Lead National Group**
- 4 **U.S. Tort System Most Costly in the World**
- 4 **U.S. Supreme Court Rules Judicial Candidates May Discuss Issues**
- 5 **Chairman's Column**

Unimpaired Claims Rising in Asbestos Litigation

A recent article in the *National Law Journal* (April 1, 2002) chronicles the increasing incidence of unimpaired claims in asbestos litigation. Although some courts across the country have instituted inactive dockets to put unimpaired claims on hold, most state courts are accepting unimpaired claims and allowing new causes of action for emotional distress, fear of developing asbestos-related illnesses, and medical monitoring.

According to the data cited in the article, most claims alleging harm from asbestos exposure are now filed by people with no diagnosis of an asbestos-related illness, such as mesothelioma or cancer. Now that more than fifty companies have filed bankruptcy due to asbestos litigation, the trust funds established as part of the liquidation or reorganization of these companies are increasingly tapped to pay unimpaired claims. These payments substantially reduce the resources available to compensate those with serious asbestos-related illnesses, effectively leaving them without an adequate remedy for their harm.

Future claimants who eventually develop cancer are at even greater risk of being left out in the cold. For example, the Johns Manville Trust, established to pay asbestos claims when Manville declared bankruptcy several years ago, is now paying only five cents on the dollar for asbestos claims. But even this reduction won't

be enough to prevent Manville from ending up in insolvency. While it has settled a half million claims already, projections are that another 2.6 million claims are likely to be filed in the future.

The deteriorating financial situation of these trust funds has led some asbestos plaintiff's lawyers to call for limitations on payments to unimpaired claimants. In fact, some prominent plaintiff's lawyers have organized an ad-hoc committee to screen out unimpaired claimants and urge bankruptcy courts to establish minimum levels of impairment for compensating claims.

Late last year, a federal appellate judge ordered the bankruptcy consolidation of five large asbestos defendants in an effort to develop a system for prioritizing payments to impaired claimants. There is also likely to be an effort by asbestos defendants to seek dismissal of unimpaired claims in the bankruptcy court setting. However, such actions will not affect the masses of cases in state courts, particularly Texas, and Congress is showing no signs of responding to the growing crisis.

That's why TACC is moving forward with a state solution to the asbestos litigation mess. A strong inactive docket proposal with clear, objective medical criteria for screening out unimpaired claims will be a core component of this solution, as will targeted civil justice reforms. It's time to sort out the deserving claimants from those who are simply exploiting a corrupt system.

FACTS ABOUT ASBESTOS LITIGATION

The scope of the asbestos litigation nightmare is truly staggering. Consider some of the facts compiled by the American Tort Reform Association:

More than \$21.6 billion in asbestos claims have been adjudicated in the United States to date.

According to the actuarial firm of Tillinghast-Towers-Perrin, \$200 billion in asbestos claims are currently pending or are projected through the year 2040.

More than a quarter million asbestos claims are pending in U.S. courts, with an additional 1.3 to 3.1 million projected for the future.

More than 1,000 companies have been named as asbestos defendants.

Half of all industry types identified by the U.S. Department of Commerce are named defendants in asbestos cases.

More than 50 major bankruptcies can be attributed to asbestos litigation, with more occurring each year.

Anticipated settlements and awards in future asbestos cases could run the entire public school system in Texas for the next decade. They could build new transportation infrastructure for the next century. They could provide health care for millions of uninsured and underinsured Texans. Instead, billions are siphoned off into the pockets of personal injury trial lawyers and claimants who in most cases aren't even sick.

It's time to put a stop to the abuses in the asbestos litigation lottery, assure that truly injured people are adequately compensated, and save Texas jobs, pension funds, and investment.

Supreme Court Races Critical to Future of Civil Justice System

This fall a majority of the Texas Supreme Court—five seats—are up for grabs in what is expected to be the most competitive statewide election since 1994. The TCJL PAC has endorsed the following candidates for the high court:

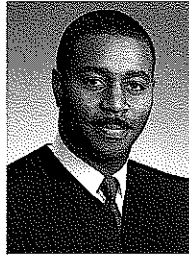
Chief Justice Tom Phillips
Justice Wallace Jefferson
Justice Michael Schneider
Justice Margaret Mirabal
Judge Dale Wainwright



Tom Phillips



Michael Schneider



Dale Wainwright



Wallace Jefferson



Margaret Mirabal

These candidates are highly qualified, experienced jurists who will continue to build the court's reputation for scholarship, integrity, and impartiality. It is vitally important for all Texans to go to the polls on November 5 and vote for these excellent judicial candidates.

In the coming months, the TCJL PAC will be informing you about the candidates, issuing slate cards, and engaging in other programs to increase voter turnout in these and other judicial races. We will be asking for your help in getting the word out to your friends, colleagues, and families about the importance of these races and the differences between the candidates.

We could never have succeeded in electing the fine judges Texas has enjoyed for the last decade without your help. Thank you for all you have done in the past and will do in the future to assure the best possible judiciary for Texas.

Studies Show Judges Just as Likely to Award Punitive Damages

A recent study published in the *Cornell Law Review* attempts to refute the long-held belief that juries are more likely to award punitive damages than judges. According to an article in the *New York Times* (August 6, 2001), the study indicates that punitive damages are awarded in about 4 percent of cases in which plaintiff's prevail, and that there is little statistical difference in the frequency of awards based on whether the case is decided by a judge or a jury.

However, the study shows that the incidence of punitive damage awards is greater when the defendant is a corporation and when the claim involves product liability (except asbestos), fraud, or intentional torts. The study also fails to account for the real problem with punitive damages: the disproportionately large awards handed out by juries that distort the system and drive settlement values.

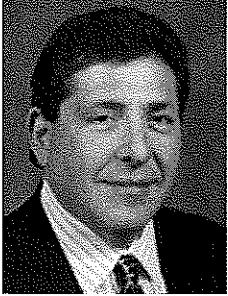
The study also neglects to tell another part of the punitive damages story, a story according to research being conducted by long-time American Tort Reform Association counsel Victor Schwartz, plaintiff's lawyers are shifting their emphasis from punitive damages to non-economic damages—pain and suffering. According to Schwartz, pain and suffering damages, which are generally unlimited by statute

and non-taxable to plaintiffs, are inflated when plaintiff's lawyers are permitted to introduce inflammatory evidence of the defendant's conduct in the liability and damages phase of the trial.

Schwartz likewise found that pain and suffering awards in asbestos, pharmaceutical, and other large product liability cases are rising significantly. It is now not unusual to see non-economic damages awards in the \$100 million range—dwarfing the amount of actual economic loss in those cases. Schwartz argues that judges are essentially allowing plaintiff's lawyers to try their punitive damages claim in the guise of non-economic damages, thus avoiding statutory or constitutional limits on punitive damages and making it much less likely that such awards will be remitted or reduced on appeal. The use of such evidence is clearly designed to appeal to the jury's desire to punish the defendant, rather than compensate the plaintiff for legitimate harm. This trend may also lead the jury away from an objective appraisal of the defendant's liability in the case, which skews the system even further.

Proposals to restore fairness to the determination of non-economic damages are vital. Schwartz plans to propose a series of reforms, including clear evidentiary rules and jury instructions that guard against abuse of pain and suffering damages. Even more importantly, Schwartz's research raises the issue of whether hard caps on non-economic damages are necessary to stop the current trend and restore predictability to the system.

Texas Medical Association Executive to Lead National Group



Louis J. Goodman

Louis J. Goodman, Ph.D., executive vice president and chief executive officer of the Texas Medical Association, has been elected president of the American Association of Medical Society Executives, a professional organization of 1,200 county, state, national, and specialty medical society CEOs.

"Lou is one of those valued members, who reads the materials he's sent and performs the responsibilities to which he has volunteered and been assigned," said California Medical Association CEO Jack Lewin, MD. "He makes thoughtful, informed decisions. He has a wonderful sense of humor and is highly respected among his peers."

Under Lou's leadership, the 37,000 member TMA has been recognized by Medical Economics magazine as the nation's best physician associations.

"We are proud of the League's longstanding relationship with Lou and the Texas Medical Association," said Ralph Wayne, TCJL President. "Lou and his staff have always been cooperative, professional, and extremely supportive of the League's efforts. All of us congratulate Lou on this wonderful honor and wish him well."

Dr. Goodman earned both masters and doctoral degrees in public administration with a concentration in medical economics from New York University. His professional experience includes stints at Michael Reese Medical Center and the American Medical Association, both in Chicago.

TMA has 119 component county medical societies around the state. Its key objective is to improve the health of all Texans. TMA is also a charter member of the Texas Civil Justice League and has long been represented on the League's executive committee.

U.S. Tort System Most Costly in the World

Each year the tort system in the United States directly consumes more than \$180 billion—a staggering 1.8 percent of the gross domestic product. According to the Council of Economic Advisers, this makes the U.S. tort system the most expensive in the world, more than double the cost of similar systems in other industrialized nations.

This "tort tax" amounts to a 2 percent additional tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income. Part of that tax is absorbed by businesses in terms of lower returns on investment, suppressed stock values, reduced capital investment, and lower productivity. And part of the tax is passed on to consumers through higher prices for goods and services.

The tort system has long been defended as the best method of redressing private wrongs that occur in the

marketplace. That would be true if all the system did was compensate truly injured persons for their actual harm.

But that is not what the current tort system accomplishes. The fact is that only about 20 cents of every dollar consumed by the system actually compensates the claimant for his or her actual damages. Another 22 percent is gobbled up by subjective non-economic damages that go far beyond the compensatory aims of the system. While it is arguable that the system should punish wrongdoers as well as compensate victims, it is indefensible that the system should divert so many resources away from either goal.

What happens to the other 58 percent? It supports those who feed on the system. The enormous apparatus of the court system includes attorney fees, court costs, costs of expert witnesses, costs of discovery, administrative support costs, and on and on. In contrast, it costs about twenty-three cents on the dollar to administer the workers' compensation system in the U.S. If transaction costs were held even to that level, the total cost of the tort system would only be about \$93 billion annually.

The burden of this \$87 billion tort tax is borne directly by private businesses and their employees. And it is rising with each passing year. Mass tort litigation and class actions are flourishing. Litigation arising from the September 11 tragedy has yet to get started, but there is no doubt that it will. State attorneys general are retaining private personal injury lawyers to sue major industries. Litigiousness seems to course through every vein of the body politic. It is no longer enough for a plaintiff's lawyer to make millions; they must now make billions.

A complete overhaul of the private litigation system is urgently needed. Costs must be cut through discovery reforms, rigorous enforcement of laws and court rules designed to weed out bad lawsuits, tight controls on mass tort and class action litigation, reasonable limitations on contingency fees, and ending regulation through litigation by state attorneys general and qui tam-type legislation.

U.S. Supreme Court Rules Judicial Candidates May Discuss Issues

In a decision that could have a radical, adverse impact on the Texas judiciary, the United States Supreme Court has ruled that canons of judicial ethics that restrict a judicial candidate's ability to take positions on specific issues are unconstitutional. The ruling is expected to allow judicial candidates to take positions on everything from abortion rights to the death penalty.

"The U.S. Supreme Court's decision is a monumental mistake," said Ralph Wayne, TCJL President. "It will allow the personal injury trial bar to pour millions of dollars into independent campaigns attacking judicial candidates for taking public policy positions. It's a no-win situation for candidates who believe in the fair and impartial administra-

The U.S. Supreme Court will allow the personal injury trial bar to pour millions of dollars into independent campaigns attacking judicial candidates for taking public policy positions.

tion of justice, as good judges should. They will be forced to take positions on all kinds of issues. If they refuse, they will be accused of ducking the issues. If they do it, they'll be hammered by misleading television ads."

The impact of the decision could be felt in this fall's elections for the Texas Supreme Court and Court of Criminal Appeals. One candidate for the Supreme Court even filed a similar lawsuit and is expected to exploit the decision to gain publicity for his underfunded campaign for the Court. This tactic could be used by other candidates who are not credible enough to attract substantial backing on their own merit. The election could become a farce.

The only answer now is to reform our judicial selection system to take the money out of judicial elections altogether. An appoint-retain plan such as the one successfully advocated in the Texas Senate by Senators Bob Duncan (R-Lubbock) and Rodney Ellis (D-Houston) would be a good start.



Chairman's Column

BY BILL BARTON

Governor Rick Perry is not given enough credit for his policy initiatives, especially in the liability arena.

Ever since George W. Bush rode liability reform to victory in the 1994 Governor's race and then presided over the passage of landmark reforms in the 1995 session, tort issues have languished in the Legislature. There have been some modest successes in the intervening years, but the focus has generally been on killing bad bills, rather than on passing needed reforms.

During his tenure as Lieutenant Governor, though, Governor Perry marshaled several important pieces of civil justice reform legislation through the Senate, including the first ever "offer of settlement" bill to pass either House, a pre-judgment interest reform bill, a bill abolishing the sliding scale settlement credit, and a constitutional amendment reforming the way judges are selected in Texas. Not bad for a session's work.

Now as Governor, Rick Perry has undertaken the most ambitious package of civil justice reform we have seen since 1995. He has laid out a comprehensive plan to reform medical liability and get liability insurance rates under control. As part of that package, he is calling for caps on non-economic damages, an absolutely crucial element to a successful plan. Past efforts have failed to tackle that issue, but Governor Perry isn't backing down from a fight on it.

In addition to medical liability, the Governor is tackling the mold issue with a bold plan that combines insurance reform with liability reform, as well as licensing and regulation of public adjusters and mold remediators who game the

system. Again, the Governor is willing to take on the trial lawyers and entire mold industry in order to get insurance rates under control and make homeowner's insurance affordable again.

On the asbestos litigation front, Governor Perry has made it clear that a major goal of his next administration will be to end the litigation lottery in Texas. He is willing to consider a range of alternatives to accomplish this, including an inactive docket plan for unimpaired asbestos claims, submission of the bankrupt manufacturers' fault to the jury, and other important reforms. He has also spoken out against abuses of class action litigation.

These issues are not always the most politically seductive, but they are vitally important to the future of our state, both in terms of economic development and fairness to all litigants. The Governor and his policy team are simply unafraid to think about big solutions and stick to their guns when everything is on the line in the Legislature.

Whether or not people agree with the Governor on everything he has done during his brief tenure in office, there can be doubt that he has the best interests of Texas and Texans at heart. His strong record on civil justice reform is part of the legacy that he is crafting for Texas. He deserves recognition for that, as well as for his other initiatives in education, transportation, and public safety.

Texas Civil Justice League members appreciate Governor Perry's efforts, and we will do everything we can in the future to assist him in making his vision for a fair and just liability system a reality.

TCJL Coordinates Asbestos Coalition

continued from page 1

"The possibility of an economic catastrophe is very real," said Dipprey. "But equally catastrophic is the impact of the current system on people who are legitimately hurt by asbestos products. Because of the overwhelming number of claims by people who aren't sick, truly injured claimants are forced to wait on overcrowded dockets. When they do finally get to the courthouse, there's no money to compensate them for their injuries."

TACC will be governed by an executive committee made up of representatives from major business trade associations, including the Texas Oil and Gas Association, Texas Chemical Council, Texans for Lawsuit Reform, Texas Association of Business, Civil Justice Reform Group, Associated General Contractors, and National Federation of Independent Business. A broad-based steering committee is also being organized to help direct policy for the coalition.

If your company is interested in joining TACC, please contact Ron Dipprey or Carol Sims at 512-320-0474.

Whether or not people agree with the Governor on everything he has done during his brief tenure in office, there can be doubt that he has the best interests of Texas and Texans at heart.

**Bill Barton,
TCJL Chairman**