



***IN THIS ISSUE: Meetings, Legislative & Election Update, Case Law Update***

## **FROM THE PRESIDENT**

Greg W. Curry, Thompson & Knight, L.L.P.; Dallas



*The TADC Summer Seminar this July was a rousing success. Los Cabos, Mexico proved to be the perfect venue for the meeting, providing a wide range of activities for members and their families. Program Chairs Patricia Alvarez with the Alvarez Law Firm in Laredo and Ed Carlton with Quilling, Selander, Cumiskey & Lownds in Dallas put together an all star program with over nine hours of hands on CLE.*

*The TADC celebrates 50 years of service to the civil justice system this fall at the 2010 Annual Meeting to be held at the Hyatt Hill Country Resort, September 22-26. You will not want to miss this meeting. The legal education is hands down, some of the best available for the practicing trial lawyer and the focus of the program is practical, how-to topics to improve your practice and courtroom performance. Speakers include top-notch practitioners from both the defense and plaintiff's bar as well as members of the judiciary from the district court level through the Supreme Court and Federal District Court.*

*There will be a number of social activities including a Golf Tournament and the 50<sup>th</sup> Anniversary celebration and awards dinner. Reconnect with your colleagues from around the state and make new business relationships or revive current ones. This will truly be a celebration of the history of the TADC and the mark it has left and continues*

*to leave on the justice system in Texas.*

*There will also be two newly created awards presented at this year's Annual Meeting. The TADC Pro Bono/Community Service Award will be given to a member in good standing (not a current board member or past president) who has devoted a substantial amount of time and resources to providing access to justice for those otherwise precluded through pro-bono legal services and/or has devoted a substantial amount of time and resources to the improvement of the social and cultural fabric of their community, state or country. The TADC Civil Justice Preservation Award will be given to a member in good standing who has contributed significantly to the protection and preservation of the civil justice system through word or deed and seeks to continue that effort on behalf of the public in general and the TADC.*

*If you would like to nominate someone for either of these awards, please contact me [greg.curry@tklaw.com](mailto:greg.curry@tklaw.com).*

*I urge each of you to recruit a member today. The TADC is the premier organization of its kind in the United States. There is no other group in Texas representing your interests as Defense Trial Counsel and no better value for your dollar. The business development opportunities are fantastic as is the education and representation of the defense bar before the legislature. If you know someone who is not a member of TADC and should be, sign them up! [CLICK HERE](#) for a membership application.*

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***Plan to Attend***  
***2010 Annual Meeting/50<sup>th</sup> Anniversary***  
***Hyatt Hill Country Resort, San Antonio, Texas***  
***September 22-26, 2010***

***A program for the practicing trial lawyer:***

- *What Defense Attorneys Do Wrong*
- *Tips for the Courtroom: Practical Advice for the Trial Lawyer*
  - *The Good Advocate: A Perspective from the Bench*
  - *Over 11 hours CLE including 2.5 hours ethics*

*The Hyatt Hill Country has extended the TADC an excellent Fall rate! Secure your accommodations now – this meeting WILL sell out quickly!*

[CLICK HERE](#) for *Registration Materials*

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## **CALENDAR OF EVENTS**

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|-------------------------------|---|
| <i>August 6-7, 2010</i>       | <b><i>Budget/Nominating Committee</i></b><br><i>Austin, Texas</i>   |
| <i>September 22-26, 2010</i>  | <b><i>TADC Annual Meeting (50<sup>th</sup> Anniversary)</i></b><br><i>Hyatt Hill Country Resort – San Antonio, Texas</i><br><i>Christy Amuny &amp; Jane Haas, Co-Chairs</i><br><b><u>Registration</u></b> |
| <i>February 2-5, 2011</i>     | <b><i>TADC Winter Seminar</i></b><br><i>Steamboat Sheraton – Steamboat Springs, CO</i><br><i>Mitch Smith &amp; Slater Elza, Co-Chairs</i>   |
| <i>March 4-5, 2011</i>        | <b><i>29<sup>th</sup> Annual TADC Trial Academy</i></b><br><i>Austin, Texas</i><br><i>Brad Douglas &amp; Tasha Waddell, Co-Chairs</i>   |
| <i>March 30-April 1, 2011</i> | <b><i>TADC Spring Meeting</i></b><br><i>Hyatt Regency on Lady Bird Lake – Austin</i><br><i>Pat Weaver &amp; Clayton Devin, Co-Chairs</i>  |
| <i>July 13-17, 2011</i>       | <b><i>TADC Summer Seminar</i></b><br><i>Snake River Lodge &amp; Spa – Jackson Hole, Wyoming</i><br><i>Mark Walker &amp; Russell Smith, Co-Chairs</i>  |
| <i>August 5-6, 2011</i>       | <b><i>Budget/Nominating Committee</i></b><br><i>Austin, Texas</i>   |
| <i>Sept. 27-Oct. 1, 2011</i>  | <b><i>2011 Annual Meeting</i></b>   |

*Hyatt Regency Maui – Maui, Hawaii  
David Chamberlain & Mitzi Mayfield, Co-Chairs*

***Deal for TADC Members***  
***DRI Oil Spill Litigation & Emerging Issues Seminar***  
***The Houstonian Hotel, Resort and Spa***  
***August 12-13, 2010***

***Topics Include:***

- ***Engineering & Technical Analysis of an Oil Rig & Coming Regulations***
  - ***The Offshore Energy Insurance Market***
- ***Internal Investigations: Company Audits, State Oil Rig Inspections & Criminal Indictments***
- ***State & Federal Venue Implications on AG and Governmental Actions***

***SPECIAL FOR TADC MEMBERS: Save \$100 on your registration if you indicate that you are a member of the TADC!***

***[CLICK HERE](#) for Registration Materials***

***LEGISLATIVE/ELECTION UPDATE***

On behalf of TADC, President Greg Curry submitted written remarks to a joint hearing of the Texas House Committees on Judiciary and Civil Jurisprudence and Business & Industry on Thursday, July 29. The subject of the hearing was the workers' compensation system and third party liability. TADC's remarks emphasized that the committees should consider the entire workers' compensation system, including non-subscribers, in trying to evaluate the impact of third party litigation,

lifetime benefit levels, subrogation, and other issues. A copy of President Curry's remarks is posted on our website for your convenience.

The bulk of the hearing was devoted to a discussion of the adequacy of benefits and the effects of the Supreme Court's decision in the Entergy case. Several witnesses testified on behalf of TTLA, consumer groups, and the AFL-CIO that benefit levels are inadequate for severely injured workers and the Entergy decision should be legislatively overturned. Texans for Lawsuit Reform testified on behalf of several business groups in favor of the Entergy decision.

In other legislative news, Lt. Governor David Dewhurst made significant changes in committee assignments in the wake of the resignation of Sen. Kip Averitt (R-Waco). Sen. Troy Fraser (R-Marble Falls) was appointed to take Averitt's place as chair of Senate Natural Resources, while Sen. John Carona (R-Dallas) was named to replace Fraser as chair of Senate Business & Commerce. The musical chairs continued when Sen. Tommy Williams (R-The Woodlands) replaced Carona as chair of Senate Transportation and Homeland Security, and Sen. Kevin Eltife (R-Tyler) replaced Williams as chair of Senate Administration. Sen. Mike Jackson (R-La Porte) becomes chair of Senate Economic Development, replacing Sen. Chris Harris (R-Arlington), who takes over the chair of Senate Jurisprudence from Sen. Jeff Wentworth (R-San Antonio). Wentworth has indicated that he will likely resign from the Senate following the November election to take a post in the Texas A&M University System.

*For copies of any testimony presented by TADC during the legislative session or interim hearings and other up-to-date legislative news, visit the members' side of the TADC website ([www.tadc.org](http://www.tadc.org))*

## **TADC PAC**

### **“THE SHIRT”**

Make your contribution to the TADC PAC in the amount of \$200.00 or more today, and you will become the proud owner of “The Shirt” bearing the TADC ranch brand. It will be the ultimate Cowboy/Cowgirl couture at the TADC 50<sup>th</sup> Anniversary Meeting at the Hyatt Hill Country Resort in San Antonio. To ensure delivery of “The Shirt” in advance of the Annual Meeting, be sure to make your contribution no later than September 1, 2010. **Contribute Today**



## LEGAL NEWS

*\*Case Summaries prepared by Rebecca Kieschnick & Melody Rodney with Donnell, Abenerthy & Kieschnick, P.C.; Corpus Christi*

### INSURANCE LAW

*[In re United Fire Lloyds—No. 04-10-00094-CV \(Tex. App.—San Antonio\)](#)*

United Fire sought mandamus in a motor vehicle accident UIM case. In the district court below, United Fire sought severance and abatement of the bad faith claims from the contractual UIM claims. Plaintiff sought bifurcation of the claims, which the trial judge granted. The Court of Appeals held that it was an abuse of discretion for the judge to bifurcate the case instead of ordering severance and abatement. The Court, relying on *Brainard v. Trinity Universal Ins. Co.*, reasoned that in a UIM case, the insurer is under no contractual duty to pay UIM benefits until the insured establishes liability and underinsured status of the third-party motorist. The Court further reasoned that United Fire should not be put to the expense or effort of going through discovery, trial preparation, etc. on the bad faith claims that could be moot based on the findings in the contractual claims. (The Fourth Court distinguished its holding in *In re Travelers Lloyds of Tex. Ins. Co.*, which had been relied on by Plaintiff in the district court proceeding, because that case was not a UM case.) **[CLICK HERE](#) to read the opinion.**

*[Amerisure Insurance Co. v. Navigators Ins. Co.—No. 09-20060 \(5<sup>th</sup> Cir.\)](#)*

This suit is the result of a dispute between two insurance companies as to duties to indemnify following a motor vehicle accident in the state of Louisiana wherein 2 employees of Texas Crewboats were injured while being transported to their vessel by a hotshot driver. Amerisure was the primary insurer, and Navigators was the excess carrier. The companies agreed that the personal injury suit should be settled and

agreed on the global amount, but disagreed as to which company owed the money. Amerisure denied coverage, but paid its limits, reserving its rights to seek reimbursement, and then sought reimbursement through subrogation against Navigators. The district court, on cross motions for summary judgment, granted judgment for Navigators, finding that the Amerisure policy did not cover the accident, but that Amerisure could not recover by way of equitable or contractual subrogation. The 5th Circuit first looked to whether the Texas Supreme Court's decision in *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co.*, which precluded contractual subrogation when the insured has been fully indemnified, barred Amerisure's contractual subrogation claim. The Court reasoned that the Texas Supreme Court had not indicated the boundaries of its opinion in *Mid-Continent* and that its opinion should be "cabined" to its facts, under which both carriers acknowledged their duties to defend and indemnify, thereby fully indemnifying their insured. The Court held that *Mid-Continent* did not bar contractual subrogation in a case where the insurers deny a duty to indemnify, but settle the case, and stated that contractual subrogation then only exists if the insurer did not have a duty to indemnify the insured.

The Court vacated the grant of summary judgment dismissing Amerisure's contractual subrogation claim and remanded on the issue of Amerisure's duty to indemnify under the employee-indemnification exclusion (because of the unanswered question whether the driver was employee or contractor).

The Court held that the Navigator's excess policy applied whether there was underlying coverage or not, because liability arose out of the "ownership, charter, use, operation, or loading" of a watercraft, since the Texas Crewboats' employees were being transported to a watercraft in a company car and were on the clock for the trip. **[CLICK HERE](#) to read the opinion.**

## **CIVIL PRACTICE**

*In re Islamorada Fish Co. Texas, LLC—2010 WL 2560556 (Tex. App.—Dallas)*

In this Dram Shop case, Plaintiffs alleged that Islamorada served an excessive amount of alcohol to a patron who became intoxicated and then caused an accident after leaving the establishment. The patron pled guilty to intoxication assault as a result of the incident. Plaintiffs sought punitive damages against Islamorada and sought discovery as to Islamorada's net worth. The Court stated that under Texas law, in an action for damages resulting from a criminal act, exemplary damages may not be awarded against a Defendant due to the criminal acts of a third party. The Court further noted that net worth is only discoverable when punitive damages may be awarded. The Court held that because the lawsuit stemmed from the harm caused by an intoxication assault committed by a third party, exemplary damages could not be assessed against Islamorada, so Islamorada's net worth was irrelevant and not discoverable. **[CLICK HERE](#) to read**



**the opinion.**

*Petree v. Southern Farm Bureau Casualty Ins. Co., et al.—2010 WL 2540477 (Tex. App.—Corpus Christi)*

In this UIM case, Defendant insurance companies were granted summary judgment on the basis of deemed admissions. Plaintiff, who was pro se at the time the requests for admissions were sent and the responses were due, subsequently hired an attorney and filed a motion for new trial claiming that she had not received the requests for admissions. The Court held that Plaintiff did not waive her right to request a new trial, because she was not aware of the need to move to withdraw the deemed admissions or respond to the summary judgment until the summary judgment was granted. The Court further held that Plaintiff's lack of response to the admissions was not a flagrant, bad faith, or callous disregard for the rules and that Defendants would not be prejudiced by withdrawal of the deemed admissions. [CLICK HERE](#) to read the opinion.

*In re Jefferson County Appraisal District—2010 WL 2347030 (Tex. App.—Beaumont)*

In this suit challenging the tax appraisal for a refinery, Plaintiffs sought to discover information regarding a jury consultant that was hired by Defendant claiming that the consultant was a consulting expert whose work was reviewed by testifying experts in the case. The theory was that the consultant's work was reviewed by the testifying experts because a mock trial was conducted and the testifying experts were allowed to be present for the mock trial and subsequent conversations with the attorney regarding the results of the mock trial. The testifying experts never reviewed any reports prepared by the consultant. The Court concluded that the jury consultant was retained to assist in trial strategy and that any discussions between the consultant and the defense attorney were core work product as same would reflect the mental impressions and legal theories of Defendant's attorney. The Court further stated that any material developed by the consultant in anticipation of trial was not discoverable and ruled that the privilege had not been waived by allowing the experts to view the mock trial, because no privileged information had been disclosed. [CLICK HERE](#) to read the opinion.

*Ustanik v. Nortex Foundation Designs, Inc., et al.—2010 WL 2404453 (Tex. App.—Waco)*

This case was the result of a failed foundation on newly constructed



residence. The Ustaniks sued the design professionals claiming professional negligence. The suit, filed in 2007, was subject to the 2005 version of § 150.002 of the Texas Civil Practices and Remedies Code, which requires a certificate of merit in suits for damages that arise out of services provided by a design professional. It was undisputed that the Plaintiffs did not file the certificate of merit. Plaintiffs claimed waiver by Defendants because Defendants waited over 2 years to file the motion to dismiss and participated in discovery during that time. The Court, acknowledging that waiver requires intent, held that Defendants took no action that was inconsistent with exercising their right to file the motion to dismiss. The Court further held that Plaintiffs' DTPA and breach of contract claims also stemmed from a professional negligence claim and were thus subject to the requirement of the certificate of merit. [CLICK HERE](#) to read the opinion.

## **TORTS**

*Gayley v. Mermaid Pools of El Paso, LLC—2010 WL 2511007 (Tex. App.—El Paso)*

Gailey hired Mermaid Pools to build a swimming pool on her property. The installation required a skimmer in the deck around the pool that was to be left uncovered during construction with a lid added only after construction was complete. Gailey went into her backyard one evening after workers had left the premises and was injured when she stepped into the uncovered skimmer. She sued under a premises defect theory. The Court found that Gailey was not an invitee, licensee, or trespasser on her own property and was in fact the owner of the premises and in control of the premises at the time of injury. The Court further found that Gailey's claim stemmed from a premises defect and not a negligent activity theory. The Court stated that it was aware of no duty imposed on an independent contractor to warn a premises owner of alleged premises defects created on her property during the construction process. The Court held that Defendant was under no duty to warn the premises owner of the uncovered skimmer or to cover the skimmer prior to completing the project. [CLICK HERE](#) to read the opinion.

## **WORKERS COMPENSATION**

*Zenith Insurance Co. v. Ayala—2010 WL 2332078 (Texas Supreme Court)*

In this worker's compensation case, Zenith agreed that the initial back sprain injury was compensable and later challenged additional diagnoses related to the back on the basis that the additional conditions were degenerative. Zenith did not challenge the compensability of the additional diagnoses until over 100 days after receipt of notice of injury. The Court held that the 60-day deadline for challenging

compensability of injury set out in Texas Labor Code § 409.021 does not apply to a dispute over the extent of injury claimed. The Court further held that preauthorization for treatment does not in and of itself make an insurer liable as preauthorization is based only on medical necessity. **[CLICK HERE](#) to read the opinion.**

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