TADC e-Update
The Texas Association of Defense Counsel, Inc.

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FROM THE PRESIDENT

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

The TADC 2010 Annual Meeting and 50th Anniversary celebration is just around the corner. It's hard to believe that an obscure resolution to modify the jury system, introduced in the summer of 1960 at the State Bar Convention, would have caused such a stir among the defense bar, and that the event became the catalyst that led to the formation of the TADC, but it did just that.

At the Hyatt Hill Country Resort in San Antonio on September 22-26, 2010, the TADC will celebrate its 50th year of protecting and preserving the civil justice system and I encourage everyone to attend. The program is outstanding and is geared towards the practicing trial attorney and will provide practical "hands-on" tips for managing your trial, from voir dire to closing arguments. Such notable defense lawyer as David Beck, James H. "Blackie" Holmes, and DRI President Cary Hiltgen will speak on topics ranging from the preparation of experts for trial to the consequences of the vanishing trial. Members of the Judiciary from virtually every level, including Federal District Judge Xavier Rodriguez, Texas Supreme Court Justice Phil Johnson, Appeals Court Justices Bob McCoy and Sue Walker and District Court Judges Patricia Kerrigan, Les Hatch, Orlinda Naranjo and Aida Flores, will have varying presentations on tips for the practicing trial attorney. There will even be presentations from noted members of the plaintiff's bar. The legal education provided at this meeting will be without a doubt, the

best you can get anywhere!

There will be number of organized social activities, allowing members to reconnect with old friends and create new relationships, both business and personal. The meeting will open with the Welcome Reception on Wednesday evening, September 22. A TADC golf tournament will be held on Thursday afternoon. The 50th Anniversary Dinner and awards presentation will occur on Friday evening, September 24. An anniversary video composed of interviews with TADC past presidents and historical information about the formation and evolution of the TADC will be viewed and awards will be presented for service to the civil justice system and for community service and pro bono efforts.

The TADC looks back with pride on 50 years of service to the civil justice system and all the relationships the Association has developed with so many other state and local defense organizations across the country. And now the TADC looks forward to further service toward protecting the jury system, legislative advocacy and election involvement in order to maintain a strong and viable civil justice system and defense bar into the next 50 years.

Have a happy and safe Labor Day weekend and I look forward to seeing you in San Antonio!

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Plan to Attend
2010 Annual Meeting/50th 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!
Register today!

CLICK HERE for Registration Materials

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CALENDAR OF EVENTS

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

LEGISLATIVE/ELECTION UPDATE

With the general election only 60 days away, campaign season is in full gear. Governor Rick Perry continues to lead challenger Bill White by at least an eight-point margin in most recent polls, though White is running strongly in major urban areas such as Dallas, Houston, and Austin. The other statewide races are keeping a much lower profile, as Democratic challengers for Lieutenant Governor, Attorney General, Agriculture Commissioner, and Railroad Commission struggle against the Obama Administration's low public approval ratings in Texas and the general anti-government sentiment across the state, particularly in suburban and rural areas. As things currently stand, it appears that the GOP will retain its hold on all statewide offices, including the Texas Supreme Court and Court of Criminal Appeals.

In fact, most observers believe that the GOP will have an exceptionally strong election this fall, both nationally and in Texas. The current Republican majority in the Texas House (currently 77-74) could grow by as many as 8 seats, according to more aggressive forecasts, and a swing of 5 or 6 seats appears entirely possible. Republican challengers are targeting several districts currently represented by Democrats. Those Democratic incumbents thought to face highly competitive contests include: Kristi Thibaut (Houston); Carol Kent (Dallas); Diana Maldonado (Round Rock); Mark Homer (Paris); Valinda Bolton (Austin); Joe Heflin (Crosbyton); Stephen Frost (Texarkana); Jim McReynolds (Lufkin); Patrick Rose (San Marcos); Donna Howard (Austin); and Chris Turner (Fort Worth). Other Democrats, such as Joe Moody (El Paso), Robert Miklos (Mesquite), Allen Vaught (Dallas), Abel Herrero (Corpus Christi), Yvonne Gonzalez-Toureilles (Alice), and David Leibowitz (San Antonio), have also drawn spirited challenges. On the GOP side, Rep. Linda Harper-Brown (Irving), who narrowly won re-election two years ago, is expected to have a tough race again this year, and Rep. Joe Driver (Garland) may likewise have a closer race than usual. All in all, however, it looks as though Republicans stand to gain seats in the Texas House--the only question seems to be how many.

The Texas Senate rarely presents any contested elections, but this year the retirement of longtime incumbent Senator Kip Averitt (R-Waco) triggered a heated special election to replace him. Republican Brian Birdwell, a former army officer and survivor of the September 11, 2001 attack on the Pentagon who lives in Granbury, defeated former Sen. David Sibley and a Democratic opponent to win the seat. In another possible change, Senator Jeff Wentworth (R-San Antonio) has indicated that he may resign from the Senate after the November election to take a job in the Texas

A&M System. Wentworth's resignation would create a vacancy that would be filled by special election early in 2011. Former State Rep. Alan Schoolcraft (R-San Antonio) has expressed interest in running if the seat comes open, and several others would likely enter the race as well.

If the GOP increases its margin in the Texas House, the dynamics of the 2011 legislative session will play out differently than they did in 2009, when Republicans enjoyed a razor-thin 76-74 advantage. Two dominant issues are on the table: an $18 billion budget shortfall, and congressional and legislative redistricting. To add to those explosive subjects, several controversial state agencies are up for sunset renewal, including the Public Utility Commission, ERCOT, Texas Department of Transportation, Texas Commission on Environmental Quality, Texas Department of Insurance (including the Workers' Compensation Division), Railroad Commission, and Texas Youth Commission.

Although the state leadership has ruled out a tax bill to help close the budget shortfall, at least three interim committees are looking at various revenue options, from "tweaking" the franchise tax to expanding the sales tax base to eliminating exemptions and exclusions. Thus far no palatable choices have emerged, and there is little interest in a general tax increase at this time (no surprise here, with an election pending). The Comptroller's official biennial revenue estimate, which will show the actual size of the shortfall, won't be delivered to the Legislature until January, so until then, much of this is speculation. Even so, expect the Legislature to scour the budget and dip into the Rainy Day Fund (which may contain as much as $9 billion by next spring) before they consider any revenue-raising measures. Still, making the budget add up won't be easy without some revenue increases.

On the civil justice front, interim hearings have focused on workers' compensation and the impact of the Entergy decision, the standard of causation in mesothelioma cases, arbitration reforms, and the paid or incurred statute. TADC continues to closely monitor these issues and is actively participating in a House working group headed by Rep. Jim Jackson (R-Dallas), which is studying potential reforms involving mandatory arbitration in consumer cases. We are likely to see proposed legislation in some of these other issues as well, but thus far no proposals have emerged as a result of interim activities. The TADC Legislative Committee is meeting monthly to discuss and review these and other matters and will keep you informed of developments.

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)**

LEGAL NEWS

**Case Summaries prepared by Greg Binns, Julie Abernethy, George Muckleroy, Alex Bailey and Andrew Cookingham with Thompson & Knight, L.L.P. in Dallas*

INSURANCE LAW

Stewart Enters., Inc. v. RSUI Indem. Co. — 2010 U.S. App. LEXIS 16555 (5th Cir.)

Stewart Enterprises owned commercial properties that sustained wind and flood damages from Hurricane Katrina. Stewart sued its excess insurer, RSUI, to recover those damages. The district court rejected RSUI's contention that the policy did not cover flood damage at all, but agreed with RSUI that the policy's anti-concurrent causation (ACC) clause limited Stewart's flood recovery to damage caused by flood alone (that is, not in conjunction with some other peril, such as wind). Both parties appealed. Applying Louisiana law, the Fifth Circuit resolved the policy's ambiguities in favor of the insured, affirming that the policy did cover flood damage. But the Fifth Circuit rejected the district court and RSUI's reading of the ACC clause. The Court acknowledged that the district court's reading was straightforward and that ACC clauses were typically enforceable. But the Court held that this ACC clause was atypical. Whereas the usual ACC clause bars recovery for damage caused by an included peril concurrently with an excluded peril, this ACC clause—under the district court's reading—purported to bar recovery for damage caused concurrently by two included perils. The Court held it was untenable to read the policy to allow Stewart to recover for damage caused exclusively by wind or exclusively by flood, but not for damage caused by both perils together. Accordingly, the Court affirmed in part and reversed in part for further proceedings. **CLICK HERE to read the opinion.**

CIVIL PRACTICE

Valenzuela v. State & County Mutual Fire Insurance Co.—No. 14-09-00191-CV (Tex. App.—Houston [14th Dist.])

The Court reversed the grant of summary judgment because the Defendant's summary-judgment evidence, the affidavit of a claims manager, did not have sufficient factual support to establish the affiant's competency. The Plaintiff was injured in a motor-vehicle accident and sued the other driver, who was insured by Defendant. The Defendant did not receive notice of the suit until Plaintiff delivered a copy of the final judgment to it a month after the trial. The Defendant filed a declaratory-judgment action seeking judgment that, because the insurance policy required the insured to provide notice of the suit, it had no duty to indemnify its insured or pay policy benefits to Plaintiff. The Defendant obtained summary judgment on this ground. On appeal, the Court analyzed the competency requirement that affidavits in support of summary-judgment motions must explain how the affiant has personal knowledge of the facts stated therein. Although the affidavit did state the affiant was currently the Defendant's claims manager and had personal knowledge of the facts stated in the affidavit, the Court held it was incompetent to prove the facts it contained because it did not state whether the affiant was claims manager during the relevant time period, how her job duties as the claims manager afforded her knowledge of Plaintiff's claim, or how she was familiar with the particular claim. **CLICK HERE to read the opinion.**

Cooper v. Litton Loan Serv., LP—2010 Tex. App. LEXIS 5809 (Tex. App.—Dallas)

Cooper sued Defendants to enjoin foreclosure of a mortgage loan on Cooper's home, and for damages. Defendants filed no-evidence and traditional motions for summary judgment. Cooper filed a response date-stamped the date of the hearing. The trial court deemed Cooper's response untimely and granted Defendants' motions. On appeal, Cooper argued that his response was timely under the mailbox rule. But the Court of Appeals affirmed, holding that since Cooper failed to establish how he served his response on Defendants, and how he presented his response to the clerk for filing, he did not show compliance with the mailbox rule. Cooper also argued that because Defendants did not address his request for permanent injunction in their summary judgment motions, the trial court improperly dismissed that request. But the Court of Appeals affirmed, noting that a permanent injunction is a

remedy, not a cause of action. As such, to defeat Cooper's request for permanent injunction, Defendants needed only refute the causes of action on which Cooper's request for a permanent injunction was based. **CLICK HERE to read the opinion.**

Sharp Engineering v. Luis, No. 14-09-645-CV, --- S.W.3d ----, 2010 WL 3153982 (Tex. App—Houston [14th Dist.] Aug. 12, 2010, no pet. h.).

Sergio Luis, a carpenter, was seriously injured when the roof of a house he was framing collapsed. After settling with the homebuilder, he sued Sharp Engineering and Shah, the licensed professionals who designed the roof, for negligence. Sharp and Shah moved to dismiss because Luis failed to file a certificate of merit, as Chapter 150 of the Civil Practice and Remedies Code requires. Luis filed a first amended petition and concurrently filed the certificate of merit. Sharp and Shah again moved to dismiss and the trial court denied the motion. Sharp and Shah interlocutory appealed, as explicitly allowed by Chapter 150.

The court of appeals reversed. Section 150.002(a), as it read at the time Luis filed his complaint (the Legislature has since amended it) required a plaintiff suing a licensed or registered professional, as defined by Section 150.001 to file a certificate of merit, signed by a professional in the same field, "with the complaint." Luis argued, and the trial court agreed, that the certificate of merit could be filed with an amended pleading; otherwise, the Legislature would have written "with the original complaint." The court of appeals, however, held that this interpretation would render meaningless another provision that allows a plaintiff who is within ten days of the expiration of limitations to request an extension of time to file his certificate of merit. Therefore, the court held, the certificate of merit must be filed with the plaintiff's first petition. The court remanded the case to the trial court to determine whether to dismiss the complaint with or without prejudice. **CLICK HERE to read the opinion.**

Sheehan v. Adams, No. 05-08-1340-CV, --- S.W.3d ----, 2010 WL 3212061 (Tex. App.—Dallas Aug. 18, 2010, no pet. h.).

Mary Lou Sheehan purchased a house from the Adamses. Realtors associated with Lori Arnold d/b/a/ Coldwell Banker represented both Sheehan and the Adamses. Several months after Sheehan purchased the house, significant foundation damage was discovered. Sheehan sued the Adamses and Coldwell Banker for DTPA violations and statutory fraud, alleging they had violated both statutes by knowing about the foundation problems but disclosing to her that any foundation problems or "settling" were normal. The jury found for Sheehan but the trial court entered judgment notwithstanding the verdict for the Adamses' and Coldwell Banker on both claims. Sheehan appealed.

The court of appeals affirmed. On the DTPA claim, the court held that evidence that the Adamses and Coldwell Banker should have known of the foundation problems was insufficient; Sheehan had to present evidence that they knew of the foundation problems and failed to disclose them. The evidence admitted that there were cracks in the walls and foundation of the home at the time of the sale establishes at most that the Adamses and Coldwell Banker should have known of the foundation problems; it does not support the inference that they knew of them. Therefore, there was legally insufficient evidence to support the jury's verdict on Sheehan's DTPA claim. For the same reasons, there was also legally insufficient evidence of Sheehan's statutory fraud claims. The Adamses and Coldwell Banker cannot be liable for not disclosing information there is no evidence that they knew. **CLICK HERE to read the opinion.**

Fresh Coat, Inc. v. K-2, Inc., No. 08-0592, 2010 Tex. LEXIS 610 (Tex. Aug. 20, 2010)

In Fresh Coat, Inc. v. K-2, Inc., the Texas Supreme Court held that (1) a home component can qualify as a "product" under Texas Civil Practice and Remedies Code Chapter 82; (2) a person or entity who contracts to both provide and install a product may qualify as a "seller" of that product under Chapter 82; and (3) § 82.002(a)'s statutory exception to indemnity exempts a manufacturer from indemnifying a seller only for losses caused by the seller's tortious or otherwise culpable act or omission for which the seller is independently liable.

Fresh Coat, Inc. ("Fresh Coat") contracted with a homebuilder, Life Forms, Inc. ("Life Forms") to install an exterior insulation and finishing system ("EIFS") on the exterior walls of homes that Life Forms built. Fresh Coat

purchased the EIFS it installed from K-2, Inc. ("K-2"). Homeowners subsequently claimed that the EIFS was defective and asserted, among other claims, products liability claims against K-2, Life Forms, and Fresh Coat. Life Forms then asserted indemnity cross-claims against Fresh Coat and K-2, and Fresh Coat sought indemnity from K-2. After Life Forms, Fresh Coat, and K-2 settled with the homeowners and Fresh Coat settled with Life Forms, Fresh Coat sought indemnity from K-2 for Fresh Coat's settlement payments to the homeowners and to Life Forms.

The trial court awarded Fresh Coat damages on its indemnity claims against K-2. The Court of Appeals upheld the trial court's indemnity award for Fresh Coat's settlement payment to the homeowners but reversed the indemnity award for the settlement payment Fresh Coat made to Life Forms. The Texas Supreme Court affirmed the Court of Appeals' holding that K-2 had a duty to indemnify Fresh Coat for the settlement payment to the homeowners but reversed the Court of Appeals' ruling that § 82.002(a) exempted K-2 from a statutory duty to indemnify Fresh Coat for Fresh Coat's settlement payment to Life Forms.

The Texas Supreme Court affirmed the Court of Appeals' holding that (1) the EIFS constituted a "product" under Chapter 82; and (2) Fresh Coat qualified as a "seller" under Chapter 82. First, the Court rejected K-2's argument that products placed into the stream of commerce lose their status as products when they become integrated into real property. Instead, the Court reasoned that, based on Chapter 82's definition of "seller," a "product" under Chapter 82 comprises "something distributed or otherwise placed, for any commercial purpose, into the stream of commerce for use or consumption." As a result, because K-2 placed its EIFS—which it admitted was a "product" when sold to Fresh Coat—into the stream of commerce and Life Forms used the EIFS in its home construction, the EIFS qualified as a "product" under Chapter 82.

Second, the Court held that Fresh Coat qualified as a "seller" under Chapter 82 even though Fresh Coat provided EIFS installation services in addition to selling the EIFS to Life Forms. The Court recognized that § 82.002(d) expressly includes as a seller a wholesale distributor or retail seller who assembles a product in accordance with the manufacturer's instructions. And the Third Restatement of Torts similarly recognizes that a product seller may also provide services. Fresh Coat contracted with Life Forms to provide both the EIFS and the EIFS installation services and installed the EIFS in accordance with K-2's instructions. Consequently, Fresh Coat's installation

services did not preclude its status as a "seller" under Chapter 82.

Finally, reversing the Court of Appeals' holding, the Supreme Court held that, under § 82.002(a), K-2 had a duty to indemnify Fresh Coat for Fresh Coat's settlement payment to Life Forms. Section 82.002(a) imposes a duty on manufacturers to indemnify sellers for losses arising out of products liability actions, except for "any loss caused by the seller's negligence, intentional misconduct, or other act or omission,… for which the seller is independently liable." The Court of Appeals concluded that the indemnity provision in the contract between Fresh Coat and Life Forms rendered Fresh Coat independently liable for its loss and therefore exempted K-2 from its statutory indemnification duty. The Supreme Court reasoned, however, that § 82.002(a) exempts a manufacturer from its indemnification duty only when the seller's "negligence, intentional misconduct, or other act or omission" caused the loss for which the seller is independently liable. Further, § 82.002(e) expressly provides that the manufacturer's indemnification duty "is in addition to any duty to indemnify established by law, contract, or otherwise." As a result, K-2 failed to prove that Fresh Coat's settlement payment to Life Forms fell within 82.002(a)'s exemption merely because Fresh Coat had a contractual duty to indemnify Life Forms.

The Court therefore held that 82.002(a)'s indemnity exemption is limited to losses caused by the seller's tortious or otherwise culpable conduct for which the seller is independently liable. Accordingly, the Court rendered judgment that Fresh Coat recover from K-2 the settlement payments that Fresh Coat made to the homeowners and to Life Forms. **CLICK HERE to read the opinion.**

Martinez-Partido v. Methodist Specialty and Transplant Hospital—No. 04-09-00463-CV (Tex. App.—San Antonio)

The Court reversed a dismissal of Plaintiff's medical malpractice claim that had been based on objections to the qualifications of Plaintiff's expert. The Plaintiff had been injured when emergency room personnel inserted a catheter without first deactivating Plaintiff's surgically implanted artificial urinary sphincter device. The Court had earlier held the Plaintiff's expert was not qualified to render an opinion on causation. The Texas Supreme Court vacated the Court's judgment and remanded to the trial court, which granted Plaintiff a thirty-day extension under Tex. Civ. Prac. & Rem. Code section 74.351 to cure deficiencies in the expert report. The expert's revised report did

not offer an opinion on causation, but instead opined on the appropriate standard of care and the breach of that standard. Defendant again objected to the expert's qualifications. Plaintiff argued the Defendant must stand on its initial objections and may not object to the expert's qualifications a second time. The Court analyzed section 74.351 and held that when a revised expert report provides an expert's opinions on a new matter, objections to the revised report may be raised with respect to the new matter. The Court also reviewed the expert's qualifications under Tex. Civ. Prac. & Rem. Code section 74.402 and found him to be qualified to render an opinion on the standard of care and the breach of that standard based on his substantial training and experience as an emergency department physician and administrator, despite the fact that his certification by the American Board of Emergency Medicine was inactive **CLICK HERE to read the opinion.**

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