



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

## **FROM THE PRESIDENT**

Keith B. O'Connell,  
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*Election day has come and gone and we now set our sights on the 2011 legislative session beginning in January. You can be assured that aside from the massive budget shortfall facing the state and the issue of redistricting, there will most certainly be activity in the area of civil justice. The TADC is standing ready to intercept and review any legislation which could potentially affect the practice of law or the civil justice system.*

*2011 will be a very active year for the TADC. Legislative luncheons and ethics seminars with judicial panels will be held throughout the state. The first scheduled CLE meeting of 2011 will be the Winter Seminar, held in Steamboat Springs, Colorado February 2-6, followed by the 29<sup>th</sup> Annual TADC Trial Academy in Austin in early March. The 2011 Spring Meeting will also be held in Austin in late March and will feature the traditional breakfast with special invited guests, current and former members of the Texas Supreme Court. The TADC Legislative Day will be held in conjunction with the meeting and will allow members of the TADC to walk the halls of the legislature and voice our opinions and concerns with matters before the body. A complete list of 2011 programming is below in the calendar section of this update.*

*I want to take a moment to thank Immediate Past President Greg Curry for all*

*his efforts and successes this past year, as well as the tremendous efforts of both Greg and Tom Ganuchau to make the 2010 TADC Annual Meeting and 50<sup>th</sup> Anniversary celebration in San Antonio this past September so fantastic. For those of you who were unable to attend, you may view the photographs at [www.overstreetphoto.com](http://www.overstreetphoto.com).*

*On a final note, I would encourage each of you to recruit a member this year. Take a minute to visit with a law partner, law school friend or any other colleague that should be a member of the TADC and is not. The TADC is the ONLY organization in the state of Texas representing the voice of the defense bar. The more members we have, the louder the voice. [TADC Membership Application](#)*

*I look forward to working with you in 2011 and please call on me or the TADC if we may be of service to you.*

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***Register Now for the  
2011 Winter Seminar***

***Sheraton Steamboat Springs – Steamboat Springs, CO  
February 2-6, 2011***

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

- \* Practical Ethics for the Litigator***
- \* Admissibility of Social Media Evidence at Trial***
- \* Texas Supreme Court Rules and Decisions***
- \* The Law of Voir Dire***
- And much more!***

***9 hours of CLE including 1.25 hours ethics***

***The TADC has an excellent rate at the Sheraton!***

*Register today!*

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

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## **CALENDAR OF EVENTS**

- February 2-6, 2011*                      ***TADC Winter Seminar***  
*Steamboat Sheraton – Steamboat Springs, CO*  
*Mitch Smith & Slater Elza, Co-Chairs*  
***Registration***
- March 4-5, 2011*                        ***29<sup>th</sup> 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, Texas*  
*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**

Led by Governor Rick Perry, the GOP scored unprecedented gains in their Texas House majority, moving from a narrow 77-73 edge to a more than 30-seat advantage. Without the Harris County vote fully counted, by 7 a.m. this morning the

Republicans had wrested 20 Texas House seats from Democratic incumbents, with at least one other in the offing.

Governor Perry garnered just over 57% of the statewide vote, easily besting former Houston Mayor Bill White, who despite running a well-financed and high profile campaign, could manage only 42%. Other Republican statewide incumbents, running against opponents with virtually no funding or name identification, fared even better. Additionally, in a race pitting complete unknowns, Republican David Porter easily defeated Democrat Jeff Weems for a seat on the Texas Railroad Commission.

Three Texas Supreme Court incumbents, Justices Paul Green, Eva Guzman, and Debra Lehrman, won easily against underfunded (or non-existent) Democratic opposition. In a closely watched battle between Austin attorney (and longtime TADC member) Kurt Kuhn and former Justice of the Peace Melissa Goodwin for an open seat on the Third Court of Appeals, Goodwin prevailed with almost 57% of the vote. Goodwin will be joined on the Third Court by a gubernatorial appointee to replace Justice Alan Waldrop, who recently resigned from the bench.

In the Texas House, the GOP substantially enhanced its majority going into a redistricting year. The biggest stunner was the defeat of leading Democratic lawmaker Rep. Jim Dunnam (Waco), who lost to Marva Beck. Republican candidates defeated about 20 Democratic incumbents: Mark Homer (Paris), Stephen Frost (Texarkana), Kristi Thibaut (Houston), Valinda Bolton (Austin), Joe Heflin (Crosbyton), Carol Kent (Dallas), Robert Miklos (Dallas), Diana Maldonado (Round Rock), Patrick Rose (San Marcos), Allen Vaught (Dallas), Kirk England (Grand Prairie), Jim McReynolds (Lufkin), Chris Turner (Fort Worth), Joe Moody (El Paso), Yvonne Gonzales Toureilles (Alice), David Leibowitz (San Antonio), Solomon Ortiz, Jr. (Corpus Christi), Paula Pierson (Arlington), and Abel Herrero (Corpus Christi). Two Republican incumbents thought to face difficult re-election challenges prevailed and will return in January: Linda Harper-Brown (Irving) and Joe Driver (Garland).

It is unclear how the Republican stampede will affect the Speaker's race between incumbent Joe Straus (San Antonio) and challenger Warren Chisum (Pampa). Speaker Straus had been expected to hold a press conference later today to discuss the election outcome.

As we have reported previously, there are two new members of the Texas Senate: former Army officer Brian Birdwell (R-Granbury), who replaced veteran Senator Kip Averitt (R-Waco) by winning a special election over former Senator David Sibley; and El Paso County Attorney Jose Rodriguez, who easily won retiring Sen. Eliot Shapleigh's seat. Rumors continue to circulate that Senator Jeff Wentworth (R-San Antonio) may retire from the Senate prior to the session to take a post in the Texas A&M University System. If that occurs, the vacancy will be filled by

special election, but for now Senator Wentworth intends to remain in the Senate for the foreseeable future.

Moving from the political to the policy side, during the campaign Governor Rick Perry unveiled a “next phase” in lawsuit reform that includes four proposals:

- a loser pays provision for “frivolous” lawsuits;
- an early dismissal mechanism for frivolous lawsuits;
- a requirement for specific legislative authority for a new cause of action (i.e., the judiciary may no longer recognize new causes of action in the development of the common law); and
- an expedited discovery and trial process for claims between \$10,000 and \$100,000.

As a practical matter, Texas already has statutory and judicial sanctions against frivolous claims, and the Texas Supreme Court has on at least one occasion ruled that it will not imply a new cause of action from a statute unless the Legislature explicitly authorizes it. “Loser pays” legislation has been introduced in prior sessions of the Legislature, but has failed to advance in the face of opposition from both the plaintiff’s bar and business groups, who fear that defendants with deep pockets will be the only “losers” ever forced to pay under such a provision. Finally, though somewhat unclear, the “small claims” provision may be a revision of the court reorganization effort two sessions ago, which attempted to eliminate disparate and inconsistent jurisdictional requirements, convert county courts to district courts, and create “special” courts for certain types of claims. This effort ultimately ran aground for a variety of reasons. It remains to be seen how the state’s budget crisis and the likely cuts that will occur in funding for the courts will affect any proposal to alter substantially the status quo.

We likewise expect that the Legislature will revisit a number of issues that were not resolved in 2009 and that have been the subject of interim committee charges, including:

- the *Borg-Warner* standard as it applies to mesothelioma claims;
- court oversight of arbitration decisions, particularly in consumer contexts;
- the adequacy of workers’ compensation lifetime income benefits for severely injured workers;
- anti-idemnity legislation;
- owner and contractor-controlled insurance programs; and
- paid or incurred.

Moreover, with a budget shortfall currently estimated in the \$18-20 billion range, we expect that the Legislature will once again discuss changes in tax policy aimed at enhancing state revenues. This discussion could include:

- possible expansion of the sales tax to include some or all legal services;
- increasing the attorney occupation tax; and/or
- modifying the business margins tax.

While the Governor and legislative leadership (and a huge majority of the Texas House and Senate) have stoutly maintained that no new taxes will be imposed, whether a shortfall of this magnitude can be resolved without a revenue bill *in the long run* remains to be seen. We will closely monitor this situation and respond appropriately. In any event, it seems unlikely that the budget situation will be resolved in the regular session, as a consequence of both the severity of the situation and the necessity of completing House and Senate redistricting before the clock runs out on the 140 days. If the Legislature fails to act on its own districts by the end of the session, the issue will default to the Legislative Redistricting Board, which includes the Lieutenant Governor, Speaker, Comptroller, Attorney General, and Land Commissioner. Congressional redistricting (in which Texas is slated to add 3-4 new congressional districts) remains within the jurisdiction of the Legislature, though federal court involvement in drawing new district lines is routine and expected. In fact, with a Justice Department under the aegis of a Democratic president for the first time in the last 50 years, we can count on very close federal supervision of the process.

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))

## ***LEGAL NEWS***

*\*Case Summaries prepared by Nancy Morrison with Naman, Howell, Smith & Lee, L.L.P. in Waco*

**ARBITRATION—Arbitration agreement was not illusory.**

**In re 24R, Inc., No. 09-1025, 2010 Tex. LEXIS 794 (Tex. Oct. 22, 2010).**

Having signed an arbitration agreement as a condition for

employment, P, nonetheless, sued her employer for discrimination. She claimed the arbitration agreement was illusory because her employer, as evidenced by the language contained in the employee manual, retained the right, without prior notice, to unilaterally change any personnel policies, including the arbitration agreement. The court found that the parties were bound by the arbitration agreement, which was a stand-alone contract, and which did not incorporate the employee manual. [CLICK HERE](#) to read this opinion.

**ARBITRATION—District court lacked inherent authority to sanction attorney for conduct during arbitration.**

**Positive Software Solutions, Inc. v. New Century Mortgage Corp., No. 09-10355, 2010 U.S. App. LEXIS 19072 (5<sup>th</sup> Cir. Sept. 13, 2010).**

P sued D for infringement. Over P's objections, the district court ordered arbitration pursuant to the parties' contract. During arbitration, D's attorney exhibited multiple instances of bad faith. Ultimately, D assigned its rights against its attorney to P, and P moved for sanctions against D's attorney. Relying upon its inherent authority, the district court granted P's motion and sanctioned D's attorney to pay a portion of P's attorneys' fees. D's attorney appealed the ruling of the district court. The court of appeals reversed the ruling for sanctions, holding that the district court lacked the requisite inherent authority to impose such sanctions. "[D's attorney's] conduct was neither before the district court nor in direct defiance of its orders. If inherent authority were expanded to cover [D's attorney's] conduct, there would be nothing to prevent courts from inserting themselves into the thicket of arbitrable issues—precisely where they do not belong. Such an expansion would also threaten the integrity of federal arbitration law in the name of filling a gap that does not exist." [CLICK HERE](#) to read this opinion.

**PROPORTIONATE LIABILITY—Proportionate liability applies only to tort claims.**

**Cressman Tubular Prods. Corp. v. Kurt Wiseman Oil & Gas, Ltd., No. 14-08-01039-CV, 2010 Tex. App. LEXIS 7775 (Tex. App.—Houston [14<sup>th</sup> Dist.]**

Sept. 23, 2010, no pet. h.).

P sued four Ds on multiple theories of liability for damages caused by the sale of goods for use in his oil well. D4, manufacturer of the goods, filed for bankruptcy after the jury found it liable for 99% of P's damages. D4's claims were severed, and judgment was entered for the full amount of P's damages against D1, which had been found by the jury to be liable for only 1% of P's damages. The issue on appeal was the nature of P's claims because only claims sounding in tort are subject to proportionate responsibility. The court of appeals found that express-warranty claims sound in contract, even when the breach causes damages only to property other than the property that is the subject of the contract. The appellate court, however, found that, generally, implied-warranty claims sound in tort, and that the exception to the rule, i.e., that implied-warranty claims sound in contract when the damages are purely economic, did not apply in this case. Therefore, proportionate liability would apply only to P's implied-warranty claims. [CLICK HERE](#) to read this opinion.

**GOVERNMENTAL LIABILITY—Plaintiff satisfied notice requirement by filing/serving lawsuit.**

**Colquitt v. Brazoria County, No. 09-0369, 2010 Tex. LEXIS 691 (Tex. Oct. 1, 2010).**

P satisfied the six-month notice requirement under the Texas Tort Claims Act by filing/serving his lawsuit on the defendant governmental entity and did not violate section 311.034 of the Code Construction Act. [CLICK HERE](#) to read this opinion.

**GOVERNMENTAL LIABILITY—Defendant had not waived its immunity under the Texas Torts Claims Act**

**Smith v. Galveston County, No. 01-08-01011-CV, 2010 Tex. App. LEXIS 8168 (Tex. App.—Houston [1<sup>st</sup> Dist.] Oct. 7, 2010, no pet. h.).**

The trial court's grant of D county's plea to the jurisdiction was affirmed when P inmate sued for an injury he suffered after slipping in the jail's shower. Despite evidence that D was aware of the slippery



nature of the shower floor and that other inmates had been similarly injured, the court held that D had not waived its immunity. The Texas Torts Claims Act does not apply to acts or omissions that occurred prior to 1970, and D offered conclusive evidence that the area of the jail in which P was injured had been built in 1960 with no subsequent modifications. [CLICK HERE](#) to read this opinion.

**FAILURE TO SERVE EXPERT REPORT—Case is dismissed based on prior non-suit.**

**Vargas v. Chavez, No. 08-09-00139-CV, 2010 Tex. App. LEXIS 8389 (Tex. App.—El Paso Oct. 20, 2010, no pet. h.).**

In this medical malpractice case, Ds filed a chapter 74 motion to dismiss based on P's failure to serve an expert's report. P subsequently filed a motion to dismiss her claims, indicating in her motion that she no longer wished to proceed against Ds. P's motion was never served on Ds, and neither motion was heard. P thereafter filed an amended petition under the same cause number, alleging the same claims. Ds filed a motion to strike the amended pleadings based upon (1) P's earlier motion to dismiss, and (2) P's failure to serve an expert report. The court held that Ds' motion under chapter 74 was moot because despite the fact that no court action was ever taken on P's motion to dismiss, her motion had, in fact, been a non-suit and had extinguished her claims without prejudice. [CLICK HERE](#) to read the opinion.

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