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

IN THIS ISSUE:

FROM THE PRESIDENT

Dan K. Worthington,
Atlas, Hall & Rodriguez, L.L.P., McAllen

What's on the Agenda…..

Originally, the title of this report was "TADC 2.0" to emphasize our movement toward a more active on-line presence. But after hammering out the article, I realized that while our methods of communicating may be changing, our voice, our message and our mission will not. Our entry into the world of social media, desk top CLE and tablet/smart phone interaction is a change of form not substance.

Having said that, we need to do a better job in advertising our changes and soliciting your input into how we can do what we need to do better.

Form

LinkedIn.

Last year, Tom Ganucheau asked that we initiate a "LinkedIn" account to be limited to TADC members. The point of this limited membership account was to provide all of us with a forum where our exchange of ideas could be more candid than other formats might allow. We established this limited account and our membership continues to grow. If you have not joined us on LinkedIn, you (and we) are missing out. This is just the type of information exchange vehicle whose worth is directly tied to

the number of members actively participating. If you have a LinkedIn account, please consider requesting joinder today. If you are not on LinkedIn, it will take you less than 10 minutes to sign up and you can be in a conversation on the TADC site very shortly thereafter. Following this report, you will see a LinkedIn button and we are just a click away. **TADC on LinkedIn**

Facebook.

Since LinkedIn is a forum limited to TADC members only, the TADC Facebook page allows for communication to both members and non-members (as well as non-lawyers). We believe it is important to spread the Association's message to as broad an audience as possible. Like us on Facebook. **TADC on Facebook**

Twitter.

Until a few weeks ago, I resisted Twitter because I didn't understand what it was and had no interest in finding out. However, after being introduced to the world of the NFL and Twitter, the possibilities it offered to the TADC seemed obvious. If you "followed" us on Twitter you would have learned about the House committee assignments, that DRI has joined with the TADC in opposing the Supreme Court's mandatory rules on expedited actions, and as a follower you will continue to get updates on the proposed rules, legislative proposals of interest and court decisions which we think are helpful to your practice. Again, we have made it easy for you to follow by giving you a Twitter button at the ends of this report. **TADC on Twitter**

TADC App.

We are developing a TADC app which will allow you to, among other things, register for CLE, link to legal research sites, order TADC publications, pay your dues, and access the TADC roster. We hope to have this out before the fall meeting. If you have any suggestions on ways in which the app can help us better serve the membership, please do not hesitate to call or email.

Webcasts.

Earlier this year we partnered with the State Bar of Texas to bring our members a free webcast on the anticipated expedited action proposal. We are actively seeking a more formal arrangement where we can count on bringing several of these free webcasts each year. While 2-3 hours of free CLE is not going to allow any of us to retire, it will reduce the cost of your membership to almost 0 in terms of what you save on your annual CLE expense. Beyond the cost savings, we will be concentrating on cutting edge and meaningful topics.

TADC Website.

We have recently completed a revamp of the TADC website. Beyond being more user friendly, we have made an effort to provide more meaningful content. Like

everything we do, it remains a work in progress and we look for your comments and suggestions to continue to make it better. **www.tadc.org**

TADC Magazine.

We are mindful that many members are more comfortable reading our message in a hard-copy print format. We have committed ourselves to include more substantive law articles in each magazine issue to further expand our efforts to get out to the membership as much up-to-date practice information as we can.

In-Person Meetings.

While all of our technological improvements are needed and will help us communicate, there is no substitute for in-person meetings. Jerry Fazio, our programs Vice-President, has shown us the way with his proactive efforts in connecting with the Dallas Bar Association (and its various committees) in facilitating meaningful and well-staffed continuing education. While we will continue to have "TADC only" meetings, adding the component of joint meetings not only expands our audience, it gives our members the opportunity to network with non-members who practice in the same area and are confronting the same challenges. We have taken this idea to our out-of-state meetings and have a meeting this week in which we will join with the Illinois Defense Bar, and a meeting in July where we will spend a day of joint CLE with the Washington State Defense Bar. This will allow us to add a networking element into the educational component of the meeting.

Substance

There is a continued pressure being applied against the civil justice system. It is the kind of force which is unrelenting and requires a continued and opposite force applied against it. We have spent much of the past several years bringing our voice and our perspective to the defense of the civil justice system. We believe that by integrating our message into the various delivery systems described above we will be more effective in keeping you in the loop and keeping the volume of our voice at a maximum level.

Our goal this year is largely two-fold. We continue to resist and encourage others to stand in opposition to the Supreme Court's proposed rules on expedited actions. For the reasons discussed in detail in our two letters to the Court, the rules are profoundly unfair to defendants and for those many cases forced into the proposal's "one size fits all" approach will result in a denial of meaningful access to the civil justice system and the 7th Amendment right to a jury trial.

As a component to these efforts to oppose this proposal, we are developing a primer for our members to use as a starting point in developing a strategy to object to the imposition of these limitations in a case-by-case basis and to handle a case submitted to the process' limited discovery and curtailed trial presentation limitations. We will be using all of our available resources to continue our advocacy for the civil justice system

and the rights of defendants in Texas to a fair opportunity to defend themselves.

Our secondary mission this year will be to keep on top of the new (or repackaged) legislative efforts to close the courthouse doors to meritorious claims and defenses. We will do this by testifying and bringing our voice to the legislature on those proposals as they arise (links to this testimony will be distributed on twitter) and by interacting with those other organizations interested in the issue to bring more voices to the debate. I am pleased to report, that while there are rumors of legislation worthy of very close review (TWIA limitations expanded to private insurers, for example), there have not been any bills yet filed that have triggered the "all hands on deck" alarm. To be sure, we fully expect to see those types of bills filed and you will know when we know.

By recognizing that we serve our membership best by putting the civil justice system first, we have developed a degree of credibility and have achieved a position of national leadership. But we can do better, get involved today, and sign up for linkedin and twitter. It is easy to do and the more of us who participate, the better it will become.

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** *REMINDER***

Your TADC Dues statement was mailed in early November and were due by January 1, 2013. If you've not yet paid your dues, drop your payment in the mail today! If you have questions or require a duplicate dues statement, contact the TADC office at tadc@tadc.org or 512/476-5225.

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REGISTER NOW!

For the 2013 TADC Spring Meeting/Legislative Day

Join the TADC in Austin, Texas - April 3-5, 2013

A program for the practicing trial lawyer:

~ Observations from the Bench: Trial Tactics

~ Expedited Jury Trials: What this could mean to your

Practice

~Medicare Set-Aside Issues

~ Top 10 Deposition Mistakes

…..and much more, including Breakfast

with the Supreme Court!

Reservation cut-off date is March 13, 2013

REGISTRATION MATERIALS

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CALENDAR OF EVENTS

February 6-10, 2013
TADC Winter Seminar
Sheraton Steamboat –Steamboat Springs, Colorado
Greg Curry & Randy Walters, Co-Chairs
REGISTRATION MATERIAL

April 3-5, 2013
TADC Spring Meeting and Legislative Day
Doubletree Suites – Austin, Texas
Robert Sonnier & Ross Pringle, Co-Chairs
REGISTRATION MATERIAL

April 26-27, 2013
31st Annual TADC Trial Academy
Sheraton Dallas North – Dallas, Texas
Clayton Devin & Mike Shipman, Co-Chairs

July 17-21, 2013
TADC Summer Seminar
Westin Whistler – Whistler, Vancouver
David Chamberlain & Greg Binns, Co-Chairs

August 2-3, 2013
TADC Budget/Nominating Committee
Austin, Texas

September 18-22, 2013
TADC Annual Meeting

W Hotel – Boston, Massachusetts
Mitch Smith & John Weber, Co-Chairs

LEGISLATIVE/ELECTION UPDATE

Governor **Rick Perry** set his priorities for the 83rd legislative session in his state-of-the-state address to a joint session of the House and Senate Tuesday morning. The Governor called for spending $3.7 billion from the Rainy Day fund for transportation and water projects, reducing taxes by $1.8 billion, and reforming public and higher education by providing more school choice, creating a technical and vocational track for high school students, allowing universities in South Texas access to the Permanent University Fund, and tying more state funding for colleges and universities to graduation rates.

House Speaker **Joe Straus** announced his committee appointments last Thursday. As always, TADC is particularly interested in the make-up of House Judiciary & Civil Jurisprudence. The Speaker selected former state district judge Rep. **Tryon Lewis** (R-Odessa) as committee chair, with Rep. **Jessica Farrar** (D-Houston) as vice chair. Representatives **Ana Luna Hernandez** (D-Houston), **Richard Raymond** (D-Laredo), **Marsha Farney** (R-Georgetown), **Lance Gooden** (R-Terrell), **Todd Hunter** (R-Corpus Christi), **Ken King** (R-Canadian), and **Senfronia Thompson** (D-Houston) round out the committee. It is interesting to note that only Reps. Lewis, Raymond, and Thompson return from last session's committee (although Rep. Hunter is a two-time former chair of the committee), and that two others are freshman members, Reps. Farney and King. Rep. Hunter, by the way, was reappointed as chair of the House Calendars Committee. Full listing of House Committees by Committee.

TADC also closely monitors legislation in House Business & Industry, House Insurance, and House Ways & Means. Speaker Straus tabbed **TADC member Rep. Rene Oliveira** to chair Business & Industry, which hears, among other things, bills related to workers' compensation, employment law, and other business issues. Rep. **John Smithee** (R-Amarillo), the longtime chair of Insurance, continues in that position, as does Rep. **Harvey Hilderbran** (R-Kerrville) as chair of Ways & Means. Other committee assignments of TADC members include Rep. **Sarah Davis**, who moves up to important seats on House Appropriations, Calendars, and Public Health. Rep. **Kenneth Sheets** (R-Dallas) also received prominent assignments on Insurance, Local & Consent Calendars, and Homeland Security & Public Safety. Newly elected Rep. **Travis Clardy** (R-Nacogdoches) scored impressive appointments as well, receiving seats on Higher Education, Local & Consent Calendars, and Special Purpose Districts.

Senate committees have been set for the past two weeks. Most legislation of interest to TADC goes either to Senate Jurisprudence or Senate State Affairs. Senator **Royce West** (D-Dallas) was appointed to chair Jurisprudence (replacing retired Sen. Chris Harris). **José Rodriguez** (D-El Paso) will serve as vice chair, and the membership includes veteran Sen. **John Carona** (R-Dallas) and three freshmen: **Donna Campbell** (R-New

Braunfels), **Kelly Hancock** (R-North Richland Hills), and **Ken Paxton** (R-McKinney). State Affairs continues under the longtime leadership of TADC member Sen. **Robert Duncan** (R-Lubbock) and vice chair Sen. **Bob Deuell** (R-Greenville), one of the Senate's three physicians (the others are Sen. Campbell and her fellow freshman Sen. Charles Schwertner of Georgetown). Other members of State Affairs include Senators **Rodney Ellis** (D-Houston), **Troy Fraser** (R-Horseshoe Bay), **Joan Huffman** (R-Houston), **Eddie Lucio** (D-Brownsville), **Robert Nichols** (R-Jacksonville), **Leticia Van de Putte** (D-San Antonio), and **Tommy Williams** (R-The Woodlands).

Thus far, we have seen few bills that would have a significant impact on the civil trial system, although to date fewer than 1,000 of an expected total in excess of 5,000 bills have been introduced. In the coming weeks, therefore, we expect to see a substantial increase in bill-filing activity and, consequently, bills that affect the practice of law. In preparation for the inevitable influx of such bills, TADC President Dan Worthington came to Austin last week to call on leading members of the Senate and House, including Senators Duncan and West, and Representatives Tryon Lewis (R-Odessa), Sarah Davis (R-Houston), and Kenneth Sheets (R-Dallas). TADC is very fortunate to have excellent and longstanding working relationships with these members, and we deeply appreciate their service to the state.

LEGAL NEWS - CASE UPDATES

* Case Summaries prepared by Cody Rees, with Orgain, Bell & Tucker, L.L.P., Beaumont

TORTS

Soon Phat, L.P. v. Alvardo, No. 14-10-00555-CV, No. 14-10-00603-CV, No. 14-11-00033-CV, 2013 Tex. App. LEXIS 395 (Tex. App.—Houston [14th Dist.] Jan. 17, 2013, no pet. h.)

The plaintiffs were apartment complex guests who had their truck towed after parking in a handicap parking space at the apartment complex. After the truck was towed, the plaintiffs retrieved the truck from impound and brought it back to the apartment complex. When the plaintiffs returned to the apartment complex, another tow truck was waiting to tow the plaintiffs' truck again. The plaintiffs alleged that when they went to talk to the tow truck employees, the tow truck employees pepper-sprayed them, hit them with a flashlight, and then sat on them until the police arrived. Charges were brought against one of the plaintiffs for assault based on the employees' statements, witness statements, and evidence that the plaintiff rammed the tow truck with their truck.

The plaintiff charged with assault brought an action for malicious

prosecution, but the court found that the trial court properly disregarded the jury's finding in favor of the plaintiff because the assault case was not terminated in the plaintiff's favor, as the plaintiff ultimately pled guilty to misdemeanor criminal mischief. Because the malicious prosecution case was properly disregarded, the court found that the plaintiffs' claims for assisting and encouraging the malicious prosecution and conspiracy to commit malicious prosecution were properly disregarded. The court further found that the owner of the apartment complex was not vicariously liable for the plaintiffs' claims of assault and false imprisonment against the tow truck employees. Conversely, the court found that the tow truck employees' employer was properly held liable for the tow truck employees' conduct and that there was evidence supporting a finding of malice of the towing employees. **READ THE OPINION IN FULL**

CIVIL PRACTICE

Schuring v. Fosters Mill Vill. Cmty. Ass'n, No. 14-12-00250-CV, 2013 Tex. App. LEXIS 249 (Tex. App.—Houston [14th Dist.] Jan. 15, 2013, no pet. h.)

The trial court denied the appellants' motion to dissolve a permanent injunction that ordered them to comply with their home's deed restrictions. It was the appellants' intention to install a metal roof on their garage and home. Appellee was granted a permanent injunction to prevent the appellants from installing these roofs, as the roofs would violate a covenant requiring the appellee's prior approval before such change can be made. The court reviewed the trial court's decision for an abuse of discretion. The court applied a balancing of the equities test to determine if complying with the injunction would create disproportionate harm of a considerable magnitude to the appellants. The appellants argued that their compliance with the injunction would create disproportionate harm because the appellants would suffer considerable expense, the loss of their home insurance coverage, and the forced sale of their home under the terms of a deed of trust. The court rejected this argument because there was other evidence in the record and presumptions that supported findings to the contrary. Therefore, the court found that the trial court did not abuse its discretion by concluding the harm and expense of installing a compliant roof were so disproportionate to the benefit of enforcing the covenant as to require dissolving the injunction. **READ THE OPINION IN FULL**

Horn v. State Farm Lloyds, No. 12-40410, 2012 U.S. App. LEXIS 26209 (5th Cir. 2012)

The appellant, State Farm Lloyds, entered into a contract with The Mostyn Law Firm that stated that The Mostyn Law Firm would non-suit individual defendants and refrain from suing individual defendants in the future if the State Farm Lloyds agreed that it would not remove any Hurricane Ike cases filed by The Mostyn Law Firm to federal court. After the execution of the contract, the appellees, represented by Mostyn, filed a class action of more than 100,000 Texas residents and property owners against State Farm Lloyds. State Farm Lloyds removed the case to federal court and the district judge remanded the case to state court on the basis that "any Hurricane Ike cases" included class

actions. State Farm Lloyds appealed. On appeal, Mostyn argued that "any Hurricane Ike cases" included all past, present, and future lawsuits filed by Mostyn. State Farm Lloyds responded that the phrase did not include class actions. The court interpreted the phrase "any Hurricane Ike cases" by giving the words their plain, ordinary, and generally accepted meanings and found that the phrase was subject to only one reasonable interpretation; which the court interpreted as encompassing all past, present, and future Hurricane Ike lawsuits filed by Mostyn on behalf of homeowners, individually or as part of a class. Therefore, the court affirmed the finding of the district court. **READ THE OPINION IN FULL**

Factory Mut. Ins. Co. v. Alon USA L.P., No. 11-11080, 2013 U.S. App. LEXIS 1481 (5th Cir. 2013)

The appellant appealed the district court's finding that the fair market value of a destroyed waste treatment plant was the replacement cost adjusted for improvements in value beyond the destroyed plant and depreciation reflecting the remaining useful life of the plant before destruction. The appellant contended that the district court should have calculated the fair market value of the plant by using the cost of the plant's component parts. The court stated that, if there was no market value for the plant, then the replacement cost was the appropriate fair market value. If, however, there was a market value for the plant, then the pricing of the plant's component parts was the appropriate method to measure damages. The court found that the trial court did not commit error in finding that the replacement cost method was the appropriate measure of damages because the evidence showed that no market for the plant existed.

The appellant also challenged one of the appellee's experts. The expert's testimony regarded the plant's estimated depreciation. The expert calculated the depreciation by talking to the plant's employees and explaining how depreciation is calculated. The court found that the trial court did not abuse its discretion in allowing the expert to testify because the trial court was in the best position to evaluate whether the expert properly relied on the figures given to him by the plant's employees. Finally, the court found that the trial court applied an appropriate multiplier for calculating replacement costs, as the multiplier was within the range recommended by all witnesses and the multiplier was consistent with the plant's past experiences. **READ THE OPINION IN FULL**

EVIDENCE

Natural Gas Pipeline Co. of Am. v. Justiss, No. 10-0451, 2012 Tex. LEXIS 1054 (Tex. 2012)

The appellant homeowners claimed that odor and noise emanating from the appellee's compressor station caused a permanent nuisance. The appellee claimed that the appellants' claims were barred as a matter of law under the applicable two year statute of limitations. The court noted that the jury could have found that the nuisance began up to four years before the suit was filed, a couple of months before the suit was filed, or not at

all. The jury found that the nuisance began a couple of months before the suit was filed, and the court held that there was sufficient evidence to support the jury's finding.

The court then found that a property owner's testimony regarding the market value of the property owner's property (i.e., the Property Owner Rule) is subject to Texas Rule of Evidence 701. Moreover, the court found that the property valuations may not be based solely on the property owner's ipse dixit; the property owner must provide the factual basis on which the property owner's opinion rests. The court then found that none of the testimony of the landowners provided evidence of diminished market values. Each landowner testified that the market value of his or her property was diminished in value without explaining how the landowners arrived at their conclusions. The court concluded that the landowners' bare conclusions provided no evidence of the damage caused by the nuisance and reversed and remanded the case for a new trial. **READ THE OPINION IN FULL**

ENVIRONMENTAL

Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., No. 12-30136, 2013 Tex. App. LEXIS 545 (5th Cir. 2013).

A citizens' suit was brought by the Center for Biological Diversity, Inc. alleging various violations of the Clean Water Act ("CWA"), Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and Emergency Planning and Community Right-to-Know Act ("EPCRA") as a result of the oil spill from the Macondo well ("the well") in the Gulf of Mexico stemming from the DEEPWATER HORIZON explosion. The court found that the district court properly took judicial notice of the date on which the well was effectively killed and no longer releasing oil based on the evidence contained in the record. The court further found that the district court properly concluded that (1) the citizens' claims requesting injunctive relief preventing the defendant drilling companies from violating CWA, CERCLA, and EPCRA were moot because the well had been effectively killed and there was no realistic prospect that future damages would occur; (2) the citizens abandoned their claims for civil penalties in order to obtain a final judgment on appeal, and those claims do not prevent a finding that the adjudicated claims were moot; and (3) the defendants properly notified the National Response Center of the release of hazardous materials under CERCLA.

The court did, however, find that the dismissal of the citizens' reporting claims under EPCRA was error. Under EPCRA, the defendants were required to provide written emergency follow-up notice of the release of hazardous substances after initial oral notice. Because the defendants had never complied with EPCRA's reporting requirement for written notice, the court found that the defendants were committing a continuing violation of EPCRA's provisions and an order requiring the defendants to comply with EPCRA's reporting provisions for the release could redress the citizens' claimed injuries. As a result, the court remanded the EPCRA reporting issue to the district court and affirmed all other findings of the trial court. **READ THE OPINION IN FULL**

COMMERICIAL LITIGATION

Smith v. Santander Consumer USA, Inc., No. 12-50007, 2012 U.S. App. LEXIS 26412 (5th Cir. 2012)

The jury found that the defendant consumer finance company negligently failed to comply with the law by failing to promptly investigate the plaintiff's credit dispute with the defendant and to correct the information the defendant misreported to the credit agency. The defendant did not dispute its liability, but disputed the amount of damages awarded to the plaintiff. The court found that the reduction in available credit to the plaintiff, standing alone, did not furnish a valid basis for actual damages, as that abstraction did not injure the plaintiff's pocketbook. However, the court affirmed the judgment of the district court because the plaintiff also testified that his decreased credit line affected his business performance and eligibility for bonuses, he suffered an increased interest rate when he refinanced his home mortgage because of his erroneous credit rating, he was forced to defer personal expenditures as a precautionary measure, and he suffered compensable mental pain and anguish, embarrassment, and difficult professional and family relations. The court found that this evidence was sufficient for reasonable and fair-minded people in the exercise of impartial judgment to support the award. Finally, the court held that the admission of letters reflecting the impact of the erroneous credit score and the plaintiff's dispute with the credit reporting agency was harmless error, if error at all. **READ THE OPINION IN FULL**

WORKERS' COMPENSATION

Univ. of Tex. Sys. v. Ochoa, No. 03-11-00596-CV, 2012 Tex. App. LEXIS 10640 (Tex. App.—Austin Dec. 21, 2012, no pet. h.)

The plaintiff filed a motion for attorneys' fees after the defendant, a self-insured state institution, sought judicial review of a decision of the Texas Department of Insurance, Worker's Compensation Division. In response to the motion, the defendant filed a plea to the jurisdiction, claiming that the plaintiff's claims for attorneys' fees were barred by sovereign immunity. The court found that nothing in the Labor Code governing worker's compensation coverage clearly and unambiguously waived sovereign immunity for attorneys' fees claims against agencies of the State. The court further found that the defendant's election to initiate the suit had no effect on its sovereign immunity from claims for attorneys' fees. Therefore, the court found that the defendant was entitled to sovereign immunity and dismissed the plaintiff's claims for lack of subject matter jurisdiction. **READ THE OPINION IN FULL**

ADR

Frontera Generation Ltd. P'ship v. Mission Pipeline Co., No. 13-12-

00265-CV, No. 13-12-00321-CV, 2012 Tex. App. LEXIS 10744 (Tex. App.—Corpus Christ Dec. 18, 2012, orig. proceeding)

The appellant and the appellee entered into an agreement for the appellant to acquire, construct, and operate a series of pipelines and related equipment to transport natural gas to the appellant's facility. After several disagreements, the appellant sent the appellee a demand for payment and notice of foreclosure sale for the appellee's assets. The trial court issued the appellee a temporary injunction pending arbitration. The appellant appealed the decision of the trial court entering the temporary injunction pending arbitration and filed a petition for writ of mandamus seeking to set aside the temporary injunction. The court found that the trial court may enter an order for injunctive relief to preserve the status quo pending arbitration under the Federal Arbitration Act. The court further found that the trial court could have reasonably concluded that the appellee faced probable, imminent, and irreparable injury in the absence of a temporary injunction because the appellee faced the potential loss of property rights. With regard to the writ of mandamus, the court rejected the appellant's argument that the temporary injunction effectively compelled arbitration, as the appellant had not asked the trial court to determine if the dispute was arbitrable. Further, the court found that the appellant was not entitled to a temporary injunction because the appellant did not carry its burden of showing it lacked an adequate remedy by appeal, as the appellee's system had been inoperable for an extended period of time and all the damages appellant asserted appellant would suffer if the issue was reviewed by appeal rather than mandamus were speculative and conclusory. Therefore, the court affirmed the injunction issued by the trial court and denied the petition for writ of mandamus. **READ THE OPINION IN FULL**