



Alton C. Todd Represented In Prestigious Lawyer List

Alton C. Todd was named one of the "Top 100 Texas Super Lawyers" in a recent survey conducted by *Texas Monthly*. The Super Lawyers were selected from responses to 65,000 ballots and further review and ranking by a Blue Ribbon panel. The list was limited to no more than 5 percent of practicing lawyers in the state.

PHYSICIANS STILL WAITING FOR LOWER INSURANCE RATES

Although Proposition 12 was approved last September in favor and through the support of Texas physicians, most of the state's doctors have not realized a reduction in medical malpractice insurance costs.

Two months after voters narrowly approved a constitutional amendment to impose caps on non-economic damages, a physician-owned insurer that covers about one-third of the state's doctors requested rate hikes of 35.2 percent for doctors and 67.9 percent for hospitals and other institutional health care providers.

Medical and insurance supporters said that caps on damages, such as pain and suffering, would cut down on lawsuits, but early signs are not encouraging.

Other states with caps on damage awards have had similar results. After caps

(Continued on Page 3)

HMO Patients' Rights At Stake

State Liability Laws vs. ERISA At Issue In Supreme Court Case

When the U.S. Supreme Court renders its decision in the case now before it on whether subscribers can sue their managed care plans, the result will have great implications for the HMO industry and, more importantly, for patients and future patients throughout the country.

Essentially, the issue being argued, a lingering and controversial aspect of the Patients' Bill of Rights, is the preemptive power of ERISA (Employee Retirement Income Security Act) over state liability laws that authorize patient suits against HMOs.

Specifically, the case of *Aetna Health Inc. v. Davila* and *CIGNA Healthcare of Texas Inc.* is a test of the Texas Health Care Liability Act, the first state law to give patients the right to sue HMOs for denying appropriate medical treatment. It is a consolidation of two cases which came from the 2002 decision by the U.S. Court of Appeals for the Fifth Circuit in *Roark v. Humana Inc.* The court ruled, relying on the Supreme's Court 2000 decision in *Pegram v. Herdrich*, that the HMOs (CIGNA and Aetna), insurers of the patients who sued, were not acting as plan fiduciaries when they denied medical treatment and thus ERISA did not preempt the Texas health care liability law.

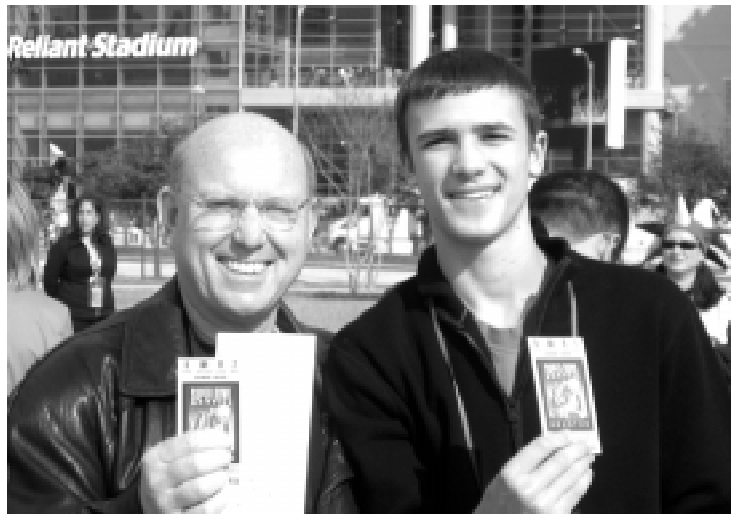
Lawyers for CIGNA and Aetna want that decision reversed. They (and the Bush

administration) argue that the Texas claims fall exclusively under the jurisdiction of ERISA and that HMO participants should be allowed to sue only in federal courts. They contend that *medical* decisions made by HMOs are *benefit* decisions and thus governed by ERISA.

ERISA protects employers by assuring "predictable standards" in federal courts, limits recoveries to the value of denied insurance benefits and does not consider injuries suffered as a result of delayed or denied care, which can include death or permanent disability. It encourages resolution of benefit claims through "administrative remedies" rather than litigation. The unfairness of this law was a major factor provoking bipartisan congressional support for a Patients' Bill of Rights that has been gridlocked in Congress.

The Texas Health Care Liability Act was passed in 1997 when President Bush was governor. The Act was publicized during his campaign as a mechanism permitting Texas consumers to sue their HMOs for money damages for injuries. When the Patients' Bill of Rights was an important campaign issue in 2000, Bush proudly proclaimed, "If I'm the president...people will be able to take their HMO insurance company to court." Now he has completely reversed his position in alignment with big campaign contributors from the HMO industry and the argument that that same Texas statute is invalid, preempted by federal law.

Today there are at least ten states that clearly authorize patients' suits against HMOs. Several others provide more limited rights. The Supreme Court's decision, expected before its June recess, will have a profound impact on patients' rights. If the Court validates states' rights, it will be a significant victory for health care consumers, allowing recourse for negligent claims against HMOs and access to equitable remedy. A ruling in favor of federal jurisdiction, rendering the ERISA preemption to be absolute, would essentially nullify state health care liability laws, leaving HMOs free to make unregulated medical decisions.



Two very happy spectators at Super Bowl 2004, Alton Todd and Son, Seth.

Resourceful Client Aids Recovery From Damage Dealt By Drunk Driver

Darell Rodgers of Friendswood, a young software developer presently completing requirements toward his bachelor of science degree in Management Information Systems at UH-Clear Lake and client of Alton C. Todd, is the husband of Katie, father of 8-month old Dakota and president of Rodgers Enterprises Inc.

The active life of the enterprising young leader came to a sudden standstill one night in February two years ago when the motorcycle he was riding was struck by a drunk driver. Darell landed in a ditch and was life-flighted to Herman Hospital. Except for a contusion to his lungs, he appeared to have survived the accident in remarkably good condition until physicians removed his boots. For eight days thereafter there would be daily surgery to remove bone fragments from the mangled pile of flesh and bones that was his dead right foot. To get blood supply to the foot, surgeons needed to revalve his severed arteries and repair the nerve damage. After removing the tiny shards of bones, they cut a muscle out of Darell's stomach and sliced about a foot of skin from his upper thigh in order to secure the muscle tissue applied to the ankle.

Pins were drilled through his foot and leg to enable the placement of an external fixator to hold his bones in place, and Darell went home. A few days later he was back in the hospital for emergency surgery. The dirt and contaminated water in the ditch where he landed had infected his bones. With a mainline heart catheter, he went home again to a daily diet of tough antibiotics. Often nauseated and weak, he tried to work despite the large dosages of medication and throbbing pain in his foot.

Not to be stopped from essential physical therapy even though it was hard to keep his appointments, Darell applied his development skills to the creation of a physical therapy device likened to a steering wheel with

cords attached to a platform where the foot is affixed. This, he could use at home to help his ankle regain its range of motion. He describes its operation as the "puppet theory." Whenever the cords are pulled, the ankle will move.

Determination clearly ruled the day when Darell actually walked into the doctor's office for his next appointment. His doctor stared at him in disbelief.

While Darell awaits his trial scheduled for this fall, he also follows the bio-mechanical testing, with-patent-pending, of his invention. He hopes that the device will bring hope to other physical therapy patients.

Darell won't be riding his motorcycle again. He has had 14 surgeries and continues to suffer pain in his foot. The progress he's made is due in no small part to the positive attitude that he's maintained throughout his ordeal. That baby boy will soon be walking and Darell will be right there with him. His unplanned detour, so carelessly dealt at the hands of a drunk driver, may have broken his bones but never his spirit.

(Darell's story touches a special place in our hearts. In 2000, Mrs. Alton Todd (Nari) spent most of the year "caged," wearing an external fixator like Darell's, following a ski accident that severely fractured her leg. Here, too, the patient's own strong will hastened her healing.)

Court Watch Review

TEXAS SUPREME COURT PROTECTS INSURERS, CORPORATE DEFENDANTS

The 7th annual study of Texas Supreme Court decisions by Court Watch, a consumer research group that monitors the judiciary, revealed that the state's highest court is dispensing unequal justice.

Aligning itself more strongly than ever with insurance and corporate defendants, the court ruled against consumer, employee and patient plaintiffs in 79 percent of the 82 cases decided in the 2002-2003 term. Court Watch reviewed all 82 of the high court's cases during this period.

Two of the more moderate conservatives on the court, Justices Deborah Hankinson and Craig Enoch, resigned their positions during the 2002-2003 term. Both had established records of responsible decision making.

The numerical breakdown of the decision making on this court tells only "half of the story," according to Dan Lambe, Executive Director of the Texas Watch Foundation. "The grimmest part is when you look at how result-oriented decisions have further unraveled consumer legal rights and eliminated avenues to justice for Texans with legitimate legal claims."

UNJUST MEDICAL MALPRACTICE BILL NARROWLY REJECTED IN SENATE

The late-February defeat in the Senate of its grossly misnamed "Healthy Mothers and Healthy Babies Access to Care Act of 2003" was a close call with a 48-45 vote but a victory nevertheless for expectant mothers, injured children and female victims of medical malpractice.

S. 2061 blatantly discriminated against women by capping non-economic damages at \$250,000 for medical malpractice cases relating to obstetrical and/or gynecological goods and services, which, by definition, are provided only to women. Under this bill, male and female victims of medical negligence would have received widely different treatment in determination of damage awards.

Instead of reducing the costs of medical negligence, S. 2061 would have shifted the costs onto the families of injured children, voluntary organizations and taxpayers.

There appears to be no relationship between the AMA's designation of a "malpractice crisis" in a state and the availability of obstetrical care. Oregon and Washington, which the AMA describes as "crisis states," are #1 and #3 in having the *smallest percentage of children with low birthweights*. Louisiana, a state considered "currently OK"

is #49 in that category.

Had S. 2061 passed, defendants and insurance companies would have been allowed to pay damages in installments, stringing out payments over the life expectancy of the victim. Defendants could have invested and earned interest on the vast majority of a plaintiff's damage award, leaving victims to cope with unexpected needs and changing medical costs.

The AMA supported the bill as "a step toward medical liability reform," which the association has named its top legislative priority for 2004.

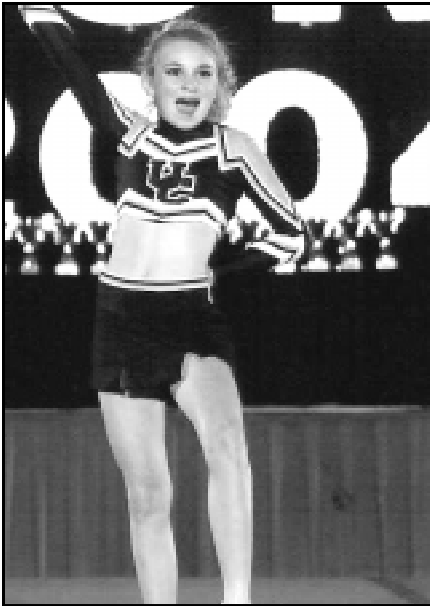
Forty-eight senators had the wisdom and foresight to recognize the unhealthy implications and discriminatory nature of a bill which covered only obstetrical services. As expected, Texas Senators John Cornyn and Kay Bailey Hutchinson were not among that number and voted for S. 2061.

THE ALTLAW™

The AltLaw is published as an informative service to clients and potential clients. Information in this newsletter is not a substitute for legal counsel. For legal counsel and free consultation, please call:

THE LAW FIRM OF ALTON C. TODD
312 S. Friendswood Drive
Friendswood, Texas 77546
Toll Free: (888) 388-TODD (8633)
Alvin-Houston: (281) 992-TODD (8633)
Facsimile: (281) 648-TODD (8633)
<http://www.altontodd.com>

ALT-RUIISM
If it is to be, it's up to me.



Kamilah Todd cheers for Lil Air Force One. Her team took 2nd place in its first year of participating in UCA (Universal Cheerleaders Association) annual competition for national championships held at Walt Disney Resort, Orlando, FL on March 12-14. Kamilah and family spent the week of spring break at Disney World and at Universal Studios and Islands of Adventure in Orlando.

Disney SHARKS



L-R: Caleb Pinson, nephew of Alton Todd; Alton Todd; daughter Kamilah Todd; her friend Abbey Griffon and Seth Park.

FRIENDSWOOD CHAMBER HONORS ALTON C. TODD

Alton C. Todd was one of several individuals recently recognized for long-term commitment to the Friendswood Chamber of Commerce.

At the Chamber's 40th annual banquet held in January at the San Luis Hotel in Galveston, Todd was recognized for his consistent efforts over the past seven years in contributing to the strength of Friendswood's economic structure.

Texas Twins



Presley and Avery Evans celebrated their first birthday on February 19 in Friendswood. They are the daughters of Chris and Jennifer Todd Evans and granddaughters of Alton and Nari Todd.

Arbitrary Statutes, Costly Litigation Are Effects Of Product Liability Law

With the passage of the new product liability bill and implementation on September 1, 2003, a 15-year statute of repose also went into effect for product liability claims. The new law not only presumes that a product approved by some government entity is not defective but also specifies a date after which the manufacturer cannot be held accountable for injury.

Although the presumption that a product is not defective may be rebutted by attacking the underlying test data utilized by the government agency to approve the design, as a practical matter, very few lawyers will engage in such costly endeavors. If litigation for the Ford Explorer and Firestone products, which have caused death and devastation across this country were filed today, the presumption would be that the products were safe. Under the auspices of the FDA, the Aircor surgical ventilator which resulted in oxygen deprivation and brain and lung damage would also be presumed safe. Children's highly

flammable pajamas would be judged "safe" because the manufacturer complied with standards of the federal Flammable Fabrics Act. Because of the costs to defeat these presumptions, they probably would all escape complete liability, at least in Texas!

The statute of repose, which in Texas terminates a manufacturer's liability for defective products after 15 years, gives a person injured just after the cut-off date no legal recourse.

Statutes of repose also encourage corporations to hide product defects when discovered near the end of the liability period. They disproportionately affect low-income families who cannot afford to buy new products and may even challenge some of the provisions of our Constitution, most notably the Equal Protection and Due Process clauses: people injured by long-term defective products when distinguished from those hurt through other forms of negligence are effectively denied equal access to the courts and the constitutional right to a jury trial.

PHYSICIANS STILL WAITING

(Continued From Page 1)

were passed in Oklahoma, the Insurance Commissioner approved an 83 percent cumulative three-year rate increase for the state's largest medical malpractice provider.

In Mississippi, home of a contentious medical malpractice "tort reform" battle, Medical Assurance Company notified doctors that it would raise rates by 45 percent regardless of the special session outcome since "tort reform does not provide a magical 'silver bullet' that will immediately affect medical malpractice insurance rates."

In Nevada last year insurers and organized medicine conducted a vicious campaign, including the deliberate closing of trauma centers, to pressure the legislature into enacting severe caps on medical malpractice compensation. Within weeks of the law's enactment, two major insurance companies announced they would not reduce rates.

When have insurers ever lowered rates as a consequence of tort reform? As it becomes increasingly clear, the underwriting practices of the insurance industry, not the legal system, are responsible for gyrations in the cost and availability of insurance.

THE LAW FIRM OF ALTON C. TODD
312 South Friendswood Drive
Friendswood, Texas 77546

RETURN SERVICE REQUESTED

Results Of Congressional Budget Office Research

No Connection Between Tort Limits and Reduced Spending

What happens to medical malpractice insurance rates after tort restrictions are enacted?

Nothing, according to Americans for Insurance Reform, the Center for Justice and Democracy, the American Insurance Association and even the Congressional Budget Office. Addressing the effects of restrictions on the medical malpractice system, a CBO report focused on two important issues: **economic efficiency** (providing the maximum possible net benefit to society) and **equity** (distributing the benefits and costs fairly).

Briefs of these CBO summaries derived from the same government that wanted and won caps on non-economic damages contain judgments that are nothing short of amazing in failing to link tort limits and medical malpractice awards.

The following conclusions were based not only on existing studies but on CBO's own research:

- Even large savings in premiums [a reduction of as much as 25 percent to 30 percent] can have only a small direct impact on health care spending [0.4 percent to 0.5 percent] because **malpractice costs account for less than 2 percent of that spending.**

- Premiums can be a source of inefficiency themselves. Amounts for malpractice coverage generally **neglect differences in quality of physician services** and may be **too high for the large majority and too low for the less careful and competent minority.**

- Insurance companies' investment yields have been lower for the past few years putting pressure on premiums to make up the difference.

CBO considered the tort restrictions argument that limiting malpractice liability would result in much greater savings in health care costs through reductions in the practice of "defensive medicine" and concluded that the practice of **unnecessary medical procedures "may be motivated less by liability concerns than by the income it generates for physicians" and, to a lesser extent, benefits to patients.**

Looking for a link between restrictions on tort liability and availability of physicians' services, investigators went to five states with reported problems. While instances of reduced access to emergency surgery and newborn delivery were confirmed in scattered, often rural areas where there were additional long-standing contributing factors, many reported reductions in supply by health care providers could not be substantiated or "did not widely affect access to health care."

The overall conclusion of the CBO summaries was that restrictions on malpractice liability, by themselves, modify the distribution of gains and losses to individuals and groups but do not create benefits or costs for society as a whole. **"The evidence to date does not make a strong case that restricting malpractice liability would have a significant effect, either positive or negative, on economic efficiency."**



The Griswolds get drenched at Epcot Center. Seth is at left beside his grandmother Diane Podnar and her other grandson Caleb Pinson, then Nari and Alton Todd.

CLOSING STATEMENT

*We value your trust and your referral.
Thank you for the opportunity to represent
your interest and for recommending
THE LAW FIRM OF ALTON C. TODD.*