



# FOR THE DEFENSE

October 2017

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 2:27

## Greetings from Doug Fletcher



Well, October has arrived and believe it or not the temperature has begun to fall slightly. Fall is in full swing and the great State Fair of Texas is now open. I am sure that many our Dallas clients have attended and eaten a famous Fletcher's (no relation) Corny Dog or two. This month also brings our Chicago Texas Law Update and we look forward to seeing all of our friends in the Chicago area. While the seasons change, one thing remains constant: our firm continues to appreciate all of the opportunities to work with our fine clients.

## Using the Texas Theft Liability Act as a Sword

### Lorin Subar



**True Story No. 1** - Plaintiffs hire a contractor to build their house. Plaintiffs sue their contractor under multiple causes of action (some good and some bad). In order to really intimidate the contractor, they include a claim under Chapter 134 of the Texas Civil Practice and Remedies Act - the Texas Theft Liability Act ("TTLA"). After 2 weeks of arbitration, the arbitrator rules against the plaintiffs on their TTLA claim and awards the contractor its attorney's fees of \$40,000.

**True Story No. 2** - Plaintiff filed suit for breach of a contract worth \$5,000, included a claim under the TTLA, incurring \$7,500 in attorney's fees. Defendant incurred \$15,000 in defense costs. By including the TTLA claim, the plaintiff, who had a very good breach of contract claim but could not prove a theft, was forced to dismiss his entire lawsuit in settlement to avoid having to pay defense costs.

Many plaintiff's attorneys, believing that including a claim under the TTLA will increase the value of their case by injecting the idea of a crime, include the claim in their pleadings in hopes of

### In This Issue

[Featured Article](#)

[Conflicts Resolved](#)

[Congrats!](#)

[Register Now!](#)

[Honoring 25 Years](#)

Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

Contact:

Doug Fletcher  
Firm Managing Partner  
214-987-9600  
[doug.fletcher@fletcherfarley.com](mailto:doug.fletcher@fletcherfarley.com)

Joanna Salinas  
Austin Office Managing Partner  
512-476-5300  
[joanna.salinas@fletcherfarley.com](mailto:joanna.salinas@fletcherfarley.com)

**Register Now for the  
Texas Law Update in  
Chicago!**



increasing their damage award by recovering attorney's fees. What they do not understand is (a) the TTLA is a "loser pays" statute, and (b) once the defendant invokes the "loser pays" provision by a counterclaim, the claim is almost impossible to dismiss.

The TTLA itself creates a civil cause of action for a theft recognized as a crime under the Texas Penal Code. Tex. Civ. Prac. & Rem. Code Ann. § 134.002. Recovery under the TTLA includes actual damages, additional damages up to \$1,000, and "court costs and reasonable and necessary attorney's fees." Tex. Civ. Prac. & Rem. Code Ann. § 134.005.

The most important part of the TTLA is this last portion, allowing for recovery of attorney's fees and costs, as the Act provides that "each person who prevails in a suit" under the TTLA is entitled to recover their attorney's fees and costs. Therefore, if a defendant mounts a successful defense under the TTLA, they are entitled to recover their fees and costs. Moreover, as in the Story 2 above, even if the plaintiff otherwise prevails on every other claim, if the plaintiff does not prevail on the TTLA claim, the plaintiff is still responsible for the payment of the defendant's attorney's fees and costs.

Cases addressing the TTLA have focused on three important aspects of the application of the TTLA. First, the language of the Act says that the party who prevails "shall be awarded" their fees and costs. The courts have made very clear that "shall" is nondiscretionary; the court must award the fees and costs. The only caveat is that the defendant cannot recover under the Act unless the recovery is requested by counterclaim. As there is no penalty for a defendant pleading for recovery under the TTLA, there is no reason to ever not include a counterclaim for fees and costs.

The second issue, and one misunderstood by most plaintiff's attorneys, is that once a counterclaim for fees and costs is filed by the defendant, the plaintiff is stuck with potential liability under the TTLA. Texas courts have found that once the counterclaim has been made, the court will treat the defendant as the "prevailing party" on the claim, even if the claim is disposed of by a voluntary dismissal *with* prejudice. The real-world application is exemplified again by Story No. 2 above. The plaintiff realized he had made an error by including the TTLA claim as it was meritless; however once made, he became liable for the defendant's attorney's fees and costs expended in defending the claim, even though the defendant's costs eventually exceeded the value of the plaintiff's entire lawsuit, and even though the plaintiff very much desired dismissing that claim.

Third and finally, the TTLA provides that the amount of fees and costs recovered have to be those related to the TTLA claim itself. For example, in Story 1 above, the total amount of defense costs were well over \$100,000; however the reasonable amount of the defense attorney's time spent defending the TTLA claim were only a fraction of that time as reflected by the award of only \$40,000. The defendant is generally charged with segregating their fees to reflect the work done in defending the TTLA claim. That said, the courts have provided that if segregation of fees is impossible because the defense of the TTLA is "inextricably intertwined" with the defense of other claims, the fees and costs, up to the full amount, may be recoverable under the Act.

As noted above, there is no penalty for making an affirmative claim for attorney's fees and costs under the TTLA whenever the claim is made. In the end, unless there is some real basis for the claim, it can be used very effectively to reduce any recovery,

**REGISTER NOW!**  
**Chicago, October 20th**

Please join us for our annual Texas Law Update at the Swissotel Chicago.

For more information and to register for this event, please [click here](#).

Join Our Mailing List!

**Honoring 25 Years  
with 25 Acts of  
Kindness**

**Fletcher Farley  
Sponsored VCC Cares  
Charity Golf Classic**

The 3rd annual VCC Cares Charity Golf Classic was held on October 2nd at The Lakes at Castle Hills in Dallas, TX.

This event is a fundraiser for local and national charities. To read more about VCC Cares and this event, please [click here](#).

by judgment or settlement.

## Conflicts Resolved

### **Fletcher Farley Obtains Defense Verdict in Motor Vehicle Collision Case where Plaintiff Sought Nearly \$1million from Jury**

Partner [Paul Bennett](#) and Senior Associate [Alex Bell](#) recently obtained a defense verdict on a motor vehicle accident case after a two day jury trial in Dallas County District Court. The case was essentially a swearing match between the Plaintiff and Defendant about who hit whom on Central Expressway in Dallas, Texas. The Plaintiff claimed serious injuries to his back from the accident and even had a lumbar fusion surgery. At trial, his lawyers asked the jury for nearly \$1million in damages. The jury of 10 women and 2 men found that the Defendant was not negligent and did not reach any damages questions. The Court is expected to enter a take-nothing judgment.

### **Fletcher Farley Obtains Summary Judgment**

A Federal District Judge in the Northern District of Texas, Fort Worth Division, granted a summary judgment in a lawsuit arising from a slip-and-fall incident that occurred in a national retail store. The Plaintiff alleged that she slipped on spilled dog shampoo while looking at dog clothing. She believed a child opened the bottle and spread the shampoo throughout the aisle before placing the bottle back on a shelf. The Plaintiff allegedly sustained severe neck, back, and shoulder injuries that required extensive medical treatment and caused her to experience significant impairment. The Plaintiff received over \$80,000.00 in medical treatment, including physical therapy, epidural steroid injections, medial branch blocks, and nerve root blocks.

Attorneys [Fred Arias](#), [Lorin Subar](#), and [DJ Hardy](#) secured effective testimony from the Plaintiff to support the motion. The Plaintiff testified that she never saw the dog shampoo, even after she fell. She also testified that the dog shampoo was smooth and did not contain any streaks or dirt. Additionally, Plaintiff testified that even if she had been looking down she would not have seen the dog shampoo. The Court ruled that Plaintiff did not produce any evidence to show that the store knew or should have known of the shampoo on the floor

## Congratulations

### **Mike Shipman Elected as Dallas Area Vice President of TADC**

We're proud to announce that [Mike Shipman](#) was elected as Dallas Area Vice President of the Texas Association of Defense Counsel (TADC). Mike previously served in other capacities on the Board of Directors, the most recently as District #5 Director.



The TADC is a professional organization of civil trial attorneys dedicated to promoting excellence in its members, advocating fairness in our judicial system, and preserving the right to jury trial for all citizens. To read more, please [click here](#).

### **Paul Bennett Named Senior Fellow of Litigation Counsel of America**

We're proud to announce that [Paul Bennett](#) has been named a Senior Fellow of the Litigation Counsel of America (LCA).



The LCA is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. To learn more about this award, please [click here](#).



Dwanna Gassaway  
Fletcher Farley Shipman & Salinas LLP  
214-987-9600