
Storm of Litigation Brews Over Open-Beach Exemption

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[Daryl Bailey](#), a Member of Gray Reed & McGraw, published "[Storm of Litigation Brews Over Open-Beach Exemption](#)" in the June 27, 2009 issue of the Houston Chronicle.

Daryl represents plaintiffs and defendants in trials, appeals, mediation and arbitration. As a trial lawyer, Daryl has successfully obtained favorable judgments for his clients through jury verdicts and bench trials. As a counselor, Daryl has been instrumental in assisting clients in resolving their disputes through mediation-formal and informal. Daryl's practice in commercial, business and general civil litigation includes real estate, construction and employment litigation. He is particularly accomplished in disputes related to real estate and claims against title insurance companies and their insureds. Through a wide variety of representations of clients, Daryl has gained substantial experience in cases involving multiple parties, contracts, fraud, business torts, DTPA, UCC, trade secrets, employer/employee contracts (including non-competes), sexual harassment and other discrimination claims, landlord/tenant, and lien filings, contractors and subcontractors rights and eminent domain / condemnation. Daryl's appellate practice includes a case he argued before the Texas Supreme Court which the Texas Lawyer ranked as one of the top 50 cases that had a significant impact on Texas law.

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By Daryl Bailey

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As the first storm of the 2009 hurricane season – Hurricane Andres – heads out to sea after skirting the Mexican coastline, it is a stark reminder of the devastation left by Hurricane Ike. But one hurricane-related storm that is currently forming did not originate from the trade winds of far distant seas.

Rather, it originated in the tempest known as the 2009 Texas legislative session, where certain political maneuvers spawned a perfect legal storm that will require those affected to "hunker down" – as Harris County Judge Ed Emmett advised last September. This storm will make landfall in the courtrooms across the Gulf Coast, but its surge has already begun.

On one side of the eye is the right to public beaches – created by Ike's fury. On the dirty side – some might say – are the rights of a few owners of private property who are trying to assert a new exemption from the 50-year-old Texas Open Beaches Act (TOBA).

The purpose of TOBA is to guarantee the public's right to free and unrestricted access to public beaches in Texas. For example, TOBA makes it illegal for beachfront owners to construct or maintain improvement on one's land that interferes with the free and unrestricted public access and use of public beaches. In 1991, TOBA was amended to allow the commissioner of the General Land Office to create rules and guidelines to assist local governments with increased beachfront development.

Importantly, TOBA also states that the public beach is seaward of the natural vegetation line and nothing can be constructed thereon.

Although many believe the 2009 Texas Legislature was somewhat inactive, a small bit of activity in the latter days of the session may result in a storm of litigation. In the closing days of the session, state Rep. Wayne Christian, R-Center, helped pass a highly specific provision creating a special exemption from the TOBA for at least a dozen property owners on Bolivar Peninsula. Hurricane Ike's surge dramatically altered the tidal and vegetation line, and according to the TOBA created a public beach where some houses once stood.

Interestingly, Christian's district in the piney woods of East Texas is notably absent of beaches, but he does own beach property on Bolivar Peninsula – and the provision he helped pass (using a legislative maneuver some have questioned) could prevent his property, and his neighbors, from becoming a public beach under TOBA.

Under the law to take effect in September 2009, the beach houses now in question can be reconstructed on the public beach created by Ike, thereby frustrating TOBA's 50-year old purpose of ensuring public access and use of Texas public beaches.

Because of the powers granted to the commissioner of the General Land Office, current Commissioner Jerry Patterson has vowed to ensure the public access and use of the beach, which technically is anything seaward of the natural vegetation line on Bolivar Peninsula. So on one side of the brewing squall line are the owners of beach property (who purchased with full knowledge of the risk that someday it could become public beach), against the interest of the state in enforcing a clear and long-standing statutory law. The argument against the state will likely be couched in terms of the state exercising its eminent domain authority and re-establishing a tax base for the community.

However, the exercise of such authority by the state is a far cry from when it is exercised to make way for development. In fact, it is the opposite, to prevent development of public areas that exist because of an act of God, not an act of the state.



Because Christian's provision is vague and ambiguous, Gov. Rick Perry has speculated that the storm surge of litigation is beginning to swell and the aftermath remains to be seen.

All of this because the rule of law is being challenged by one (Wayne) Christian's view of an act of God.

Bailey is a real estate trial lawyer at Gray Reed & McGraw's Houston office.