



Blowing the Whistle on Legal Gamesmanship

House Bill 969 and Senate Bill 735

by Kathleen Hunker, Policy Analyst

Civil trials can often become arenas for gamesmanship, where attorneys attempt to secure victory through procedural tricks that drive up the cost of litigation rather than through a fair assessment of facts and law. Over the last decade, the Texas Legislature has sought to put a stop to these shenanigans, but despite multiple rounds of reform, there still remain several holdovers that encourage plaintiffs to file intrusive and unproductive motions.

Senate Bill 735 and House Bill 969 seek to eliminate one of the worst of these provisions, in particular the combination of statute and case law that enable trial attorneys to submit invasive discovery requests whenever they claim their clients are entitled to exemplary damages (also colloquially referred to as “punitive damages”).

As a general matter, state law deems any evidence concerning a party’s wealth as “irrelevant and prejudicial” and therefore “almost always inadmissible at trial.” Defendants have the right to have their conduct judged in a prejudice-free atmosphere. Knowledge of their finances could tempt the jury to decide cases based on the depth of the defendants’ pockets instead of the depth of their culpability.

The state, however, does make an exception in disputes involving exemplary damages. Acting under a now obsolete rationale, Section 41.011(a)(6) of the Civil Practice and Remedies Code explicitly requires the trier of fact to consider the defendant’s net worth when determining the amount of exemplary damages. In addition, the Texas Supreme Court has since expanded the admissibility of a defendant’s net worth in *Lunsford v. Morris*, ruling that the plaintiff could submit discovery inquiries pre-trial and present the evidence anytime in the proceeding.

Taken together, trial attorneys are granted an almost unfettered right to investigate a defendant’s net worth. The Texas Supreme Court has held, “[a]bsent a privilege or specifically enumerated exemption, our rules permit discovery of any “relevant” matter.” Thus, whereas many jurisdictions impose an evidentiary threshold, Texas plaintiffs have no obligation to make a prima facie showing of the defendant’s guilt before inquiring into his or her finances. The extent of the discovery is limited only when a trial court in its discretion concludes that the requests involve unnecessary harassment or invasion of privacy. The Texas Supreme Court, however, has not offered lower courts much guidance in what constitutes an improper discovery request. Standards vary throughout Texas’ appellate jurisdictions as a result, and requests often lead to ‘satellite litigation’ whose expense and burden far exceed any potential benefit the documents would add to the proceedings.

All of this could be excused perhaps but for the fact that recent reforms have neutralized the Court’s stated rationale for allowing the discovery. Justice Bill Kilgartin, who authored the majority opinion in *Lunsford*, originally contented that the defendant’s ability to pay was directly related to whether the punishment was harsh enough to discourage a repeat in behavior. Since that time, Texas has imposed a cap on exemplary damages that is adjusted according to the injury the plaintiff suffered rather than the defendant’s bank account. Discovery into a defendant’s net worth now has no bearing on any live question during the proceedings although it continues to force the defendant to publicize sensitive information as well as expend resources to both acquire the data and guard their privacy in the event of overreaching requests. This gives trial attorneys ample opportunity to submit invasive requests in the hopes of having the defendant drain their resources in the ensu-

ing satellite litigation or pressuring them to settle the case in order to prevent the information going public.

With this in mind, Senate Bill 735 and House Bill 969 make two simple changes. First, they strike Section 41.011(a)(6) Civil Practice and Remedies Code, removing the defendant's net worth from the list of factors the jury must consider when determining exemplary damages. Second, they override the precedent set out in *Lunsford*, establishing that a party's wealth is not relevant for either supporting a claim for

exemplary damages or calculating the amount. Instead, those questions will be decided based on the injury suffered and the defendant's culpability. Texas' current rule raises very serious privacy concerns and allows investigations that are at best only tangentially related to the merits of the case. Senate Bill 735 and House Bill 969 merely recognize that the legal environment has changed since that rule's enactment and bring this area of the Civil Practice and Remedies Code back into conformity with state's determination to favor justice over legal gamesmanship. ★

About the Author



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