Tort Reform

Contents

FACTS ABOUT LAWSUIT ABUSE IN TEXAS

- According to the "State Liability Systems Ranking Sudy" by the U.S. Chamber of Commerce, business leaders believe the Texas civil liability system is among the nation's poorest.

- The survey ranks Texas' liability system 46 out of 50 in terms of how fair and reasonable the system is perceived to be by America's business leaders.

- The same survey shows that nearly 80 percent of the respondents indicate the litigation environment of a state could affect decisions such as where to locate or do business.

- According to a study by *Lawyers Weekly*, Texas produced the fourth and eighth largest jury verdicts nationally in 2001.

- According to a public opinion survey released by Central Texans Against Lawsuit Abuse (CTALA) in February 2001, Texans regard class action lawsuits as the least effective way of protecting consumers – falling a distant third to legislation and regulation. The survey found that a majority of Texans are concerned that class actions actually end up benefiting lawyers much more than the households the individuals and groups they claim to represent.

- Nationally, one in every four small businesses has been sued or threatened with a lawsuit in the past five years.

- The National Center for State Courts reports that there were more than 15 million civil lawsuits filed in 1999 – or one lawsuit for every 18 people in the United States. That equates to a lawsuit filed every 2.08 seconds, the equivalent of one lawsuit filed with each blink of the eye.

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OUT-OF-COURT SETTLEMENTS

The Issue:

Enactment of a strengthened "Offer of Settlement Rule" would encourage early and fair settlement offers and reduce the number of cases coming to trial that have little merit or unreasonable damage awards.

Rule 68 of the Federal Rules of Civil Procedure provides for cost shifting when an offer of settlement is refused. Under the Rule, if a defendant makes an offer of settlement that is refused by the plaintiff and the plaintiff, upon trial of the case, gets a result less favorable to it than the defendant's offer, then the plaintiff must pay certain court costs incurred by the defendant. The trouble with Rule 68 is that it does not include attorneys' fees as part of the costs that are shifted to the non-settling plaintiff.

Recommendation:

Texas should adopt an Offer of Settlement Rule modeled on Federal Rule 68, and attorneys' fees should be included in the costs that are shifted. Basically, the rule would work as follows:

> *If the defendant made an offer to the plaintiff within the prescribed time period, and the plaintiff refused the offer and proceeded to trial, and at trial received a judgment less favorable to it than the defendant's offer, then the plaintiff would have to pay attorneys' fees and other costs incurred by the defendant after the date of the defendant's offer.*

This rule would encourage a defendant to make a full and rational assessment of its liability as early as possible after a lawsuit is filed. If it determines that it has liability, then the rule makes it in the defendant's best interest to make an early and full settlement offer to the plaintiff. The law should encourage early and fair settlement offers, and this rule would do more toward that purpose than anything currently in the law.

If the plaintiff rejects the defendant's offer, either because the plaintiff thinks the offer is too low or because the plaintiff wants to hold out for a windfall judgment, then the plaintiff can proceed to trial. But if the jury in effect vindicates the defendant's offer by making an award that is less favorable to the plaintiff than was the defendant's offer, then it is only fair and just that the plaintiff should pay for the costs, including attorneys' fees, incurred by the defendant after the plaintiff rejected its offer. By imposing this risk of cost shifting on the plaintiff, it has an incentive to accept reasonable and fair

offers by the defendant. The rule would go a long way to discouraging the trial of cases in which there is either little merit to the claims or unreasonable demands for damages.

To avoid hardships on plaintiffs, the defendant's recovery for costs and attorneys' fees could not exceed the amount of damages awarded to the plaintiff. Therefore, a plaintiff would not have to pay the defendant's attorneys' fees out of pocket.

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LIABILITY REFORM

The Issue:

Texas' 1995 "proportionate responsibility" law should be amended to allow juries to assess fault to bankrupt parties, unapprehended criminals, and people who have fled or are otherwise outside the jurisdiction of the court

One of the major reforms adopted by the 1995 Legislature concerned joint and several liability (better termed "proportionate liability"). Prior to the 1995 reform, Texas was in the silly and grossly unfair position of sometimes holding a defendant who was found only partially at fault to be fully responsible for paying the plaintiff's damages. Thus, a defendant who was found by the jury to be at fault for, say, 10 percent of the harm to the plaintiff was sometimes required to pay 100 percent of the plaintiff's damages.

After the 1995 reform, a plaintiff who is found to be more than 50 percent at fault for his or her own damages cannot collect anything from any defendant. A defendant who is found to be more than 50 percent at fault may be held accountable for 100 percent of a plaintiff's damages, but a defendant found to be 50 percent or less at fault can be held liable only for its percentage of fault as found by the trier of fact. However, this does not apply in all cases. For example, if a person using a mail kiosk on a shopping center parking lot is accosted by and harmed by a criminal, and that criminal is not apprehended, the harmed person might sue the shopping center owner, the center's management company, the center's security force, and the various tenants in the shopping center, none of whom did the act of harm to the plaintiff.

In the trial of the case, the jury will hear testimony that the criminal is the party wholly or mostly at fault. But when it comes time to assess the blame, the jury is not allowed to assess any fault to the criminal, and must apportion fault only to the named defendants. The criminal is not known, and therefore is not a party to the lawsuit. The jury might well believe that the criminal is 90 percent or even 100 percent liable for the plaintiff's harm, but is given no opportunity to so rule. Therefore, it must apportion fault among the named defendants. This is patently unfair, causing parties whom the jury may think to be truly not at fault or only minimally at fault to be assessed much larger portions of liability. This frustrates jurors because they see the intrinsic irrationality and unfairness in such a system.

Recommendation:

The 1995 proportionate responsibility statute should be amended to allow juries to assess fault to bankrupt parties and unapprehended criminals and other persons who have fled or are otherwise outside the jurisdiction of the court. This would give greater reach to the common-sense notion that a person should not pay damages beyond his or her own proportion of fault for the damages incurred.

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CLASS ACTION LAWSUITS

The Issue:

Class action lawsuits have become one of the most abused aspects of the civil justice system and reform is desperately needed.

Class actions are designed to bring efficiency to civil litigation when there are numerous parties allegedly harmed by a particular product or action. As such, they are an important, necessary, and beneficial mechanism of judicial disposition. Unfortunately, however, class actions have emerged into one of the most abused aspects of our civil justice system. Class action lawyers are vigorous venue shoppers, seeking the friendliest judges before whom to file their claims. They are also lawyers who actively seek out plaintiffs, through television, radio and print advertising as well as "seminars' held throughout the country.

The key to a class action suit is to find a trial judge who will "certify" the class. Once a trial judge rules that a class exists and that the case can proceed as a class action, there is huge pressure on a defendant to settle the case. A defendant who proceeds to trial will face a mountain of legal expenses and puts its very existence at risk.

Therefore, class actions are almost always settled. In fact, it is thought (but impossible to determine for certain) that no class action in Texas has ever proceeded to final trial determination. Often, there are settlements in which the value to each member of the class is measured in tens of dollars, or even cents (or coupons applied to future purchases), but in which the lawyers reap fees of millions or tens of millions of dollars.

Recommendation:

In Texas, there is no statutory right of appeal to the Texas Supreme Court of a trial judge's decision to certify a class. Texas should enact a statute that allows a party an interlocutory appeal (an appeal that takes place during the course of litigation rather than awaiting the end of trial) of a judge's class certification determination. The case should be stayed (halted) pending the outcome of the appeal. Such an appeal would be first to the Court of Appeals, and then to the Supreme Court.

This would allow the Supreme Court over the course of a few years to review a sufficient number of class certifications to develop case law in a way that would produce a clear and coherent guide to all trial judges and Courts of Appeals concerning class certifications. And it would enable defendants who believe that a

class action is not appropriate to get a hearing on this critical issue instead of being forced to settle without ever having appellate review of the determining factor in the case – that is, whether there is a legitimate "class" under the particular circumstances of the case.

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FUTURE DAMAGES

The Issue:

In some instances, defendants are forced pay interest on future monetary damages awarded by juries.

Texas law in this regard should be in "Ripley's Believe It Or Not". Texas statutory law does not explicitly prevent interest from being tacked onto damages incurred by a plaintiff. Fair enough. A defendant should not be encouraged to stonewall or delay, figuring that it can earn more money investing the amount of damages than it would if it paid damages to the plaintiff timely. The problem is that some Texas Courts of Appeals interpret the law as also allowing interest on "future damages." Thus if a jury awards, say, $500,000 for future pain and suffering, Texas law tacks on an interest factor for those *future* damages. This defies all rationality and sense of fair play and must be eliminated. The plaintiff has not lost any "opportunity costs" on future damages, and therefore deserves no interest on them.

Recommendation:

The Legislature should enact a statute prohibiting interest on future damages.

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VENUE

The Issue:

Additional reforms are needed to discourage lawyers from "venue shopping" in multi-plaintiff cases.

Prior to the 1995 tort reforms, a plaintiff's lawyer was practically unlimited in his ability to pick and choose a court anywhere in Texas. After the 1995 venue statute was passed, venue is now largely restricted to a jurisdiction that has a rational nexus to the lawsuit, and venue shopping is less of a problem than it once was. But a clever plaintiff's lawyer combined with a friendly judge can frustrate the venue statute, as was pointed out by members of the Texas Supreme Court in a case styled in *American Home Products vs. Clark* (2000). The best way to solve the tactics of the type described in *American Home Products* is to amend the venue statute to allow defendants in multi-plaintiff cases a right of interlocutory appeal to the court of appeals when the trial court finds that each plaintiff has independently established proper venue and the defendant unsuccessfully challenges that ruling by the trial court.

Recommendation:

Trial courts should be required to make detailed findings with regard to venue determinations in multi-plaintiff cases so that the appellate courts have an adequate record to review on an interlocutory appeal of a venue question.

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PUNITIVE DAMAGES

The Issue:

Punitive damages should be restricted to only those civil cases in which intentional conduct is involved.

If a person is accused of robbing a convenience store, the full weight of constitutional protections assure that the state does not wrongly or arbitrarily punish that person. The person must be clearly told of his rights, including the right to a state-provided attorney if he cannot afford one on his own, must be indicted by a grand jury before he is sent to trial, and then must be proven guilty beyond a reasonable doubt. The state cannot use forced confessions, evidence produced by unreasonable searches and seizures, or hearsay testimony. These are only a few of the protections afforded a defendant in a criminal proceeding before the state can impose a punitive action on that person.

Yet, defendants in civil cases are routinely punished without any of the myriad of constitutional protections afforded an accused thief or murderer. There is a serious philosophical question of whether *punitive* (consider the word) damages have an appropriate place at all in civil cases, considering the disparity of a defendant's rights in criminal and civil proceedings meting out punitive action.

Certainly, punitive damages in civil cases should be restricted to cases in which the defendant intended to do harm to another party. Punitive damages, although awarded to a private person or entity, are really imposed by state action (the judicial process).

Recommendation:

State punishment should be restricted to the most clearly culpable parties, and that is why punitive damages should be awarded only in cases involving intentional conduct.

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NON-USE OF SEATBELTS

The Issue:

Under Texas law, the non-use of a seatbelt is not admissible into evidence in a civil damages trial.

Texas law currently provides that the driver and front-seat passengers must wear a seatbelt. Yet the non-use of a seatbelt is not admissible into evidence in a civil damages trial. Say a front-seat passenger is injured in an automobile accident, and sues the driver of her car, the driver of the other car, and the automobile manufacturer. Each defendant should be able to allege and prove that the plaintiff was partially or wholly at fault for her injuries by her failure to wear a seatbelt. Yet current Texas law prohibits that as a fact issue for determination by the trier of fact.

Recommendation:

The non-use of a seatbelt should be admissible into evidence. This would have a contingent salutary effect of encouraging the use of seatbelts.

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REASONABLE ATTORNEYS' FEES

The Issue:

A 1999 law which establishes a system of checks and balances on state contingency fee contracts with outside attorneys should apply to all governmental entities in Texas.

Texans had to stand by helplessly when former Attorney General Dan Morales made a deal with five of his plaintiffs' lawyer supporters and awarded them $3.3 billion in legal fees for the tobacco settlement, even though any rational analysis of their work and risk would have indicated that their fees should have totaled less than $100 million.

Fortunately, such an outrage cannot occur again by any state of Texas officer acting alone. In 1999, the Legislature passed a statute that regulates a state agency which enters into a contingency fee arrangement with outside lawyers. It has these features: (i) the state agency or the Governor must sign the contingency fee contract, (ii) the Legislative Budget Board must verify the need for a contingent fee contract in advance, (iii) the amount of the contingent fee payable is capped at four times a reasonable hourly rate, which is itself capped at $1,000 per hour, and (iv) the contingency-fee lawyers must keep time and expense records, which are subject to independent verification and public disclosure.

Recommendation:

The 1999 statute should be made applicable to all government entities, including county and city government entities, throughout Texas.

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TORT REFORM PUBLICATIONS & EXPERTS

Other TPPF Tort Reform Publications:

The following publications can be downloaded from the Texas Public Policy Foundation's website at www.tppf.org:

The Growing Asbestos Litigation Crisis in Texas: Immediate Action is Needed
By William O. Faulk
VERITAS, January 2002

Thanks for the Memories: How lawyers get the testimony they want
By Walter Olson, July 1998

Tort Reform: Has Texas Ended Its Lawsuit Lottery?
By B.D. Daniel and Michael D. Weiss, Fall 1995
This paper addresses the Texas tort reform legislation of the last two legislative sessions and if it has lived up to its promises.

The Impact of Joint and Several Liability on Texas Accountants, Business Consultants, and Other Professions: The Need for a Proportionate Liability
By Frank Cross, Winter 1995
This brief presents both empirical data and anecdotal material that makes a strong case for moving to a system of proportionate liability in our state.

The Economic Impact of Punitive Damages in Texas: Carpet-Bombing the State's Prosperity
By J.J. Launie, William P. Jennings and Robert C. Witt, April 1994
This study examines the burden of punitive damages on the Texas economy.

Punitive Damages Haunt Texas Business People; Sampling of Typical Experiences Shows Climate and Concern
By J.J. Launie, William P. Jennings and Robert C. Witt, December 1993
A compilation of statistical analyses of fears and experiences of Texas businessmen relating to punitive damages.

English Tailoring for Texas Suits: How the Loser Pay Rule Could Strengthen Civil Justice
By Gregory E. Maggs & Michael D. Weiss, December 1993

Sue City: The Case Against Contingency Fees
By Walter K. Olsen, July 1993
Discusses why contingency fees create perverse incentives for lawyers while undercompensating harmed individuals.

America's Queen of Torts: The Long Arm of Texas Law
By Micahel D. Weiss, July 1993
An on-the-ground discussion of some of the worst abuses of Texas tort law. Appeared originally in Policy Review.

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