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Revisiting tort reform: Let the waves settle or full speed ahead?

On the heels of major civil litigation changes made during the 1993 and 1995 legislative sessions, those on both sides of the issues are gearing up for even more tort law proposals in the 1997 session. Various proposals are expected, covering issues from restricting out-of-state lawsuits to limiting attorney contingency fees. This report examines many of the proposed issues and lays out some general arguments for and against the various measures.

Is more tort reform needed?

Supporters of new tort reform proposals say Texas has been on the right track toward establishing a level playing field in civil courtrooms. However, even more changes need to be made, they say, in order to restore balance and fairness to the Texas legal system. Advocates of the proposals presented in 1997 will seek to change the Texas legal system by stopping the importation of out-of-state lawsuits, reducing attorney contingency fees and modifying liability laws governing workplaces, landowners and professionals. Tort reform supporters argue that changes are needed to either prevent unnecessary lawsuits from being filed in the first place or facilitate quick settlements and thus avoid unnecessary legal fees. Some tort reform advocates have said that once these changes are enacted, most of the major abuses in Texas courts will have been remedied. Others say that they will continue to press for changes until Texas' legal system becomes a model for the rest of the nation.

Opponents of additional changes argue that, because cases under the 1995 tort law revisions are just being filed, it will be several years before any significant data regarding their effectiveness is available. They contend that without such data it is very difficult to determine whether additional modifications are justified. Some of the laws enacted during the 1995 session might even need to be revised in order to allow plaintiffs to be fairly compensated. One examination of actual cases filed in Dallas and Tarrant counties suggested that the 1995 joint and several liability law (SB 28 by Sibley) might, in many cases, be unfair to plaintiffs. *See*, James T. Clancy, *Reform of Texas Joint and Several Liability: The Changes and Their Effect*, THE ADVOCATE (State Bar of Texas, Litigation Section) Vol. 15, No. 1, Spring 1996. The tort reform supporters' approach, they argue, is not based on an unbiased view of what will be best for Texas, but is merely an attempt by business defendants to regain the upper hand in the courtroom.

Public opinion regarding additional tort reform measures has been mixed and seems to depend on who sponsors a particular poll and the questions asked in that poll. A survey of 800 registered Texas voters

CONTENTS

conducted by Voter/Consumer Research on behalf of the Texas Public Policy Foundation in March 1996 indicated that most people (79 percent) believe that more changes to the legal system need to be made. The strongest response was opposition to the collateral source rule, which prohibits the introduction of evidence by the defense that the plaintiff has received compensation for injuries involved in the suit from another source, such as insurance or worker's compensation. Of those polled, 81 percent favored abolishing the rule (72 percent strongly in favor). However, a poll sponsored by Texas Citizen Action in September 1996 found that 60 percent of those polled did not believe the Legislature should further restrict a person's ability to sue or be compensated.

Tort Reform in 1995

Seven bills enacted in 1995 substantially changed several aspects of Texas tort law:

- SB 25 by Sibley (Junell), placed limits on punitive damages;
- SB 28 by Sibley (Junell), modified joint and several liability law;
- SB 31 by Lucio (Seidlits), increased penalties for filing frivolous lawsuits;
- SB 32 by Montford (Duncan), restricted venue (where lawsuits can be filed);
- HB 383 by Junell (Shapiro), limited the liability of certain public servants;
- HB 668 by Junell (Bivins), limited damages and removed sophisticated transactions from the Deceptive Trade Practices Act (DTPA), and
- HB 971 by T. Hunter (Sibley), increased notice and bond requirements for filing medical liability lawsuits.

For an in-depth review of the 1995 tort law revisions, see *74th Legislature Overhauls Tort Law*, House Research Organization, Session Focus No. 74-13, June 30, 1995.

The 1995 changes are expected to have a considerable impact on cases to which they apply, as suggested by the hurried rush to file suits before September 1, 1996. Most of the 1995 legislation applied only to suits concerning actions that occurred on or after September 1, 1995. Suits involving joint and several liability (modified by SB 28) and based on actions that occurred before September 1, 1995, had to be filed within one year or face being placed under the new law. During August 1996 the number of new cases filed increased to more than three times the normal rate in counties throughout Texas.

Tort legislation enacted in the 1995 session has already affected insurance rates. HB 1988 by Duncan included a provision, added by Rep. Mark Stiles as a floor amendment, that required the insurance commissioner to roll back benchmark rates to reflect savings in litigation costs and damage awards expected to result from tort reform legislation. The purpose of the legislation was to prevent the lag time from the point at which insurance companies begin to realize savings and the point at which they pass them on to consumers. HB 1988 mandated that if the insurance commissioner did not take action to rollback rates by a certain date, they would be automatically rolled back by percentages included in the bill.

The Department of Insurance met the deadline and rolled back rates on policies ranging from auto liability to professional malpractice insurance. The overall rollback is expected to produce $428.7 million in savings on premiums in the first year, according to Department of Insurance estimates. Specific rollbacks included 6 percent off the average benchmark rate on private passenger auto liability insurance, 10 percent for medical malpractice for doctors and 15 percent for commercial umbrella policies.

Possible Issues for the 75th Legislature

Changes to the Texas tort system proposed by various groups can be grouped into four areas:

♦ **Procedural Matters** — where a suit is tried and summary judgment standards;

♦ **Damages Issues** — limiting available damages and allowing evidence of collateral sources;

♦ **Limiting Liability** — job site liability, professional liability and landowner liability; and

♦ **Attorneys' Fees and Settlements** — limiting contingency fees and changing settlement procedures.

Procedural matters

Should Texas courts be given greater discretion to refuse to hear cases from out-of-state plaintiffs?

The doctrine of *forum non conveniens* allows civil courts to dismiss a lawsuit brought by a citizen of another state or country when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another jurisdiction. In 1993, SB 2 by Montford, et al., enacted by the 73rd Legislature as TEX. CIV. PRAC. & REM. CODE § 71.051, reinstated the doctrine of *forum non conveniens* in Texas after that doctrine had been held inapplicable to personal injury and death cases by the Texas Supreme Court in *Dow Chemical v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

The *Alfaro* case involved 82 Costa Rican farm workers who sued because they were required to handle pesticides allegedly manufactured by Dow Chemical and Shell Oil. The Supreme Court found that a Texas state district court could not refuse to hear the case because the Legislature had expressly authorized that all personal injury suits may be tried in Texas no matter who the parties were or where the injury occurred. The 1993 law permits a Texas court to decline to hear the case of a claimant who is not a legal resident of the United States on grounds of *forum non conveniens* "on any conditions that may be just."

To dismiss claims brought by a citizen of another state, however, the court must still make several findings, specified in sec. 71.051(b), and the defendant must agree to numerous conditions, including the waiver of any defense of statute of limitations in the new jurisdiction. Additionally, sec. 71.051(b) does not apply to cases brought under the Federal Employers' Liability Act, the Federal Safety Appliance Act and the Federal Boiler Inspection Act; cases involving air travel originating from or destined for Texas; and cases alleging injury due to asbestos. In 1995 two bills, HB 2916 and HB 2917, both by Duncan, proposed making the standards for applying *forum non conveniens* more permissive and removing the exception for asbestos cases. Neither bill was reported out of committee.

Tort reform advocates have recommended amending sec. 71.051(b) to permit Texas courts to dismiss cases brought by out-of-state residents for claims unrelated to Texas on grounds of *forum non conveniens* "on any conditions that may be just" without any specific limitations. Supporters of these measures contend the perceived pro-plaintiff orientation of certain Texas courts has been a magnet for out-of-state plaintiffs. Until recently Texas judges were powerless to dismiss cases brought by nonresidents and, some argue, because of this Texas became the "courthouse of the world."

The importation of lawsuits by citizens of other states threatens the business climate of Texas, they say, and subsidizes out-of-state litigants at the expense of Texas businesses and consumers. Companies considering relocating to or remaining in Texas must take into account the imported lawsuit burden they could avoid by locating in some other state that refuses to allow imported lawsuits. Not only must Texas taxpayers cover the expense of having to operate courts to serve out-of-state claims, but the efficiency of the court system is impaired for all, as litigants often have to wait years for a trial date in their home counties.

Giving courts more authority to reject out-of-state lawsuits would realign Texas with a majority of other states that have identical or very similar requirements to the federal system for using *forum non conveniens*, supporters say. Currently 33 states use the federal *forum non conveniens* criteria, including California, Florida, Illinois, Michigan and New York. The federal standards let judges decide "what makes sense" in a particular case, say supporters.

For example, if a New York resident is injured in New York in a store run by a company that happens to do business or be headquartered in Texas, the judge has the opportunity to ask whether it "makes sense" to try the case in New York or Texas. Clearly, in most cases, it would make more sense to try such a case in New York because the cause of action occurred there, the plaintiff is there, the witnesses are there, and the defendant has a presence there. The only reason to try the case in Texas is so that the plaintiff can take advantage of the Texas court system and its perceived pro-plaintiff bias, say those advocating change.

Opponents of expanding *forum non conveniens* contend that a suit filed in a Texas court by definition affects Texas because of personal jurisdiction requirements. In order to establish personal jurisdiction, a party must either appear in court, be a resident of the state or have sufficient contacts with the state as defined by constitutional doctrine. In order to have the constitutional "minimum contacts" required:

- the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in Texas;
- the cause of action must arise from, or be connected with, that action or transaction, and
- the assumption of jurisdiction by the state must not offend traditional notions of fair play and substantial justice.

Clearly, in order even to be brought into court, the defendant must have taken some action in Texas, they say, because jurisdiction must be established before all other issues. Why should someone who does business in the state not be subject to being sued in Texas?

The liberal application of *forum non conveniens* doctrine to suits by citizens of other states is designed to benefit large companies that operate nationally or internationally, opponents assert. Such companies, like Dow Chemical in the *Alfaro* case, may conduct a large portion of their business in Texas, but, opponents say, they would prefer to move the case to another state just to get away from the perceived plaintiff's slant of Texas courts and juries.

Opponents also contend the purpose of *forum non conveniens* doctrine—just as the name implies—is to allow for the convenience of the parties. However, today it is very hard to argue, except in a few cases, that it would be overly burdensome to try a case anywhere in the United States, they say. The technologies of jet travel, fax machines and satellite video conferencing, to name a few, make it just as easy to try a case in one state as another. Texas should not be burdened with cases that bear no relationship to the state, but neither should it refuse to hear the case of a U.S. citizen without ensuring the rights of that citizen, as required by the current law. They also say sec. 71.051(b) simply seeks to protect the plaintiff's rights by ensuring that dismissal on the grounds of *forum non conveniens* will not, in effect, be a complete dismissal of the case.

Should Texas adopt federal summary judgment standards?

Summary judgment is a procedural device used to adjudicate a case with an obvious outcome and eliminate the need for a trial. A party submits a motion to a court, available under both the Texas and the Federal Rules of Civil Procedure, stating that there is "no genuine issue as to any material fact" and judgment should be rendered "as a matter of law." The difference between the state and federal systems is in the burden of proof required for summary judgments.

In the federal system when a summary judgment motion is considered, each party has the same burden of proof they have at the trial, but evidence presented is examined in the light most favorable to the party opposing the motion. A defendant may make a motion claiming that the plaintiff does not have sufficient evidence to prove one of more of the plaintiff's claims at trial. Once that motion is made, it is up to the plaintiff to show sufficient evidence to bring that claim to trial.

When a summary judgment motion is presented in Texas, the burdens of proof are reversed from what they would be at trial. In Texas courts defendants moving for summary judgment must prove that they are entitled to the judgment as a matter of law. It is not enough for a defendant to show that the plaintiff does not have enough evidence to prove its case, which is what the defendant would normally have to prove at trial. On summary judgment unless a defendant shows evidence of a claim that would override the claims of the plaintiff (an affirmative defense), the plaintiff is not required to show anything to challenge the summary judgment motion.

Standards similar to those used in federal courts were proposed in the 1995 session in HB 1352 by Nixon, which died in the House Civil Practices

Organizations involved in tort law revisions

Texans for Lawsuit Reform (TLR) — a lobbying organization, funded primarily by corporate and small business interests, with over 3,000 members. TLR was successful in getting eight major tort reform bills, from its proposed agenda of eleven revisions, enacted during the 1995 legislative session.

Texas Civil Justice League (TCJL) — a non-profit corporation created in 1986, with 5,500 members, making it the largest state tort reform association in the country.

Texans Against Lawsuit Abuse (TALA) — an organization that distributes information directly to the public supporting tort reform.

The Rand Institute for Civil Justice (ICJ) — part of the Rand Corporation, which conducts research on changes to the civil justice system. Studies are funded by grants from businesses and individuals.

Texas Trial Lawyers Association (TTLA) — a voluntary association of over 4,000 lawyers that has opposed some past tort law changes.

Consumer's Union — a consumer organization that publishes *Consumer Reports* magazine that has opposed certain tort law changes.

Public Citizen — a consumer watchdog organization founded by Ralph Nader that has opposed certain tort law changes.

Texas Citizen Action (TCA) — a non-profit consumer organization, funded by individuals, that has focused on the issues of tort law, utility regulation, health care and insurance.

Committee. In November, the Supreme Court Advisory Committee recommended, by an 11-10 vote, changing Rule 166 of the Texas Rules of Civil Procedure to more closely follow federal summary judgment standards. The Texas Supreme Court has the final decision on whether to approve the advisory committee's recommendation.

Advocates of legislation adopting the federal summary judgment standard say it could be a powerful tool to weed out meritless suits at an early date. Summary judgment procedures work well in federal court and the courts of many other states. But Texas courts rarely grant summary judgment, and if they do, they are reversed on appeal quite often. Supporters say summary judgment motions are regarded by many Texas lawyers as simply a waste of time. Even if it is apparent that the plaintiff will never be able to produce any admissible evidence at trial to support an element of the claim, summary judgment will not be granted.

In federal court, summary judgment is a favored procedural device designed "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1. Supporters say the federal courts place realistic burdens on both the plaintiff and defendant for summary judgment. In federal court a party must base its claims on actual, competent evidence, not on conclusory allegations or a promise that evidence may be forthcoming in the future. Across the country, a majority of state court systems have either expressly adopted or cited with approval the federal procedure standards. Texas is among only a handful of states that have expressly rejected those standards.

Opponents of moving Texas to the federal standard contend that summary judgment is an extreme measure where a case is decided without the use of live testimony or a jury and should involve as many procedural safeguards as possible. At a summary judgment hearing, the only evidence on which the court bases its decision are affidavits prepared by both sides and the arguments of the attorneys. Courts have often said that live testimony is superior to written affidavits, which are merely

written statements by witnesses whose credibility and demeanor cannot be judged by a jury and who are not subject to impeachment or cross examination. Just because these summary judgment standards are used in federal courts there is no guarantee that they will be applied with the same uniformity or precision in Texas courts.

Other critics say that any changes in summary judgment standards should be made by the Texas Supreme Court, which has rulemaking authority regarding procedural matters. Summary judgment standards are currently contained in the Texas Rules of Civil Procedure, not statutes, and the Legislature should defer to the judgment of the Supreme Court to make any changes, opponents say.

Should lawsuits with multiple defendants be required to take place in the county where the injury occurred?

Venue is the geographic location where a suit may be filed. SB 32 by Bivins, enacted in 1995, substantially changed venue rules by eliminating a number of exceptions that, according to the bill's supporters, allowed plaintiffs to establish venue in the county of their choosing regardless of whether the case bore any direct relationship to that county. Tort reform advocates, however, contend that one glaring loophole remains that must be fixed—the problem with multiple defendants. They recommend creating a mandatory venue rule for actions involving multiple defendants that would require venue for the suit to be set in the county where all or a substantial portion of the cause of action accrued.

Supporters of this proposal explain that when a plaintiff has a cause of action against multiple defendants, more likely than not only a few so-called "deep pocket" defendants will have substantial assets to satisfy a judgment. In order to put the deep pocket defendants at the greatest disadvantage, the plaintiff will also file suit against another defendant so that venue can be established in a county more favorable to the plaintiff. The deep pocket defendants are then added to the suit after venue has been established.

Supporters say while SB 32 did help narrow this loophole by forbidding the first defendant from waiving the venue rights of other defendants, as a practical matter it is very difficult for later-joined defendants to convince a judge to transfer a case. Fixing venue in the county where the cause of action occurred is the most logical way to eliminate this loophole. Exceptions to this rule would only be possible if all parties in the suit agreed. Without such a rule, defendants will still be subject to being drawn into courts in places that have no direct connection to the suits at hand, supporters say.

Opponents of imposing a mandatory venue rule for multiple defendants contend that it does not always promote the selection of a location that makes sense. For example, if a Houston plaintiff, while travelling through Harlingen, is injured by a falling display at a gas station owned by a company based in Houston and also sues the out-of-state manufacturer of the display that fell on him, the plaintiff and defendants will be forced to make the unnecessary expense of trying the case in Harlingen. In this case the deep pocket defendant (the gas company) would probably prefer to try the case in Houston, but the fact that there is more than one defendant in the case would keep it in Harlingen.

Damages Issues

Should the collateral source rule be abolished?

The collateral source rule prohibits introduction of evidence by an opposing party that an injured plaintiff received reimbursement for the injury from other sources. An injured person may recover wages lost and medical expenses incurred following the injury even though such amounts were already paid for by gift, by insurance or by his employer and still recover the full amount of damages awarded by a jury for any injuries. Texas law does not permit a defendant to introduce any evidence of collateral sources of income to the plaintiff unless the plaintiff "opens the door" to such evidence by bringing it up himself. The collateral source rule applies to both past and future damages. See *Mundy v. Shippers, Inc.*, 783 S.W.2d 743 (Tex. App.—Houston [14th Dist.] 1990, no writ).

Across the country, application of the collateral source rule varies greatly. Fourteen states, including Texas, retain the rule without exception, while six states (Alaska, Connecticut, Florida, Michigan, Minnesota and New York) have completely eliminated the rule. The remaining states allow collateral evidence to be introduced in varying

degrees for specific actions such as products liability claims, no-fault insurance claims, medical malpractice claims or actions against the government.

Critics of the collateral source rule say it results in double recoveries of some damages and advocate that it be abolished so that a plaintiff could only recover those items of economic loss that were paid or will be paid *from his own pocket.* They say awards for economic damages should be reduced by disability payments, insurance payments or other sources of recovery. In many cases, the abolition of the collateral source rule would not reduce the plaintiff's actual recovery. For example, where the plaintiff has received worker's compensation benefits, the worker's compensation carrier often has a lien against the plaintiff's recovery from third parties, a practice known as subrogation. Subrogated claims would not be affected by eliminating the rule, only those for which the plaintiff receives a second recovery.

Opponents of abolishing the collateral source rule say it has been common practice in Texas for more than 100 years, reduces jury confusion and maintains fair treatment of both sides. See *Texas & Pac Ry. v. Levi & Bros*, 59 Tex. 674 (1883). The purpose of the rule is to ensure that a negligent party does not receive a benefit from a party with whom there was no privity of contract, they say. In other words, because the defendant did not make any arrangements with the plaintiff's insurance company and paid none of the premiums for such insurance, the defendant should not receive an undue break because a particular plaintiff has insurance.

Opponents say it would be very difficult to accurately show a jury what the true amount of compensation should be when dealing with subrogated and unsubrogated claims. They maintain juries might be inclined to award less than adequate damages if they were told that the money they award would not go the plaintiff but to an insurance company or worker's compensation carrier. Additionally, a similar rule applies the collateral source rule to defendants as well; a plaintiff is not allowed to show that a defendant has insurance in order to let the jury know that the defendant can afford a large verdict. See *Barrington v. Duncan,* 169 S.W.2d 462 (Tex. 1943). It would be inconsistent, opponents say, to abolish the collateral source rule that benefits plaintiffs while retaining the collateral source rule that benefits defendants.

Should limits be placed on pain and suffering damages?

Supporters of limits on pain and suffering damages say such damages were designed to try to compensate a plaintiff for the amount of physical damage that an injury caused but are now abused by plaintiffs in order to receive large awards. Because there is no way to factually determine how much money will compensate a particular amount of pain, these awards vary dramatically and often come down to how much the jury likes the plaintiff or dislikes the defendant, they say.

For example, a person who spends six months in the hospital accruing hundreds of thousands of dollars in medical bills will almost certainly have suffered more than someone who went to the emergency room and was released the same day with only a few thousand dollars in expenses. However, awards for pain and suffering do not take such factors into account, and the person who left the hospital in one day might be awarded just as much, if not more, damages for pain and suffering than the person who stayed there six months. Some discretion should be left to juries to determine actual amounts, but juries must be guided with some caps in order to prevent outlandish, undeserved verdicts, say supporters of limits.

Opponents explain that only in rare instances does a plaintiff actually receive a windfall from an award for pain and suffering. They say that limits on pain and suffering damages may have superficial appeal, but in application it is very difficult to determine some formula or other system to limit such damages without being unfair to plaintiffs. By their very nature, pain and suffering damages are subjective because there is no quantifiable correlation between an amount of pain and suffering and an amount of money. In many cases, pain and suffering awards are actually used to cover the attorney's fees, allowing the plaintiff to simply pay any medical bills.

Should prejudgment interest be limited?

Prejudgment interest is an amount awarded to a plaintiff on a claim that equals the interest that would have been accumulated on the award had it been made at a reasonable time after the injury occurred. Prior to the Texas Supreme Court's decision in *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), Texas courts did not allow prejudgment interest in tort cases. Following *Cavnar*, in 1987 the Legislature enacted Tex. Rev. Civ. Stat.

ANN. art. 5069-1.05, which requires prejudgment interest in personal injury cases, at a rate based upon 52-week U.S. Treasury bills that floats between 10 and 20 percent. In a recent case, *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315 (Tex. 1994), the Supreme Court held that art. 5069-1.05 requires prejudgment interest for all elements of a tort recovery, including future damages.

Supporters of limits propose that prejudgment interest be set at true market rates and only be allowed for past economic damages. Critics say prejudgment interest should not be allowed for non-economic damages, such as pain and suffering, mental anguish, etc., since such items do not represent out-of-pocket expenses to the claimant. They say that requiring a defendant to pay interest from the date of the claimant's injury on items of damage that the claimant will incur in the future cannot be justified under any economic theory and defies common sense.

Critics of prejudgment interest also say that, in general, it rewards plaintiffs for unnecessarily delaying the trial of their case. Since it is very difficult to prove a plaintiff deliberately caused a delay, courts generally award prejudgment interest regardless of any delays. Additionally, critics claim, the current prejudgment interest rate is too high. The 10 percent floor may have made sense in 1987, but is not realistic in today's economy. A simple solution, they claim, would be to remove the floor and base the rate on the existing market. Also, juries are never told that interest will be added to the sum that they award the plaintiff; the typical instruction asks the jury "what amount, if paid in cash now" would compensate the plaintiff. Because of this instruction, juries may already factor some interest into their original award.

Opponents of such proposals respond that the Texas Supreme Court's decision in the *C&H Nationwide* case was based on a plain-language interpretation of art. 5069-1.05. The majority opinion relied on the interpretation of the intent of the legislation as stated by one of its drafters, Sen. John Montford, written after its enactment. (*C&H Nationwide*, 903 S.W.2d at 325 citing Montford and Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Civil Justice System*, 25 HOUS.L.REV. 59, 102-03 (1988)). The purpose of prejudgment interest is not merely to fully compensate the plaintiff, but also to encourage settlement of claims, they say. They claim such a rationale explains why prejudgment interest does not begin to accrue until the earlier of the 180th day after the defendant receives notice of a claim or the date the suit is actually filed. These timings show that the goal of imposing prejudgment interest is to give the defendant an incentive to settle the claim before the court system must be involved. The imposition of prejudgment interest on the entire damage award is designed to further such a goal, say limitation opponents.

Should a defendant be required to pay punitive damages to multiple plaintiffs for the same wrong?

A proposal deleted from last session's tort reform package would have limited punitive damages for the same action by a defendant to one award no matter how many times the defendant is sued for the same act by different plaintiffs.

Supporters of such a proposal contend that the purpose of punitive damages is to punish the defendant for an especially bad action. However, when an action involves more than one injured party, a defendant is subject to being punished numerous times for the same wrong. When the same action is involved in every case, it is like a burglar being punished 12 times for stealing a dozen items from one house instead of being punished once; doing so would be considered double jeopardy. The problem is that juries cannot be certain that the defendant will be punished adequately by other juries in other trials, so the jury will often recommend the amount it feels is appropriate for the whole action. Because there is no way to determine once one trial concludes how many other juries will find the defendant liable for punitive damages, there is no way to spread the damages out evenly. Therefore, supporters say, punitive damages should be limited to being awarded only one time for any single action.

Opponents of such a limitation claim that it would unfairly benefit one plaintiff over the others. The one plaintiff who could get a verdict awarding punitive damages first would receive a windfall. There would have to be a way for other plaintiffs to sue that first plaintiff for a part of those damages, but that would only result in more lawsuits. Juries are sophisticated enough to realize that if an action injured ten people and only one is before them, the other nine will likely have their own suits, and most juries will adjust their awards accordingly.

Other critics suggest that the problem of punitive damages will not be remedied until the law is changed to award the damages to someone other than the

plaintiff. One California proposal would award the plaintiff 20 percent of any punitive damage award and give the other 80 percent to the state to use for education and alternative dispute resolution. The plaintiff's attorney could collect a contingency fee on only the 20 percent awarded to the plaintiff. These critics contend that until the windfall nature of punitive awards is changed, the system will continue to be flawed. Opponents of such proposals, however, have claimed that it may be unconstitutional for the state to share in the monetary award of a civil action or could, at the very least, create a conflict of interest because the court, considered an arm of the state, has the ability to add to or reduce such awards.

Liability Issues

Workplace Liability

Should the liability of workers' compensation covered employers and bankrupt parties be considered by a jury?

Under the comparative negligence system in Texas tort law, whenever liability must be decided the jury is instructed to apportion a percentage of the responsibility among the responsible parties. Those parties can often include the plaintiff, any defendants and even those defendants who settled with the plaintiff. When liability is apportioned to those defendants who already settled with the plaintiff, it does not make them liable for any additional damages; it simply means that those defendants still in the suit are not liable for that portion of the damages.

In 1995, SB 28 by Sibley added responsible third parties to the list of those whose liability the jury could consider. SB 28, now chapter 33, TEX. CIV. PRAC. & REM. CODE, allows the defendant to bring into the suit anyone who may be partially responsible for the harm done to the plaintiff. The intent of this provision was to prevent the plaintiff from suing only the one party responsible for the plaintiff's claim that had assets and ignoring any other parties who, while more responsible, could not pay a judgment.

Employers covered by worker's compensation insurance and persons who are bankrupt were specifically exempted from being brought into a suit. An employer covered by worker's compensation is immune from being sued by the injured worker because the worker's compensation system is used to determine compensation for any work-related injuries. A bankrupt person may be sued, but any monetary damages awarded are almost always dismissed by the bankruptcy court. The states that have addressed the issue are equally divided on whether the responsibility of these parties may be considered by the jury.

Supporters of eliminating the exclusions for worker's compensation covered employers and bankrupt persons say because of the exclusions a defendant's liability will, in many cases, turn on factors other than the true percentage of responsibility that should be attributed to that defendant. Even if a claimant's injury was primarily caused by his employer or a bankrupt third party, the trier of fact is nonetheless required to disregard the conduct of that culpable person and assess 100 percent of the responsibility among those persons whose responsibility can be considered. This situation can result in persons who are only slightly at fault being required to pay the entire cost of the claimant's injury. The proposal does not seek to have those now excluded brought in as parties to the suit, requiring that they hire attorneys to defend their rights, only to have them treated as settling defendants whose liability should not be counted against other defendants.

Opponents of removing the two exclusions contend that these exclusions represent parties whom the plaintiff could not have brought into the suit even if the plaintiff wanted to. The purpose of SB 28 was to allow defendants to bring into a lawsuit those people whom the plaintiff could have or should have sued but chose not to for tactical reasons. But allowing the defendant to bring these excluded parties into the suit would merely cause confusion for the jury because the plaintiff has no way to assert a legal cause of action against these parties.

Should workers' compensation immunity extend beyond the direct employer?

When contractors covered by worker's compensation insurance use their own employees, they are immune from liability under worker's compensation law. If they employ subcontractors who have covered employees, the subcontractor is immune from liability, but the general contractor, the premises owner and other subcontractors at the same job site are not. Tort reform advocates propose removing such a distinction. Last session, HB 2279 by Combs, which was not reported out of committee, would have made the premises owner and all other contractors at a site

immune from liability if the injured employee was covered by worker's compensation insurance.

Supporters of broadening workers' compensation immunity contend that a contractor or premises owner who hires a contractor with workers' compensation covered employees should have the same immunity as the worker's direct employer. They say the burden of liability insurance, indemnity contracts and related costly red tape not only runs up costs but also erects barriers to the entry of start-up, minority and other small firms. General contractors now often require a subcontractor to have insurance to cover the general contractor against claims by subcontractors' employees. Such insurance can be extremely costly and can prevent certain businesses from getting jobs that they could do if they had the insurance. Those with insurance pass along the costs in their bids and eventually raise the cost of construction generally. Forty-four states extend the protection of worker's compensation immunity beyond the direct employer to include the general contractor and, in most states, the premises owner.

Opponents say broadening immunity would significantly affect the recovery of injured workers. Often workers' injuries are caused by general site conditions or by other contractors. Making other contractors immune to suits would decrease the safety at all job sites because no one would be directly responsible for the safety of the workers. Damages from other contractors do not represent a windfall to employees because the worker's compensation insurer often has a lien against any recovery the employee may receive from another source. The current law makes everyone at a job site more conscious of the safety of all workers, opponents say.

Professional Liability

Should CPAs be subject to liability when their reports are relied on by people for whom they were not prepared?

Privity is a relationship between parties that is tantamount to a contractual relationship. Because of their contractual relationship, a CPA's clients are always in a position to rely on a CPA's work product and to hold the CPA responsible for harm suffered through reliance on a negligently prepared work product. With respect to non-clients (third parties), many states require that privity must be established (1) before a user can rely upon a CPA's work product and (2) before a user of such work product has legal recourse against the CPA for negligence. Texas law allows a third party to rely on the work product of a CPA without establishing privity.

Supporters argue that a privity statute would protect both CPAs and third party users from inappropriate reliance on a CPA's work product. CPAs associated with general purpose financial statements frequently become unnecessary targets of litigation from parties suffering losses. With a privity concept in place, appropriate communication between the CPA and the third party user of the CPA's work product would be required. In the course of this communication (which generally establishes privity), the CPA would have the opportunity to discuss relevant issues with the third party and thereby enable the third party to make a better informed decision. Once privity was established with a third party, that party would have full recourse against the CPA for negligence. Supporters say a privity statute is needed for Texas not to insulate CPAs from responsibility for their work, but to deter inappropriate reliance by third parties on the work products of CPAs.

Opponents of a privity requirement for CPAs contend that it would only be acceptable if a written disclaimer were included either in the CPA's report or on each financial statement or other document to warn the reader that it could not be relied upon except by the person for whom the document was specifically prepared. Without such a disclaimer, opponents contend, a party who received a financial statement would have no way of knowing whether it could be relied upon. When unsophisticated parties are involved in financial transactions, they may be shown various financial statements and not know that those statements cannot be relied upon without such a disclaimer. Providing an explanatory statement on prepared documents would not be a burden on CPAs and would actually help to ensure that they will not be subject to suit when someone inappropriately relies on their work, opponents say.

During the 1995 legislative session, HB 505 by Brimer, a privity statute limiting the liability of CPAs, passed the House but was not considered by the Senate. A companion bill, SB 309 by Harris, was recommended favorably by the Senate Economic Development Committee but was not considered on the Senate floor.

Landowner Liability

What liability for criminal acts of third parties should landowners bear?

Landowners owe a duty to protect certain persons from harm when they come on to their land. The scope of the landowner's duty depends on whether the person is a trespasser, invited for social purposes or invited for commercial purposes. For example, when the person on the land is a social guest (called a licensee) the landowner has a duty to warn the guest or make safe any concealed dangerous conditions that the landowner actually knows about. On the other hand, if the guest is one invited for commercial purposes (called an invitee) the landowner has a duty to warn the guest or make safe any concealed dangerous condition that the owner knows about or *should have known about.* Concealed conditions are those where the danger is not open and obvious.

This distinction means that commercial premises owners have a duty to protect invitees from the criminal acts of third parties if they know or have reason to know of an unreasonable risk of harm because "the party with the 'power of control or expulsion' is in the best position to protect against the harm." *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993). The premises owner is held responsible for crimes that are foreseeable based upon the "totality of the circumstances." *Garner v. McGinty*, 771 S.W.2d 242, 248 (Tex. App.—Austin 1989, no writ).

Tort reform advocates recommend limiting the liability of a premises owner for the criminal acts of third parties to situations in which the premises owner actually knows of a serious threat of criminal activity and consciously or recklessly decides not to take reasonable steps to protect or warn persons on the property.

Supporters of this proposal contend it is unfair for a premises owner to be held responsible for the criminal acts of third parties in which the owner did not participate, but that a jury concludes he somehow could have foreseen but negligently failed to prevent. In today's society crime is foreseeable in almost any location, they argue, and premises owners are often powerless to prevent acts of violence by third parties. When stores are held responsible for crimes in parking lots because juries find that robberies are foreseeable in "high crime" neighborhoods, businesses have a powerful incentive to locate only in "safe" neighborhoods. A decision to do business in a "high crime" area, they say, should not make a business a de facto insurer against third-party crimes.

Recently, the California Supreme Court, which had originally developed the "totality of the circumstances" standard, abandoned that doctrine as placing an unfair burden on landowners. The new standard requires plaintiffs to show that there had been prior similar incidents at a location in order to find the landowner liable. See *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (1993).

Opponents contend that the current liability standard applied to business owners is fair and reasonable. Texas courts do not use the foreseeability test as haphazardly as the proponents of change would suggest in allowing crime to be foreseeable in any location. In the *Garner* case, the Austin court of appeals did not find that a daylight robbery and injury to a person was foreseeable even though the store in question had been burglarized at night twice before. Many of the cases involving a premises owner's liability involve complex and lengthy facts and must include a judgment on the history of the location and the actions of the owner. A court or a jury is best suited to examining any pattern that has emerged and making a fair judgment. The proposed change, opponents say, is designed to ensure that the case is not brought before a jury. They assert that more states use the "totality of the circumstances" test than any other to determine whether the criminal act was foreseeable. The proposed new standard would give business invitees on the land almost as low a level of protection as trespassers, say opponents.

Should assumption of risk be reinstated as an absolute defense in Texas?

Under prior Texas liability law, a claimant could not recover for injuries due to a dangerous condition or defect on a premises if the claimant had voluntarily exposed himself to a known and appreciated danger. Recovery by such a claimant was barred by the doctrine of "assumption of the risk," an affirmative defense to liability available to defendants. However, since Texas in 1973 moved to a comparative negligence system, whether a plaintiff assumed the risk of a danger known to him does not bar recovery but is considered by the jury in apportioning percentages of fault among the parties. See *Farley v. M M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975). Under the current

system, a verdict must be rendered and the plaintiff must be found to be more than 50 percent at fault before the plaintiff can be barred from recovery. Tort reform advocates have proposed returning to the traditional rule of assumption of risk for premises liability claims.

Supporters of such a change argue that a person who voluntarily exposes himself to an obvious danger should not expect a landowner to pay for an injury that could have been avoided. Assumption of risk is a concept that would return a measure of personal responsibility back to tort law. While the current system does bar recovery if the plaintiff is more than 50 percent responsible for the harm, a landowner must still go through the burden and unreasonable expense of defending such lawsuits. Determining percentages of responsibility is a question of fact that must be decided by a jury. By reinstating the defense of assumption of risk, supporters claim, landowners and the court system would not be burdened with cases that could and should be decided as a matter of law before the case goes to trial.

Opponents contend that assumption of risk is an unfair, outdated legal concept that was done away with when comparative negligence (now called proportionate responsibility) was adopted in Texas in 1973. Under the old scheme a landowner was either 100 percent responsible for the claimant's harm or zero percent responsible. Assumption of the risk let landowners who were substantially at fault completely escape liability.

Comparative negligence law asks the jury to determine the percentage of fault attributable to the plaintiff and defendant. Under comparative negligence, a plaintiff is barred from recovering damages if the plaintiff's percentage of fault is greater than 50 percent. Reinstating the doctrine of assumption of risk for premises liability cases would only create an anomaly in the comparative negligence system, opponents say, allowing one class of cases to be decided before a trial and before a jury has had the opportunity to hear the facts of a case. Only four states, Nebraska, Pennsylvania, South Dakota and Rhode Island, still maintain the assumption of risk doctrine.

Should liability limitations on not-for-profit recreational land uses be expanded?

Chapter 75 of the Civil Practices and Remedies Code limits the liability of landowners who open up their land to others for recreational use. This limitation only applies when the landowner does not charge for entry onto the premises or the landowner charges but does not collect more than twice the total property tax assessment for the land per year. Chapter 75 does not limit the liability of a landowner who is grossly negligent, acted with malicious intent or acted in bad faith. Amendments enacted in 1995, HB 2085 by B. Turner, allow private landowners to be immune from liability if they carry insurance of at least $500,000 per person or $1 million per occurrence for bodily injury and $100,000 for property damage. If a landowner carries insurance in these amounts, the landowner is excused from any liability beyond such amounts.

Tort reform backers recommend broadening Chapter 75 to remove the distinction between agricultural and other types of land and changing the statutory definition of "recreation" to encompass all non-business, educational and charitable uses. Currently, recreation only includes sporting activities such as hunting, fishing, swimming, boating, camping and all activities that might be related to such activities. Supporters say there is no reason to limit recreation to just these activities or to restrict land used for other non-business or charitable activities.

Another recommendation would eliminate the doctrine of "attractive nuisance" as a basis for liability to those persons whom the landowner has allowed to enter the premises for recreational, non-business and charitable uses. The doctrine of attractive nuisance imposes liability on landowners if some aspect of the property, such as playground equipment or a swimming pool, exposes children to dangers that a child might not recognize. Supporters of this proposal contend that because Chapter 75 applies only when the landowner has given permission to use the property, the responsibility to supervise the activities of children should be placed on the person to whom the landowner has given permission. The goal of this change, supporters say, is to expand the use of private lands for charitable and recreational purposes. In doing so, activities that involve children should not be singled out and hinder access to private lands.

Opponents of such changes assert landowners are in a better position than anyone else to know the potential dangers on their land. Landowners who permit others to

use their land and even charge persons for the use of the land should not be able to simply ignore dangerous conditions because they have insurance. At the very least, the landowner should be held to the same standard as if the persons on the land were the guests of the landowner.

They also say the doctrine of attractive nuisance has long been used to protect from harm those, especially children, who cannot appreciate dangerous conditions. See *Sioux City & P.R.R v. Stout*, 84 U.S. 745 (1873). To allow landowners to be immune from liability for such conditions would be disastrous because those people whom the landowner has given permission to come on to the land will likely not be aware of all dangerous conditions. The landowner must retain some portion of responsibility in order to guard the safety of children using the land.

Attorneys' Fees and Settlements

Should contingency fees be limited?

In most tort cases today, plaintiffs' attorneys' fees are generated by using contingency agreements. Such agreements guarantee the attorney a portion of the plaintiff's recovery, usually 33 or 40 percent but sometimes as high as 50 percent. These fees are often taken directly from the gross recovery before any expenses or court costs are paid.

Some believe the contingency fee system has become an unjustifiable windfall to attorneys. Reimbursement of hourly fees is less susceptible to abuse because attorneys must document the actual time spent on a case and are open to fraud charges if they bill clients for hours not actually worked. Additionally, while fees of $200 an hour may sound overpriced, they do not compare to contingency rates that often amount to thousands of dollars per hour of work. Supporters of the contingency fee system claim that it is justified because the attorney takes the risk of not being paid adequately if there is little or no recovery.

In 1994, the Manhattan Institute published "Rethinking Contingency Fees: A proposal to align the contingency fee system with its policy roots and ethical mandates," by Lester Brickman, Michael J. Horowitz and Jeffrey O'Connell, in which the authors propose a model statute, the Injured Parties Protection Act (IPPA), designed, they say, to eliminate certain abuses inherent in the current contingent legal fee system. The IPPA, proposed in the 1995 session as SB 27 by Sims et al. but not considered in committee, would have established a system under which cases without substantial issues or that are settled quickly would not generate contingency fees.

Under the IPPA, an attorney would be severely limited in charging a contingency fee. Such fees would be allowed only if settlement offers were later increased or the case went to trial. Even when a trial took place an attorney could not charge more than either the agreed hourly rate or 10 percent of the recovery under $100,000 and 5 percent of the recovery over $100,000. Additionally, any attorneys' fees awarded on a contingency fee basis under the IPPA would only be taken after expenses and court costs were deducted.

Proponents of the IPPA claim that the current contingency fee system no longer serves the purpose of allowing those who cannot afford lawyers to obtain representation. Instead, it allows only those people with a substantial chance of recovering a large sum for a small amount of work to obtain a lawyer's services. The authors of the IPPA say contingency fees of 1/3 to 1/2 of the total recovery "can only be understood as products of a system in which attorneys exercise their monopoly of access to the courts to exact a massive, routine toll from all payments to their clients, irrespective of whether those payments would have been made without their efforts." The only truly accurate means of ensuring that each attorney is paid a reasonable fee in each case would be to have a court investigate each and every fee paid because, it can easily be argued, each case is different. However, such a system would bring the judicial process to a halt. Instead, the IPPA was designed as an alternative that attempts to encourage settlements and the use of hourly rates to determine fees, but still allows contingency fees when a case is taken to court or when settlement offers are increased because of attorney effort, supporters say.

Opponents of the IPPA say that attorneys' fees, including contingency fees, are determined by the market; attorneys do not charge any more than the market will bear. Unlike services by doctors or other health care providers, services provided by an attorney are rarely considered essential, and when they are, as in a criminal case, the state generally provides for them. The contingency fee system aids lower income persons who have a valid case but cannot otherwise afford a higher quality, and highly priced, attorney.

No state has adopted the IPPA, so there is no way to tell what consequences may stem from its enactment, say opponents. It could discourage the use of settlements because a contingency fee could only be obtained if a settlement was rejected or if the case went to trial. In worst case scenarios, this arrangement could promote collusion between attorneys on both sides to drag out cases to increase their fees. There is a disadvantage to such collusion now because plaintiffs' attorneys would like cases settled as quickly as possible. Under the IPPA, though, it would be beneficial to both sides to extend the time it takes to conclude a case. Opponents also claim that the IPPA could be considered an infringement on the constitutional right to contract if it were imposed in this state.

Should attorneys' fee awards be based on contingency fee agreements?

In certain cases, usually contract cases and cases under the Deceptive Trade Practices Act (DTPA), a successful plaintiff is entitled to recover attorneys' fees from the defendant in addition to the damages awarded. Texas courts had held that an award of attorneys' fees must be based on the number of hours worked multiplied by a reasonable hourly rate. In several recent cases, however, the courts have departed from this rule and allowed a recovery of attorneys' fees to be based upon a contingent fee contract. See *City of Dallas v. Arnett*, 762 S.W.2d 942 (Tex. App.—Dallas 1988, writ denied). For example, if a plaintiff who had signed a 40% contingency fee contract were awarded $100,000 by the jury, the court could add $40,000 to the judgment as attorneys' fees, even if the time actually spent by the attorney would justify fees of only $10,000.

Critics have recommended eliminating the ability to recover attorney's fees on a contingency contract. They say this change would eliminate potential windfalls without affecting the contract between the attorney and the client in any way: in the preceding example, the proper total award would be $110,000 (not $140,000), which would include a reasonable attorney's fee. Only the windfall would be eliminated. If this were the rule, the plaintiff could even structure a contingency fee agreement in such a way to base the fee on the amount awarded by the court for attorneys' fees. Most states and the federal system do not automatically award attorney's fees based on a contingency fee agreement; they do, however, take that agreement into consideration when determining the reasonableness of the fee, say supporters.

Opponents of such a proposal respond that contingency fee arrangements are an essential part of the American legal system because they are often the only way that a plaintiff can afford to bring a case to court. The purpose of awarding attorneys' fees in a contract case is to promote resolution of contract disputes without using the courts. Unlike negligence cases where the jury is often called upon to decide questions of fact, most contract cases are clearly defined by the terms of the contract, with few questions of fact for the jury to decide. Because of this, contract cases could often be decided by means other than the court system, and if the defendant refused to cooperate, that defendant could be penalized by having to pay attorneys' fees. The current rule also ensures that the plaintiff is granted the full amount of recovery. In tort cases, legal bills are often covered by non-economic damage awards, but in contract cases, all damages are economic damages. Allowing the contingency fee to be taken out of the plaintiff's recovery would significantly reduce the ability of a plaintiff to be adequately compensated.

Should the sliding scale calculation for settlement credits be eliminated?

When any issue of liability is sent to a jury or other trier of fact, the amount of each party's liability is determined. When damages are determined, a defendant must pay the percentage of the damages equal to the liability attributed to that defendant. However, when there is more than one defendant in a case and one defendant settles with the plaintiff before the issue of liability goes to the jury, a determination must be made by the court as to how that settlement may be credited against the liability of the defendants who remain in the case.

The law, as expressed in TEX. CIV. PRAC. & REM. CODE § 33.012, provides that in the event of a settlement, the claimant's recovery against the nonsettling defendants may be reduced by either the dollar amount of the settlement or a sliding-scale credit. The defendant is allowed to elect which method to use, but in the absence of an election or when elections among defendants differ, the sliding scale credit is applied. This option was established under SB 5 by Montford in 1987 in response to the ruling of the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

The *Duncan* court held that when the plaintiff settled with one or more defendants, the liability of the remaining defendants was reduced by the percentage of

responsibility attributed to the settling defendant. In other words, if the jury found the settling defendant liable for 25 percent of the harm, the remaining defendants would not be liable for that 25 percent of the damages.

SB 5 abolished the use of the *Duncan* method for settlement credits and instituted the option of the dollar amount of the settlement or a sliding scale. According to its supporters, the sliding scale credit was enacted in order to encourage settlements and create a system that was not dependent on the number of defendants settling but on the amount of damages involved in the case.

If during the course of a negligence case one defendant settles, when the jury assesses a percentage of responsibility against the settling defendant the settlement already paid to the plaintiff must be credited to the other defendants. Under *Duncan*, that settlement would have been credited based on the percentage of responsibility the jury assigned to the settling defendant. If a dollar-for-dollar settlement credit is used, the amount of the award payable by all defendants is reduced by the settlement amount, and the difference is split among the remaining defendants in proportion to the liability assigned to them by the jury.

Under the sliding scale credit, the amount of the credit does not depend on the percentage of the settling defendant's liability or the amount of the settlement; instead, it is a scaled percentage of the jury verdict. For example, based on the statutory formula, the credit for a $100,000 verdict is $5,000, and the credit for a $1 million verdict is $145,000. The sliding scale credit amount is applied like the dollar for dollar credit, subtracting it from the total amount of the defendants' liability and splitting the remainder equally. Under the other calculations, multiple settlements are taken into account, but the sliding scale credit amount does not change if more than one defendant settles.

Critics argue that the sliding scale is not only unnecessary, hopelessly confusing, and impossible to administer, but also substantially biased in favor of plaintiffs. It allows plaintiffs to receive a substantial windfall if they can settle with a defendant who will likely be found to be responsible for a large percentage of the harm. The remaining defendant, who would be found liable for only a small portion, would still be required to pay a substantial amount as the only defendant left in the case. It can also work to a plaintiff's benefit simply to settle with a defendant for more than what the credit will actually be. For example, in a case where the damages are $100,000, the settlement credit will be only $5,000. If the plaintiff can settle with any defendant for more than $5,000, that money will be a windfall to the plaintiff. Others have suggested that in order to give defendants an option, the *Duncan* calculation could be brought back as an alternative to dollar for dollar credits.

According to its supporters, the purpose of the settlement credit was to encourage settlement, thus reducing the burden on the court system. It was not designed to be punitive to defendants nor to create a windfall to the plaintiff. It was designed to allow the defendants to elect to use either the dollar-for-dollar settlement credit or the sliding scale credit instead of being forced to use the *Duncan* calculation. The *Duncan* calculation actually deterred plaintiffs from settling because their recovery was reduced not by the amount of the settlement but by the percentage of responsibility of the settling party. When a case can be settled, the sliding scale credit encourages defendants to do so.

Should a party be penalized for rejecting a settlement offer that is actually more favorable than the final judgment?

When a settlement is offered in a case, it is a completely voluntary and often the result of secret negotiations. There is no punishment for rejecting any settlement offer, and a settlement offer cannot be introduced as evidence. Under the Federal Rules of Civil Procedure Rule 68, if a defendant makes a settlement offer that the plaintiff rejects and the eventual recovery by the plaintiff is less than the settlement offer, the plaintiff is required to pay the costs incurred by the defendant after the offer was made. Costs, under Rule 68, include court fees but not attorneys' fees or expert witness costs.

Proposed federal legislation expanding offer of settlement rules, H.R. 988, would have applied to offers by either party and included all costs, including attorneys' fees. Exceptions could be made if the court found that the case presented a novel and important question of law or fact that substantially affected non-parties or if the application would be manifestly unjust. Under rules promulgated by the Eastern District of Texas federal courts in 1991, litigation fees, including attorneys' fees, may be awarded to either party if the final judgment is more than 10 percent less favorable to the party rejecting the offer. Under Florida law, the costs are recoverable if the final judgement is more

than 25 percent less favorable, and under an Oklahoma law enacted in 1995, costs can be awarded but only if the defendant makes the initial offer and the plaintiff makes a counteroffer that is rejected.

Advocates of an offer of settlement rule similar to H.R. 988 claim it is the only practical way to provide a monetary incentive to settle a case before having to burden the courts with a trial. The proposed statute would be fair to both plaintiffs and defendants as either could make an offer that would trigger the law. It would encourage parties to make reasonable offers and to make them early in the litigation process. Additionally, because costs would accrue only after the offer was rejected, there would be an incentive to make the offer as early as possible.

They say the Texas court system is clogged with cases that could have and should have been settled before coming to trial. If a settlement offer was made that was better than what the party received at trial, there should be some consequences for the person who rejected the offer and forced the other party to endure the expense of a trial. The offer of settlement rule, supporters say, is a fair and efficient way to encourage settlements without harming the parties' rights.

Opponents say this proposal would rob litigants of the opportunity to have their day in court by essentially bullying them into accepting the first settlement offer or suffer the consequences if things fail to go their way at trial. Exceptions must be included, as in the proposed federal statute, that would protect parties if the case presents a claim that really should go to court even if a settlement was possible. Parties must also be protected from offers that are made in bad faith simply to force the other side to take an unfair settlement.

Because the rule encourages early offers, it may prevent a party from discovering evidence that may be crucial to the case, opponents say. For example, if a plaintiff reasonably believes his case to be worth $100,000 and is given a settlement offer of $90,000 very early in the process, the plaintiff would be forced to accept that or risk having the jury award anything less. However, there may be evidence that could be found through the discovery process that might make the claim worth much more or that could provide evidence of wrongdoing to other potential plaintiffs. The offer of settlement rule, opponents say, provides powerful defendants a way to rid themselves of suits before any significant discovery even takes place.

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