

# Tort Reform: Has Texas Ended Its Lawsuit Lottery?

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The 73rd and 74th Sessions of the Texas Legislature generated significant legislation reforming the Texas civil justice system. While this legislation will govern lawsuits involving business disputes as well as those cases involving physical injuries, these legislative changes are normally and most effectively encapsulated by the phrase "tort reform."

This paper addresses the Texas tort reform legislation of the last two legislative sessions to analyze what issues were subjects of potential tort reform, what reforms were presented to the legislature for passage, which of those reforms were actually achieved, and last, what potential reforms remain to be revisited either in future legislative sessions or by the courts.

## **Tort Reform Issues**

### **Introduction**

Two key tort reform bills in the 1993 legislative session enacted limits on products liability and restrictions on the ability of plaintiffs, particularly foreign citizens, to use the courts of Texas for essentially foreign disputes.

The subjects of additional tort reform of general applicability<sup>1</sup> that were contemplated for potential legislative action by tort reform advocates and their allies in anticipation of the 1995 legislative session in Texas were:

1. Venue
2. Punitive Damages
3. Joint and Several Liability
4. Deceptive Trade Practice Act (DTPA)
5. Frivolous Lawsuits
6. Junk Expert Testimony
7. Case Resolution Efficiency
8. Judicial Selection
9. Judicial Fund Raising
10. Contingent Fees

With respect to issues of venue, punitive damages, joint and several liability, DTPA, frivolous lawsuits and judicial fund raising, Texas law was altered, sometimes dramatically, through new legislation passed by the Legislature and signed into law by Governor Bush. As will be discussed below, the punitive damage legislation for the most part merely secured punitive damage reform already achieved by a decision of the Texas Supreme Court. That Court also issued a notable decision after the close of the session narrowly interpreting the evidentiary rules relating to so-called "junk" expert testimony -- impacting that issue, which the Legislature had not addressed. In the end, legislation on the issues of case resolution and contingent fees was not seriously pursued in deference to the Supreme Court's potential role in those reforms.<sup>2</sup> Legislation on judicial selection pressed by minority groups did not pass the Legislature.

# Executive Summary

## Venue

Lawyers who actually try and settle cases rank high in importance the venue rules, those which govern the possible locations of a lawsuit -- i.e., the county in which, and therefore the judges and juries before which, a plaintiff may choose to file a case. The more parochial the judge or jury, the greater the chance that local sympathies rather than impartial justice will influence the outcome of the case. Tort reform advocates, therefore, pushed for important limitations on the choices available to plaintiffs' trial lawyers in selecting counties for lawsuits without regard for any real connection between the concerns of those Texas counties and the disputes in the lawsuits. In part, these venue reforms were an outgrowth of the *forum non conveniens* measure passed in the 1993 legislative session limiting the ability of plaintiffs to force Texas judges and juries to resolve essentially foreign disputes. At that time, the Texas Supreme Court had issued its *Alfaro* decision,<sup>3</sup> which appeared to open the doors of Texas courthouses to the citizens of the world.<sup>4</sup> The 1993 legislature succeeded in enacting a procedure permitting Texas courts in appropriate cases to dismiss a lawsuit in favor of court proceedings in another country.<sup>5</sup> One of the features of this legislative response to *Alfaro* was a prospective effective date: the new *forum non conveniens* legislation did not become effective until a specific date after the 1993 legislative session.<sup>6</sup> This feature gave shrewd plaintiffs' lawyers the opportunity to file lawsuits from around the world in Texas courts before the reform could take place. In the process, these lawyers so abused the venue rules applicable to wholly domestic lawsuits that loopholes remaining in the domestic venue system were highlighted for legislative action. As a result, significant venue reform was passed in 1995, but once again the new rules have only prospective applicability so that loopholes remain to be reformed in future legislative sessions.

Unfortunately, as we will discuss, the counterproductive and confusing element of prospective applicability infects each of the significant areas of tort reform to come out of the 1995 session and warrants creative attention in the future.

## Punitive Damages

Before the 1995 session, the Texas Supreme Court issued the *Moriel* decision,<sup>7</sup> which restricted the substantive grounds for awards of punitive damages and altered the procedure by which juries may award punitive damages. The legislature etched the *Moriel* ruling into legislative stone for future cases and also future imposed caps on the amount of punitive damages that could be awarded in any event. Further reform appears needed in this area to limit unfair and unwise multiple punitive damage awards.

## Joint and Several Liability

Although previous enactment of a comparative fault statute<sup>8</sup> had ameliorated some of the worst aspects of the common law scheme of joint and several liability for tort damages, it still remained possible under Texas law that the least and only marginally culpable actor among many defendants could be forced to pay the full amount of a plaintiff's damages plainly caused by those other defendants. Tort reform advocates therefore sought and achieved further limitations on the exposure of defendants who were not primarily responsible for the damages incurred by the plaintiff. No further reform would appear to be needed on this issue in the immediate future beyond allowing the joinder of all defendants (including employers) in civil cases.

## Texas Deceptive Trade Practice Act (DTPA)

The Texas Deceptive Trade Practices -- Consumer Protection Act ("DTPA")<sup>9</sup> has metastasized far beyond its original intended purpose, which was to provide remedies for individual consumers who face disadvantageous bargaining positions in individual consumer business transactions. Virtually all small business trade associations were unanimous in the belief that coverage of DTPA should be scaled back to reflect more accurately that original purpose. The legislature answered their call. Further reform is likely to be pursued by specific business groups.

### Frivolous Lawsuits

Almost all small business groups were also concerned about the frequency with which patently frivolous claims were pursued in Texas courts for their nuisance value or other improper purposes. The perceived solution for this problem was to strengthen the court procedures for sanctioning the pursuit of meritless claims. This solution was implemented.

### Junk Expert Testimony

The extent to which liberal rules of evidence governing expert trial testimony can be manipulated to achieve significant damage recoveries on the basis of false or "junk" science has been extensively documented from cases throughout the country.<sup>10</sup> Recently, the United States Supreme Court issued a decision interpreting the expert opinion rules of the Federal Rules of Evidence in this context.<sup>11</sup> Tort reform advocates focused on this issue, but have refrained from pushing legislative solutions because revision of evidence rules normally falls within the province of the Texas Supreme Court. Quickly confirming the validity of this approach, the Texas Supreme Court issued a decision immediately after the session which interpreted the expert opinion rules in the Texas Rules of Evidence to require a more strict court inquiry into the reliability and relevance of a particular "expert" witness's testimony before allowing the jury to hear that testimony.<sup>12</sup>

### Case Resolution Efficiency

Because justice delayed is often justice denied, tort reform advocates have explored ways of expediting the case resolution process in the civil justice system. Reform on these issues, however, almost always comes from active management of an individual judge's case load and effective supervision of other judges and court dockets by administrative judges and higher courts. Failures in the system, therefore, are often best resolved by the election of different judges. Tort reform advocates ultimately decided not to press for a legislative solution to this issue.

### Judicial Selection

While judicial selection was not on the express agenda of the typical tort reform advocate during the 1995 legislative session, judicial selection did become a key legislative issue. Because Texas selects its judges primarily through partisan elections conducted as part of Texas' statewide elections, the issue of judicial selection often succumbs to the vagaries of partisan infighting. The 1995 Texas legislative session provided a good example of this syndrome. At the same time that Republicans in Harris County turned out almost every incumbent Democrat judge up for reelection in the 1994 general election, prompting calls for non-partisan reform of the judicial selection process, a Republican was elected Governor; and that new Republican Governor, George W. Bush made clear his opposition to a change from partisan elections just as Republicans were benefitting from the system of electing judges. Because of the potential conflict between partisan and tort reform goals, tort reform advocates did not push any particular legislation. Defeats in federal Voting Rights Act lawsuits attempting to subdistrict the geographic areas from which Texas judges are elected<sup>13</sup> did, by contrast, prompt minority advocates to push a supposed compromise judicial selection process developed by a joint legislative committee. Because one of the compromises included subdistricting for the election of trial judges, tort reform advocates monitored this legislation closely, and it did not pass.

## Judicial Fundraising

In recent years, justice in Texas has appeared to be for sale to the richest of the plaintiffs' personal injury lawyers.<sup>14</sup> This perceived injustice caused tort reform advocates to lobby for limits and restraints on fund-raising for and expenditures by judicial candidates and officeholders. Many of these reforms were adopted.

## Contingent Fee Reform

Tort reform advocates also urged limitations on windfall contingent fees that unnecessarily reduce the compensation received by injured parties. Because of the perception that attorney-client relationships were a matter best left to the Texas Supreme Court to resolve, specific legislation to limit excessive contingent fees was in the end not pressed in the 1995 legislative session. Because the Court is not likely to act on this issue, it may be an important issue to address in future legislative sessions.

# **Reform Proposals, Enacted Legislation and Future Reforms**

## **Venue**

### **The Problem**

As currently enacted, the general venue provisions of chapter 15 of the Texas Civil Practice and Remedies Code erect a veritable maze of semi-mandatory, truly mandatory and plainly permissive locations for most lawsuits. The very complexity itself is anathema to an orderly system of civil justice.

The fundamental venue statute purports to require venue either in a county "in which all or part of the cause of action accrued or in the county of defendant's residence if defendant is a natural person."<sup>15</sup> But part of a cause of action may accrue almost anywhere. If a plaintiff is suffering an alleged ongoing injury, "part of the cause of action" -- damages -- is probably accruing wherever the plaintiff chooses to live.<sup>16</sup> The general rule, therefore, permits a plaintiff to sue almost anywhere in Texas if the plaintiff's lawyer or lawyers can pay to move the plaintiff into a particular county (not a significant burden if the lawyer wants to try the case in that county anyway).

Furthermore, this general rule contains express and implied exceptions that virtually swallow the basic rule in most any contemporary lawsuit. First, there are two express exceptions stated in the general rule itself, incorporating both the truly mandatory but quite limited venue provisions of "Subchapter B" and the broadly permissive locations specified in "Subchapter C."<sup>17</sup> But there is an even more expansive notion that effectively cancels out any notion that a particular case can necessarily require a particular venue for resolution. That is the provision which provides that if more than one defendant is properly joined in a lawsuit, then the plaintiff need establish appropriate venue only as to one of the defendants, and venue can be maintained over all of the defendants; the only apparent escape from this net would be if another defendant can assert mandatory venue in another county.<sup>18</sup> Even then, however, the mandatory provisions are not always mandatory, because yet another principle of venue law has been that if one defendant waives a venue objection, even an objection that would require transfer to another county under the mandatory venue provisions of Subchapter B, then venue is established for that defendant and thus for all defendants under the joint defendant rule.<sup>19</sup>

Of course, none of these loopholes would matter were it not for the extraordinarily broad permissive venue provisions of Subchapter C, mentioned previously. The most deliberately expansive of these provisions is the rule for corporate defendants incorporated in a state other than Texas. In addition to the option of a county in which all or part of the cause of action accrued, subsection "37" permits a foreign business entity to be sued "in any county in which the company may have an agency or representative or in the county in which the principal office of the company may be situated, or, if the defendant corporation has no agent or representative in this state, then in the county in which the plaintiffs of either of them reside."<sup>20</sup> The permissive venue provision for suing domestic business entities -- corporations, partnership or associations -- would appear to be somewhat less expansive, providing as a first option in subsection "36" the county in which the business has its "principal office" in the state, then as further options "the county in which the plaintiff resided when all or a part of the cause of action arose, provided the [entity] has an agency or representative in the county, or, if the [entity] had no agency or representative in the county in which the plaintiff resided, when all or a part of the cause of action arose, then suit may be brought in the county nearest that in which plaintiff resided at that time in which the [entity] then had an agency or representative."<sup>21</sup> Indeed, Texas courts had read the "principal office" liberally to include a county in which the entity has an agent or representative,<sup>22</sup> giving plaintiffs' lawyers a wide range of options even in suing Texas businesses. Then, in manufacturer breach of warranty cases, the

case can be brought wherever the manufacturer has an agent or representative or in the county where the plaintiff resides.<sup>23</sup>

Because of this combination of provisions, Texas plaintiffs' lawyers can in many cases choose almost any county in the state in which to bring a lawsuit. Some counties had become so popular with the plaintiffs' bar that they have been termed "killing zones."<sup>24</sup> Once venue was established for a particular plaintiff against particular defendants in such a county, shrewd injury trial lawyers would then pour other plaintiffs into that lawsuit even though the late arriving plaintiffs could not have established venue in the county on their own.

On a procedural level, contemporary venue law in Texas has sought to eliminate venue battles at the outset of litigation, permitting resolution on the pleadings and affidavits, and prohibiting immediate appeals.<sup>25</sup> Furthermore, current law permits transfer of venue in only three very limited cases: a) when the county of suit is not a proper venue; b) when an impartial trial cannot be had in the county of suit; or c) when all parties consent in writing to the transfer.<sup>26</sup> The combined effect of these procedural provisions has been that costly litigation could proceed in an inappropriate venue and create settlement value for meritless cases.<sup>27</sup>

### **The Legislation**

Tort reform advocates proposed legislation to deal with many of these issues. As passed, revised Senate Bill 32 fell short of closing all the loopholes, but made significant progress on some issues.

The new law defines "principal office" so that the mere existence of an agent or representative cannot be used as evidence of such an office.<sup>28</sup>

The new legislation rewords the basic venue choice to permit suit only "in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred"<sup>29</sup> rather than any county where only "part" of a cause of action arose. The use of the word "substantial" should tighten the venue options premised on this basic provision. The new legislation then provides that all facts establishing venue must be assessed as of the time that the cause of action accrued.<sup>30</sup> Because ongoing damages are neither an event "giving rise to" a claim nor facts in existence when a claim accrues, plaintiffs should no longer have the option of simply moving to a more favorable county for suit.

The most fundamental change in the venue law relates to the "semi-mandatory" provisions subject to both the truly mandatory and truly permissive provisions of the following subchapters. As noted, the provision providing for venue where part of a cause of action accrued has been tightened. Then the new law provides for additional "mandatory" venue in the county where a non-individual defendant maintains its "principal office" as newly defined in restrictive fashion.<sup>31</sup> But then yet another venue option is added: if there is no Texas county where events underlying the cause of action took place, an individual defendant resided, or a business has its "principal office" as defined, then the plaintiff may bring suit in his or her county of residence.<sup>32</sup>

On balance, these changes would appear to reform the basic venue provision in a way that actually benefits Texas plaintiffs first. It must be remembered that any option added to the basic "mandatory venue" list of Subchapter A adds options for plaintiffs, because the permissive options of subchapter C are left in place by the new venue law. That subchapter has laid out, and will continue to lay out, possible but tortuous avenues a plaintiff may follow to sue a foreign or domestic business in or near the plaintiff's county of residence. The new law, therefore, will apparently permit Texas residents to sue foreign or domestic businesses in their home county on a more direct basis, without establishing the facts required under subsections "36" or "37". Of course, this additional option for venue in a county favorable to plaintiff arises only in the very unusual circumstances in which a business has no principal office in the state, as defined,<sup>33</sup> and no substantial part of the

events underlying the cause of action arose in Texas; but it is precisely in these unusual circumstances that the lawsuit probably does not belong in Texas in the first place and should be dismissed under the *forum non conveniens* procedure.

Another way the new venue law appears to be at least as favorable to plaintiffs as to defendants is that it adds another provision providing that if a plaintiff establishes venue as to one defendant, venue will have been established as to all defendants.<sup>34</sup> It is not clear how this provision was meant to fit with the existing provision that reads almost identically; if anything, the new language is subject to the potential interpretation that it will be easier for plaintiffs to select favorable venue in a multiple defendant case. On the flip side, however, the new law includes important reforms on certain details, providing that mandatory venue provisions applicable to certain claims control over permissive venue provisions<sup>35</sup> and that waiver of venue by one defendant specifically does not preclude other defendants from challenging venue.<sup>36</sup>

The new law does directly address the issue of multiple plaintiffs piggy-backing the appropriate venue choice of another plaintiff. Any plaintiff who cannot independently establish venue where the suit is filed will no longer be permitted to join or intervene in the suit without showing a lack of prejudice to all other parties, an "essential need to have the person's claim tried in that county," and the fairness and convenience of the chosen venue for all parties.<sup>37</sup>

In an important reform, the new law will also permit a judge in his or her discretion to transfer a case from one appropriate venue to another appropriate venue (called a "proper venue") so long as the moving party demonstrates its own hardship, a balance of interests of all parties in the transfer, and no injustice to any other party.<sup>38</sup> Any decision to transfer or not to transfer will not be appealable.<sup>39</sup>

In order to provide an early opportunity to resolve mandatory venue issues, the new law will generally permit immediate review by mandamus to enforce the mandatory provisions of the new venue law.<sup>40</sup> In addition, a defendant will be provided an opportunity to resolve multiple plaintiff joinder and intervention issues through an expedited interlocutory appeal.<sup>41</sup>

The new law applies only to lawsuits "commenced on or after September 1, 1995", except for cases brought under the Jones Act or the Federal Employers' Liability Act (FELA), in which the new law applies to suits commenced on or after January 1, 1996.<sup>42</sup>

## **Issues to Be Addressed**

The new law clearly will tighten certain of the loose provisions of existing venue law. The authors believe, however, that tort reform advocates should continue to press for continued reform of the venue laws to impose further limits on unjust forum selection. For example, changes in the multiple defendant rule should be considered. In tort cases, many individuals and corporations are potential defendants; permitting a shrewd plaintiff's lawyer to name particular defendants to establish favorable venue for an entire case should not be permitted.

Venue reform is an arena that promotes jingoism. Shortsighted attitudes lead to inappropriate results when applied to a civil justice system, however. Texas public policy simply does not require that the Texas procedure for resolving disputes between a Texas resident and foreign corporations, whether out-of-state U.S. corporations or truly foreign businesses, be slanted to favor the Texas resident. Unjust results in favor of a single Texas resident can cost jobs for hundreds of thousands of Texans, even when the out-of-state defendant does not employ a single Texan, because the business of the foreign corporation may require the "downstream" assistance of substantial Texas employers. Similarly, unjust results favoring a single Texas resident may persuade or require an out-of-state manufacturer to withdraw an important product from the Texas market, and at the very least will increase the cost of that defendant's business and thus of the prices of its products or services in Texas. If a lawsuit involves facts occurring out-of-state and

defendants residing out-of-state, there is little reason for a Texas judge or jury to resolve the matter just because the plaintiff lives in Texas. The authors would therefore advocate reform leading to a complete rewrite of the venue rules, with the most prominent goal being a radical simplification of the overall venue scheme. The process of simplification should lead to more direct legislative consideration of the real issues underlying venue provisions and their responsible reform.

## **Punitive Damages**

### **The Problem**

The common law rationale for punitive damage liability was that it allowed juries to "punish" wrongdoers in those rare cases in which the defendant had in effect acted criminally. In 1981, however, the Texas Supreme Court held that juries could award punitive damages for "gross negligence,"<sup>43</sup> a term defined ambiguously by the common law. In addition, appellate review of punitive damage awards was conducted under a deferential standard, making it difficult to correct excessive awards. Outlandish punitive damage awards have since proliferated, and punitive damage claims have become a feature of virtually every lawsuit.

The Texas Supreme Court's decision in *Transportation Ins. Co. v. Moriel*,<sup>44</sup> fundamentally altered the *Burk Royalty* paradigm. First, the Court specified that proof of "gross negligence" required evidence that "(1) viewed objectively from the standpoint of the actor, the act or omission ... involve[d] an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor ... ha[d] actual, subjective awareness of the risk involved, but nevertheless proceed[ed] in conscious indifference to the rights, safety, or welfare of others."<sup>45</sup> In addition, the *Moriel* Court made two sweeping changes to the procedure for punitive damage awards. The Court ruled that defendants may insist on a bifurcated trial so that "the jury first hears evidence of actual damages, and liability for punitive damages "and is not initially asked to quantify a punitive award."<sup>46</sup> [T]he same jury is [at the second stage] presented evidence of the defendant's net worth, plus any other evidence relevant only to the issue of punitive damages."<sup>47</sup> In addition, the Court altered appellate review of punitive awards, imposing on appellate courts the duty, "when conducting a factual sufficiency review of a punitive damage award, hereafter [to] detail the relevant evidence in its opinion."<sup>48</sup> The court did not, however, heighten the burden of proof for punitive damages issues.

Punitive damages are awarded to punish wrongdoing and misconduct, not compensate the plaintiff. As such they are like criminal fines and penalties; in fairness, no one should be so punished except by evidence beyond a reasonable doubt.

### **The Legislation**

Tort reform advocates urged legislative affirmance of the key *Moriel* rulings. In addition, they espoused legislative provisions increasing the burden of proof for recovery of punitive damages, removing gross negligence as a basis for exemplary damages, establishing caps on the amount of punitive damages, and providing mechanisms to prohibit multiple punitive damage awards for identical acts. Many of these goals were substantially achieved in revised Senate Bill 25.

Most notably, the new law will require proof of each of the elements necessary to permit an award of punitive damages by "clear and convincing" proof.<sup>49</sup> The new law will permit punitive damages for gross neglect only in wrongful death cases, otherwise removing gross negligence as a basis for an exemplary award.<sup>50</sup> The new law also defines "malice" as a basis for punitive damages, consistent with the *Moriel* decision, as conduct involving "an extreme degree of risk" viewed objectively, together with "actual, subjective awareness" by the defendant of that extreme risk, together with conscious indifference to the rights or safety of others.<sup>51</sup> The new law caps the

amount of punitive damages in most cases as \$200,000 or the amount of noneconomic damages up to \$750,000 plus two times the amount of economic damages.<sup>52</sup> The cap will not apply if the punitive damage defendant's conduct was criminal.<sup>53</sup> The new law will limit the extent to which punitive damages can be imposed on employers for the acts of employees, authorizing such relief only in cases in which the employer authorized the acts of the employee or maliciously employed an unfit employee, or the employee was a manager acting within the scope of his employment.<sup>54</sup> The new law will also severely restrict the imposition of punitive damages on defendants for the acts of other persons who are not employees of the pertinent defendant.<sup>55</sup>

With respect to procedural issues, the new law as enacted will explicitly authorize the bifurcated trial contemplated by *Moriei* and specify that the only issue in the second phase of the trial is the amount of punitive damages. Evidence only admissible in the second phase may not be admitted in the first "liability" phase.<sup>56</sup> The new law specifies the factors that may be considered in determining the amount of a punitive damage award.<sup>57</sup> And the new law requires that, on intermediate appellate review of a punitive damage award, the court of appeals must issue a written decision explaining the basis for its ruling on the punitive damage issues.<sup>58</sup>

Last, Senate Bill 25 as enacted contains the following effective date provision as § 2:

This Act takes effect September 1, 1995, and applies only to a cause of action that accrues on or after that date. A suit filed before the effective date of this Act is governed by the law applicable to the claim that existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.<sup>59</sup>

If the first sentence means what it says about applying the new law only to causes of action accruing after September 1, 1995, then many lawsuits could be filed after that date which would be governed by prior law. For example, a fraud cause of action accruing on August 31, 1995, could under the current limitations statute<sup>60</sup> be filed as late as August 31, 1999. Under the first sentence of the effective date provision, prior law would appear to apply to that case under the language of the first sentence. Such an interpretation, however, would make the second sentence of the effective date provision confusing, if not superfluous. This effective date provision is almost certain to lead to litigation, but it is not clear that any definitive court ruling on the meaning of this provision can be expected prior to the next regular session of the Legislature.

### **Issues To Be Addressed**

The new punitive damage law is a major improvement over the law prior to *Moriei* and confirms and expands *Moriei* itself, but the effective date provision constitutes a potentially lengthy retention of prior law in the face of substantial contrary public sentiment. Fortunately, that "prior" law now includes *Moriei*. Tort reform advocates should nevertheless consider pressing to limit the continued applicability of prior law in the next legislative session. As will be discussed below, other tort reform measures will apply unambiguously to all lawsuits filed after September 1, 1996. There is no reason to force the Supreme Court to deal with common law resolution of punitive damage issues any longer into the future, as the effective date of the new law threatens.

It is our understanding that two factors impeded passage of legislation to block multiple punitive damage awards for the same conduct: first, no consensus could be reached among the negotiating parties; and second, the issue became entangled with disputes over its impact on pending breast implant lawsuits. Given the effective date provision of Senate Bill 25 appearing to ensure that prior law would apply well into the future, the second rationale seems exceedingly weak. Efforts should therefore be made to devise a workable provision limiting the extent to which multiple punitive damage awards can be imposed on the same business or individual defendant for essentially the same conduct.

Punitive damage awards constitute windfalls for plaintiffs and their contingent fee attorneys in any event, and multiple punitive awards plainly come at the expense of other innocent creditors of the defendant and, in the case of a business defendant, the company's innocent employees and stockholders. Further limits on punitive damage awards, and more prompt imposition of newly enacted limits, should be the focus of reform in future legislative sessions.

## **Joint and Several Liability**

### **The Problem**

Under joint and several liability, defendants who are only marginally responsible for a plaintiff's injury but who have the ability to pay can be held liable for the whole amount of the damage award; thus some defendants are sued primarily because they are successful businesses. As an issue of fundamental fairness, tort reform advocates recommended a straightforward rejection of joint and several liability as a system imposing on solvent but tangential defendants the heavy burden of civil damages. Advocates urged a simple percentage responsibility system, limiting the liability of any particular defendant to the percentage of the damage caused by the wrongful act[s] of that defendant. Each person should be liable for the damage they cause, but no more.

Certain limitations on joint and several liability and related limitations on the ability of certain negligent plaintiffs to recover were enacted in 1987 as part of the overall comparative responsibility law codified in chapter 33 of the Texas Civil Practice and Remedies Code. As currently enacted, there are a variety of threshold percentages related to both the issues of joint and several liability and negligent plaintiff liability depending on the types of causes of action.

### **The Legislation**

The actual legislation passed was a compromise, increasing existing responsibility thresholds for imposing joint and several liability and lowering thresholds for plaintiff negligence leading to a bar on recovery.

Revised Senate Bill 28, applying to all causes of action based in tort, will create a single bar prohibiting recovery by a claimant, except in the cases of joint criminal conduct punitive damages, if the claimant was responsible for more than half his or her damage.<sup>61</sup>

In addition, the new law will limit a defendant's liability to its percentage of responsibility, except in three situations.<sup>62</sup> Any defendant, in any case, that is more than 50% responsible for the claimant's damage; any defendant in specified environmental pollution and toxic tort cases that is responsible for more than 15% of a claimant's damages; and any defendant who is held liable by reason of an intentional commission of specified criminal offenses, will be jointly and severally liable for the entire damage awarded the plaintiff.<sup>63</sup>

The new law will specify the procedural method by which juries will determine percentage of fault and will permit the liberal addition of third party defendants by existing defendants to attempt to reduce the percentage responsibility attributable to any one named defendant.<sup>64</sup> The law will also enact a new chapter 95 of the Texas Civil Practice & Remedies Code limiting property owner liability to contractors.

Senate Bill 28, as enacted, contains the following effective date provision:

¶ 3. This Act takes effect September 1, 1995, and applies to all causes of action that accrue on or after that date. This Act applies to all causes of action that accrued before the effective date of this Act and on which suit is filed on or after

September 1, 1996. A cause of action that accrued before the effective date of this Act and on which suit is filed prior to September 1, 1996, is governed by the law in effect immediately prior to the effective date of this Act and that law is continued in effect for that purpose.

¶ 4. Notwithstanding Section 3 of this Act, Chapter 95, Civil Practice and Remedies Code, as added by this Act, takes effect September 1, 1996, and applies only to a cause of action that accrues on or after that date.<sup>65</sup>

While these provisions mean that existing law will have applicability well into the future, at least this effective date provision requires that the new law apply to all lawsuits filed on or after September 1, 1996.

### **Issues To Be Addressed**

The authors support further reform to enact strict proportionate responsibility in all cases.

## **Texas Deceptive Trade Practice Act (DTPA)**

### **The Problems**

DTPA suits have grown beyond their intended purpose of protecting consumers from fraudulent and deceptive practices arising primarily from their inferior bargaining power. Although there were a wide range of proposals for modifying and limiting DTPA actions, the most prominent recommendations entering into the 1995 session were those to preclude the use of DTPA by large businesses, to exclude professional services from the coverage of DTPA, to impose proportionate rather than joint and several liability in DTPA actions, to limit the amount and types of damages recoverable in DTPA actions, to impose a system of contributory responsibility, to effectuate certain waivers of DTPA protections by consumers represented by a lawyer, and to narrow and rationalize the key definitions of "knowingly" and "unconscionability". The overwhelming majority of these proposals were enacted in House Bill 668.

### **The Legislation**

The new DTPA will continue to apply to any transaction involving a consumer's residence, but it will not apply to any other transaction in which the consumer pays more than \$100,000 and is represented by legal counsel not selected or urged on the consumer by the defendant, or, without regard to legal representation, transactions in which the consumer pays more than \$500,000.<sup>66</sup>

Under the new law, DTPA will not "apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion or similar professional skill," except that DTPA will apply in all circumstances to four types of conduct: "express misrepresentation", failures to disclose that meet the criteria of "laundry list" item 23, unconscionable conduct "that cannot be characterized as advice, judgment, or opinion," and "breach of an express warranty that cannot be characterized as advice, judgment, or opinion."<sup>67</sup>

As noted above, the new proportionate responsibility law will apply" to any cause of action based on tort."<sup>68</sup> In addition, that new law will delete the provision of prior law that expressly exempted DTPA from the coverage of the prior comparative responsibility law.<sup>69</sup> This combination of legislative acts seems clearly intended to subject DTPA actions to the new proportionate responsibility scheme, including the provision that a claimant may not recover if the claimant is responsible for more than half his or her damages. The absence of a provision expressly applying the new proportionate responsibility scheme to DTPA, however, may well prompt lead to unnecessary litigation on this point.

The pre-existing DTPA permits recovery of all actual damages, and then permits the jury to award an additional amount of damage, up to three times the amount of the actual damages, if the jury determines that the DTPA defendant acted "knowingly."<sup>70</sup> The new DTPA will limit recovery to (1) "economic damages," defined as "compensatory damages for pecuniary loss, including costs of repair and replacement" arising out of the consumer's reliance on the deceptive act or practice and the definition expressly excludes personal injury and related damages; and in the event the jury determines that a DTPA defendant acted "knowingly," mental anguish damages up to three times the economic damage may be awarded.<sup>71</sup> As additional damages, the jury may then award three times the total of economic damage and mental anguish damage, but only if the jury has determined that the DTPA defendant acted "intentionally," effectively defined to require meaningful proof of a specific intent to defraud or dupe the consumer.<sup>72</sup>

The new DTPA will make conspicuous, written waivers of DTPA claims enforceable as a defense in certain circumstances without regard to the dollar amount of the transaction so long as the consumer is not in a disadvantaged bargaining position and is represented by a lawyer not chosen by the DTPA defendant or its agent.<sup>73</sup>

Pre-existing DTPA law defines "unconscionable" transactions to include those which result "in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."<sup>74</sup> The new DTPA will exclude this part of the definition of "unconscionable"<sup>75</sup> and thus the "gross disparity" method of proving a DTPA case.

Other substantive changes in the new law will add price gouging and insurance company redlining<sup>76</sup> to the list of practices actionable under the DTPA.<sup>77</sup>

The new DTPA will also bolster the provisions of the law that are designed to promote out-of-court resolution of consumer claims. The new law will strengthen the ability of a DTPA defendant to abate a lawsuit when the consumer has not given proper notice of a DTPA claim, conform the notice requirements to the changes in damages available under the new DTPA, and enact a system of potentially mandatory non-binding mediation for DTPA claims.<sup>78</sup>

The new law makes general venue law applicable to the DTPA, and also permits suit in any county where a defendant or defendant's agent solicited the pertinent consumer transaction.<sup>79</sup>

The effective date provisions of the new DTPA largely track those of the proportionate responsibility law, maintaining pre-existing law for claims that accrue before September 1, 1995, and asserted in lawsuits filed before September 1, 1996.<sup>80</sup>

### **Issues To Be Addressed**

The new DTPA appears to leave little left unresolved for future legislative action. For example, while the definition of "knowingly" was not substantially changed, a finding of knowing action was added as a requirement for the recovery of mental anguish damages, and intentional action was substituted for knowing action as the necessary premise for recovery of multiple additional damages. In these circumstances, the practical result achieved very closely approximates the goal sought to be accomplished by a direct revision of the "knowingly" definition. Court decisions should rule that the new proportionate responsibility law applies to DTPA actions.

## **Frivolous Lawsuits**

### **The Problem**

One of the authors tried a DTPA/fraud jury case implicating virtually all of the foregoing tort reform issues just a couple of weeks before beginning preparation of this paper. During questioning for jury selection, the jury panel called for voir dire in that case contained a significant majority who admitted being aware of advertising campaigns claiming that frivolous lawsuits are being filed in Texas, and most of those potential jurors admitted agreeing with certain of the propositions in those advertisements. In addition, many of the panel members expressed the opinion that "mental anguish" damages had gotten out of hand, and several panel members expressed sincere reluctance to award any mental anguish damages at all. We mention this experience to point out the apparent effectiveness of the educational campaigns conducted by grassroots tort reform advocates, particularly Citizens Against Lawsuit Abuse ( CALA) groups, in Texas and to caution that significant improvement in our civil justice system needs to be achieved by appropriate methods in addition to legislative reform. That does not mean, however, that legislative reform is not critically important.

### **The Legislation**

Senate Bill 31 in effect enacted the federal court system of sanctions for frivolous pleadings, made those sanctions applicable to pleadings or motions filed after September 1, 1995, and prohibits the Supreme Court from adopting a Rule to alter the legislation.<sup>81</sup>

### **Issues To Be Addressed**

Many of the issues raised by the federal sanctions system have only recently been resolved by definitive federal court decisions.<sup>82</sup> It will therefore be important to assess how the federal system is applied in Texas state court before it can be determined whether further changes need to be made in future Texas legislative sessions. These results should be monitored.

## **Junk Expert Testimony**

### **The Problem**

It is widely recognized that the use of expert witnesses in litigation is commonplace, that the scientific theories about which they testify are increasingly complex, and their testimony has become more crucial to the outcome of the case.<sup>83</sup> Given the potentially prejudicial impact of expert testimony on jury decisions and the difficulty jurors face in resolving complex scientific issues upon which experts do not agree, commentators have favored placing more responsibility on the trial judge to ensure that expert testimony is reliable.<sup>84</sup>

### **Legislative Inaction**

It was nevertheless decided to leave reform of junk expert testimony to court resolution. Two weeks after close of the 1995 legislative session, the Texas Supreme Court in *E.I. DuPont De Nemours & Co v. Robinson*, held that Texas judges must ensure that any and all expert testimony admitted is not only relevant, but reliable".<sup>85</sup> In doing so, the Court pointed out that "[p]rofessional expert witnesses are available to render an opinion on almost anything, regardless of its merit."<sup>86</sup> The Court therefore created a six point non-exclusive list to determine the reliability of "so-called" expert testimony: (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the experts, (3) whether the theory has been subjected to peer review and/or publications, (4) the potential rate of error of the technique, (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the non-judicial uses that have been made of the theory or technique.<sup>87</sup>

### **Issues To Be Addressed**

In light of this action by the Texas Supreme Court, the decision to leave the issue of expert testimony to court resolution appears at this stage to reflect a wise allocation of reform resources.

## **Case Resolution Efficiency**

### **The Problem**

Because of heavy court case loads, plaintiffs are effectively denied justice by the delay in having their case heard.

### **Legislative Action**

It remains the authors' opinion that wise selection of capable judges for administrative positions has had a far greater impact on the efficient disposition of civil justice in our state courts than any potential legislative direction to the Supreme Court. Again it appears wise for reform advocates not to have devoted significant resources with the legislature on this issue. Future legislative action related to this issue should not deserve priority.

## **Judicial Selection**

### **The Problem**

While it is difficult to tie issues of judicial selection directly to tort reform, we strongly urge tort reform advocates to monitor closely the developments both in court and in the legislature which may lead to modifications in the method for electing and selecting judges in Texas. The goal of certain organizations is to subdistrict as many elective positions as possible in state government in order to attempt to ensure greater representation in those positions of particular racial and ethnic groups. Such subdistricting, however, would greatly magnify the extent to which the venue and campaign finance provisions in Texas law can be manipulated by plaintiffs' trial lawyers to undermine the effectiveness of key elements of the tort reform achieved in this legislative session.

In that context, a brief review of the status of efforts to change the system of judicial selection in Texas is in order.

### **Proposed Legislation**

In the late 1980's, a federal district judge ruled that Texas' system of electing trial judges of general jurisdiction on a county-wide basis violated the federal Voting Rights Act in several large urban Texas counties.<sup>88</sup> The Fifth Circuit stayed his order requiring the legislature to subdistrict judicial districts in those counties while the ruling was appealed.<sup>89</sup> Ultimately a majority of the entire Fifth Circuit ruled that the Voting Rights Act did not apply to judicial positions, but the U.S. Supreme Court reversed that holding.<sup>90</sup> A panel of the Fifth Circuit subsequently affirmed the trial court's ruling that county-wide judicial elections in certain counties violated the Voting Rights Act.<sup>91</sup>

The Texas Attorney General and Legislature then agreed on legislation that might have led to the subdistricting contemplated by the trial court's ruling. Again sitting as an entire court on review of the panel's decision, the Fifth Circuit rejected this attempted settlement (in large measure because certain responsible state officials like the Chief Justice of the Texas Supreme Court opposed the "settlement") and held that the county-wide system of electing trial judges did not violate the federal Voting Rights Act.<sup>92</sup> The U.S. Supreme Court declined to review this ruling.<sup>93</sup>

During this same time frame, another federal trial judge ruled that district-wide election of state appeals judges in the Thirteenth Court of Appeals violated the Voting Rights Act. Soon after the full court upheld county-wide elections for district judges, a panel of the Fifth Circuit reversed the Thirteenth Court of Appeals case and ruled that district-wide election of its judges did not violate the Voting Rights Act.<sup>94</sup>

When the Fifth Circuit panel reversed the federal trial court's ruling in the district court case, yet another suit was filed challenging district-wide election of appellate judges in courts other than the Thirteenth Court of Appeals. Following the final decisions in the district judge case and the case involving appellate judges heard by the Thirteenth Court of Appeals, appeals judges who had intervened in the new appellate judge case moved for a summary judgment that district-wide elections do not violate the Voting Rights Act in the challenged courts. That motion remains unresolved.

In the immediate past legislative session, a bill was proposed to change the judicial selection system to subdistrict district court elections in large urban counties, but to provide that appellate judges would be initially chosen by gubernatorial appointment. The bill was kept alive throughout the session but in the end did not pass.

### **Issues To Be Addressed**

In this context, tort reform advocates should be aware that similar efforts may be made by the proponents of subdistricting in future legislatures, and that the effectiveness of tort reform could be undermined significantly if subdistricting were accomplished.

## **Judicial Fundraising**

### **The Problem**

Because of the extent to which the extraordinary wealth of plaintiffs' personal injury lawyers gives them the ability to influence judicial decisions through substantial contributions to the campaigns of judges, tort reform advocates supported reform of the Texas system of judicial fundraising.

### **The Legislation**

Significant new limitations on judicial fundraising were in fact passed in the just completed legislative session.<sup>95</sup> A realistic understanding of the details of these limitations cannot be achieved without significant familiarity with existing campaign finance law in Texas, but some highlights of the new law can be profitably summarized. Judges may not accept contributions outside of a period beginning 210 days before the election filing deadline and 120 days after the election.<sup>96</sup> The new law significantly limits the amount any one person, and particularly any one lawyer, may contribute to the campaign of a judge -- generally no more than \$ 5000 for statewide judges and judges from the largest counties; and the limitations are made meaningful by counting related law firm and PAC contributions against the limit of an individual lawyer.<sup>97</sup> In a further section that may conflict with the First Amendment, the new law also establishes a sliding scale of limits on the total amount that judicial candidates may spend on campaigns.<sup>98</sup>

### **Issues To Be Addressed**

Tort reform advocates should monitor the effectiveness of this new legislation closely. Significant effort was made to close all potential loopholes, but it remains unclear whether there are any means for personal injury trial lawyers to skirt the intended limitations. As suggested above, moreover, this type of limitation may not survive court challenge under the First Amendment, so that different reforms may have to be devised in the future.

## **Contingent Fee Reform**

### **The Problem**

Attorneys who are retained on a contingency fee basis routinely receive between thirty to forty percent of a judgment.<sup>99</sup> A good portion of any damage award is thus transferred from the victim to the victim's attorney.<sup>100</sup> The policy favoring a contingency fee system is that it provides access to the courts for those who would otherwise be unable to retain an attorney. On the other hand, the contingency fee system has been known to encourage frivolous lawsuits.<sup>101</sup> Proponents of reform favor capping the contingency fee at a lower percentage of the award so that worthy plaintiffs actually receive more compensation, and their lawyers less.

### **Proposed Legislation**

One of the rare sources of significant disappointment for tort reform advocates in the past legislative session was the decision to defer the issue of contingent fee reform to the Texas Supreme Court. From the author's perspective, the issue of limiting contingent fees is a matter of public policy, not an issue of professional ethics or litigation procedure that can be meaningfully addressed by judges, particularly by judges who must run expensive statewide political campaigns with contributions and must rely for those contributions on lawyers and law firms who all profit ultimately from maintaining the high level of percentages for contingent fees.

### **Issues To Be Addressed**

Legislation imposing meaningful limitations on contingent fees should therefore be on the list of important tort reform goals for the next legislative session.

### **Forum Non Conveniens -- 1993**

#### **The Problem**

As noted above, the Texas Supreme Court held that anyone, including foreign nationals, could sue anyone else in Texas if the defendant had any minimum contacts with Texas.<sup>102</sup>

#### **The Legislation**

Senate Bill 2 of the 73rd Legislature (1993), reinstated the doctrine of *forum non conveniens*. The legislation gives courts the discretion to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were tried in another forum.<sup>103</sup> Notably, the law does not apply to causes of action resulting from the violation of the laws of Texas or the United States, nor does it apply to certain other causes of action, for instance those involving air crashes or asbestos.

#### **Issue To Be Addressed**

The *forum non conveniens* law contains exceptions that may require Texas juries to resolve most cases involving hazardous materials transportation. This loophole should be closed, and a *forum non conveniens* standard should be uniformly adopted for all cases.

### **Products Liability - 1993**

#### **The Legislation**

The 1993 products liability legislation<sup>104</sup> limits the potential liability of both product manufacturers and sellers. It provides that plaintiffs alleging that a product was defectively designed are required to prove that an economically and technologically safer alternative was available at the time of manufacture, and to prove that the alternative would have prevented or significantly reduced the risk of injury without impairing the utility of the product. Further, under the new law, "innocent retailers" are to be indemnified for liability if they did not modify a product or breach their own warranty. The statute provides a 15 year statute of repose for suits involving manufacturing equipment. Finally, the law immunizes sellers of products that the common consumer knows to be inherently unsafe, such as alcohol and tobacco.

#### **The Future**

The 1993 product liability reform bill reformed liability for manufacturers of alcohol, cigarettes & firearms to conform with comment i, inherently unsafe products, § 402A of the Restatement 2d of Torts, addressing ordinary products which cannot be made entirely safe for all consumption or use. For manufacturers of certain other consumer chemical products, mainstay defendants in product liability litigation, reform was limited to the instruction on a safer alternative design; drugs were excluded from this provision, however, as were causes of action based on environmental or toxic torts. In recognition that many life-saving drugs are unavoidably unsafe and are not defective despite the risk, comment k of the Restatement provides that the products are not unreasonably dangerous and sellers are therefore not subject to strict liability for physical harm caused by their use. Legislation embodying this principle would be laudable.

Tort reform advocates have not been successful in persuading the Texas legislature to pass the government standards defense, which would preclude negligence liability for products that comply with FDA or other governmental safety standards. Further, the statute of repose set at 15 years only applies to a limited number of cases. In future legislature sessions, action may be taken to close these loopholes and make the principles of this legislation universal across all products and industries.

## **CONCLUSION**

Past history demonstrates that shrewd plaintiffs' trial lawyers paid on contingent fees are going to take every opportunity to work around tort reform measures and to advance arguments in court to limit the effectiveness of enacted tort reform legislation. Tort reform advocates should already be prepared to address certain issues not resolved in this past legislative session, but perhaps most importantly, must be eternally vigilant to newly devised abuses of our civil justice system that will have to be corrected through tort reform that may not yet be formulated.

Other potential reform includes the following.

### **Limit Non-Economic Damages**

Unlimited damage awards for non-economic "pain and suffering" threaten to undermine the gains made in punitive damage reform. Texas should follow the lead of nine other states, including Colorado, Oregon and Hawaii, and limit non-economic damages. The prevailing limit in those states is half a million dollars. A half a million dollar limit should make sense for Texas.

### **Allow A Government Standards Defense**

Generally, courts have held that compliance with government product safety regulations is admissible and relevant but does not conclusively resolve whether a product is defective or a manufacturer is negligent. It is illogical to give so little weight to safety standards promulgated by expert agency required by law to balance all public interests. Texas should legislate a conclusive defense based on specified government standards.

### **Protect Self Critical Analysis**

It is practice in many industries, and legally mandated in some, that after an accident the business conduct a "self critical analysis" to figure out what when wrong and how to correct it. There should be a generally enforceable discovery privilege for voluntarily conducted audits of this type, as has been recognized by some federal courts.<sup>105</sup> Lack of such protection is a disincentive to performing self-evaluations that can lead to safer conduct of future business.

### **Prohibit Felon Lawsuit**

Felons in this state may sue their victims if the victim used "unreasonable force" in attempting to stop the felony. It should be the law of Texas that a felon is simply barred from bringing suit against the victim of his or her crime.

### **Reduce the Cost of Automobile Liability Insurance**

Automobile insurance claims, and therefore premiums, keep rising in Texas, although there has not been a significant increase in the number of accidents. The culprit is clear: attorneys encouraged by contingent interests in claims. Lawyers who use contingency fee contracts in automobile cases have a great incentive to increase the amount of the claim, even when the insurance company makes a reasonable offer to settle. The solution, therefore, should be a

limitation on the attorneys' award thereby limiting the incentive to create claims. A simple way to do this would be to allow an attorney to receive a limited percentage fee based solely on the excess payment received by the claimant over what the insurance company offered. This idea is not novel; it is the intuition behind Federal Rule of Civil Procedure 68, which provides for attorney fee shifting in cases where a reasonable offer of settlement is rejected. Under Texas law, everyone is required to carry car insurance. Attorneys should not make this legal obligation unduly expensive.

A workable system of no-fault insurance should be seriously considered. The key is that in limiting lawsuits between injured and insured, a no-fault plan should be constructed that does not increase claims between insured and carrier, so that the overall costs of insurance can ultimately be reduced. For similar reasons, a no-fault plan should avoid monetary limitations that have led to higher claims costs in other states, so that premium reduction goals can be met.

### **Investigate Premises Liability**

Tort reform advocates should investigate the burgeoning caseload in so-called premises liability, where landowners are held liable for criminal acts on their property.<sup>106</sup> Standards for enforcement of security in semi-public areas should be set by the legislature, not left to the whims of local juries.

## ENDNOTES

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<sup>1</sup> Significant legislation of less than widespread applicability reforming health care litigation and lawsuits against government officials was passed and signed into law. Acts 1995, 74<sup>th</sup> Leg., ch. 140; Acts 1995, 74<sup>th</sup> Leg., ch. 139. Information on this new legislation may be obtained from the authors.

<sup>2</sup> The legislature did pass H.B. 2987 which would have prohibited the Supreme Court from adopting any rule affecting an attorney's right to contract. At the urging of tort reform advocates, Governor Bush vetoed the legislation, believing it to raise serious separation of powers concerns.

<sup>3</sup> **Dow Chemical Co. v. Alfaro** 786 S.W.2d 674 (Tex. 1990).

<sup>4</sup> Weiss, *America's Queen of Torts*, Policy Rev. 82 (Fall 1992).

<sup>5</sup> TEX. CIV. PRAC. & REM. CODE § 71.051.

<sup>6</sup> Acts 1993, 73rd Leg., ch. 4, § 2 (applying to "causes of action filed on or after September 1, 1993").

<sup>7</sup> **Transportation Ins. Co. v. Moriel**, 879 S.W.2d 10 (Tex. 1994).

<sup>8</sup> TEX. CIV. PRAC. & REM. CODE ANN., ch. 33.

<sup>9</sup> TEX. BUS. & COM. CODE ANN. §§ 17.41 - 17.50.

<sup>10</sup> Huber, *Galileo's Revenge: Junk Science in the Courtroom* (1991).

<sup>11</sup> **Daubert v. Merrell Dow Pharmaceutical, Inc.**, 113 S. Ct. 2786 (1993).

<sup>12</sup> **E.I. DuPont de Nemours & Co. v. Robinson**, 38 Tx. S. Ct. J. 852 (June 15, 1995).

<sup>13</sup> **Rangel v. Morales**, 8 F.3d 242 (5th Cir. 1993); **LULAC v. Clements**, 999 F.2d 831 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994).

<sup>14</sup> *60 Minutes: Is Justice For Sale In Texas?* (CBS television broadcast, December 1987).

<sup>15</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 15.001.

<sup>16</sup> See **Ponder v. Brice & Mankoff**, 889 S.W.2d 637 (Tex. App. -- Houston [14th Dist.] 1994); **C.G. Sun Medical v. Overton**, 864 S.W.2d 558 (Tex. App. -- Fort Worth 1993).

<sup>17</sup> **Id.**; see TEX. CIV. PRAC. & REM. CODE ANN. ch. 15, subch. B and C.

<sup>18</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 15.061.

<sup>19</sup> **Ladner v. Reliance Corp.**, 293 S.W.2d 758 (Tex. 1956).

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<sup>20</sup> *Id.* § 15.037.

<sup>21</sup> *Id.* § 15.036.

<sup>22</sup> **Accent Energy Corp. v. Gillman**, 824 S.W.2d 274, 277 (Tex. App. -- Amarillo 1992, writ denied).

<sup>23</sup> *Id.* § 15.033.

<sup>24</sup> Tonn and Associates, *Medical Professional Liability: An Examination of Claims Frequency and Severity in Texas* (February 1994).

<sup>25</sup> *Id.* § 15.064.

<sup>26</sup> *Id.* § 15.063.

<sup>27</sup> See **PoCaris Inv. Mgm't Corp. v Abascal**, 38 Tx. S. Ct. J. 308 (Feb. 16, 1995).

<sup>28</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 15.001(a), as added.

<sup>29</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1), as added.

<sup>30</sup> *Id.* § 15.006, as amended.

<sup>31</sup> *Id.* § 15.002(a)(3), as amended.

<sup>32</sup> *Id.* § 15.002(a)(4), as amended.

<sup>33</sup> For this reason, it is difficult to conceive a situation in which this option would ever apply to provide for "easy" venue in the county of plaintiff's residence; a Texas business is almost guaranteed to have a "principal office" in Texas, even as restrictively defined by the new venue law. The new law raises an intriguing issue for businesses incorporated out of state. If a business has sufficient connections with Texas to ensure that Texas courts can exercise jurisdiction over the business under the due process clause of the United States Constitution and the long-arm statutes of Texas, then it might consider establishing just such a "principal office" as defined in a "defendant-friendly" county, eliminating the plaintiff's county as a "mandatory" option of Subchapter A. Unfortunately, this issue cannot be resolved with this linear analysis, because even with a Texas resident defendant, a plaintiff's lawyer will also have the "permissive" options supplied by subsection 15.037, as well as those offered by the multiple defendant provisions discussed above and below; in addition, the analysis would require further consideration of the proportionate liability reforms discussed below, which may reduce the advantage to plaintiffs of using a limited set of defendants, making the multiple defendant provisions even more important. The authors cannot help wondering, however, whether the legislature's focus on the "principal office" issue was in part motivated by a desire to give out-of-state businesses a perverse incentive to establish such offices in Texas.

<sup>34</sup> *Id.* § 15.005, as amended.

<sup>35</sup> *Id.* § 15.004, as amended.

<sup>36</sup> *Id.* § 15.0641, as added.

<sup>37</sup> *Id.* § 15.003, as added.

<sup>38</sup> *Id.* § 15.002(b), as added.

<sup>39</sup> *Id.* § 15.002(c), as added.

<sup>40</sup> *Id.* § 15.0642, as added.

<sup>41</sup> *Id.* § 15.003(c), as added.

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42 S. B. 32, § 11.

43 **Burk Royalty v. Walls**, 616 S.W.2d 911 (Tex. 1981).

44 879 S.W.2d 10 (Tex. 1994); *see also* **Universal Serv. Co. v. Huy**, 38 Tx. S. Ct. J. 870 (July 7, 1995)

45 879 S. W. 2d 23.

46 *Id.* at 30.

47 *Id.*

48 *Id.* at 31.

49 TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001(2), 41.003(a), as amended.

50 *Id.* § 41.003(a)(3), as amended.

51 *Id.* § 41.007, as amended.

52 *Id.* § 41.008(b), as amended.

53 *Id.* § 41.008(c), as amended.

54 *Id.* § 41.005(c), as amended.

55 *Id.* § 41.005(a), (b), as amended.

56 *Id.* §§ 41.009, 41.011(b), as added.

57 *Id.* § 41.011(a).

58 *Id.* § 41.013.

59 Acts 1995, 74<sup>th</sup> Leg., ch. 19, § 2

60 TEX. CIV. PRAC. & REM. CODE ANN. § 16.051.

61 TEX. CIV. PRAC. & REM. CODE ANN. § 33.002, as amended.

62 *Id.* §§ 33.003, 33.013(a), as amended.

63 *Id.* §§ 33.013(b), (c), as added.

64 *Id.* § 33.004, as amended.

65 Acts 1995, 74<sup>th</sup> Leg., ch. 136 § 4.

66 TEX. BUS. & COM. CODE ANN. §§ 17.49(f), (g), as added.

67 *Id.* § 17.49(c), as added.

68 TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a), as amended.

69 *Id.* § 33.002(c), as amended.

70 TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

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71 *Id.* §§ 17.50(b)(1), 17.45(11), as amended.

72 *Id.* §§ 17.50(b)(1), 17.45(13).

73 *Id.* § 17.42, as amended.

74 *Id.* § 17.45(5)(B).

75 *Id.* § 17.45(5), as amended.

76 Redlining is the term used to describe the insurance company practice of discriminating by selectively excluding classes of potential insureds from coverage.

77 *Id.* §§ 17.46(b)(25); H. B. 668, § 16.

78 TEX. BUS. & COM. CODE ANN. §§ 17.505, 17.5051, 17.5052, as amended.

79 *Id.* § 17.56, as amended.

80 H. B. 668, § 20. The new venue provision became effective September 1, 1995. *Id.*

81 TEX. CIV. PRAC. & REM. CODE ANN., ch. 10, as added; Acts 1995, 74<sup>th</sup> Leg., ch. 137, § 2.

82 See, e.g., **Cooter & Gell v. Hartmarx Corp.**, 496 U.S. 384 (1990); **Thomas v. Capital Sec. Servs.**, 836 F.2d 866 (5th Cir. 1988).

83 **Dupont v. Robinson**, 1995 Tex. LEXIS 103, at \*11.

84 *f/a Id.* at \*12.

85 *Id.* at \*22.

86 *Id.* at \*11.

87 *Id.* at \*24-25.

88 See **LULAC v. Clements**, 999 F.2d 831, 837-838 (5th Cir. 1993).

89 *Id.*

90 **Houston Lawyers Assoc. v. Attorney Gen.**, 501 U.S. 419 (1991).

91 **LULAC v. Clements**, 986 F.2d 728 (5th Cir. 1993).

92 **LULAC v. Clements**, 999 F.2d 831 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994)

93 114 S. Ct. 878 (1994).

94 **Rangel v. Morales**, 8 F.3d 242 (5th Cir. 1993).

95 S. B. 94.

96 TEX. ELEC. CODE ANN. § 253.153, as amended.

97 *Id.* §§ 253.155-60, as amended.

98 *Id.* §§ 253.168-72, as amended.

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<sup>99</sup> See Maggs & Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 U. HO. L. REV. 1915, 1924 (1994).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> **Alfaro**, 786 S.W.2d at 679.

<sup>103</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 71.051.

<sup>104</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 82 et seq.

<sup>105</sup> Compare **Bredice v. Doctors Hosp., Inc.**, 50 F.R.D. 249 (D.D.C. 1970), affd., 479 F.2d 920 (D.C. Cir. 1973), with **Dowling v. American Hawaii Cruises, Inc.**, 971 F.2d 423, 425 (9th Cir. 1992). Courts recognizing the privilege have generally required the party asserting the privilege demonstrate at least three propositions: (1) that the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free internal flow of the type of information sought; and (3) the information must be of the type whose flow would be curtailed if discovery were allowed.

<sup>106</sup> See **Centeq Realty Inc. v. Siegler**, 38 Tx. S. Ct. J. 658 (May 25, 1995).