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Restoring Civil Justice In Texas

Finishing What We Started

By Bill Peacock, director of the Center for Economic Freedom

A Review of Texas Tort Reform

By the late 1980s, it was no secret to anyone that justice was very difficult to come by in the Texas civil justice system.

60 Minutes had shown the nation the problems of which most Texans were all too aware. The courts were swamped by tens of thousands of lawsuits filed in Texas by people who had never set foot in the state but were merely fishing for a sympathetic judge or jury. Many of those judges were presiding over trials which awarded outrageous noneconomic and punitive damages.

The workers' compensation system benefited lawyers more than injured workers. People who were truly harmed had a difficult time having their day in court because of the backlog of dubious cases encouraged by the broken system.

That began to change in the mid-nineties, as Texans began to elect judges, legislators and other officials who understood the problem and were willing to do what was necessary to fix it.

Since 1995, Texans have embarked on an unprecedented effort to restore justice to its rightful place in Texas courtrooms. The civil justice reforms enacted by the legislature or implemented by the Texas courts

Options for Continued Tort Reform

Jury Selection: Improve the jury assembly and selection process.

Expert Testimony: Encourage use of independent professionals to evaluate expert testimony and subject doctors who provide expert testimony to oversight by the Texas Medical Board.

Judicial Selection: Change to some mix of 1) merit selection of judges; 2) retention elections; and 3) non-partisan elections.

Caps on Noneconomic Damages: Extend the current noneconomic damage caps in Texas to actions other than medical liability.

Splitting Punitive Damage Awards: Adopt punitive damages sharing, which directs a percentage of the damages to the state—much like a civil penalty in a regulatory enforcement case.

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during the last 11 years are too numerous to fully catalog, but a short listing would include reforms in areas such as:

- Venue abuses and interstate forum shopping
- Product liability
- Punitive and noneconomic damages
- Workers' compensation
- Joint and several liability
- Deceptive Trade Practice Act
- Frivolous lawsuits
- Junk expert testimony
- Class action lawsuits
- Medical liability
- Asbestos and silica litigation

One can get a sense of the impact of these reforms by examining the benefits of the 2003 medical liability reforms. Since they were put into place, the American Medical Association dropped Texas from its list of states that are in a medical liability crisis. Malpractice insurance rate cuts announced by five of the largest insurers in the Texas market will save doctors (and their patients) about $50 million. In fact, every liability insurance provider in Texas except one had lowered premiums by 2005. Additionally, there have been at least 15 new entrants to the medical malpractice insurance market, further increasing competition and the downward pressure on rates.

However, the benefits of medical liability tort reform have not been just monetary. Health care for Texans has also improved as some of the tens of millions of dollars being saved by health care providers are being redirected into new services and improvements such as loss prevention initiatives, safer transportation of patients, enhanced testing procedures, and monitoring and certification of nurses. The reforms have also made doctors more willing to take on new, risky cases and given hospitals unprecedented success in recruiting new physicians.

Furthermore, it is not just medical liability tort reform that is good for one's health. From 1981 to 2000, a study by Paul Rubin and Joanna Shepherd found that tort reforms in general led to an estimated decrease of 14,222 accidental deaths across the country because lower tort costs enabled businesses and consumers to invest more in risk-reducing processes and products such as worker safety, medicines, and medical services.[1]

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More Work to Be Done

While Texans have clearly benefited from past tort reforms, the history of abuse of the tort system suggests more work remains to be done in completing the overhaul of the Texas civil justice system.
History shows that the trial bar is populated with extremely talented entrepreneurs who devote their efforts to discovering different means of mining profits from the tort system. These avenues to wealth creation take many different approaches, including: venue shopping, where attorneys seek out sympathetic judges and juries; using jury selection to build favorable juries; recruiting so-called expert witnesses who make their living by supporting the plaintiff's bar; constructing novel legal theories that are supported by friendly judges; filing mass lawsuits against multiple companies hoping that the mere threat of a large jury verdict will lead companies to settle; exploiting the complexities of our legal and regulatory system; and looking for the most profitable areas of the U.S. economy to create new profit centers for themselves. Texas has been a venue for many of these entrepreneurial endeavors.

As previously mentioned, Texas became infamous in the late 1980s for its hospitality of lawsuits filed on behalf of residents of other states. Tort reformers worked for years to bring this abuse of the system to an end. However, their success did not mean the end to lawsuit abuse in Texas—it merely caused the plaintiff's bar to put its resources into more profitable areas.

One of the new profit centers that sprung up in Texas was asbestos litigation. Texas became a favorite venue for plaintiffs, leading the nation in new filings from 1988 throughout the 1990s. Three counties, Har-

ris, Galveston and Jefferson, led all other jurisdictions for new filings for much of the 1990s. While other states such as Mississippi and New York vied for second and third, Texas led the nation in asbestos filings for over a decade.[2]

The evidence suggests that the vast portion of the increased asbestos litigation was not due to actual illness or injury. After looking at the numbers, Joseph Stiglitz concluded:

> The dramatic acceleration in claims does not appear to be associated with an acceleration in the number of severely affected people. Indeed, the American Academy of Actuaries has concluded that about 2,000 new mesothelioma cases are filed each year, a flow which is largely unchanged over the past decade, and that the annual number of other cancer cases at least partly related to asbestos exposure amounts to between 2,000 and 3,000. Such cases cannot come close to explaining the increase in asbestos claims being filed, which increased by almost 60,000 between 1999 and 2001.[3]

A better explanation for the explosion in asbestos lawsuits is that trial lawyers began hiring screening firms to carry out massive recruitment programs across the country. These efforts were not medical screenings meant to identify patients with diseases who need treatment, but legal screenings to identify potential litigants who met questionable legal criteria that qualified them for settlements.[4] These legal criteria are in essence relaxed standards of diagnoses that have developed over time in an attempt to streamline cases.[5] However, the result is that most people who meet the legal criteria do not meet the medical standards necessary in order to produce a positive diagnosis of illness or impairment.

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For example, one study using independent radiologists identified the presence of lung abnormalities in only 4.5 percent of x-rays used in asbestos litigation, in contrast to the doctors employed by trial lawyers who found abnormalities in 96 percent of the x-rays.[6] Other studies estimate that up to 89 percent of all asbestos claims come from people who do not have cancer and may not be ill or impaired at all.[7]

The efforts at recruiting plaintiffs certainly yielded dividends. The more than 8,400 companies named as defendants in asbestos lawsuits, along with insurance companies and other parties, have spent in excess of $54 billion on asbestos litigation, with transaction costs (attorneys' fees, court costs, etc.) accounting for more than half of the spending.[8] At least 70 companies have filed for bankruptcy.[9]

However, the success of this effort led to a problem for trial lawyers—the pool of potential plaintiffs began to dry up. So in order to take continued advantage of the cottage industry they had set up, trial lawyers began looking for plaintiffs who could claim exposure to silica—which can cause silicosis—using the same medical and legal methodology developed through years of asbestos litigation.

Though trial lawyers were successful in recruiting new plaintiffs, they ran into a road block last year in the Corpus Christi courtroom of U.S. District Judge Janis Graham Jack, who was presiding over 10,000 silica lawsuits which had been consolidated in her court for pretrial proceedings. Rather than rubber stamp the diagnoses from the mass screening as most other judges had done, she held hearings to examine their validity. The results of her investigation of this issue are enlightening:

- One doctor testified that he diagnosed 860 people with silicosis in a 72-hour period without seeing any of them. Another doctor said he signed diagnoses without reading them.
- A West Virginia radiologist testified he didn't interview, conduct physical exams on, or check the work records of 2,700 of the claimants. He had secretaries prepare the diagnoses and stamp his name on them.
- Doctors recanted more than 4,000 of the 10,000 diagnoses when questioned under oath.

- Many of the plaintiffs in the trial had previously filed lawsuits claiming to have asbestosis. Doctors acknowledged diagnosing the same patients with both asbestosis and silicosis, depending on the lawsuit.
- The owner of a screening company that produced 6,500 of the plaintiffs said he set up his company after educating himself on how to run an X-ray machine and take a patient's medical history.

To address this problem, Texas enacted medical criteria reforms in 2005 that have largely eliminated meritless cases filed by people who may have been exposed to either silica and asbestos in the past and may become ill in the future. Now the truly ill will have speedy access to the courts to have their claims adjudicated. Unfortunately, the trial bar has already shifted gears to bypass this obstacle and move on to other, more profitable areas.

The most recent example of the entrepreneurial work of the trial bar is seen in the decision last August by an Angleton jury to award more than $253 million in damages against Merck in the first Vioxx lawsuit to go to trial.

The actual economic damages in the case totaled only $400,000. Most of the damages seemed designed to punish Merck for what the jury considered to be questionable marketing practices. Noneconomic damages were $24 million, including $22 million for mental anguish and loss of companionship. The punitive damages were $229 million. If the verdict is upheld on appeal, Texas law requires that the punitive damages be reduced, but the total damages would still top $25 million if all of the noneconomic damages are allowed.

Potential payouts like this are driving massive filings of Vioxx lawsuits all across the country. Kent Jarrell, a spokesman for Merck's defense team, says more than 6,400 suits had been filed by Sept. 30, over 3,500 of them in various state courts.[10] In Texas, lawsuits have been filed on behalf of at least 600 to 700 plaintiffs. And more are probably on their way.

Tommy Fibich, a Houston trial lawyer, explained why Texas in particular is attractive to trial lawyers who are adopting the state strategy.

"All mass torts go through Texas: breast implants, fen-phen and now Vioxx. Mass tort resolution is going to go through Texas. There is no other group of lawyers anywhere able to do what the lawyers in Texas have done, and every other state looks to us. Mark [Lanier, the attorney in the first Merck lawsuit] has led off with a grand slam home run," said Fibich.[11] Texas may look even more attractive to plaintiffs now that juries in both New Jersey and Louisiana have found Merck not liable in the second and third Vioxx cases to go to trial. The first big wave of Vioxx lawsuits is likely to hit Texas sometime this year.

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Options for Continued Tort Reform

Texans' tort reform efforts over the last decade have succeeded in making Texas a much better place to live and do business. Yet there can be no doubt that trial lawyers continue to be successful in finding areas of the law to pursue the mass lawsuits with the potential of bringing in huge profits. While Texas policymakers should continue to look for specific areas of the law where they can enact reforms to address this abuse—like they did with asbestos and silica, they should also look for systemic reforms that can bring an end to the excessive awards and questionable verdicts that remain a part of the Texas civil justice system. The following is a brief discussion of five such options:

Improve Jury Selection

Perhaps the most fundamental reform left to help limit excessive awards by juries would be reforming the jury process. To ensure that the integrity of a

jury's critical role in the legal process is maintained, a number of reforms should be examined. These include harmonizing the many rules governing the jury process, ensuring jurors are randomly summoned from a fair cross section of the community, and eliminating any opportunity to manipulate the jury assembly or selection process.

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Improve Expert Testimony

In both asbestos/silica and Vioxx cases, inaccurate and misleading expert witness testimony continues to be a problem. It took a tremendous effort on the part of Judge Jack to gather the information that led doctors to recant their diagnoses of patients. Not all courts, particularly at the state level, have the resources needed to sift through the voluminous information presented in many trials in order to verify the accuracy of expert testimony and determine whether it should be allowed in the courtroom.

At least two reforms have been proposed to help deal with this problem. First, giving judges the necessary resources to use independent doctors and other professionals to help them determine whether expert testimony should be admitted in court. Second, requiring that doctors who testify as expert witnesses be deemed to be practicing medicine, which would give the Texas Medical Board the authority to discipline those who fraudulently testify.

Reform Judicial Selection

The partisan election of judges in Texas has come under criticism from a variety of sources. Critics argue that the elections require judges to solicit contributions from the very lawyers who practice before them, creating at least an appearance of impropriety. Additionally, partisan identification may cause some voters to overlook the qualifications of individual judges and rely solely on their party affiliation when voting.

Reforms that have been proposed for judicial selection include 1) merit selection of judges, where the governor appoints judges in the trial courts, appeals courts, or both; 2) retention elections, where appointed judges face occasional retention elections by the voters; and 3) non-partisan elections, where judges run together on a non-partisan ballot, much like municipal races are held today.

Place Caps on Noneconomic Damages

The problem of unrestricted awards for noneconomic damages was recognized by members of the Texas Legislature in 2003. As a result, they passed a constitutional amendment, subsequently approved by the voters, allowing noneconomic damage caps to be adopted with a 60 percent vote of the legislature, and approved legislation putting the caps on all medical liability lawsuits. The caps were the centerpiece of the medical malpractice reforms in 2003 that produced the benefits discussed earlier in this paper.

Another possible reform is to extend the noneconomic damage caps in Texas to actions other than medical liability. To date, eight states (Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, and Ohio) have done this. The caps run from $250,000 in Kansas and Idaho to $1 million in Mississippi. Some of the caps vary according to circumstances, such as in Colorado, where its $250,000 cap can be raised to $500,000 in the case of "justification by clear and convincing evidence." Some states, e.g., Mississippi and Colorado, place the caps on all civil actions, while others limit it to certain types of actions, such as personal injury.

Split Punitive Damage Awards

Because of the caps already in place, punitive damages do not exhibit the erratic and excessive characteristics of noneconomic damages. But there is still the question of whether punitive damages properly belong to the plaintiffs or should be directed to the state, much like a civil penalty in a regulatory enforcement case. Seven states (Georgia, Illinois, Indiana, Iowa, Missouri, Oregon and Utah) have adopted some form of punitive damages sharing, which di-

rects a percentage of the damages to the state. The state's share generally runs from 25 percent to 75 percent. Some states take their share right off the top, while others take their share only after the attorney's fee has been paid. As with the noneconomic damage caps, some states apply this reform only to certain actions. Several states have adopted this reform in addition to punitive damage caps.

> Both justice and jobs are at risk when tort law is subject to abuse. Texas policymakers should look closely at how they can continue to build on their excellent accomplishments in reforming the Texas civil justice system.

The structure of a law implementing revenue sharing of punitive damages is important if a state hopes to reduce the number of lawsuits filed. A January 2000 research study by Andrew Daughety and Jennifer Reinganum looked at six states that have adopted some form of this concept.[12] The paper showed that at least four of the states structured their laws to enhance state revenue rather than decrease lawsuits.[13] States that sought to decrease lawsuits adopted a sharing formula that gave the state a high proportion of the award (60-75 percent) before attorney's fees were paid; states that sought to maximize revenue generally took a lower share of the damages after the attorney's fees had been paid.[14]

Conclusion

Improved access to the courts, lower insurance rates, better health care, and the improved administration of justice are some of the major benefits that Texans have experienced from the tort reforms enacted over the last 11 years.

However, perhaps because of the vast scope of the reforms, momentum for additional reforms may be waning. But there are still problems with Texas tort law that need to be addressed.

The 2005 State Liability Rankings Study[15] ranks the tort litigation climate in each state as perceived by over 1,400 practicing corporate attorneys and general counsels. Texas, which ranked near the bottom at 46th in 2004, moved up only two spots to 44th in 2005. Houston and Beaumont still rank in the bottom 15 jurisdictions nationally when it comes to a poor litigation environment. Though 86 percent of the respondents expect Texas' litigation climate to improve, not all Texas courtrooms seem to have gotten the message that Texas is serious about tort reform.

An overwhelming 81 percent of the respondents in the liability rankings study indicate the litigation environment of a state could affect decisions such as where to locate or do business. Both justice and jobs are at risk when tort law is subject to abuse. Texas policymakers should look closely at how they can continue to build on their excellent accomplishments in reforming the Texas civil justice system. 

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Endnotes

[1]Paul H. Rubin and Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, American Enterprise Institute (2005) 18.
[2]Stephen J. Carroll, et al., *Asbestos Litigation Costs and Compensation, An Interim Report*, Rand Institute for Civil Justice (Sep. 2002).
[3]Joseph Stiglitz, Jonathan M. Orszag, and Peter R. Orszag. *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*. Sebago Associates (Dec. 2002).
[4]Lester Brickman, "On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality," *Pepperdine Law Review* 31 (Jan. 2004) 33-170.
[5]George Scott Christian and Dale Craymer, "Texas Asbestos Litigation Reform: A Model for the States," *South Texas Law Review* 44 (2002) 981-1011.
[6]Joseph N. Gitlin, et al., "Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos Related Changes," *Academic Radiology* 11 (2004) 843-856.
[7]Stephen J. Carroll, et al., *Asbestos Litigation Costs and Compensation*.
[8]Ibid.
[9]Mike Tolson, "Asbestos lawsuits stir new debate," *Houston Chronicle*, 31 Oct. 2004.
[10]Brenda Sapino Jeffreys, "Vioxx Lawyer Wants His Next Move to Be in State Court," *Texas Lawyer*, 31 Oct. 2005.
[11]Ibid.
[12]Andrew F. Daughety and Jennifer F. Reinganum, *Found Money? Split-Award Statutes And Settlement Of Punitive Damages Cases*, The Law School: Vanderbilt University (2000).
[13]Ibid, 30.
[14]Ibid, 33-34.
[15]Harris Interactive, Inc. and the U. S. Chamber Institute for Legal Reform, *2005 State Liability Rankings Study* (2005).

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