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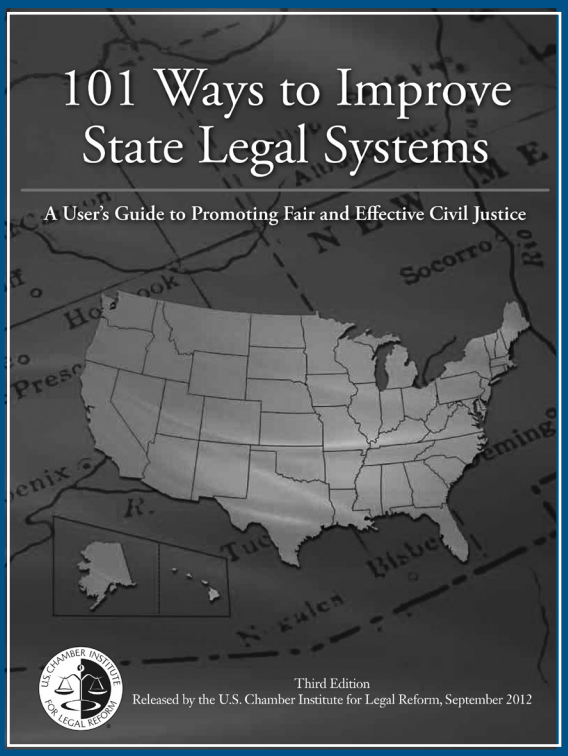

TEXANS FOR LAWSUIT REFORM

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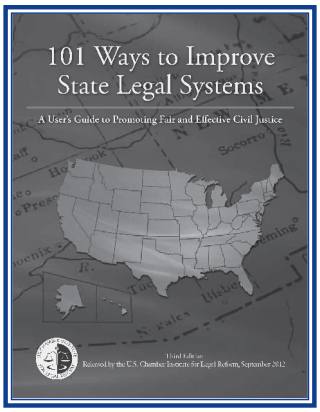

Texas Tort Reforms are National Model: A Look at the Institute for Legal Reform's Recommendations

The U.S. Chamber's Institute for Legal Reform's 2012 State Liability Systems Survey, entitled "Lawsuit Climate," explores how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses. (The full report is posted at www.tortreform.com.) Senior attorneys for American businesses believe that a state's litigation environment is important to business decisions made at their companies, such as where to locate or do business. Certainly, this is borne out by Texas's experience in the past twenty years of tort reform. Texas is consistently ranked as the best place in the nation to do business by Site Selection Magazine, and the Bureau of Labor Statistics shows that Texas continues to lead the country in job creation—all of which is consistent with Texas advancing 10 places among states on ILR's list in the last decade.

The Institute for Legal Reform's companion publication, "101 Ways to Improve State Legal Systems," cites numerous ways to improve a state's civil justice system. (The full report is posted at www.tortreform.com.) We in TLR can be proud that Texas has dealt with the vast majority of the issues raised by the ILR. Here is the ILR "wish list" and where Texas stands on each one.

ILR SUGGESTION NO. 1:

Provide Transparency in Hiring of Private Lawyers by State Officials.

Texas Status: Accomplished in 1999.

Following the scandalous award of $3.3 billion to five lawyers by former Texas Attorney General Dan Morales from the tobacco litigation settlement, Texas passed a law requiring state officials to approve the hiring of contingent-fee lawyers and requiring that legal fees paid to the lawyers be based on a reasonable hourly rate multiplied by the hours actually worked by the lawyers, with appropriate caps on the hourly rate and percentage of the recovery that can be paid to the lawyers (SB 178). Had this law been in place at the time of the tobacco settlement, it is estimated that the five lawyers would have received under $100 million in fees, not $3.3 billion. In 2007, the Texas Legislature expanded this law to apply to most local governments as well (HB 3560).

ILR SUGGESTION NO. 2:

Prevent Double Dipping in Asbestos Litigation.

Texas Status: Partly addressed in 2005 and 2007.

In 2005, Texas led the nation in comprehensive reform to cure the worst abuses in asbestos litigation (SB 15). The law became the model for similar reforms throughout the Nation. Passage of the asbestos-reform bill in 2005 was followed by a historic decision by the Texas Supreme Court in 2007, where the Court ended the asbestos-litigation exception to the rules prohibiting the use of junk science in Texas courts. When the 2005 legislation was coupled with the 2007 Court decision, there was a dramatic, positive change in asbestos litigation in Texas. More work, however, could be done regarding asbestos litigation. Approximately 70 companies that historically had been defendants in asbestos litigation have established trust funds under federal bankruptcy law to pay claimants suffering from asbestos-related diseases. Plaintiff lawyers in asbestos litigation sometimes wait to file claims against these trusts until after the plaintiffs have received a settlement or judgment through litigation against solvent defendants. In this way, the plaintiffs do not have to offset the bankruptcy trust recovery against the settlement or judgment – which is what the ILR accurately describes as "double dipping." The 2005 statute does not specifically address "double dipping," and this is expected to be an issue considered by the Legislature in 2013.

ILR SUGGESTION NO. 3:

Stop the Spread of Lawsuit Lending that Encourages Prolonged Litigation.

Texas Status: Needs to be addressed.

There are two problems in lawsuit lending. One is related to consumer-type lending, in which the lender makes loans directly to the plaintiff, but collects its principal and interest only if the plaintiff prevails. In these transactions, the interest rates are extraordinarily high and can consume the entire recovery by the plaintiff in the lawsuit, thus reducing the plaintiff's incentive to resolve the case for a reasonable sum of money. The other problem is large lending of a kind similar to venture capital investing, where the lender loans money to the plaintiff attorneys to fund litigation and is paid a percentage of the ultimate recovery if the plaintiff prevails. This is like buying an interest in the lawsuit, and can have the result of encouraging specious mass-tort claims. While there is some authority for the position that this venture-capital-type lending is unlawful in Texas, there is no statutory prohibition. And there is no regulation of either type of lending provided by Texas law. The Legislature appropriately will consider these matters this year.

> *"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."*
>
> – James Madison

ILR SUGGESTION NO. 4:

Ensure that Damages for Medical Expenses Reflect Actual Costs

Texas Status: Accomplished in 2003.

Texas solved this problem through the "paid or incurred" provision of the Omnibus Tort Reform Bill of 2003 (HB 4). The 2003 law provides that only those medical expenses that actually have been paid or are still owed can be claimed as damages in a lawsuit. This prevents the award of "phantom damages" for amounts that were billed by the medical-service provider, but have not been paid and are not owed by anyone.

ILR SUGGESTION NO. 5:

Losers Pay for Filing Frivolous Lawsuits.

Texas Status: Accomplished in 2011.

In Governor Rick Perry's Omnibus Tort Reform Bill of 2011 (HB 274), the Legislature passed a bill instructing the Texas Supreme Court to establish a "motion to dismiss" procedure that would allow the early dismissal of a lawsuit and the award of attorney's fees to the prevailing party. A lawsuit will be dismissed if it has no basis in law or no basis in fact. The prevailing party in the motion to dismiss must be awarded attorney's fees against the losing party. The loser pays. This new procedure complements the work done by the Legislature during the 1995 legislative session (the first in which TLR was engaged), when it established sanctions that a judge can impose against a plaintiff who files a frivolous lawsuit (SB 31).

ILR SUGGESTION NO. 6:

Ensure that Juries Represent the Entire Community, Not Just Select Segments.

Texas Status: Largely Accomplished.

The ILR notes that laws of some states exempt certain professionals, making it easier for citizens to avoid jury service, and provide inadequate compensation for working jurors to serve. Texas already has accomplished the reforms advocated by the ILR. In 2005, for example, the Legislature increased compensation paid to jurors from $6 per day to $40 per day (SB 1704) and implemented provisions regulating attempts to avoid jury service. And Texas does not exempt any professions from jury service. Other jury-related reforms, however, might be accomplished, as is detailed in the report on juries published by the Texans for Lawsuit Reform Foundation in 2007 ("The Civil Jury in Texas, Recommendations for Reform"), which you can access on the web at www.tlrfoundation.com or by calling 713.963.9363 to have a copy mailed to you.

ILR SUGGESTION NO. 7:

Reduce Forum Shopping.

Texas Status: Accomplished in 1995, 1999, 2003 and 2005.

Prior to TLR's attention to civil justice reform, Texas was known as the "Lawsuit Capitol of the World." Plaintiffs from all over the nation – and all over the world – came to Texas to file lawsuits because Texas's venue statutes were exceedingly inviting. Putting an end to such "forum shopping" was one of TLR's top priorities. The Legislature passed forum shopping reform in 1995 (SB 32) and further refined it in later sessions (SB 220, 1999; HB 4, 2003; HB 755, 2005), thereby ending forum shopping abuses in our state.

> *"In the law, the power of clear statement is everything."*
>
> – U.S. Supreme Court Justice Joseph Story

ILR SUGGESTION NO. 8:

Safeguard the Right of Appeal.

Texas Status: Accomplished in 2003.

The ILR notes that in order for a defendant to stay the execution of a judgment and protect its assets, it must post an appeal bond, which can be as high as 150% of the judgment in some states. Long ago, TLR recognized that if a defendant is unable to appeal a verdict from a trial court, that person is denied justice. Therefore, we advocated, and Texas enacted, legislation providing that an appeal bond should be the total compensatory damages awarded to the plaintiff in the judgment, but not to exceed the lesser of: (i) $25 million, or (ii) one-half of defendant's net worth (HB 4, 2003). There is also a "saving" provision allowing for a reduced bond if the amount provided by this law will cause the defendant to suffer substantial economic harm.

ILR SUGGESTION NO. 9:

Support Sound Science and Expert Evidence in the Courtroom.

Texas Status: Accomplished in 1995, 1997 and 2003.

In the seventies and eighties, "junk science" was prevalent in Texas courtrooms. Not anymore. A series of excellent Texas Supreme Court decisions assure that any competent and honest state judge will allow only sound expert testimony and scientific studies into evidence. Trial judges that allow questionable expert testimony or scientific evidence are likely to be overturned by Texas appellate courts.

In 2003, Texas enacted legislation (HB 4) requiring expert reports in medical negligence cases to meet certain standards and required the experts rendering those reports to have actual experience in the field of study about which the opinion was issued. Similar provisions have been applied to architects, engineers and other professions.

But the trial lawyers remain persistent. In 2009, TLR and its allies successfully fought-off trial lawyer attempts to legislatively re-introduce junk science into asbestos cases.

ILR SUGGESTION NO. 10:

Stem Class Action Abuse.

Texas Status: Accomplished in 2003 and before.

Class action reform was one of TLR's first proposals. Now, abusive class actions under Texas law are a thing of the past because: (i) the Texas Supreme Court has jurisdiction to correct erroneous trial court certification orders (HB 4), (ii) class actions within the jurisdiction of a state agency must be addressed by that agency before proceeding in court (HB 4), (iii) awards of attorney fees may be challenged by members of the class or the defendant, and must be based on the number of hours actually worked by the lawyer multiplied by a reasonable hourly rate, (iv) when class actions are settled using coupons, the lawyers must also be paid in coupons in the same proportion as the plaintiffs (HB 4), and (v) the Texas Supreme Court, through case law and rulemaking, has imposed strict standards on certification of classes.

ILR SUGGESTION NO. 11:

Promote Fairness in Judgment Interest Accrual.

Texas Status: Accomplished in 2003.

The purpose of awarding a prevailing party interest on its judgment is to compensate the party for the often-considerable lag between the event giving rise to the cause of action and the actual payment of damages. Before 2003, however, the statutory pre-judgment and post-judgment

interest required an award of above-market interest to the prevailing party and a prevailing party could be awarded pre-judgment interest on damages that would arise after judgment (like future medical expenses awarded in the judgment). Texas resolved both of these issues in 2003, by providing that interest rates on judgments should be market rates, with a 5% floor and a 15% ceiling, thereby eliminating windfalls; and by providing that pre-judgment interest could not be awarded on future damages (HB 4).

ILR SUGGESTION NO. 12:

Protect the Rights of Consumers of Legal Services.

Texas Status: Accomplished in part.

The ILR advocates something akin to a "consumers' bill of rights" for clients of lawyers, which would include anti-barratry provisions (i.e., provisions against unethical solicitation of lawsuits), restrictions on lawyer advertising, full and clear explanations of fees, requiring all lawyers (including contingency fee lawyers) to keep detailed time and expense records, and several other transparency requirements. In 2011, the Texas Legislature passed a significant anti-barratry bill, allowing a client who was subject to barratry to recover from the offending lawyer all fees the client paid to the lawyer (SB 1716). Reforms in this area also have come in the form of Texas Supreme Court decisions and rules. The Court has implemented rules governing lawyer advertising. And, starting in 1997, the Court has handed down a series of common-sense decisions that, among other things, require that attorney fee awards be based on detailed time records. But, so far, there is not a "consumers' bill of rights" for legal clients of in our state. This is a task the State Bar of Texas should undertake.

ILR SUGGESTION NO. 13:

Encourage Compliance with Government Regulations.

Texas Status: Partly accomplished in 2003.

The ILR advocates the sensible idea that if a party complies with government regulations concerning a product, process or service, it should receive some protection from liability concerning that product, process or service. Product liability reform was on TLR's original agenda and great progress was made in 2003, with these results: (i) in pharmaceutical cases, a rebuttable presumption exists in favor of the defendant in cases alleging failure to provide adequate warning about the product's risk if the defendant provides the government-approved warnings with the product; (ii) in other product liability cases, a rebuttable presumption is established in favor of manufacturers who comply with federal standards or regulatory requirements applicable to a product, provided the government standard was mandatory, applicable to the aspect of the product that allegedly caused the harm, and adequate to protect the public from risk (HB 4).

ILR SUGGESTION NO. 14:

Prevent Lawyers from Circumventing Product Liability Requirements.

Texas Status: Accomplished 1993.

The ILR report finds that plaintiff lawyers sometimes rely on legal theories – such as common law nuisance or statutory consumer protection provisions – to avoid the limitations found in many product liability laws. The ILR notes that only about 20 states' product liability laws are statutory. The ILR therefore suggests that states codify their product liability laws or update their existing statutes to ensure that those who claim injury from a product fulfill the basic elements of proof necessary to recover. Texas accomplished this goal in 1993 when Texas codified its product liability laws.

ILR SUGGESTION NO. 15:

Protect Innocent Product Sellers.

Texas Status: Accomplished in 2003.

The ILR advocates that the seller of a product not be held liable for defects in the product if the seller merely sold the product. Texas accomplished this goal in 2003 by enacting an "innocent seller" defense to a product liability lawsuit (HB 4). Under Texas law, a seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the seller had some actual responsibility for the condition of the product that caused the claimant's injury.

ILR SUGGESTION NO. 16:

Recognize Product Liability Ends at the Expiration of a Product's Useful Life.

Texas Status: Accomplished in 1993.

The ILR recommends adoption of a statute of repose by which a state recognizes that, after a certain number of years, the useful life of a product ends and an injury allegedly stemming from use of that product does not result from a defect at the time of sale. Texas adopted a 15-year statute of repose in 1993.

ILR SUGGESTION NO. 17:

Prioritize Recovery for Sick Litigants in Asbestos Litigation.

Texas Status: Accomplished in 2005.

Texas led the nation on asbestos litigation reform in 2005 with SB 15, envisioned and advocated by TLR. That statute: (i) creates strict, medically sound criteria to be used by courts to determine the viability of asbestos claims, (ii) provides for the transfer of asbestos lawsuits (old and new) to a single multi-district court, so that all asbestos cases receive fair and consistent treatment, (iii) provides that asbestos cases cannot proceed to trial until the claimant shows through a medical report written by a qualified doctor that the injured person actually has an asbestos-related disease, (iv) prohibits the infamous "bundling" of plain-

tiffs into massive lawsuits that intimidated defendants into unjustified settlements, (v) limits or prevents the use of questionable diagnostic materials, (vi) moves the cases of persons having a malignant asbestos-related disease to the front of the line and guarantees these claimants a quick trial, and (vii) extends the statute of limitations to allow claims to be filed within two years after diagnosis of actual impairment or the death of the person exposed to asbestos so that truly injured Texans can have their day in court, without regard to how long it took for that person to contract the disease. This legislation ended the flood of non-meritorious asbestos cases into Texas and served as a model for other states struggling with their own avalanche of asbestos cases.

Currently in Texas, there are thousands of claims by unimpaired persons that have been on the "inactive docket" since 2005, and TLR advocates a fair process to dismiss those pending, inactive claims.

ILR SUGGESTION NO. 18:

Stop Unwarranted Expansion of Liability to Trespassers.

Texas Status: Accomplished in 2011.

For over 100 years, Texas law has recognized that a landowner does not owe a duty of care to a person trespassing on his or her property. In 2011, the Legislature enacted a law (SB 1160) governing the liability of landowners to people who trespass on their property to counter an insidious recommendation by the American Law Institute to replace historic trespass law with a new duty to exercise reasonable care as to all entrants on land, including trespassers other than "flagrant trespassers."

ILR SUGGESTION NO. 19:

Restore Common Sense in Consumer Protection Laws.

Texas Status: Accomplished in 1995 and 2011.

In 1995, TLR advocated the reform of the Texas Deceptive Trade Practices Act, and the Legislature enacted a series of amendments to that Act which restored it to its original purpose of a consumer protection statute to allow a consumer to have adequate processes and remedies against product sellers and service providers (HB 668). The reform eliminated or amended aspects of the Act that had led to many abusive lawsuits.

In addition, certain trial lawyers manipulated "prompt pay" provisions in the Insurance Code to raid the Texas Windstorm Insurance Association (TWIA) following Hurricanes Rita and Ike. TWIA is a quasi-governmental body providing windstorm coverage to coastal property owners. In 2011, the Legislature reformed TWIA to establish a fair claims process with reasonable time tables, which should end the kind of manipulation that previously resulted in this insolvent insurer paying hundreds of millions of dollars in legal fees to a few lawyers.

ILR SUGGESTION NO. 20:

Create Transparency as to When Legislatures Create New Ways to Sue.

Texas Status: Accomplished in part by case law.

In the seventies and eighties, the Texas Supreme Court was dominated by politicians-turned-jurists who were supported by the personal injury trial lawyers. When the business and professional community started paying attention to judicial elections and after Governor George W. Bush and Governor Rick Perry appointed excellent judges to fill vacancies on the Supreme Court, the Court moved from being one of the worst state high courts to one of the best – perhaps, the best. The Texas Supreme Court now is a strict constructionist court that does not create new causes of action (i.e., new ways to file lawsuits) by interpreting legislation. Nevertheless, Texas would benefit from a statute that instructs state courts that they are not to interpret a statute to imply a private right of action or affirmative duty in the absence of express language in the statute.

> *"The Justices were not appointed to roam at large in the realm of public policy and strike down laws that offend their own ideas of what is desirable and what is undesirable."*
>
> – U.S. Supreme Court Chief Justice William Rehnquist

ILR SUGGESTIONS NO. 21 AND NO. 22:

Comparative Fault: Fairly Allocate Fault Between Plaintiff and Defendant.

Joint and Several Liability: Fairly and Proportionately Allocate Liability Among Parties.

Texas Status: Accomplished in 1995 and 2003.

The tort reforms advocated by TLR have established a clear and effective system of proportionate responsibility in Texas. A defendant is liable for only its own percentage of fault unless it is more than 50% responsible, in which case that defendant may be required to pay the entire judgment. Conversely, a plaintiff found more than 50% responsible for its own injury is barred from any recovery (SB 28, 1995). The fact finder in a trial (judge or jury, as the case may be) must assign percentages of fault to each potentially responsible person (or entity), whether or not that person is actually before the court as a litigant and whether or not that party can pay its share of responsibility (HB 4, 2003). This assures that if a jury assigns only, say, 25% of fault to a defendant, that defendant is responsible for no more than 25% of the judgment. A defendant found to be more than 50% responsible who pays the entire judgment may obtain contributions from co-defendants for their respective shares of the judgment.

ILR SUGGESTION NO. 23:

Place Reasonable Bounds on Subjective Noneconomic Damage Awards.

Texas Status: Accomplished in healthcare cases in 2003.

In 2003, in medical liability lawsuits, Texas placed a cap on non-economic damages, such as pain and suffering and mental anguish, which has encouraged thousands of doctors – especially much-needed specialists – to come to our state (HB 4). A state constitutional amendment was passed in 2003 to assure that the statute would withstand constitutional review by the courts; the constitutional amendment allows the Legislature to cap non-economic damages in all lawsuits.

ILR SUGGESTIONS NO. 24 & NO. 25:

Prevent Excessive Punitive Damage Awards.

Protect Due Process in Punitive Damages Determinations.

Texas Status: Accomplished in 1995 and 2003.

Texas took care of these issues in the first wave of TLR-advocated reforms in 1995 (SB 25), which were enhanced in 2003 (HB 4). Now, punitive damages are limited to the greater of: (i) $200,000 or (ii) two times economic damages plus an amount not to exceed $750,000 for non-economic damages. Punitive damages are permitted only upon a showing of "clear and convincing evidence" rather than merely a "preponderance of the evidence." Punitive damages can be awarded only if the plaintiff proves the defendant committed fraud, acted with malice, or was "grossly negligent" (a rigorous standard that is conceptually similar to a stringent "reckless disregard" standard). A unanimous jury verdict is required for the award of punitive damages.

ILR SUGGESTION NO. 26:

Provide Juries with Full Information on the Plaintiff's Actual Losses.

Texas Status: Mixed.

The "collateral source rule" prohibits admission of evidence that all or some of plaintiff's damages will be or have been paid by a source other than defendant, such as through insurance or previous settlements. As a result, the plaintiff may receive double recovery. Texas has employed the collateral source rule since it joined the Union. But, importantly, Texas does allow judgments for plaintiffs to be offset by settlements and payments from some other sources, such as a workers' compensation award.

Since 2003, Texas has required claims for "lost earnings," "lost earning capacity" and "loss of inheritance" to be reduced by the amount of taxes that would have been paid on those lost amounts.

Prior to 2003, a plaintiff could present a cost estimate for future medical loss and recover that estimate in a judgment even if the future medical loss was never incurred because the service was not needed or the plaintiff died before the time the service would have been provided. In medical negligence cases after the enactment of HB 4 in 2003, future medical losses as found by the jury are to be paid as the loss is actually incurred. Future medical losses included in a jury award that are not actually paid are not owed by the defendant.

ILR SUGGESTION NO. 27:

Protect Access to Health Care Through Medical Liability Reform.

Texas Status: Accomplished in 1995 and 2003.

Texas enacted comprehensive, historic medical liability reform in 2003 (HB 4), building on what was accomplished in 1995 (HB 971). These reforms have allowed hospitals to put savings from lower insurance premiums into enhanced facilities and patient care. Texas's medical liability reforms have improved access to health care to all Texans because doctors are staying in Texas, doctors from other states are moving to Texas, and emergency facilities – which were closing because of liability issues – are now plentiful in Texas. ■

"If you have ten thousand regulations, you destroy all respect for the law."

– Winston Churchill

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