

July 11, 2003

## Texas Tort Reform — Highlights of the Texas Omnibus Civil Justice Reform Act

Last month, Texas Governor Rick Perry signed into law major tort-reform legislation, which he described as “The most sweeping comprehensive lawsuit-reform in the nation.” By passing this legislation, the insurance-and-business lobby won the first round in what has been — and continues to be — a highly publicized, protracted fight against plaintiffs’ attorneys and consumer groups over the new tort-reform law.

Governor Perry will present the new law to the state electorate in a special election on Saturday, September 13, 2003, in which voters will be asked to adopt the reform measures as an amendment to the state constitution.

Nevertheless, the legislation will become effective even if voters reject the constitutional amendment — at which point the battle would go forward in the courts. Similar legislation passed in 1977 was struck down in 1988 as unconstitutional by the Texas Supreme Court. However, backers of the current legislation maintain that the court would uphold it this time, regardless of whether voters adopt the constitutional amendment.

Although much of the legislation relates to medical malpractice (which is not discussed here), other, less publicized provisions will have a significant impact on other civil cases. Below are highlights from the legislation most likely to affect our clients. Most provisions become effective in cases filed on or after September 1, 2003; however, some provisions become effective earlier or later as noted below.

### Offers of Settlement

One of the more important provisions enacted by the Legislature is a settlement offer procedure which allows the defendant(s) in a case to choose whether to invoke the procedure. Once invoked, the procedure allows an offering party (either plaintiff or defendant) — whose offer is rejected under the circumstances described below — to recover its litigation

costs (including attorneys’ fees) from the rejecting party. Specifically, the legislation provides for the following:

- ♦ The Texas Supreme Court is required to create offers of settlement rules by January 2004.
- ♦ Defendants are the the only parties that have the option of invoking the new offers of settlement rules.
- ♦ In cases with multiple defendants, each defendant has the option of invoking the offer of settlement rules. One defendant may not bind another.
- ♦ Once invoked, either plaintiffs or defendants may recover their litigation costs (subsequent to the offer) if a written offer to settle is rejected and the judgment is within twenty percent of the offer. That is, for a plaintiff to recover litigation costs, the judgment must be more than 120 percent of the rejected offer, and for a defendant to recover litigation costs, the judgment must be less than 80 percent of the rejected offer.
- ♦ Recoverable litigation costs include reasonable attorneys’ fees, fees for up to two testifying experts, and court costs.
- ♦ There is a maximum recoverable award. It is limited to 50 percent of economic damages, plus 100 percent of non-economic damages, plus 100 percent of exemplary damages, minus statutory or contractual liens.
- ♦ These rules will not be available for class actions, shareholder derivative suits, workers’ compensation actions, family code lawsuits, justice of the peace suits and suits against the government.

## Class Actions

The Legislature changed the method for awarding attorneys' fees and procedures for interlocutory appeals in class action lawsuits. The legislation requires the Texas Supreme Court to adopt rules to "provide for the fair and efficient resolution of class actions" by December 31, 2003.

### **Attorneys' Fees**

- ◆ The rules being adopted by the Texas Supreme Court must incorporate the Lodestar method for calculating attorneys' fees. The trial court may have discretion to increase or decrease the fee award by no more than four times the Lodestar amount.
- ◆ If the class recovery includes noncash benefits (e.g., coupons), then the total attorneys' fee award must be in the same proportion of cash and noncash as the recovery for the class.

### **Interlocutory Appeals**

- ◆ Before ruling on class certification, the trial court first must rule on all pending pleas to the jurisdiction in which a party asserts that a state agency has primary or exclusive jurisdiction — including an allegation of failure to exhaust administrative remedies.
- ◆ If the trial court denies the plea to the jurisdiction and certifies the class, interlocutory review is available.
- ◆ A petition for review to the Texas Supreme Court is allowed for an appeal of an interlocutory order certifying —or refusing — to certify a class.
- ◆ An interlocutory appeal relating to class certification or refusal to certify stays all trial court proceedings pending the appeal.
- ◆ The Texas Supreme Court's "conflicts" jurisdiction is broadened over interlocutory appeals — jurisdiction to resolve conflicts among the courts of appeal (including non-class action cases)

## Venue

Under the new law, each plaintiff must independently establish venue. An interlocutory appeal is allowed if one plaintiff in a multi-plaintiff case has not independently established venue. The trial of the case is stayed pending the appeal, but the appellate court must resolve the issue within 120 days after the appeal, if perfected.

## Forum Non Conveniens

Texas has repealed its prior statute and adopted the federal rule of forum non conveniens. Under this section, a court "shall"

stay or dismiss a claim or an action if the court finds that — "in the interest of justice and for the convenience of the parties" — it would more properly be heard in a forum outside the state.

## Proportionate Responsibility

The following applies to cases filed on or after July 1, 2003:

### **Responsible Third Parties**

- ◆ In a tort case or a case under the Texas Deceptive Trade Practices Act, a defendant may move to designate a person or entity as a "responsible third party," even though the person or entity is not a party in the case. If the motion is granted, the defendant is permitted to present evidence showing that the responsible third party caused (in whole or in part) the damages or harm for which the plaintiff seeks to recover. There are some minor exceptions.
- ◆ The motion must be filed at least 60 days before trial. Although other parties may object, the court should grant the motion unless the objecting party can establish that the defendant failed to plead "sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the *Texas Rules of Civil Procedure*." A party may move to strike the designation on no-evidence grounds.
- ◆ A claimant is not barred by limitations from joining a designated person as a party if the plaintiff does so within 60 days after the designation by the defendant.
- ◆ A defendant's liability is reduced by the percentage apportioned by the trier of fact to a responsible third party.

### **Settlement Credits**

- ◆ Recoverable damages are reduced by the percentage of responsibility attributable to all settling persons.
- ◆ The sliding method for calculation of settlement credits is abolished.

### **Proportionate Responsibility**

- ◆ In tort cases, a party is liable for a percentage of damages equal to the percentage of responsibility, unless the party is more than 50 percent responsible or is responsible for certain criminal acts.
- ◆ When a defendant is found more than 50 percent responsible, that defendant is jointly and severally responsible for the recoverable damages.

## Products Liability

- ◆ The new statute defines a "products liability action" as a lawsuit brought against a seller or manufacturer whose product is allegedly defective.

- ◆ According to the new statute: “A claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product.”
- ◆ Potential liability for “innocent retailers” is significantly decreased.
- ◆ For sellers and manufacturers of products other than pharmaceuticals, a rebuttable presumption is created in their favor if: (a) if at the time the product was manufactured, its labeling, design, or formula was in compliance with federal safety standards or regulations; or (b) the product was subject to federal licensing or marketing approval and the product complied with federal requirements.
- ◆ In pharmaceutical cases, a rebuttable presumption that a defendant is immune from liability for failure to warn is created if the product contains warnings approved by the FDA or stated in FDA monographs. The presumption can be rebutted with evidence that the defendant: (1) made material misrepresentations to the FDA; (2) continued to sell the product in the United States after the FDA ordered its removal; (3) recommended using the product for something other than what was approved by the FDA; or (4) prescribed an off-label use not approved by the FDA.
- ◆ The Legislature has ordered the Texas Supreme Court to change the Texas Rule of Evidence relating to subsequent remedial measures to conform with its federal counterpart (Rule 407).

## Damages

- ◆ To recover punitive damages, a jury must make a unanimous finding of both liability for punitive damages and the amount of punitive damages. The jury must also be instructed on this requirement.
- ◆ Medical expenses are limited to those expenses the claimant actually paid or incurred.
- ◆ If compensatory damages are sought, proof establishing a loss of earning capacity, a loss of inheritance, and a loss of contributions of a pecuniary value must be presented in the form of a net loss after reduction for taxes. The court must instruct the jury whether or not the recovery is subject to income tax.

## Interest

The new law reduces the rate of postjudgment interest to the prime rate. The floor for interest is 5 percent and the ceiling is 15 percent. No prejudgment interest can be awarded on future damages.

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