TEXAS-SIZED TRANSFORMATION: THE CONSERVATIVE COUNTERREVOLUTION ON THE TEXAS SUPREME COURT

Meredith B. Parenti

Susanna Dokupil

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Texas-Sized Transformation: The Conservative Counterrevolution on the Texas Supreme Court

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*By Meredith B. Parenti & Susanna Dokupil**

Over the past twenty years, it is quite possible that no state supreme court has seen a metamorphosis of the scope that has occurred on the Texas Supreme Court. In 1985, the oft-used expression "Everything's Bigger in Texas" had no better example than the $11 billion verdict handed down by a Houston jury in a tortious interference with contract case, *Texaco, Inc. v. Pennzoil, Co.*, which at the time was the largest jury verdict in United States history.[1] The verdict was upheld by the intermediate court of appeals, and the Texas Supreme Court—which was viewed as demonstrably pro-plaintiff—refused to review the case, although it did announce that there was no reversible error.[2] But change was just over the horizon. In 1987, the CBS news program *60 Minutes* ran a story entitled "Justice for Sale," which questioned the fundraising activities of the justices of the Texas Supreme Court, including the contributions of Pennzoil's lead lawyer, Joe Jamail, to the justices' campaigns.[3] This led to an upheaval in the court's personnel. Later that year, Governor Bill Clements appointed Thomas Phillips to be the Chief Justice of the Texas Supreme Court—a position he would hold for sixteen years.[4] This change marked the beginning of a new era for the Texas Supreme Court—described by enthusiasts as an era in which the will of the people is expressed through legislation rather than litigation and in which businesses are no longer subjected to unchecked Draconian treatment in the civil justice system. Below are some of the significant areas of law in which the Texas Supreme Court has scaled back plaintiffs' previous gains and exhibited a new judicial philosophy. The appendix to this article details some of the more significant civil justice reforms enacted by the legislature.

**Meredith Parenti is an Associate with Weil, Gotshal & Manges, LLP, of Austin, Texas. Susanna Dokupil is an attorney in Houston, Texas.*

I. Torts & Products Liability in the Liberal Court

In the 1970s and '80s, Texas gained a reputation as a plaintiffs' haven in part due to the Texas Supreme Court's concerted efforts to expand plaintiffs' rights and remedies.[5] In tort and products liability cases, in particular, the court was criticized by conservatives as routinely and often openly engaged in results-oriented decision-making in order to ensure plaintiffs' victories. During this period, the court established several new tort causes of action, including actions for strict liability,[6] invasion of privacy,[7] wrongful birth,[8] and negligence that causes another to commit suicide.[9] The court recognized implied warranties for personal injuries, goods, and property,[10] and expanded loss of consortium and mental anguish claims.[11] In a case that was emblematic of the era, the court upheld a jury verdict finding that Exxon Corp.'s negligence over a truck driver sprayed in the face with oil proximately caused the driver to commit suicide over two-and-a-half years later.[12] The court rejected Exxon's argument that it could not have reasonably anticipated that the driver would commit suicide following the oil spray incident, reasoning that under the rule of foreseeability the negligent actor need not anticipate exactly how the injuries will develop from the negligent conduct.[13] Although the court admitted there were "contrary indications in the evidence from which it could be concluded that [the driver] was lucid at the time he committed suicide [,] and that his suicide was voluntary and not attributable to an insanity caused by his injury many months before," it concluded there was evidence to support the jury's finding that he was acting under an

uncontrollable impulse when he committed suicide, and thus that Exxon could be held liable for his death. [14]

During this era, the court also expanded defendants' duties to plaintiffs, including a new duty for employers to prevent off-duty employees over whom they have control from drunk driving,[15] considerably pro-claimant duties for insurance and worker's compensation carriers,[16] and the duty of a non-manufacturing designer to warn consumers of hazards associated with the use of its designed product.[17]

In *Alm v. Aluminum Co. of America*, a case involving an eye injury caused by an exploding bottle cap, the court held that companies that design and manufacture bottle-capping machines have a duty to warn the ultimate soft drink consumer of the hazards of their technology, even when the company itself does not manufacture or sell the final product that injures the plaintiff, and has no direct contact with consumers.[18] The court reasoned that a company could, in some circumstances, satisfy its duty by proving it adequately trained and warned the intermediary who sold the product, but concluded that there was evidence the defendant inadequately warned the bottles' seller of the danger.[19] Commentators criticized the decision for expanding the duty to warn in situations involving designers and manufacturers of products that indirectly contributed to consumer injury, arguing that there was little support in the law for imposing a duty on a manufacturer to warn the ultimate consumer of a product made by its own product.[20]

The court also eliminated previous hurdles for plaintiffs, such as the requirement to demonstrate a physical manifestation of mental anguish,[21] the rule of *caveat emptor* as applied to services,[22] contributory negligence,[23] the privity requirement for the Uniform Commercial Code action for implied warranty of merchantability,[24] and the elements of the ordinary consumer and prudent manufacturer in strict liability cases involving design defects.[25]

A. Legislative Role of the Court

In establishing these new rights and causes of action, the court was often criticized for frequently taking on a legislative policymaking role.[26] The court at times justified its actions by pointing to the legislature's failure to pass legislation on a given subject.[27] The court viewed its role as that of continually reevaluating and changing the law when necessary in light of changing social mores: "The law is not static; and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual reevaluation of common law concepts in light of current conditions."[28] The court also justified the imposition of new duties on defendants given the "increasing complexities of human relationships." [29] The existence of a comprehensive statutory scheme did not deter the court from engaging in judicial meddling.[30] Nor did the court of the 1970s and '80s limit itself to the text of a statute, but explained that "the legislative intent rather than the strict letter of the Act will control."[31]

B. Counterrevolution

Beginning with the appointment of Chief Justice Phillips and the 1988 elections, new moderate and conservative judges began to replace some of the liberals on the court, thus ushering in a "conservative judicial counterrevolution."[32] Gradually, the court began to rein in some of its more expansive jurisprudence. Given the court's conservative trend, as well as tort-reform initiatives in the legislature, plaintiffs' lawyers began to feel a negative impact on their bottom line.[33] As the court began to cut back on the changes from the previous two decades, the remaining liberal justices complained bitterly.[34]

In contrast with the 1970s and '80s, the court in the 1990s worked to rebalance the duties defendants owe to plaintiffs and refused to recognize expansive new tort causes of action. For example, the court held that an attending physician in a hospital owed a duty of reasonable care to the patient, not necessarily to third parties;[35] that the national arm of the Boys Scouts of America did not independently owe a duty to a sexually molested scout;[36] and that a horse owner did not have a duty to keep her horse from roaming on a farm-to-market road when neither the legislature nor her local government had imposed such a duty.[37] In *Johnson County Sheriff's Posse, Inc. v. Endsley*, the court held that an owner of a rodeo arena had no duty to a spectator with respect to an alleged dangerous condition of dirt in the arena.[38] The plaintiff, who was struck by an unknown object kicked up by a horse at a barrel-racing event, argued that rocks

in the dirt created an unreasonably dangerous situation and that the owner of the arena, who leased it for the event, should have made the dirt "rock free," or "safer than ordinary dirt," in the court's words.[39] The court opined that while the natural state of dirt can be hazardous under the right conditions, it was not unreasonably so.[40]

The court has also declined to recognize a separate tort action between spouses for fraud on the community estate,[41] the tort of false light invasion of privacy,[42] negligent infliction of emotional distress,[43] and mental anguish based on negligent property damage.[44] In addition, the court adopted the *Daubert* standard for the admissibility of scientific expert testimony, emphasizing that it is especially important that trial judges scrutinize novel scientific theories.[45]

This rebalancing of the court has increased pressure on plaintiffs to assess their cases more pragmatically and to attempt to settle cases when possible rather than banking on a windfall at trial.[46] The trend has also given some degree of flexibility to insurers and other defendants, who are becoming more willing to take a chance on resolution of a dispute through the courts.[47] Given the current makeup of the court, and continuing resistance among lower courts in some parts of the state, the conservative trend in tort and products liability cases shows no sign of abating.

II. Limiting Punitive Damages

In the area of punitive damages, the liberal court openly sought to lessen plaintiffs' burden to recover punitive damages.[48] The court in *Transportation Insurance Co. v. Moriel* later criticized these holdings and explained that courts must serve a gatekeeper role in order to keep punitive damages in check.[49] In light of the criminal nature of punitive damages, the court explained that courts must apply "appropriate substantive and procedural safeguards to minimize the risk of unjust punishment."[50] Because punitive damages admittedly amount to a "private windfall," the court described its duty as ensuring "that defendants who deserve to be punished in fact receive an appropriate level of punishment, while at the same time preventing punishment that is excessive or otherwise erroneous."[51]

While the legislature has signficantly limited the availability of punitive damages in recent years, the court has continued to apply the reasoning in *Moriel* to uphold a series of measures capping punitive damages.[52] The court's increased scrutiny of these awards, coupled with dramatic legislative reforms (see Appendix), has sent a clear message to judges and plaintiffs' lawyers that while juries may sometimes award excessive punitive damages, those awards will be carefully reviewed on appeal.

III. Regulating Class Actions

For years, Texas was an extremely favorable forum for class actions because of what many deemed to be the lower courts' "certify now and worry later" approach.[53] Because the Texas Supreme Court could review interlocutory appeals from class certification only when a conflict arose with another court of appeals decision or a Texas Supreme Court decision,[54] there were relatively few cases at the supreme court level dealing with this issue. This fact also meant that the courts of appeals had broad, largely unchecked discretion to certify a class.

In 2000, the Texas Supreme Court issued two key opinions that created more rigorous standards for certifying a class: *Intratex Gas Co. v. Beeson* and *Southwestern Refining Co. v. Bernal*.[55] In *Intratex*, the supreme court adopted the idea of the "'fail-safe' class, that is, one bound only by a judgment favorable to plaintiffs, but not by an adverse judgment."[56] In other words, a "fail-safe" class is validated when the defendant is held liable, but the class is not bound by the decision if the plaintiffs lose.[57] The *Intratex* court emphasized that a class "must be presently ascertainable by reference to objective criteria," meaning criteria "that require an analysis of the merits of the case."[58]

In *Bernal*, the court clarified Texas Rule of Civil Procedure 42(b)(4), which requires common questions of law or fact to predominate over individual questions.[59] It held that "[i]f it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate."[60] Together, *Intratex* and *Bernal* require the courts to perform a more rigorous analysis to ensure that a certified class comports with the standards of Rule 42.

The court has continued to reiterate and strengthen these standards for class actions.[61] The Texas legislature recently expanded the court's jurisdiction to allow it to hear all interlocutory appeals of orders certifying or refusing to certify a class, which will likely result in even further rigorous review of class certifications.[62]

In 2003, as part of a major tort reform measure, the legislature charged the Texas Supreme Court with adopting rules for the "fair and efficient resolution" of class actions within certain guidelines.[63] These changes, effective January 1, 2004, were geared toward conforming Texas law to changes made to Federal Rule of Civil Procedure 23,[64] but also went beyond federal practice. The tort reform measure also required the court to comply with three key legislative mandates.[65] First, if a trial court awarded attorney's fees to class counsel, those fees must be calculated using the lodestar method; the court could not adjust them upward more than four times the lodestar rate; and the attorneys must recieve the same proportion of cash and non-cash awards as the class.[66] Second, it expanded the supreme court's jurisdiction to hear appeals from a class certification order and to stay all proceedings pending that appeal.[67] This change goes beyond federal practice and generally prevents the use of class certification as a settlment lever. Finally, if a state agency asserts primary jurisdiction, the trial court must rule any plea to the jurisdiction or assertion that a party has failed to exhaust administrative remedies before certifying the class.[68] Together, this combination of reforms has made class actions significantly less attractive. Although older class action suits continue to make their way through the courts, the tort reform measure eroded potential class counsels' ability to bring new ones.

The most significant changes made by the Texas Supreme Court affected class certification. Rule 42(c)(1)(A) was amended to allow the trial court more time to evaluate the merits of certification before deciding that issue. Under revised Rule 42(c)(1)(B), a certification order must define the class, and Rule 42(c)(1)(D) added eight elements that must be included in that order.[69] These revisions are geared toward forcing a court to explain why its class certification order meets the requirements of Rule 42, including commonality, typicality, and predominance. Also, Rule 42(g) now requires the court to appoint class counsel, and Rule 42(h) sets forth the revised process for calculating attorney's fees, if the court awards them. Most of these changes track those made to Federal Rule 23.

Two cases have been decided since these revisions. *Compaq Computer Corp. v. Lapray* emphasized the importance of a stringent predominance evaluation, similar to *Bernal*.[70] *State Farm Mutual Automobile Insurance Co. v. Lopez* found that the trial court had abused its discretion in certifying a class without a trial plan conforming to the requirements of Rule 42.[71] The Texas Supreme Court seems poised to continue holding lower courts to a more rigorous standard of compliance with Rule 42.

IV. Holding the Line On Statutes of Limitation

In the 1970s and '80s, the justices often would not apply statutes of limitation that impeded plaintiffs' ability to bring suit. In *Nelson v. Krusen*, raising a wrongful birth claim for a baby born with birth defects, the court held the statute of limitations for medical malpractice claims of two years from the date of medical treatment violated the Texas Constitution's open courts provision because it cut off causes of action before the party knows or reasonably should know he is injured.[72] As the concurring opinion pointed out, the open courts provision applies only to well-established, common-law causes of action, and the court had only recognized a wrongful birth cause of action four months prior.[73] In another effort to ease statutes of limitation for plaintiffs, the court held that the statute of limitations for bad faith claims against insurers did not begin to run until the underlying insurance contract claims are finally resolved.[74]

In more recent years, the court has retreated from that flexible view of statutes of limitation. In *Bala v. Maxwell*, the court rejected plaintiff's argument that medical malpractice and wrongful death claims could be filed within two years of the cancer victim's death rather than two years from the alleged act of malpractice.[75] And in *Rowntree v. Hunsucker*, the court held that when a physician fails to diagnose a condition, the continuing nature of the diagnosis does not extend the tort for limitations purposes.[76] The court also rejected the discovery rule exception for negligence in a case involving repressed memories of sexual abuse.[77]

V. Review of Jury Verdicts

As of 2003, several surveys had found that Texas often led the United States in top jury awards in several categories.[78] Despite these statistics, the Texas Supreme Court has demonstrated in recent years that it will not hesitate to scrutinize the legal sufficiency of jury verdicts. The court has not infrequently reversed and rendered take-nothing judgments because the evidence was legally insufficient to support the jury's findings.[79] In addition, the court has scrutinized the foundational data supporting expert testimony to determine whether the expert opinion is reliable and admonished trial courts to do the same.[80] The court has also made clear that courts should not allow expert opinions that "pile[ ] speculation on speculation and inference on inference."[81] In one recent case reversing a jury's $17 million verdict in favor of accident victims who claimed that a defect in their automobile caused their head-on collision with another car, the court held that expert testimony that was uncorroborated, unreliable, and conclusory provided no evidence of causation, explaining:

> We are not required . . . to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect. While juries are important to our legal system, they cannot credit as some evidence expert opinions that are not reliable or are conclusory on their face.[82]

Plaintiffs' lawyers and trial judges appear to have gotten the message that excessive jury awards will most likely be scrutinized closely on appeal.

VI. Protecting Sovereign Immunity

Sovereign immunity in Texas was initially extremely broad when it was first recognized in 1847.[83] Unless the legislature waived immunity, the state enjoyed immunity both from liability and from lawsuits arising out of that liability.[84] A waiver of both is necessary for a plaintiff successfully to recover against the state. If the legislature has waived immunity from liability, then the state's immunity from suit can still bar recovery, even if the state is found properly liable. If, on the other hand, the legislature has waived immunity from suit, the plaintiff may sue, but it cannot win while the state retains immunity from liability.[85]

While the Texas Tort Claims Act waives immunity in tort in certain circumstances, no similar law outlines the state's immunity in contract.[86] For municipalities, immunity from suit on a breach of contract claim is waived by statute.[87] The common-law rule is that even if the state is liable, it retains immunity absent legislative consent. As a result, the common law has created a strange situation in which a government entity may, for example, contract with a construction company and then refuse to pay. Because of the distinction between immunity from liability and immunity from suit, the government entity may be liable under the contract,[88] but it remains immune from suit absent legislative consent.[89] In 1999, the legislature passed Chapter 2260 of the Texas Government Code, which provides an administrative procedure for settling contract claims against the state that involve goods, services, or construction. Chapter 2260, however, does not waive immunity from suit or liability.[90]

Although the Texas Supreme Court has generally upheld the state's right to sovereign immunity in recent years, it has made some exceptions. For example, a person's right to recover against an unconstitutional taking trumps the state's claims to immunity.[91] If the state settles a contract dispute, the court has allowed the beneficiary of the settlement to sue to enforce the agreement.[92] It has construed the Texas Administrative Procedure Act as a broad waiver of immunity, determining that the Act provides for judicial review of an agency's decision whether or not the agency's enabling statute does.[93] It has also found that the legislature intended to waive immunity for Anti-Retaliation Law claims.[94] Most recently, the court held that a recreational use statute did not supercede the waiver of immunity under the Tort Claims Act in the case of a premises defect claim for gross negligence.[95]

But, on the whole, the Texas Supreme Court reads the legislature's waiver of immunity narrowly.[96] It has found, for example, that the legislature's passage of an administrative procedure for settling contract disputes foreclosed the right to a waiver-by-conduct exception to the sovereign immunity rule.[97] It also ruled that a state agency does not waive immunity by its non-litigation conduct, even when that conduct is in the context of an

ongoing business relationship.[98] The court recently refused to find that a city is entitled to recover for property damages caused by the state under a statute allowing a state agency to so recover.[99] These cases suggest that the Texas Supreme Court will continue to interpret the legislature's intent to waive immunity narrowly.

VII. Legislative Reform

New conservative majorities in the legislature have ushered in several successive tort reform efforts, including the passage of sweeping civil justice reform legislation in 2003.[100] The passage of this legislation, known as H.B. 4, was fueled by the growing sentiment that the legal climate in Texas has increasingly attracted meritless and costly litigation that has imposed growing burdens on state businesses and courts and resulted in, among other things, a statewide medical malpractice insurance crisis. The legislation, which included measures addressing class actions, settlement offers, products liability, health care liability, proportionate responsibility, and successor liability for asbestos claims, has been looked to by tort reform advocates as a model of reform for other states.[101]

Most recently, the legislature continued its tort reform initiatives with legislation significantly curtailing asbestos and silica litigation and prohibiting "obesity suits" against restaurants, farmers, ranchers, or trade associations.[102] The appendix to this article reviews some of the more significant legislative reforms.

CONCLUSION

Despite the revolutionary changes on the Texas Supreme Court, change is not always apparent in the courtroom and in jury verdicts, and it often takes years for the effects of such transformation to be fully felt in the courtroom. Notwithstanding the legislative reforms, a number of smaller rural counties in Texas are still well-known as notorious plaintiffs' havens. But there have been some well-defined overall trends both in the judiciary and in statewide politics, and proponents as well as critics of this change are beginning to express the view that this transformation in Texas's civil justice system may be lasting.

Footnotes

[1] 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *see also* Keith Baker & David Popple, *The Cases That Rocked the Century*, Tex. Law., Dec. 20, 1999, at S35.

[2] *Texaco*, 729 S.W.2d at 768. The Texas Supreme Court for many years had a procedure whereby it could refuse to grant a writ of error, but nonetheless declare there was "no reversible error," which meant that while the Texas Supreme Court may not have been entirely satisfied with the court of appeals's opinion, it nonetheless found that the application presented no error requiring reversal. *See* Aguilar v. Anderson, 855 S.W.2d 799, 811 n.17 (Tex. App.—El Paso 1993, writ denied).

[3] Baker & Popple, *supra* note 1, at S35.

[4] *See* http://www.supreme.courts.state.tx.us/history/cj.asp.

[5] Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 St. Mary's L.J. 47, 52-53 (1997); Raphael Cotkin, *Extracontractual Liability of Insurers in 1994: A Tale of Four States*, Litig. & Admin. Practice Course Handbook Series, PLI Order No. H4-5211 (Feb./Mar. 1995).

[6] McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789-90 (Tex. 1967).

[7] Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973).

[8] Jacobs v. Thiemer, 519 S.W.2d 846, 848-50 (Tex. 1975).

[9] Exxon Corp. v. Brecheen, 526 S.W.2d 519 (Tex. 1975).

[10] Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987) (implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner); Garcia v. Tex. Instruments, Inc., 610 S.W.2d 456, 462-65 (Tex. 1980) (implied warranty of merchantability for personal injury despite lack of privity).

[11] *See* Reagan v. Vaughn, 804 S.W.2d 463, 466-67 (1991) (loss of consortium and mental anguish for adult and minor children when a parent is injured by tortious conduct of a third party); Freeman v. City of Pasadena, 744 S.W.2d 923, 923-24 (Tex. 1988) (mental anguish for bystanders who witness a traumatic accident); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551 (Tex. 1985) (mental anguish and loss of companionship suffered by children as a result of parent's death); Whittlesey v. Miller, 572 S.W.2d 665, 666 (Tex. 1978) (loss of consortium resulting from physical injuries caused to spouse by intentional or negligent conduct of third party).

[12] *Brecheen*, 526 S.W.2d at 520, 524. The court adopted §455 of the Restatement of Torts, imposing liability for self-inflicted acts done during insanity caused by negligent conduct.

[13] *Id.* at 520, 524.

[14] *Id.* at 522.

[15] Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983).

[16] Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 212-13 (Tex. 1988); Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).

[17] Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 591 (Tex. 1986).

[18] *Id.* at 591-92.

[19] *Id.* at 591, 594.

[20] *See, e.g.*, Lillian Fouché, *Note: Alm v. Aluminum Company of America: An Extension of Duty to Warn*, 39 BAYLOR L. REV. 339, 347 (1987).

[21] St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650, 654 (Tex. 1987), *overruled in part on other grounds by* Boyles v. Kerr, 855 S.W.2d 593, 595-96 (Tex. 1993); Moore v. Lillebo, 722 S.W.2d 683, 686 (Tex. 1987).

[22] Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

[23] Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) (judicially adopting comparative apportionment system for strict products liability cases).

[24] Nobility Homes of Tex., Inc. v. Shivers, 557 S.W.2d 77, 80-81 (Tex. 1977).

[25] Turner v. Gen. Motors Corp., 584 S.W.2d 844, 847 (1979).

[26] *See, e.g., Melody Home*, 741 S.W.2d at 356-57 (Gonzalez, J., concurring) ("The majority's action constitutes an improper excursion into the legislative arena."); Sanchez v. Schindler, 651 S.W.2d 249, 256 (Tex. 1985) (Pope, J., dissenting) (criticizing court's view that "legislative inaction should no longer thwart what they consider a better policy").

[27] *Sanchez*, 651 S.W.2d at 252 (explaining that legislature had attempted to amend state's wrongful death act, but none of bills had passed, and that "[t]his court should not be bound by the prior legislative inaction in an area like tort law which has traditionally been developed primarily through the judicial process"); *see id.* at 256 (Pope, J., dissenting) (criticizing court for announcing a new rule of statutory construction—"that a legislature's inaction is a signal that courts are free to move into legislative policy matters").

[28] Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

[29] Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 310 (Tex. 1983).

[30] *See* Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 215 (Tex. 1988) (Phillips, C.J., dissenting) (arguing that comprehensive statutory scheme for worker's compensation claims did not give rise to an implied duty of good faith and fair dealing).

[31] Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980).

[32] Cotkin, *supra* note 5, at 183.

[33] Joseph Calve, *Poured Out: Times Have Never Been Tougher for the Plaintiffs Personal-Injury Bar. The Civil-Justice System May Never Be the Same*, TEX. LAW. Dec. 16, 1996, at 1.

[34] Lyons v. Millers Cas. Ins. Co. of Tex., 866 S.W.2d 597, 602 n.1 (Tex. 1993) (Doggett, J., dissenting) (stating that the majority's opinion "is but one example of the Court's recent indifference to precedent and its commitment to wholesale revision of Texas law").

[35] Van Horn v. Chambers, 970 S.W.2d 542, 545-47 (Tex. 1998).

[36] Golden Spread Council, Inc. v. Akins, 926 S.W.2d 287, 290-91 (Tex. 1996). The court did hold, however, that the local scout council did have a duty not to recommend the individual as a scoutmaster based on the information it knew. *Id.*

[37] Gibbs v. Jackson, 990 S.W.2d 745, 749-50 (Tex. 1999).

[38] Johnson County Sheriff's Posse, Inc. v. Endsley, 926 S.W.2d 284, 285 (Tex. 1996).

[39] *Id.* at 285, 287.

[40] *Id.* at 287. Recognizing that a lessor generally has no duty to tenants or their invitees for dangerous conditions on the premises, the court declined to adopt Restatement of Torts §359, providing for liability for a lessor leasing premises for the purposes of public admission. *Id.* at 286-87.

[41] Schlueter v. Schlueter, 975 S.W.2d 584, 587-88 (Tex. 1998).

[42] Cain v. Hearst Corp., 878 S.W.2d 577, 579-80 (Tex. 1994).

[43] Boyles v. Kerr, 855 S.W.2d 593, 595-96 (Tex. 1993). In rejecting an independent right to recover for negligent infliction of emotional distress, the court explained that "mental anguish damages should be compensated only in connection with defendant's breach of some other duty imposed by law." *Id.* at 596.

[44] City of Tyler v. Likes, 962 S.W.2d 489, 497 (Tex. 1998).

[45] E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 554-56 (Tex. 1995) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-90, 113 S.Ct. 2786, 2795 (1993)).

[46] *See supra* note 33, at 1.

[47] *Id.*

[48] *See*, *e.g.*, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 918-19, 921 (Tex. 1981) (changing standard of review for gross negligence in findings because former standard made it impossible for plaintiffs to recover punitive damages).

[49] 879 S.W.2d 10, 19-21 (Tex. 1994).

[50] *Id.* at 16-17, 20, 23.

[51] *Id.*

[52] *See, e.g.,* Dillard Dep't Stores, Inc. v. Silva, 148 S.W.3d 370, 371 (Tex. 2004) (reversing award of exemplary damages to store customer falsely imprisoned for shoplifting because there was no evidence of malice); Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 454 (Tex. 1996) (holding that actual malice must be shown before punitive damages may be assessed against an employer for violating anti-retaliation statute); Travelers Indem. Co. v. Fuller, 892 S.W.2d 848, 850-53 (Tex. 1995) (holding that the Texas Constitution guarantees punitive damages for wrongful death only when beneficiary otherwise possesses a cause of action for compensatory relief); Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 917-18 (Tex. 1993) (holding that punitive damage award exceeded the statutory four-times-actual-damages cap and violated the Texas Constitution's prohibition on parents recovering punitive damages in wrongful death actions).

[53] Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

[54] *See id.* at 430.

[55] Intratex Gas Co. v. Beeson, 22 S.W.3d 398 (Tex. 2000) (holding that a class may not be defined by the ultimate liability issue); Southwestern Refining Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000) (emphasizing importance of predominance requirement as a factor to ascertain pre-certification).

[56] *Intratex*, 22 S.W.3d at 402.

[57] *Id.* at 404.

[58] *Id.* at 403.

[59] TEX. R. CIV. P. 42(b)(4).

[60] *Bernal*, 22 S.W.3d at 436.

[61] *See, e.g.,* Ford Motor Co. v. Sheldon, 22 S.W.3d 444 (Tex. 2000) (decertifying class because there was no clearly ascertainable class membership).

[62] TEX. GOV'T CODE §22.225(b).

[63] TEX. CIV. PRAC. & REM. CODE ANN. §26.001(a).

[64] Jeremy Counsellor, *Texas Procedural Developments: 2003 Year in Review*, 56 BAYLOR L. REV. 343, 350 (2004).

[65] TEX. CIV. PRAC. & REM. CODE § 26.002.

[66] TEX. CIV. PRAC. & REM. CODE § 26.003.

[67] TEX. GOV'T CODE §§ 22.001(e), 22.225 (d)-(e), 51.104 (a)-(c).

[68] TEX. CIV. PRAC. & REM. CODE § 26.051.

[69] The elements are:

> (i) the elements of each claim or defense asserted in the pleadings;
>
> (ii) any issues of law or fact common to the class members;
>
> (iii) any issues of law or fact affecting only individual class members;
>
> (iv) the issues that will be the object of most of the efforts of the litigants and the court;
>
> (v) other available methods of adjudication that exist for the controversy;
>
> (vi) why the issues common to the members of the class do or do not predominate over individual issues;
>
> (vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy; and
>
> (viii) if a class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.

TEX. R. CIV. P. 42(c)(1)(d).

[70] 135 S.W.3d 657 (Tex. 2004).

[71] 156 S.W.3d 550 (Tex. 2004).

[72] 678 S.W.2d 918, 922 (Tex. 1984).

[73] *Id.* at 926 (Robertson, J., concurring).

[74] Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 168 (Tex. 1987).

[75] 909 S.W.2d 889, 891-93 (Tex. 1995) (per curiam).

[76] 833 S.W.2d 103, 108 (Tex. 1992).

[77] S.V. v. R.V., 933 S.W.2d 1, 22 (Tex. 1996).

[78] Christopher O'Leary, *Lone Star Litigation: Are Huge Jury Awards in Texas a Relic?*, CORPORATE LEGAL TIMES 43 (May 2003).

[79] *See, e.g.,* Marathon Corp. v. Pitzner, 106 S.W.3d 724, 729 (Tex. 2003); Southwest Key Program, Inc. v. Gil-Perez, 81 S.W.3d 269, 273 (Tex. 2002). The court has no jurisdiction to review the factual sufficiency of the evidence. *See* Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985).

[80] *See, e.g.,* Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997) (holding that the evidence was insufficient to establish that the drug Bendectin caused birth defect).

[81] *Pitzner*, 106 S.W.3d at 729.

[82] Volkswagen of Am. v. Ramirez, 159 S.W.3d 897, 912 (Tex. 2004).

[83] Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (holding that "a state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent").

[84] Tex. A & M Univ.-Kingsville v. Lawson, 87 S.W. 3d 518, 520 & n.14 (Tex. 2002).

[85] Fed. Sign v. Tex. S. Univ., 951 S.W. 2d 401, 408 (Tex. 1997); Fireman's Ins. Co. v. Bd. of Regents, 909 S.W.2d 540 (Tex. App.—Austin 1995, writ denied).

[86] TEX. CIV. PRAC. & REM. CODE §101.001 *et seq*.

[87] TEX. LOC. GOV'T CODE §271.151-.160. *See also* Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006) (noting that prior to the enactment of this statute in 2005, "sue and be sued" clauses in local charters might or might not waive immunity, depending on the context).

[88] The State entity waives immunity from liability, but not from suit, when it enters a contract. Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001); *Fed. Sign*, 951 S.W. 2d at 408.

[89] *See Little-Tex*, 39 S.W.3d at 593; *Fed. Sign*, 951 S.W.2d at 406. The immunity is somewhat questionable in that whether the entity is in fact immune will be litigated. *See generally* Tara L. Shaw, *Is Texas Waving Good-bye to Sovereign Immunity?*, 3 TEX. TECH. J. TEX. ADMIN. L. 225 (2002).

[90] TEX. GOV'T CODE §2260.006.

[91] Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 550 (Tex. 2004).

[92] Texas A&M Univ.-Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002).

[93] Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, 145 S.W.3d 170 (Tex. 2004).

[94] *See, e.g.,* City of La Porte v. Barfield, 898 S.W.2d 288 (Tex. 1995).

[95] State v. Shumake, ___ S.W.3d ___, 2006 WL 1715304 (Tex. June 23, 2006).

[96] *See* Wichita Falls v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003) (noting that waiver must be "clear and unambiguous"). *See also, e.g.*, San Antonio State Hosp. v. Cowan, 128 S.W.3d 244 (Tex. 2004) (construing Texas Tort Claims Act narrowly to uphold governmental immunity); Ctr. for Health Care Servs. v. Quintanilla, 121 S.W.3d 733 (Tex. 2003) (holding that the legislature had not waived immunity by enacting whistleblower legislation); Tex. Dep't of Transp. v. Garza, 70 S.W.3d 802 (Tex. 2002) (holding that a speed limit sign actually reflecting the speed limit did not have a "condition" waiving immunity under the Texas Tort Claims Act).

[97] *See* Gen. Servs. Comm'n v. Little-Tex, 39 S.W.3d 591, 600 (Tex. 2001).

[98] Tex. Dep't of Transp. v. Aer-Aerotron, 39 S.W.3d 220 (Tex. 2001).

[99] Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637 (Tex. 2004).

[100] *See* Act of June 11, 2003, 2003 TEX. SESS. LAW SERV. Ch. 204.

[101] Shad Rowe, *Texas Tort Reform Can Be a Model for Other States*, HOUSTON BUS. J., July 11, 2003, *available at* http://www.bizjournals.com/houston/stories/2003/07/14/editorial4.html.

[102] Brenda Sapino Jeffreys, TEX. LAW., June 13, 2005, at 5.

Appendix*
Reform Legislation in Texas, 1995-2005

1. Class Actions

- Texas Supreme Court given interlocutory jurisdiction in appeals from trial court certification orders, and trial court proceedings are stayed pending appeal.
- Class actions within the jurisdiction of a state agency must be addressed by that agency before proceeding in court.
- Class action contingency fees abolished in favor of hourly rates with possible multipliers not to exceed four times hourly rate.
- When class actions are settled using coupons, the lawyers must also be paid in coupons in the same proportion as the class.
- The Texas Supreme Court through case law had already imposed strict standards on certification of classes, similar to the limits used in federal practice.

2. Punitive Damages

- 1995 reforms limit punitive damages 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.
- 1995 reforms also permit award only upon a showing of "clear and convincing evidence" rather than a mere "preponderance of the evidence."
- Combination of 1995 and 2003 reforms establishes a rigorous gross negligence standard conceptually similar to a stringent reckless disregard standard.
- 2003 reform requires unanimous 12-0 jury verdict for the award of punitive damages rather than the 10-2 verdict required in other cases.

3. Full Proportionate Responsibility

- A defendant is liable for only its own percentage of fault unless it is more than 50 percent responsible. Similarly, plaintiffs found more than 50 percent responsible are barred from any recovery.
- Factfinder must assign percentages of fault to *all* potentially responsible persons, whether actually before the court as a party or not.
- Fault assignments are not limited by the status of the person. Therefore persons such as those who have settled; bankrupts; fugitive criminals; private and governmental entities entitled to immunity or limited liability; employers covered by workers' compensation; and persons beyond the court's jurisdiction may all be assigned percentages of fault. Fugitive "John Doe" criminals can be named even if they cannot be identified by name.
- Fault assignments determine what percentage of a judgment the named parties must pay, but fault assignments as to nonparties have no legal effect on them.
- Proportionate responsibility rules apply to cases of all kinds, including economic and business torts in addition to personal injury, death, and other personal tort claims.
- The proportionate responsibility allocation rules permit factfinders to mix negligence, product liability, fraud, or any other kind of fault in a single allocation array.

4. Asbestos and Silica Litigation Reform

- Stops the flood of claims by persons not actually impaired by asbestos or silica exposure by imposing strict medical criteria on both pending and future cases.
- Dismisses new claims by unimpaired plaintiffs, permitting claims to be filed later if actual impairment occurs; pending unimpaired cases are transferred to a multidistrict court and do not proceed unless and until medical criteria are met.
- Stops abusive "bundling" of hundreds of cases by allowing only one unrelated plaintiff per trial.
- Stops abuses by limiting the use of diagnostic materials obtained through mass x-ray mobile van screenings sponsored by lawyers.
- Assures fairness by extending statute of limitation to permit lawsuits to be filed within two years after diagnosis of actual impairment.

5. Health Providers' Liability

- Comprehensive reform in this statutory area.
- Caps on non-economic damages, such as pain and suffering, imposed in all medical cases. $250,000 per-claimant cap applies to doctors and nurses.
- A separate $250,000 cap applies to each health care institution on a per-defendant basis, subject to a $500,000 aggregate non-economic damages cap in favor of all health care institutions in the case.
- Limitation on personal liability of government employees extended to other health care professionals in government hospitals as well as

nonprofit operators of city or hospital district hospitals.

- Provides additional limits under defined circumstances to nonprofit hospitals or systems that provide charity care and community benefits in an amount equal to at least 8 percent of the net patient revenue of the hospital or system, and that provides at least 40 percent of the charity care provided in the county in which the hospital or system is located.

6. Venue

- 1995 reforms abolish highly permissive venue rules as to corporations, which had fostered the development of abusive plaintiff-oriented venues in certain areas of Texas.
- 2003 further reforms remedied a judicially created loophole in the 1995 statute, which as originally enacted required all plaintiffs to establish venue independently, by allowing an immediate appeal of a trial court's decision allowing multiple plaintiffs to join a case.

7. Interstate Forum Shopping

To discourage out of state and foreign forum shopping into Texas, state *forum non conveniens* rules are modified to give Texas trial judges broad discretion to dismiss cases that should more appropriately be pursued in some other state or country. Texas rules now are consistent with federal *forum non conveniens* practice.

8. Offer of Settlement

- Parties who make reasonable pretrial settlement offers can be entitled to attorneys' fees and other litigation-related costs when the opponent turns the offer down and recovers significantly less in the trial.
- Process may be initiated only on defendant initiative in order to prevent the rule from becoming a one-way "defendant pay" rule because plaintiffs normally are unable to pay—particularly in personal injury cases.

9. Product Liability

- In pharmaceutical cases, a rebuttable presumption is established in favor of manufacturers, distributors, or prescribers of pharmaceutical products in cases alleging failure to provide adequate warning about the product's risk, if the defendant provided the government-approved warnings with the product.
- In other product 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 (1) mandatory, (2) applicable to the aspect of the product that allegedly caused the harm, and (3) adequate to protect the public from risk.
- Sellers of products are not liable for a product defect if the seller does nothing more than acquire the product from the manufacturer and sell it to the customer in cases where the manufacturer is a domestic company.
- Fifteen-year statute of repose for most product liability claims.

10. Repeal of Abusive Components of "DTPA" Consumer Protection Act

- In 1995 reform, the Texas Deceptive Trade Practices-Consumer Protection Act, which had become a vehicle for litigation abuse, is extensively amended to eliminate claims involving matters with a total value of more than $500,000, or more than $100,000 for claims based on a written contract if plaintiff had received independent legal advice prior to signing the contract.
- The DTPA can be used against professionals only when the claim involves misrepresentation, unconscionable conduct, or breach of warranty.
- Generally, DTPA actions are now allowed only for economic damages and are subject to the proportionate responsibility statute.
- Comprehensive detailed changes remove a broad range of one-sided, pro-plaintiff provisions.

11. Appeal Bonds

- No appeal bond can exceed the *lesser* of $25 million, one-half of defendant's net worth, or the total compensatory (not punitive) damages awarded to the plaintiff.
- Savings provision for circumstances where 50 percent of net worth or the total compensatory damages would still produce a bond that could not be paid.

12. Limits on Attorney General Contingent Fee Contracting

- Outlaws award of contingent legal fees for representing the state based on a percentage of the recovery. Only hourly "lodestar" fees are permitted, which if subject to contingency may include a

premium multiple of up to four times the reasonable hourly rate.

- Attorney General may not award even an hourly-based contingency fee contract without concurrence of either the Legislature or a special committee that includes the lieutenant governor and the speaker of the house when the legislature is not in session.
- Extensive protective provisions incorporated to prevent abuses exemplified by the $3.3 billion Texas tobacco legal fee deal.

13. Multidistrict Litigation Panel

- Modeled on federal MDL procedure, a Judicial Panel on Multidistrict Litigation is now authorized under Supreme Court jurisdiction, including power to transfer factually related cases pending in multiple counties to a single court for consolidated or coordinated pre-trial proceedings.
- Remedies former practice, which contained no similar provision.

14. Seat Belt Evidence Admissible

Allows the factfinder to know whether a plaintiff was wearing a seat belt at the time of an accident for the purpose of determining the cause of damages and allocating fault if relevant and otherwise admissible.

15. Actual Damages

- Limits recovery of health care expenses to expenses actually incurred by the plaintiff.
- Allows the factfinder to consider a plaintiff's income taxes when awarding lost future income—most importantly allowing the disclosure that personal injury awards are not taxable.
- Prohibits the assessment of pre-judgment interest on an award of future damages, correcting an anomaly of prior law.
- Lowers prejudgment and post-judgment interest rates to market rates, between 5 and 15 percent, eliminating windfalls.

16. Schoolteacher Liability

Provides protection for teachers against non-meritorious litigation related to actions taken by the teacher at school.

17. Successor Liability in Asbestos Cases

For acquisitions prior to May 13, 1968, successor corporation's liability in asbestos-related litigation limited to the asset value of the acquired company.

18. Volunteer Immunity

- 1995 reform law expands immunity coverage of prior law to state and local elected and appointed officials, volunteers, employees, and board and commission members.
- 1999 reform extends protection to doctors and other health care providers who donate time and skill to treat persons unable to afford medical care.
- 2003 reform provides additional protection from lawsuits for volunteers of charitable organizations and volunteer firefighters.

19. Limitation on Claims Against Design Professionals

In a suit against a registered architect or licensed professional engineer, requires the plaintiff, at the time suit is filed, to provide an affidavit by a third-party registered architect or licensed professional engineer, setting forth the specific acts of negligence allegedly committed by the defendant.

20. Air Migration of Particles "Trespass" Claims

Narrows a loophole being promoted by plaintiffs in environmental and toxic tort cases in which defendant's molecules are supposedly "trespassing" and therefore creating liability without fault. Limits trespass actions for migration or transport of an air contaminant (other than odors) only on a showing of actual and substantial damage to the plaintiff.

21. Judicial Campaign Finance Limitations

1995 reforms impose disclosure requirements on the process of judicial fundraising and impose limits on the amount of funds that any individual or any law firm may make to a judicial candidate. All judges in Texas are elected by popular ballot.

*This appendix was taken, with permission, from Richard W. Weekley and Hugh Rice Kelly, *Template for Reform: How Texas is Restoring its Civil Justice System*, TEXANS FOR LAWSUIT REFORM (2006). In addition to the reforms listed here, a number of other reforms of lesser significance were passed in the 1995-2003 period. A more detailed summary of reform legislation in Texas during this period can be viewed at the Texans for Lawsuit Reform website, www.tortreform.com.

The Federalist Society
for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036