

• **PUNITIVE DAMAGES BILL HITS GOVERNOR'S DESK** •

After more than two years of research and preparation, and more than three months of intensive negotiations, a comprehensive punitive damages reform bill has passed the Texas Legislature and was signed by Governor George W. Bush on April 20.

S.B. 25, authored by Senator David Sibley (R-Waco) and Representative Rob Junell (D-San Angelo), is arguably among the best punitive damages reform legislation enacted by a state legislature. The bill accomplishes the major goals established by the Texas Civil Justice League two years ago as essential to meaningful reform:

- The legal standard for punitive damages is raised from "gross negligence" to "malice," bringing Texas into line with more than 30 other states. The "malice" standard solves a problem that was created by previous Texas case law, which diluted the "gross negligence" definition and made punitive damages potentially recoverable on little more than simple negligence.

- The burden of proof for a punitive damages claim is raised from the current "preponderance of the evidence" standard to "clear and convincing evidence," joining 26 other states that have adopted a higher burden of proof requirement. Thus, punitive damages—which are in essence a criminal penalty—must be proved with significantly stronger evidence of "malice" than is true under pre-existing Texas law.

- One of the major problems with the law of punitive damages has been its unpredictability. The pre-S.B. 25 cap on punitive damages is the greater of four times actual damages or \$200,000. Unfortunately, this cap brings no predictability because actual damages include "soft" damages like pain and suffering and mental anguish—damages that can't be objectively determined. Moreover, the current law cap does not apply in all cases in which punitive damages may be claimed, further weakening its impact.

S.B. 25 makes major improvements in the cap. Under the bill, the cap will be the greater of two times economic damages plus up to \$750,000 of any non-economic damages found by the trier of fact in the case, or \$200,000. For the first time, Texas has a cap on punitive damages that can be predicted, since economic damages involve out-of-pocket, objectively quantifiable damages. Unlimited non-economic damages are no longer in the base for calculating the cap. Moreover, the cap applies in virtually all cases (with the exception of certain specified intentional torts), as do the legal standards for establishing liability for punitive damages (except for cases brought under the Texas Antitrust Act, the DTPA, or Chapter 21, Insurance Code, each of which has its own punitive damages provisions).

- Under the pre-existing law, premises owners, such as restaurants, convenience stores, banks, and other businesses with pedestrian traffic,

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**Key Leaders Spearhead Punitive Damages Reform**

Obviously, when a major tort reform bill is passed, it is due to the committed efforts of a large number of legislators. S.B. 25 is certainly no exception.

The sponsors of the legislation, Sen. David Sibley and Rep. Rob Junell, deserve our special thanks. They spent hours in difficult negotiations, despite the fact that each has many other pressing legislative duties to attend to—

Sen. Sibley as Chair of Senate Economic Development, Rep. Junell as Chair of House Appropriations. Their firm and even-handed leadership resulted in a product that is not only real and substantial reform, but fair to all parties. This is not an easy balance to strike, but these two leaders found the balance.

Lieutenant Governor Bob Bullock, Speaker Pete Laney, and Governor

George W. Bush also deserve a lion's share of the credit. Each devoted personal time and effort to the negotiating process, helping to guide the discussions to a successful conclusion. Lieutenant Governor Bullock and Speaker Laney made punitive damages a priority issue—as a result, it was the first of the tort package to pass the legislature. Governor Bush, with his emergency declaration and strong support, kept the issue on the front burner and never let momentum for reform lag. We wish to express our gratitude to each of these leaders for

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**PUNITIVE DAMAGES BILL** *continued*

could be held liable for punitive damages as a result of the criminal acts of third parties on the premises—even though the owner had no control over either the act or the person who committed the crime. S.B. 25 provides that a premises owner is not liable for punitive damages that result from the criminal act of another, unless the person who committed the criminal act is an employee of the owner and the criminal act can be imputed to the owner under existing principles of law.

- S.B. 25 also codifies the most important aspects of the Texas Supreme Court's decision in the Moriel case. A trial court is required to give specific instructions to the jury regarding the law. Appellate courts must specifically review awards of punitive damages and justify their decision to uphold such an award. A defendant is given the option of bifurcating a trial involving a punitive damages claim into two phases, one to determine liability and amount of actual damages and liability for punitive damages, and the second to determine the amount of punitive damages to be awarded.

Jury instructions that mirror the actual law and specific appellate review are important to safeguard a defendant's right to due process in what is similar to a criminal trial. We would never dream of allowing juries to decide the guilt or innocence of a criminal defendant based on vague instructions to the jury, but that is exactly what we do with punitive damages today. By the same token, appellate courts must carefully scrutinize criminal convictions, but were not required to do the same if a defendant was held "criminally" responsible for punitive damages.

Finally, giving a defendant the option of a bifurcated trial is intended to protect the defendant from the prejudicial effects of evidence of net worth. Too often juries are led to focus on the defendant's apparent wealth, and not on the defendant's actual liability for punitive damages. S.B. 25, with its focus on due process safeguards, should help correct this problem.

For further explanation of S.B. 25, a matrix comparing pre-S.B. 25 law with the law as it will stand when S.B. 25 goes into effect is enclosed with this edition.

**Effective Date of S.B. 25**

S.B. 25 takes effect on September 1, 1995. It will apply to any cause of action that "accrues" on or after that date. According to the legislative intent for S.B. 25, this means that if an act or event occurs that would trigger the statute of limitations to begin running on a cause of action takes place on or after September 1, S.B. 25 will apply to that action.

A cause of action that accrues prior to September 1 is governed by the law in effect immediately before September 1. Thus, the 1987 caps and the Moriel standards continue to apply in those instances.

**Punitive Damages Reform** *continued*

their key roles in accomplishing this difficult task.

We also want to recognize other long-time friends of reform who helped make S.B. 25 a reality. Rep. Curtis Seidlits (D-Sherman), Chair of the House State Affairs Committee, shepherded the bill through committee on the House side, and was a key floor leader for the bill. Other key floor leaders in the House were Rep. Todd Hunter (D-Corpus Christi), Rep. Mark Stiles (D-Beaumont), and Rep. Robert Duncan (R-Lubbock).

There are many others to thank as well, including the 14 of 15 members of House State Affairs who voted to approve the bill and a near unanimous vote of the Texas Senate to send the bill to the House in the first place. We deeply appreciate all the members who supported the bill in committee and on the floor.

**TCJL Members and Business Groups Lead Reform Effort**

As the top legislative priority of the Texas Civil Justice League, the completion of punitive damages reform is a matter of pride for TCJL members. As always, it is our members who deserve the credit for laying the groundwork for success and for following through. Congratulations to all of you.

TCJL is an association made up of a lot of organizations without whom punitive damages reform would never have gotten off first base. To name a few: National Federation of Independent Business, Texas Medical Association, Texas Municipal League, Texas Railroad Association, Texas Realtors Association, Texas Restaurant Association, Independent Bankers Association of Texas, Texas Association of Builders, Consulting Engineers Council of Texas, Texas Association of Defense Counsel, Texas Society of Certified Public Accountants, Texas Hospital Association, Texas Bankers Association, Texas Association of School Boards, Texas Apartment Association.

The efforts of Texans for Lawsuit Reform, together with those of other major business groups, such as the Texas Association of Business, Texas Chemical Council, and Texas Mid-Continent Oil and Gas Association, were invaluable to the success of the effort. It just goes to show what the Texas business and health care community can do when it pools its resources and unites solidly behind a legislative goal.

## Other Tort Reform Measures Making Steady Progress

With punitive damages reform now signed into law, attention turns to the remaining tort reform measures working their way through the legislative process. Here is a quick rundown of the issues and where each stands:

### VENUE

Venue reform, one of the original charter objectives of the TCJL, has passed the Senate and been reported out of the House State Affairs Committee. S.B. 32 by Senator John Montford (D-Lubbock) and H.B. 6 by Representative Robert Duncan (R-Lubbock) are similar bills, which is not surprising given the close working relationship of these two outstanding legislators.

The bills are aimed at reducing forum shopping by tightening the general venue rule, preventing plaintiffs from intervening in a lawsuit without establishing venue independently, and preventing one defendant from waiving the venue rights of another. Both bills eliminate the discriminatory treatment of corporations chartered in other states not doing business in Texas through the repeal of the venue provision allowing such corporations to be sued where they have an "agent" or "representative." We will provide a more detailed analysis of the bills as they progress through the system.

### JOINT AND SEVERAL LIABILITY

Joint and several liability, S.B. 28 by Senator Sibley and Representative Junell, was pending in the House State Affairs Committee at the time of publication. The bill, as it passed the Senate, generally provides that a defendant is not jointly and severally liable for all the plaintiff's damages unless the defendant is more than 50% responsible for the plaintiff's harm—an enormous advance from current law under which a defendant is generally jointly and severally liable for all damages except in narrow circumstances. In cases involving so-called "toxic torts," the threshold for joint and several liability is 20%. Intentional tortfeasors continue to be jointly and severally liable, as they are at current law. The bill also allows a defendant to

submit to the jury the fault of certain responsible third parties who contributed to the plaintiff's harm. Look for more information as the issue develops.

### DECEPTIVE TRADE PRACTICES ACT REFORM

Another long-time TCJL objective, DTPA reform (H.B. 668 by Representative Todd Hunter and Junell/S.B. 26 by Senator Teel Bivins) is out of the House State Affairs Committee and pending in the Senate Economic Development Committee. Although the negotiations on the main features of the bill continue, the TCJL continues to push very strongly for removing the rendition of professional judgment and advice from the DTPA, stopping the use of the DTPA for personal injury actions, and limiting the scope of the DTPA to pure consumer transactions.

### GOVERNMENTAL LIABILITY

H.B. 383 by Rep. Junell and Senator Florence Shapiro has passed the House and is awaiting action in the Senate. The bill limits the liability of elected and appointed officers of governmental units in the same manner as that of governmental employees and may be insured by the governmental unit. Independent contractors over whom the governmental unit has no legal right to control are not treated as public servants for whom the unit could be liable for damages. Finally, the personal liability of a public servant is limited to \$100,000, if the damages result from an act or omission by the public servant in the course and scope of the servant's office or employment and the public servant is covered by indemnification or errors and omissions coverage.

The Texas Municipal League is leading the effort on H.B. 383, and is strongly supported by the TCJL.

### MEDICAL LIABILITY

Medical liability reform legislation has likewise passed the House and is headed for Senate action. H.B. 971 by Rep. Todd Hunter and Senator Sibley makes significant improvements in the procedures adopted last session to prevent malpractice lawsuits without merit.

The bill requires that in every health care liability claim, the plaintiff must file a \$5,000 cost bond, place \$5,000 in cash in an escrow account, or file an expert report for each physician or health care provider listed in the claim. If none of those are filed, a defendant may, on motion to the court, require the filing of a \$7,500 cost bond; if the bond is not filed, the action shall be dismissed for want of prosecution, and may not be reinstated by the plaintiff unless the plaintiff pays the defendant's court costs and files a \$7,500 bond.

Once a medical liability lawsuit is filed, the plaintiff must submit to each defendant within a specified time period any expert reports, together with the qualifications of the expert, or voluntarily nonsuit the action. If the plaintiff fails to comply, the court shall sanction the plaintiff or the plaintiff's attorney reasonable attorney's fees and court costs, the cost bond shall be forfeited, and action shall be dismissed with prejudice to refiling.

The bill further strengthens the qualification requirements for expert witnesses in medical liability cases. Experts testifying against a physician must be actively practicing medicine at the time the claim arose and be qualified on the basis of training or experience to offer an expert opinion regarding the appropriate accepted standards of medical care. In determining whether the expert is qualified, the court must consider whether the expert

## Analysis of S.B. 25 (Punitive Damages)

| S.B. 25  | MORIEL  | ABUSE RESOLVED   |
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| <p>Malice is basic threshold. Requires a specific intent to cause substantial injury to the claimant or an act or omission which when viewed objectively from the defendant's standpoint at the time of occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others and of which the defendant has actual subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.</p> <p>"Gross neglect" remains the standard for wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. The definition of "gross neglect" is the Moriel definition as defined by S.B. 25.</p> <p>Act applies to all claims for exemplary damages, regardless of nature of injury or basis of lawsuit. Only exceptions are suits brought under the Texas Free Enterprise and Antitrust Act of 1983, the DTPA, and Chapter 21, Insurance Code.</p> <p>Amount of exemplary damages limited to greater of two times economic damages plus up to \$750,000 of non-economic damages found by the jury. Caps do not apply to intentional torts specified and defined by the Penal Code, including murder, capital murder, aggravated kidnapping, aggravated assault, sexual assault, injury to a child, elderly or disabled person, forgery, commercial bribery, misapplication of fiduciary property or property of financial institution, securing execution of a document by deception, fraudulent destruction,</p> | <p>Gross negligence is basic threshold. Requires creation of extreme degree of risk, in terms of magnitude and probability, viewed from defendant's standpoint and actual awareness of and conscious disregard of that risk. The Moriel standard is incorporated into S.B. 25's definition of "malice."</p> <p>Uncertain. 1987 Tort Reform Act referred to cases involving personal injury or death, but Supreme Court's recent Keever decision suggested that current statute applies to all cases.</p> <p>Uncertain. In personal injury or death cases—and perhaps others, given Keever—damages limited to four times both economic and non-economic damages (or \$200,000, whichever is greater), except that if defendant committed an intentional tort, exemplary damages are not limited.</p> | <p>Gross negligence is basic threshold. Requires showing of such an entire want of care from which conscious indifference to rights could be inferred. Since Burk Royalty, this standard permits a finding of "glorified negligence" to support a jury finding of punitive damages, giving Texas one of the most diluted legal standards for punitive damages in the nation, increasing the risk of punitive damages even in simple negligence cases, and putting coercive pressure on defendants to settle even marginal cases.</p> <p>Chapter 41, CPRC, applies only to personal injury or death, and specifically excludes 15 other laws. Thus, even the 1987 reforms only apply in a limited number of cases.</p> <p>Because of the enormous growth of the nature and amounts of non-economic "soft" damages being awarded, the 1987 caps of four times actual damages were virtually illusory. Moreover, the caps did not apply in all cases, most notably major commercial litigation and employer-employee actions in which huge punitive damages awards are being given.</p> |

| S.B. 25   | MORIEL   | ABUSE RESOLVED   |
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| <p>removal or concealment of a writing, theft, intoxication assault, or intoxication manslaughter.</p> <p>Bifurcation of trial into separate phases on (1) compensatory liability, damages, and liability for exemplary damages and (2) amount of exemplary damages must be provided upon motion of a defendant.</p> <p>Evidence of defendant's net worth shall be considered by the trier of fact, along with the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which the conduct offends a public sense of justice and propriety. Evidence of these factors is relevant only to the amount of exemplary damages and is not admissible during the first phase of a bifurcated trial.</p> <p>Liability for exemplary damages must be proven by "clear and convincing evidence."</p> <p>Appellate courts are required to explain in written opinion decision to uphold or disturb a challenged exemplary damage award.</p> | <p>Same, except the decision did not specify that the motion for bifurcation is limited to a defendant.</p> <p>Evidence of defendant's net worth is discoverable and admissible in the second phase of a bifurcated trial, and jury may consider net worth in determining amount of exemplary damages to award against defendant.</p> <p>Liability for exemplary damages must be proven by a preponderance of the evidence.</p> <p>Same.</p> | <p>The prejudicial effect of evidence of a defendant's net worth, which focuses the jury on the relative wealth of the parties and not on the actual liability of the defendant for punitive damages, impaired a defendant's ability to adequately defend itself against a claim for punitive damages. Bifurcation of trial, in many cases, allows a defendant to keep evidence of net worth out of the trial until the jury has determined whether the defendant is actually liable for punitive damages.</p> <p>Specific factors the jury may consider in determining the amount of punitive damages are left to the court's instructions and the pattern jury charge under pre-existing law. This resulted in different juries being given different instructions in similar cases, leading to unpredictable, inconsistent, and unjust results. Requiring specific instructions and limiting consideration of evidence of these factors to the issue of the amount of punitive damages should better protect a defendant's right to due process.</p> <p>The "preponderance of the evidence" standard is inadequate for a determination of punitive damages, which is essentially a quasi-criminal penalty. 26 states have raised the burden of proof to "clear and convincing" evidence or higher.</p> <p>Appellate courts are not required to articulate specific reasons for upholding an award of punitive damages or to address with specificity the evidence supporting the award. In fact, since <i>Burk Royalty</i>, appellate courts were hard-pressed to disturb a jury finding of punitive damages because of the diluted</p> |



| S.B. 25   | MORIEL   | ABUSE RESOLVED |
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| <p>S.B. 25 applies to a cause of action that accrues on or after September 1, 1995. A suit filed before the effective date is governed by the law applicable to the claim that existed immediately before the effective date.</p> | <p>Moriel and related case law and Chapter 41, CPRC, continue in effect for causes of action that accrue before September 1, 1995.</p> |                |

**Other Tort Reform Measures** *continued*

is board certified or has other substantial relevant training and is actively practicing medicine in rendering medical care services relevant to the claim.

Prejudgment interest is limited under the bill as well. Prejudgment interest may not be charged to a physician or health care provider who has settled a claim before the 181st day after the date notice of the claim was first mailed to the provider. If the claim is not settled during that period, prejudgment interest may be charged on past damages found by the trier of fact, but not on future damages.

Finally, the bill provides that the limitations period for a minor's health care liability claim begins to run not later than the date on which the first action on the claim is commenced.

The Texas Medical Association is taking the lead on H.B. 971, also with the strong support of the TCJL.

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