SUBJECT: Revising joint and several liability law

COMMITTEE: State Affairs — favorable, with amendment

VOTE: 15 ayes — Seidlits, S. Turner, Alvarado, Black, Bosse, Carter, Craddick, Danburg, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay, Wolens

0 nays

SENATE VOTE: On final passage, March 1 — 26-3 (Barrientos, Gallegos, Luna)

WITNESSES: (*On SB 32 and/or its House companion, HB 4 by Junell*)

For — Larry York, Reid Garrey, George Meros, Jr., James H. Thompson, Richard J. Trabulsi, Jr., and Richard W. Weekley, Texans for Lawsuit Reform; Shannon Ratliff, Texas Civil Justice League; Albert G. Brown; Ronnie Rudd and Paula T. Saizan, Texas Society of Certified Public Accountants; Mike Gallagher; W. David Bayless, Sr.; Harry Robards; Frank Cross; Bill Nunley and Richard L. Hardcastle, Texas Agricultural Aviation Association; Ted B. Roberts, Texas Association of Business and Chambers of Commerce; Kathleen M. Kerr, Texas Chemical Council; Clint Murchinson; Douglas N. Gordon, Hoechst Celanese Corporation; Frederick E. Rowe, Jr.; Daniel D. Clinton, Jr., Texas Society of Professional Engineers; R. Kinnan Coleman, Shell Oil Co.; Robert E. Parker, Associated Builders and Contractors of Texas; John A. Womack; David D. Peden, Jr., H.A. Lott, Inc.; Gary D. Sarles, America's Favorite Chicken Company

Against — Tom Smith, Public Citizen; Bill Lewis, Mothers Against Drunk Driving; Dwayne Anderson, Clean Water Action; Bill Whitehurst, Texas Trial Lawyers Association; Robert D. Kizer; Dan Lambe; Rick Levy, Texas AFL-CIO

BACKGROUND: In Texas comparative negligence allows a plaintiff to recover even if that plaintiff is as much as 50 percent liable (60 percent for products liability cases). Each defendant is also assigned a percentage of negligence by the jury — the percentages assigned to the plaintiff and all defendants must equal 100 percent — and, assuming that each defendant is solvent, each defendant pays a percentage of the plaintiff's award equal to the percentage

of fault that the jury assigned that defendant. For example, if the injuries in one case amounted to $100,000 and the plaintiff was judged to be 10 percent liable, comparative negligence would require the defendant, or the defendants jointly, to pay the plaintiff $90,000.

When more than one defendant is liable for damages, the damages are apportioned under the concept of joint and several liability. This means a defendant who was only partially liable for the harm done may be entirely liable for paying the compensation awarded to the plaintiff.

There are four ways for liability to be apportioned among multiple defendants based on the harm:

• Two separate injuries — Defendant A injures plaintiff's arm, Defendant B injures plaintiff's leg. Each defendant is responsible only for the specific injury caused to the plaintiff.

• Indivisible injury, each defendant is a producing cause — Each defendant's actions alone are enough to cause the entire harm to the plaintiff. For example, one defendant dumps chemical A into a lake and another defendant dumps chemical B, either chemical A *or* chemical B are enough to cause the harm to the lake. Under Texas law, either defendant could be held liable for the entire amount.

• Indivisible injury, each defendant is a necessary contributing cause — In this situation, both defendants had a necessary role in the injury. Without action of both defendants, no injury to the plaintiff would have occurred. For example, one defendant dumps chemical A into a lake, another defendant dumps chemical B. Only the reaction of chemical A to chemical B produced the harm; either alone could not have produced the harm. Again, in this situation, each defendant may be held liable for the whole harm done to the plaintiff.

• Indivisible injury, unequal or unknowable culpability — Each defendant committed different acts that caused some measure of a single harm to the plaintiff, but it is difficult, if not impossible, to sort out which part of the injury each defendant caused. In this case, the law of torts shifts the burden of proof to the defendants. This shift is accomplished by letting the

plaintiff collect 100 percent of his compensation due from any defendant who is partially responsible. The burden then shifts to that defendant to bring a suit for contribution against any other party who is also liable to the plaintiff. The defendants to sort out the degree of liability among themselves.

The current law governing joint and several liability, found in Chapter 33 of the Civil Practices and Remedies Code, allows any defendant to be held liable for the entire amount of the plaintiff's harm if:

- the defendant is found to be more than 20 percent liable and the amount of liability attributed to the defendant is greater than the percentage of liability assigned to the plaintiff,

- the defendant is found to be more than 10 percent liable and the plaintiff is assessed no percentage of liability, or

- the injury is based on the release of any hazardous or harmful materials into the environment (a toxic tort) or the harm is caused by a hazardous material, no matter what percentage of liability is assessed against the defendant.

These standards were set by the Legislature in 1987. Previously, a defendant could be made to pay the entire amount of the plaintiff's claim so long as the plaintiff's percentage of responsibility was not greater than the defendant's. Under any system a plaintiff will never be entitled to more than 100 percent of the damages that the court awards.

Civil Practices and Remedies Code secs. 33.012 and 33.014 require a plaintiff to have any settlements made with any defendants applied to the final judgment against any non-settling defendants.

The current system allows a defendant to implead (bring into the suit) another party under Rule 38 of the Rules of Civil Procedure. However, when the charge is given to the jury, only the plaintiff and the parties that the plaintiff brought into the case are adjudged a percentage on the basic liability issue. If, on the first question, the jury finds that the defendant is liable and the plaintiff is not barred from recovery (by being more than 50

percent liable), the jury is then asked to apportion that percentage of liability assessed against the original defendant among all defendants in the case.

DIGEST:

SB 28, as amended, would amend Chapter 33 of the Civil Practices and Remedies Code governing the apportionment of responsibility for tort actions to establish a new system of proportionate responsibility. The bill would specify that a plaintiff could not recover any damages on any tort case if the plaintiff was found to be more than 50 percent liable.

SB 28 would raise the threshold at which a defendant may be found jointly liable from greater than 10 percent to greater than 50 percent. In toxic tort cases (environmental harms) or harms done by hazardous substances, the threshold standard would be raised from 1 percent to 20 percent under the version of SB 28 engrossed by the Senate. The House committee amendment to SB 28 would retain the 1 percent threshold for harms caused by hazardous substances or toxic torts. *(The House committee amendment would also override the 50 percent threshold and replace it with a 20 percent threshold for all joint and several liability claims. This was not the intention of the drafters of the amendment and a corrective amendment is planned. See NOTES).*

When a defendant was found to have committed a criminal act, as listed in the bill, with specific intent—defined as when it is the person's conscious effort or desire to engage in such conduct for the purpose of doing substantial harm to others—that defendant would be subject to joint liability without regard to the percentage of fault assigned by the jury.

SB 28 would require the jury to determine the percentage of responsibility for each responsible third party joined into the suit at the same time that it determines the responsibility for each plaintiff, each defendant, and each settling party.

SB 28 would allow a defendant the same right that the plaintiff has to bring additional parties into a suit and have them assigned percentages of responsibility. A defendant could seek to have any party joined into the suit before the plaintiff's statute of limitations period runs, or, if the limitations period has run, within 30 days after the defendant's answer is

required to be filed. If a defendant joined a third party after the limitations period had run, the plaintiff would have the opportunity to join other third parties within 60 days of when the defendant's request for joinder of third parties was granted.

SB 28 would explicitly state that it would not affect any rights to indemnification currently available under Chapter 82 of the Motor Vehicle Commission Code (VACS art. 4413(36)) or any other statute contract or common law or any rights established in the future.

The bill would apply only to a cause of action or claim that accrues on or after its effective date, September 1, 1995.

SUPPORTERS SAY:

SB 28 would bring needed fairness to joint and several liability law by establishing a new system of proportionate responsibility that would determine who should responsible for what proportion of compensation, if any, in a tort action. Joint and several liability law now may require a defendant to pay a greater percentage of the plaintiff's compensation than a jury decides that defendant is responsible. SB 28 would eliminate the unfair concept that as long as the defendant who pays had something to do with the harm, that defendant should have pay the all of the damages merely because the defendant has "deep pockets" and a greater ability to pay.

Texas comparative negligence law bars a plaintiff from recovering anything from any defendant if the jury determines the plaintiff's fault is greater than 50 percent for all tort actions except strict liability actions including products liability and breach of express warranties. There is no reason that a plaintiff should be able to recover under any theory of liability if the plaintiff is more at fault than the defendant. By moving the comparative responsibility standard to 50 percent for all cases, SB 28 would achieve a fair result for plaintiffs and defendants in every type of tort action.

Joint and several liability law currently allows a defendant to be held responsible for the entire award to the plaintiff if that defendant is only 11 percent liable (joint and several law states greater than 10 percent, but since it requires a percentage to be in whole numbers, 11 percent is the lowest amount a defendant could be held liable for). This result should violate

anyone's sense of fairness. Almost anyone brought into a suit can be found 11 percent liable if the plaintiff's lawyer sets that as a goal of the trial.

SB 28 would require that before any defendant can be held liable for an entire damage award, that defendant must have been found more at fault than any other party in the suit. In other words, a defendant would have to be found at least 51 percent at fault before that defendant could be forced to pay the liability assessed against other defendants. This change in the law is logical and reasonable because if one party is found to be more at fault than another, the party with the lesser amount of liability should not be required to pay for the liability of the party with more responsibility. When there are only two parties to an action, a defendant is not required to pay the plaintiff's award if the plaintiff is more liable than the defendant; that rule should not be any different when there are more than two parties to a case.

Environmental harms. *(There are three different proposals for the treatment of harms caused by hazardous substances or toxic torts.)*

• The Senate engrossed version of the bill would require a defendant in these actions to be at least 21 percent liable in order to be jointly and severally liable.

• The committee amendment to SB 28 would retain current law and require a defendant to be only 1 percent liable to be jointly and severally liable.

• A proposed compromise between these two positions would set an 11 percent threshold.

Supporters of a 21 percent bar say just as it is unfair to hold a defendant who is not the person most at fault liable for all of the harm in any other tort, a defendant in a toxic tort should not be held liable for being only 1 percent at fault. It is clear that environmental harms should be punished and polluters of our environment should face stiff penalties, but a 1 percent threshold is much too low. A defendant could receive 1 percent of the liability simply for being named in the suit. A much more reasonable compromise would be to set the threshold at 20 percent so that a defendant must at least have been substantially at fault.

Supporters of a 1 percent bar say environmental harms and toxic torts should be punished as much as the law allows. There is no reason to change the current law that allows a polluter to be held jointly liable for the actions of other polluters. According to the Institute for Southern Studies, Texas ranks 49th in the nation in efforts to protect the environment, and that ranking reflects a 1 percent threshold. If it were raised any higher, Texas might fall off the scale as the worst state in the nation for environmental protection.

Supporters of an 11 percent bar say it represents a compromise between the 21 percent and the 1 percent bars. Setting the percentage at 11 percent would still allow for the punishment of nearly every polluter, but would require some substantive contribution to the pollution before being held liable.

When a cause of action involves a felony criminal act with specific intent, SB 28 would allow the criminal actor to be held jointly and severally liable no matter what percentage of fault was attributed to that felon by the jury. The policy behind such a rule is that if someone had a specific intent to commit harm, that person is the person most at fault even if the jury does not assess 51 percent of the liability to that defendant.

Under current law plaintiffs and defendants are treated differently in their ability to bring third parties into the suit. A plaintiff can bring as many parties into a suit as the plaintiff wants and have the jury assign all of those parties a percentage of responsibility at the same time. Strategically, a plaintiff could decide that it would prefer a large percentage award against only one defendant and therefore only sue one defendant, or it could decide that it would prefer to split up the liability among a number of defendants (hoping of course that the solvent defendants are adjudged a percentage of liability great enough to require them to cover the liability of the insolvent defendants). A defendant does not get the same opportunity. A defendant who wishes to claim that another party is responsible for the plaintiff's damages may bring that party into the suit, but that party is not assigned its percentage of liability at the same time as the original defendant is. Instead, the defendant's percentage of fault is apportioned among the original defendant and any parties who the defendant brings into a suit in a separate action.

For example, an original defendant found on the first question to be 70 percent liable for a claim of $100,000. might have brought into the case two other defendants. On the second question, liability might be assigned 20 percent for the original defendant (D1), 30 percent for defendant A (DA) and 50 percent for defendant B (DB). Therefore, if all parties are solvent, D1 pays $14,000 (20 percent of $70,000), DA pays $21,000 (30 percent of $70,000) and DB pays $35,000 (50 percent of $70,000). However, if DA and DB are insolvent, D1 must pay $70,000 even though D1 actually caused only 14 percent of the harm. If all of these parties were submitted to the jury on one question, D1 would not have had to pay any more than $14,000 because his percentage of liability was less than that of the plaintiff. SB 28 would correct this problem by requiring all responsible parties to be apportioned a percentage of the liability at the same time.

The definition in the bill of who could be brought into the suit as a responsible third party is very carefully crafted. It would exclude an employer who maintained workers' compensation insurance and bankrupt parties. These are parties that the plaintiff could not have sued in the first place. The parties who are included are everyone who could have been sued by the plaintiff. By structuring responsible third parties in this way, it would negate the plaintiff's determining who can be brought into the suit in order to defeat the joint and several liability threshold.

OPPONENTS SAY:

SB 28 would make it more difficult for plaintiffs with legitimate injuries to recover and allow defendants who can afford to pay more to pay less than their fair share. As originally developed, the law of joint and several liability was based on the idea that if more than one defendant could have caused the entire harm, each defendant could be held responsible to pay for the entire harm. Later joint and several liability law was expanded to cover those cases in which multiple defendants produced only a portion of the harm but where it was impossible for the plaintiff to determine what percentage each of those defendant's caused. Both of these justifications still apply today, and joint and several liability should not be altered.

The 51 percent liability requirement for joint and several liability to apply may be justifiable in cases where an unequal proportion of the liability is applied to each defendant, but there is no reason to have such a bar for

cases where each defendant was a producing cause of the harm or a necessary contributing cause to the harm.

A producing cause defendant is one who alone could have caused the entire harm to the plaintiff. For example, imagine that two cars simultaneously ran red lights and killed a pedestrian. Had just one of the cars hit the pedestrian, the result would have been the same — the death of the pedestrian. At trial, each of these defendants would be determined to be 50 percent liable for the plaintiff injuries. Under SB 28, if one of those defendants was insolvent, the plaintiff would only receive 50 percent of the compensation that the jury awards. This is a completely unfair result, because if the plaintiff had been hit by only one defendant, or had only one defendant been subject to the jurisdiction of the trial court, the plaintiff could recover 100 percent of the compensation awarded by the jury.

A necessary contributing cause defendant is one without whom the injury would not have occurred. Imagine two defendants drag-racing down a city street when one hits a pedestrian. In this case, the defendant who actually hit the pedestrian would not have been drag-racing without the other. A jury is likely to find that each defendant is 50 percent liable, and might even believe that this is the best way to get the plaintiff the highest amount of the compensation that the jury awards. In fact, one defendant might be insolvent, and the plaintiff would only be able to recover 50 percent of the compensation awarded by the jury.

In order to correct this problem, the language of SB 28 should be altered to allow joint and several liability to apply when the defendant is found to be greater than or *equal to* 50 percent responsible by the jury.

Environmental harms. *(There are three proposals for different standards for environmental harms. See SUPPORTERS SAY.)*

Opponents of a 21 percent bar say that just as two persons acting in concert (as a producing cause each or as a necessary contributing cause) would be enough to negate the plaintiff's award, only five defendants would be necessary to negate the plaintiff's award under a 21 percent bar in an environmental case. While five defendants might seem like a substantial number, it is very common to have as many as twenty different polluters to

a particular area, each polluting with the same toxic material. For example, the EPA says there are more than 13 plants releasing vinyl chloride, a highly carcinogenic substance, into the Houston/Galveston/Brazoria County airshed. In any action against one of these plants, all 13 would be joined and the possibility of finding one more than 20 percent liable would be substantially reduced.

Opponents of a 1 percent bar say that it is unfair to force a defendant to pay 100 percent of a plaintiff's award when that defendant was only 1 percent at fault for the harm. While environmental harms must be severely limited, the current law is simply unjust.

Opponents of an 11 percent bar say that it is not much better than a 21 percent bar, it would simply allow for nine equally liable defendants rather than four in order to be held jointly liable.

OTHER OPPONENTS SAY:

Joint and several liability as a concept of tort law is wrong and should be abolished entirely. A person should only be held responsible for the percentage of fault that the person causes. It is intrinsically unfair for a person to have to cover the liability of another simply because one person is insolvent and the other is not.

NOTES:

The committee amendment proposes a new sec. 33.013(c). In the Senate engrossed version, this section would state that in order to be held jointly and severally liable the harm must have been caused by hazardous material or a toxic tort *and* the defendant must have been found to be more than 20 percent liable. Under the committee amendment, sec. 33.013(c) would allow a defendant to be held jointly and severally liable if the harm were caused by a hazardous material, if the harm was a toxic tort *or* if the defendant were found to more than 20 percent liable.

The drafters of the amendment say their intent was only to remove the 21 percent bar to joint and several liability in toxic tort and hazardous substance cases, not to lower the 51 percent threshold to 21 percent for other tort cases. A corrective amendment is likely to be offered.