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Volume 4 Number 7 February 27, 1992

TAKE ACTION NOW

Mississippi--The Product Liability Task Force has introduced a comprehensive six-bill package in a climate favorable to tort reform (see Watch 5). HB 1150 (Garriga) and SB 2846 (Graham) would set stricter standards for the award of punitive damages. HB 1231 (Hines) and SB 2954 (Wicker) are comprehensive product liability reform bills. HB 1298 (Williams) would introduce a "loser pays" rule for attorneys fees. HB 1300 (Williams) would allow evidence of collateral source payments. All of the house bills listed above are in the House Judiciary A Committee and all of the Senate bills are in the Senate Judiciary Committee.

Act now to help make these comprehensive reforms a reality. On March 3, the Senate and House Judiciary Committees will hold a joitn hearing on teh subject of product liability. ATRA will be testifying at this hearing. For more information on how you may assist in this effort for Mississippi tort reform, contact Bob Pittman of Mississippi Economic Council at (601) 969-0022 or Steve Dickson of the Task Force at (601) 859-6871.

Alabama--An eagerly-awaited punitive damage reform bill was introduced in the Alabama Senate this week, SB 280 (Owens). Early drafts indicated that SB 280 would eliminate vicarious liability under specific conditions (see Watch 2). On February 26, the Senate Small Business Committee was scheduled to hear SB 280. Your immediate support is needed to help this bill pass the Senate. Contact your State Senators today. Letters should be addressed to: The Honorable _______, State House, Montgomery, AL 36130.

In the House, Representative Higgenbotham is expected to introduce a companion bill in the next few days which is likely to be sent to the Committee on Commerce, Utilities and Transportation. Both of these measures are supported by the Alabama Civil Justice Reform Committee. To find out how you may assist in this important effort in Alabama contact J.B. Brand, Coalition Chair, at (205) 322-2404.

Minnesota--Coalition-supported joint and several liability reform bills need your help in Minnesota. SF 592 (Stumpf) and HF 396 (Simoneau) provide for a 30% threshold for the application for joint and several liability, Any defendant 30% or less at fault would be liable only for his or her share of the damages. On February 25, the Civil Law Subcommittee of the House Judiciary Committee heard HF 396 and it is hoped that the Senate Judiciary Committee will vote on SF 591 in the next few weeks.

The opposition has countered with SF 1745 and HF 1705 (Carruthers), which would bar a plaintiff's claim if his or her fault is greater than all of the defendants as a group. Currently, a plaitiff's claim is barred if his or her fault is greater than any one of the individual defendants. These bills must be stopped now. HF 1705 is in the House Judiciary Committee and SF 1745 (Cohen) is in the Senate Judiciary Committee.

Voice your support for HF 396 and SF 591 and your opposition to HF 1705 and SF 1745 by calling your State Senators and Representatives. The State House switchboard number is (612) 296-6013.

Michigan--Bi-partisan medical liability reform continues to be the main focus in Michigan. HB 5434 (Niederstadt) and HB 5435 (Hickner), which are based on the fault-based administrative alternative recommended by the Physician's Insurance Association of America (PIAA), remain in the House Judiciary Committee. Urge your members, employees and contacts in Michigan to write their Representatives in support of HB 5434 and HB 5435. Letters should be addressed to: The Honorable ___, State Capitol, P.O. Box 30036, Lansing, MI 48909-7536. For more information on this package and other medical liability reform developments, contact Kevin Kelly of the Michigan Medical Liability Reform Coalition at (517) 337-1351.

Wisconsin--On February 25 the Senate heard AB 388 (Krug), a measure which would raise the limit on non-economic damages in wrongful death actions from $50,000 to $250,000. The controversy surrounding this bill involved the limit amount to be selected; the coalition-supported amount of $100,000 or the opposition's figure of $150,000 (see Watch 6).

mailed 2/20

MISSISSIPPI ECONOMIC COUNCIL

THE STATE CHAMBER OF COMMERCE / Bob W. Pittman, President

MEC

February 20, 1992

Mr. Matthew Bordonaro
American Legislative Exchange Council
214 Massachusetts Avenue N.E.
Suite 430
Washington, D.C. 20002

Dear Matt:

This is a follow up to our telephone conversations of the past few days, and an urgent request from the Mississippi Economic Council for Vice President Quayle's support in our tort reform efforts.

First, I gave you incorrect dates by telephone yesterday. I advised you that the 1992 session of the Mississippi Legislature would close about April 5. The session runs an extra 30 days this year since this is the first year of a new state administration, so the session will continue until May 10.

This means that the April 9 date which we discussed for Vice President Quayle's appearance in Mississippi will be critical to our tort reform campaign. Under the legislative schedule, our tort reform bills should have come out of committees and should be on House and/or Senate calendars at that time. A personal appeal from the Vice President at that time could mean the difference in success or failure this year.

Now, for other details of our Mississippi Economic Council meeting and our tort reform crusade:

This is a request for Vice President Quayle to be the featured speaker at the Annual Membership Meeting of the Mississippi Economic Council in Jackson, Mississippi, on Thursday, April 9. He would speak at the annual luncheon at 12:30 p.m. The meeting will be held at the Holiday Inn Downtown in Jackson, which has a banquet hall capacity of about 1,000.

The Mississippi Economic Council is Mississippi's largest association of business, industrial, and professional members, representing some 2,500 businesses from across the state. The Annual Membership Meeting is recognized as one of the highlights of the year for the state's business leadership.

In years past, this Annual Meeting has featured such dignitaries as President Nixon, Senator Robert Byrd, the U. S. Secretary of Defense, Ted Koppel, and Bob Hope.

As for tort reform, the Council has been a leader in Mississippi efforts to improve the civil justice system for several years now, with major emphasis placed on this issue over the past five years.

In fact, the Council has been the leader of a 30-member business organization coalition for tort reform since 1988. We passed significant tort reforms in Mississippi in 1988 and 1989, after bitter confrontation with plaintiffs' attorneys, and we are introducing six more tort reform bills in the 1992 legislative session.

Major reforms in 1989 included revisions in Mississippi's statute of limitations, reforms in joint and several liability, and penalties for the filing of frivolous lawsuits.

This year we are targeting limitations on punitive damages, product liability reforms, and four other revisions -- all a part of the Administration's package.

I assure you we have used the information and strong statements from the Vice President and others in our efforts here in Mississippi. Two recent surveys have indicated that we have strong public support for our positions on tort reform, and we are trying to capitalize on that.

Without question, the appearance of the Vice President in Mississippi in April, with a strong pro tort reform statement, would make a difference at the Capitol.

You may be aware that Mississippi has just elected a Republican governor -- Kirk Fordice -- and he is strongly supporting our tort reform efforts.

Matt, thanks for your help in trying to arrange for an appearance by the Vice President at the Council's Annual Membership Meeting in April. Please let me know what I need to do next.

I look forward to seeing you in Washington next Tuesday.

Cordially,

Bob

Bob W. Pittman

jsf

o payment of punitive damages to a state fund designated for the purpose [of] providing health care to citizens who do not currently have access to such care.

Additionally, two 1991 joint and several liability bills that carried over for consideration this year are attracting a lot of attention. HF 396 (Simoneau) and a companion bill SF 591 (Stumpf), measures which would provide for a 30% threshold for the application of joint and several liability, were the subject of interim study hearings this summer. HF 396 has been the subject of Civil Law Subcommittee hearings this session. If the response to joint and several liability reform is strong enough, the Minnesota Civil Justice Coalition (CJC) may ask sponsors to improve the bill by amending it to provide for the "California Rule", eliminating joint and several liability for non-economic damages. The CJC hopes this bill will be on the House Floor in 1992. Although the Senate will be a tougher battle, the coalition is optimistic due to the pro-tort reform atmosphere in Minnesota.

Concerned parties should also watch for protective order legislation.

MISSISSIPPI

CONVENES JANUARY 7 -- ADJOURNS MAY 10

Mr. Bob W. Pittman
Mississippi Economic Council
State Chamber of Commerce
P.O. Box 23276
Jackson, Mississippi 39225-3276
601-969-0022

Mr. Steve Dickson
Product Liability Task Force of Mississippi, Inc.
Corporate Relations Management
P.O. Box 84
Canton, Mississippi 39046
601-859-6871

John
Let's have them find us a host.
DJ

A new Republican governor with a strong business background has raised the hopes of tort reformers in Mississippi. The governor is so committed to reform that he has promised to attend legislative meetings around the state sponsored by the coalition. The outlook for passage has improved! As a result of the revitalized atmosphere a new coalition has been formed, the Mississippi Business Coalition. This new group is made up of the Mississippi Manufacturers Association, the Retailers Association of Mississippi, the Mississippi Economic Council and the Product Liability Task Force. They hope to introduce punitive damage and product liability reform legislation.

P.S. quick like a bunny!

P.P.S. Suggest Trinity Maine -- see what they think

MISSISSIPPI PRODUCT LIABILITY BILL

This products liability bill contains provisions that clearly state the rules governing liability for injuries related to the use of products. The bill's general provisions apply to all products liability lawsuits; application of specific provisions depends on the claims alleged in the lawsuit.

GENERAL. The bill would:

- Product Flaw -- Require proof that something is wrong with the way a product was designed, manufactured, or marketed, making the product unreasonably dangerous to the user.
- Ordinary User -- Require proof that the product is more dangerous than contemplated by the ordinary user. Prescription drugs and medical products must be more dangerous than contemplated by the ordinary prescribing doctor.
- Retailer Liability -- Relieve retailers and wholesalers from liability when they did not design or manufacture the product and did not know the product was defective.
- Assumption of Risk -- Prohibit liability when the injured person voluntarily chose to encounter a known risk.

<u>SPECIFIC</u>. The bill would:

- <u>Warnings</u> -- Require manufacturers to provide warnings and instructions for use of a product that a reasonably prudent person would provide.
- <u>Alternative Design</u> -- Require proof in design defect cases that a safer alternative design existed that would have prevented the plaintiff's injury without limiting the product's usefulness.
- <u>Known Dangers</u> -- Provide that manufacturers are not liable for and do not have to warn about obvious or known product characteristics.

DRAFT

February 25, 1992

WHY MISSISSIPPI NEEDS A
PRODUCTS LIABILITY STATUTE

The business community is supporting the enactment of a products liability statute in the 1992 session. The purpose of the statute is to codify some basic rules of liability, not to make sweeping changes in the law or enact general "tort reform."

Key decision makers understandably want to know why legislation of this kind is necessary and how it will benefit Mississippi's citizens. The information presented below addresses these issues.

1. Stabilize the Law

The basic rules of products liability should be stated clearly so that producers and consumers can know exactly what is expected of them. Current Mississippi products liability law does not adequately provide such direction. The law has been subject to constant change, and recent court decisions have clouded the scope of liability. For example:

* For over twenty-five years, Mississippi courts have applied the "consumer expectations test" in determining whether a product is "defective" in design. Recently, however, a passing reference in a case (Whittley v. City of Meridian) led some people to suggest that the Mississippi Supreme Court may have abandoned its long-standing position and adopted a different standard (the "risk utility test"). Today, confusion surrounds this important area of the law.

* Mississippi courts have long recognized that a retailer or wholesaler who is a mere conduit of a product is not subject to liability. (Shainberg Co. v. Barlow). Recently, however, the Court imposed liability on a company for a product that it did not manufacture (Coca Cola Bottling Co. v. Reeves). This ruling could preclude courts from dismissing non-negligent wholesalers and retailers even though they did nothing wrong.

* Since at least 1947, Mississippi courts have recognized that claimants should not be allowed to create their own lawsuit by obtaining money damages when the claimant knowingly and voluntarily encountered the risk that caused his injury. Some members of the Court have indicated that they are simply waiting for the right case to abolish the assumption of risk doctrine, a doctrine

that has guided product sellers and users for decades. (McDaniel v. Ritter).

Instability of this kind is basically unfair. It is like telling motorists that they will be punished for exceeding the speed limit but refusing to advise them what the limit is. To make matters worse, when a new rule is announced, it is retroactively applied. Thus, on fairness grounds alone, a products liability statute is justified. It is the only way of restoring some stability to the law.

2. Business Development

In state after state, surveys of business executives show that a state's products liability laws are a factor in decisions to locate facilities, expand operations, and develop products. For example:

* One national survey reported that 97 percent of the business executives who responded believe that a decision by a state's supreme court can be a significant factor in a manufacturer's decision to locate facilities in that state.

* A survey of manufacturers in Texas found that 1 out of every 3 companies responding had considered relocating their manufacturing operations to a state with more reasonable product liability laws. Three thousand Texas manufacturers (1 in 4) reported that they had decided not to introduce a new product, while 1,500 manufacturers (1 in 8) decided to withdraw an existing product because of liability lawsuits.

* In another Texas survey, almost every one of 200 economic development recruiters interviewed stated that predictable liability laws are an important consideration in attracting new business to Texas.

* In a survey in Michigan, over 40 percent of responding manufacturers reported that liability costs had caused them to discontinue a product or decline to manufacture a new product. Similar surveys in New York and Louisiana reported that 19 percent and 13 percent of manufacturers had discontinued or declined to introduce products or services.

3. Promote State Competitiveness

Many of Mississippi's neighbors have enhanced their competitive position in the region by enacting liability statutes. Mississippi, which has not enacted any comprehensive products liability measures, has been placed at a disadvantage. For example:

* In 1988, Louisiana enacted a statute that spells out the basic rules governing products liability lawsuits. Alabama has also enacted a products liability statute that provides predictable rules for manufacturers and product users.

* Following the enactment of several reform statutes in 1987, Alabama launched a massive campaign to recruit businesses on the basis of its reforms. The theme of the campaign -- Alabama is Open for Business -- highlighted the benefits of fair and predictable liability laws. Sample materials from the Alabama campaign are attached.

* At least 21 states have codified a defense for innocent product sellers, including states that compete with Mississippi for warehouses, dealerships, and regional distribution centers, such as Georgia, North Carolina, and Tennessee. Mississippi, however, is headed in exactly the opposite direction. Its courts are considering imposing strict liability on retailers and wholesalers even though they did not play any role in designing or manufacturing the product and did not know that it was defective.

* In 1987, Texas abolished its rule of pure comparative fault in products liability cases and adopted the rule of modified comparative fault. Similarly, five other states in the region apply either the rule of contributory negligence (no liability if the plaintiff contributed to his injury; Alabama, North Carolina, Tennessee) or the rule of modified comparative fault (no liability if plaintiff's fault is greater than the defendant's fault; Arkansas and Georgia). In contrast, Mississippi appears headed towards the harshest possible combination of rules (pure comparative fault with no assumption of risk). This is a clear signal that business is not welcome in Mississippi.

4. Product Innovation

Fear of liability lawsuits has discouraged research, hampered product development, halted marketing of improved products and driven up costs. Directly or indirectly, these actions affect Mississippi in the form of lost job opportunities and fewer benefits for our citizens. For example:

* Liability costs have caused drug manufacturers, including Baxter and American Cyanamid (Lederle) with plants in Mississippi, to stop manufacturing childhood vaccines. The president of Lederle, for example, testified that at one time the dollar demand of lawsuits against the company for the childhood DTP vaccine was 200 times the vaccine's annual sales.

* Liability costs have caused enormous increases in vaccine prices. The price of DTP vaccine increased from $0.11 per dose to $11.40 per dose at the same time that the number of lawsuits increased from 1 to 219. This raises the costs to parents, health insurance companies, and state health services of providing vaccines for infants and children in our state.

* The American Medical Association has recommended the enactment of products liability laws because lawsuit costs and the fear of liability are interfering with research and development and thereby limiting treatment options available to doctors. Undoubtedly, this hits hardest those who are already at a great disadvantage in obtaining affordable quality healthcare, such as the rural poor.

* The effects of unstable and unfair products liability laws are not limited to drugs and medical equipment. Monsanto Company, which maintains a facility in Mississippi, canceled development of a safe, biodegradable insulation product that could have replaced asbestos. The company decided that liability risks made it imprudent to proceed with commercial development.

* Liability costs have virtually destroyed the single engine aircraft industry in the United States. In 1979, the industry produced nearly 18,000 planes. By 1986, the number had plunged to fewer than 1,500. The number of small planes shipped to dealers and customers fell by 11 percent from 1990 to 1991. Industry employment has declined by 70 percent.

* The effects of products liability laws are not limited to high technology products. The price of stepladders has increased by 30 percent as a result of product laibility costs. Schools and colleges now pay twice as much as they used to for football helmets, largely as a result of lawsuits against helmet manufacturers. For this reason,

many college and high school coaching officials have publicly supported produced liability reform.

5. <u>International Competition</u>

Mississippi and the rest of the country must compete in a global economy. Yet America's liability system imposes direct and indirect costs on American products that make our products less competitive overseas. For example:

* One study concluded that in 1987 direct costs of the tort system amounted to 2.5 percent of the United States gross national product. That cost was 5 times greater than the cost to manufacturers in the United Kingdom and 7 times greater than the cost in Japan.

* Product liability costs of American sporting goods manufacturers were 4.2 percent of sales in 1982, compared to 0.5 percent for their Japanese competitors. The gap has widened since then.

* Football helmets used to be produced by more than a dozen American companies. Now, because of liability costs, only two American companies are left. Foreign companies dominate the market.

* American companies pay about ten times more than foreign companies for product liability costs. Because prices in world markets are intensely competitive, this ten-fold difference in operating costs seriously weakens the profitability and thus for long-term viability of American manufacturers.

* In one national survey, 85 percent of CEOs reported their belief that U.S. products liability laws have a major or moderate impact on the ability of American firms to compete in world markets.

* The effect of products liability laws on U.S. research and development is also dramatic. In 1970, 27 percent of all U.S. patents went to foreigners. In 1989, that number had risen to 47 percent. Almost half of those went to Japanese.

* In a twelve year period, the number of U.S. patents granted to foreigners, mostly the Japanese, increased from 38 percent to 53 percent in the machinery and automobile industries.

*   *   *

The enactment of a products liability statute in Mississippi will not solve all of these problems in Mississippi, let alone the rest of the country. Such a statute, however, can play a part in addressing the products liability problem. It can help improve the state's business climate and address the unfairness of a system whose rules are constantly changing.

February 24, 1992

H.B. 523 WILL NOT PREVENT MERITORIOUS PRODUCTS LIABILITY LAWSUITS

This paper discusses the potential application of H.B. 523 to certain highly publicized cases involving injuries from products. The purpose of the paper is to show that H.B. 523 will not in any way bar recovery in cases where liability is justified.

Breast Implants

H.B. 523 would definitely not bar recovery in cases involving injuries resulting from ruptured or leaking silicone gel breast implants. The facts in these cases are still emerging, and it is difficult to predict exactly what claims the plaintiffs will bring. Nonetheless, it is certain that H.B. 523, far from barring such claims, will actually codify the theories of liability that are customarily invoked in such cases.

For example, if it is shown that problems with implants resulted from manufacturing defects in the envelopes in which the gel is contained, H.B. 523 will impose liability without regard to whether the manufacturer could have known of such risks or whether the defects could have been avoided through better quality control techniques. The bill will provide that the injured persons be compensated.

H.B. 523 also will not protect breast implant manufacturers who failed to warn physicians of the implants' risks. In the case of medical devices such as implants, H.B. 523 requires manufacturers to communicate the information that physicians need to advise their patients concerning possible side effects and other dangers. This is consistent with current Mississippi law.

Critics of breast implants have asserted that the manufacturers failed to adequately test the implants and press reports have left the impression that information may have been withheld from the public and FDA concerning the dangers of the devices. Moreover, some physicians have suggested that they were not adequately informed of the risks of leakage or the possible health affects associated with silicone release. If these claims are substantiated, H.B. 523 clearly would provide for liability.

H.B. 523 also would impose liability for design defects in silicone breast implants. Under H.B. 523, such liability could be asserted on various grounds including failure to design rupture resistant envelopes in which the gel is contained or failure to use material other than silicone, such as saline solution, that does not present equivalent health risks.

The assumption of risk defense and the limitation of liability for open and obvious dangers in H.B. 523 also have no bearing on the breast implant cases. The assumption of the risk doctrine applies only where the injured person knew of the risk and voluntarily encountered it. The critics of breast implants, however, are complaining of hidden dangers about which they were given little or no information. For this reason, neither the assumption of risk defense nor the open and obvious danger rule applies.

Asbestos

Asbestos manufacturers also will not be protected by H.B. 523. Asbestos claimants have typically asserted that manufacturers knew of the dangers of asbestos but failed to warn of them, and punitive damages have been awarded in a number of cases precisely on these grounds. Nothing in H.B. 523 would affect this result.

The assumption of risk provision also would not protect asbestos defendants. Exposure to asbestos has typically occurred in the workplace settings, such as the Pascagola Shipyard. It is well recognized that an employee does not "voluntarily" encounter a risk when he or she is forced to encounter it as a condition of employment. The voluntary assumption of risk defense thus has no bearing on asbestos workplace claims.

Dalkon Shield

H.B. 523 would not prevent recovery in cases involving products like the Dalkon Shield intrauterine device (IUD). The plaintiffs in these cases have asserted that the defendant company knew of the risks presented by the product, but failed to withdraw it from the market or adequately warn doctors or patients. As with breast implants, nothing in H.B. 523 would absolve such a defendant for failing to warn about the risks of pelvic disease associated with the Dalkon Shield.

The plaintiffs have also asserted that the company that made the Dalkon Shield failed to incorporate alternative designs that would have prevented the harm. IUDs manufactured by other companies do not present the health risks that plaintiffs have identified in the Dalkon Shield litigation. Thus, the provisions of H.B. 523 would not preclude design defect claims.

Pinto Automobile

The plaintiffs in the Pinto automobile cases asserted that the defendant manufacturer considered alternative designs that would have reduced the likelihood of fire in rear-end collisions, but chose to use a more risky design based on cost/benefit considerations.

H.B. 523 does not protect companies in these circumstances. The bill protects a company only where it was impossible to discover the risk posed by a product, and where there was no other feasible design available that would have prevented the harm.

The obvious danger provision of H.B. 523 also would not prevent recovery in gas tank cases. While it is possible to place a gas tank at many different locations on an automobile's frame, a consumer cannot be expected to determine the risks of a particular location or whether the tank is adequately reinforced to prevent rupture in the event of an accident.

Thalidomide

Thalidomide was a sedative marketed for stress during pregnancy. The drug was sold in Europe in the early 1960s and was found to cause birth defects in the offspring of women who took the drug. Other pregnancy drugs did not have this effect. FDA did not approve Thalidomide or the warnings provided with the drug, and it was not marketed in the Untied States, although some women did obtain the drug while traveling abroad.

As with medical devices, under H.B. 523 a plaintiff would only have to prove that the manufacturer should have known of the risk; that the ordinary physician prescribing the drug was not aware of the risk; and the manufacturer did not provide an adequate warning to the doctor.

February 24, 1992

MISSISSIPPI PUNITIVE DAMAGES BILL

This punitive damages bill clearly states the rules governing liability for punitive damages and procedural safeguards applicable to punitive damages claims.

STANDARDS. The bill would:

- Standard of Liability -- Establish a standard for liability for punitive damages of malice or conscious, flagrant disregard for the safety of others.
- Burden of Proof -- Establish a higher burden of proof for damages that punish a defendant than for damages that compensate a plaintiff.
- Government Standards -- Establish a defense to punitive damages for activities and products that comply with mandatory state and federal government standards.

PROCEDURES. The bill would:

- Bifurcation -- Authorize the jury to decide whether the defendant is liable for the plaintiff's injury before considering evidence relevant solely to punitive damages.

- Financial Evidence -- Prohibit consideration of defendant's financial condition to determine the amount of a punitive damages award.
- Judicial Decision -- Require the judge to consider the evidence and fix the amount of the punitive damages award.
- Award Limit --Limit the number and size of a punitive damages award -- one award for a single act or course of conduct.

February 24, 1992

WHY MISSISSIPPI NEEDS A PUNITIVE DAMAGES STATUTE

Mississippi punitive damages law is out of step with much of the rest of the country. As currently applied, the law imposes great hardship on companies seeking to provide goods and services in Mississippi and may well violate due process rights guaranteed by the United States Constitution. A punitive damages reforms statute is clearly needed.

1. The Problem

Under current Mississippi law, after finding that a defendant's conduct is intentional or in wanton disregard of the safety of others, a jury is allowed virtually unlimited discretion to determine whether to award punitive damages. No limit is placed on the amount of punitive damages awards, nor are there any clear standards for juries to apply in determining whether awards are appropriate.

Moreover, defendants upon whom excessive awards are imposed have no real recourse. Appellate courts are permitted to reduce or overturn punitive damages awards only if they are so excessive "as to shock the conscience."

The lack of fundamental safeguards to protect defendants from the constant threat of unfair punitive damages awards in Mississippi has been highlighted by recent decisions. For example, in a concurring opinion in Bankers Life and Casualty Company v. Crenshaw in which U.S. Supreme Court Justice Scalia joined, Justice O'Connor observed that "Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state * * * [T]here is reason to think that this * * * violate[s] the due process clause" of the U.S. Constitution. Similarly, the United States Court of Appeals for the Fourth Circuit recently suggested that Mississippi's punitive damages law is unconstitutional. The Court based this suggestion on the recent decision of the United States Supreme Court in Pacific Mutual v. Haslip, which requires due process safeguards in the award of punitive damages.

A recent Mississippi case is illustrative. In that case, the jury awarded $20,000 in compensatory damages and $1,600,000 in punitive damages, a ratio of punitive to compensatory damages of 80 to 1. The United States Supreme Court in Pacific Mutual v. Haslip has said that a punitive damages award four times the compensatory award is "close to the line" of violating the defendant's right to due process.

According to a study of the American Bar Association, more than half of all jury awards for punitive damages are reversed by a judge or appellate court. This demonstrates that juries need, but are not getting, adequate guidance and direction concerning reasonable awards for punitive damages.

2. The Solution

Most of Mississippi's neighbors, as well as many other states, have imposed reasonable limitations on punitive damage awards. Alabama, Florida, Georgia, and Texas, among other states, have enacted statutes imposing caps on the amount of punitive damages that courts or juries can award. Punitive damages are prohibited in Louisiana, Michigan and New Hampshire by legislation and in Connecticut, Massachusetts, Nebraska and Washington by judicial decree.

The Mississippi business community is supporting the enactment of legislation to set reasonable standards for punitive damages in Mississippi, including a limitation on the amount of punitive damages awards. The American College of Trial Lawyers, the American Bar Association, and the Committee for Economic Development have urged that states adopt a ceiling on the amount of a punitive damages award. The American College of Trial Lawyers recommends no more than two times compensatory damages or $250,000.

Many states, including neighboring Georgia, allow defendants to request a bifurcated trial in which liability for compensatory damages is decided before consideration is given to liability for punitive damages. This measure, which is also part of the proposed Mississippi statute, helps ensure that inflammatory evidence does not affect the jury's determination of basic liability for compensatory damages. The American Bar Association, the American College of Trial Lawyers, and a committee of the American Law Institute recommend bifurcation at the defendant's request.

An even larger number of states, including Alabama, Georgia and South Carolina, impose a higher burden of proof on plaintiffs seeking to recover punitive damages than they impose on plaintiffs seeking only compensatory damages. This procedural safeguard recognizes that punitive damages are quasi criminal in nature. A clear and convincing evidence test, which is also included in the proposed Mississippi statute, is recommended by the American Bar Association, the American College of Trial Lawyers and the American Law Institute committee.

The United States Supreme Court and members of the Mississippi judiciary have expressed concern about the fairness of allowing evidence of the defendant's financial condition in trials where punitive damages are sought. This concern is based on apprehension that affluent defendants may be punished simply because of their wealth. Mississippi, however, continues to allow the introduction of such evidence. The proposed statute will address this additional problem.

Many observers have questioned the fairness of allowing punitive damages in cases where the defendant's actions were specifically required or approved in advance by the government -- for example, where the defendant acted in compliance with the dictates of a regulatory agency. A committee of the American Law Institute, has questioned the fairness of awarding any damages for harm caused by an aspect of a product that was approved by the federal government and has urged states to permit a "government standards" defense to both compensatory and punitive damages. Mississippi however does not permit such a defense even as to punitive damages.

*   *   *

The proposed statute will help ensure that punitive damages awards will not be imposed in Mississippi unless they are clearly warranted. By adopting meaningful guidelines, the statute will help ensure that such damages are awarded in accordance with due process requirements and that the defendants are accorded the minimal procedural safeguards.

From Bob Pittman
(601) 969-0022

FAX TO ERIC JOWETT   202-456 7044

CIVIL JUSTICE REFORMS ENACEED IN MISSISSIPPI IN 1988-89

1. Reduce general statute of limitatins from 6 to 3 years
2. Barred lawsuits from out-of-state plaintiffs when the action is time barred in the state where the cause of action arose
3. Modified joint and several liability to provide that, where there are multiple defendants, a defendant less than 50 percent at fault would be liable for not more than 50 percent of damages

xRenaxie

4. Penalties for the filing of frivilous lawsuits or proceedings
5. Removal of exemption from jury duty for physicians and lawyers
6. Exemption from liability for volunteers (xxxxhxxx (summer baseball xxxx coaches, managers, volunteer firemen, etc) unless willfully negligent

CIVIL JUSTICE REFORMS INTRODUCED IN 1992 MISSISSIPPI LEGISLATIVE SESSION AND BEING SUPPORT BY MISSISSIPPI ECONOMIC COUNCIL AND TORT REFORM COALITION

1. Set standards for awarding of punitive damages
   (U.S. Supreme Court Justice O'Conner said in haslip case, Mississippi's present law, lacking standards for awarding of punitive damages, may be unconstitutional)

2. Set standards for products liability
3. Reduce damages awarded to Plaintiff by xxx amount of collateral source reimbursements
4. Repeal statute which requires Sxss state Supreme Sxx Court to render jxxdgxxxtxxgaxxxt15 percent penalty against appellant when judgment of lower court is affirmed
5. Authorize awarding of attorneys' fees to the prevailing party in civil suits