Sunshine on My Shoulder: Reptile Smiting in the Sunshine State! *And an Update on Legislative Nuclear Verdict Reform Elsewhere*

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Reptile theory litigation tactics and commensurate nuclear verdicts have become a recurring problem for motor carriers, transportation brokers, and now, even shippers, in high stakes, catastrophic casualty litigation. There are many effective ways to counter Reptile theory tactics before litigation and in the heat of litigation itself. However, defense counsel can be aided in litigation by legislatively enacted state laws, which codify more rational decision-making processes for these cases. Such legislation can serve to curb the inflammatory and non-proximate causally related aspects of that type of litigation. That helps smite Reptile tactics, at least in part. Several states have already enacted legislative reforms that will assist transportation industry defendants in litigation, to achieve results that are not tainted by prejudice. The most noteworthy of these is Texas, but efforts have also been made in states such as Missouri, Iowa, West Virginia, Louisiana, West Virginia and Montana.

Now, the Sunshine State has also weighed in. The Florida state legislature recently enacted *Florida Tort Reform* H.B. 837 (§768.0427 Fla. Stat: the "Act"). That Florida statute is chock full of helpful codifications for motor carriers, brokers, and others in Reptile theory, high value casualty litigation. First, the Act reduces the statute of limitations for general negligence cases (which would encompass all MVA casualty litigation) from four years to two years (this change applies to claims that have occurred after the effective date of the legislation, which is March 24, 2023). Clearly, this temporal ambit reduction compresses the time within which plaintiffs can file their lawsuits. It thus commensurately reduces the exposure period for motor carrier and broker defendants. This reduction also helps with exposure, analysis and projections – and of course, reduces actual risk.

The Act next also changed Florida's comparative negligence system, from a *pure* comparative negligence system, to a *modified* comparative negligence system. By that comparative system, plaintiffs who are found to be more than 50% at fault for their own harm are barred from recovering any damages. Often in these cases, there is significant comparative fault attributable to the noncommercial driver plaintiff. The statute recognizes that that *quantum* of fault should be a factor. Because of the risk that a plaintiff's comparative fault may entirely bar the claim, plaintiffs' counsel thus have a stronger motivation to settle, and settle earlier, to recover at least some portion of damages. Obviously, this scenario leads to more leverage for defendants during settlement negotiations and should lower overall settlement amounts, because of the increased litigation risk to plaintiffs. Jury research shows though, that in comparative negligence jurisdictions, jurors are sometimes less likely to take the extra step and find the plaintiff 51%, liable if they know that the plaintiff would not recover at all. So, this is a bit of a wild card at trial. However, it still is nonetheless an *excellent* settlement tool.

The Act also modifies what evidence is admissible at trial to prove medical treatment and expenses. The Act limits the amount of damages for past or future medical expenses to evidence of the amounts actually paid, regardless of the source of payment. Under the Act, if the claimant has health care coverage, he or she may offer evidence of the amount necessary to satisfy unpaid charges of the amount which such health care coverage is obligated to pay the health care provider, to satisfy the charges for the health care itself. If the claimant does not have health care coverage, evidence of the Medicare reimbursement rate effective at the time of trial for claimant's incurred medical treatment or services will be the evaluation tool. If there is no applicable Medicare rate for service, 140% of the applicable state Medicare rate will be applied. These measures, among others

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related to medical payments, should dramatically reduce actual and future medical expense recovery under the Act. Similar proof parameters apply to future medical treatment and services. Consequently, to evaluate the cost of past and future medical expenses in these cases, defendants will need to know and understand reimbursement rates, and carefully assess the medical bills in each case, for admissible dollar value *versus* face value. This undertaking may require retention of expert witnesses to determine the actual value of the medical bills. Importantly though, it is the plaintiff's burden to prove their medical damages.

The Act also makes a good attempt to curtail the cottage industry of plaintiff's counsel referring plaintiff/"patients" to particular doctors, to create inflated injuries, and commensurate medical expenses. The Act deems that referrals by plaintiff's counsel to treating physicians are no longer privileged and may be explored in depositions. Consequently, defense counsel is now permitted to inquire as to who recommended particular courses of treatment, and why that treatment was recommended. Defense counsel will also be permitted to explore the doctor's relationship with plaintiff's counsel on a financial, professional and personal level. These discovery topics, and their availability, should help decrease that particular cost-spiraling cottage industry. This provision of the Act further serves to level the playing field in Reptile theory litigation.

The plaintiff's bar in Florida recognized the dramatic impact that the Act would have on plaintiff's recovery on claims in Florida. To that effect, the Florida state court system was deluged with eleventh hour filings prior to the statute's effective date. *To wit*, there were 90,593 civil cases filed in the five days between March 17 and March 22, 2023. This statistic is obviously a very clear signal that plaintiffs' counsel realized the dramatic limitations on their recovery, that are propagated by the Act. It also might mean slower docket times in Florida state courts for a while. Either way, the sun is shining a little brighter in the Sunshine State for motor carrier, broker and shipper casualty defendants!

Update on Legislative Reforms Elsewhere (An update from the authors' prior article on this topic)

Reining in the Reptile: A Lone Star Template

As noted in our previous article, in 2021, an ameliorative statute which contained a smorgasbord of bipartisan legislative reforms that benefit motor carriers in reptile theory casualty litigation (VCTA §§ 72.051-055). Right out of the box, the new Texas statute splits the trial into two phases. The first phase deals only with the motor carrier driver's fault and liability (truck malfunction and negligent maintenance claims also are addressed in phase one). Notably, this phase excludes unrelated allegations of unsafe motor carrier safety practices. In fact, it is possible that during phase one, the jury may not even know the name of the motor carrier. The second phase allows plaintiffs to sue the carrier itself, but only after the motor carrier driver's liability has been established. So, phase two concerns liability under respondeat superior and the amount of punitive damages, if any. Consequently, in trial proceedings under this bifurcated process, the evidence, testimony, and more importantly arguments, intimations and innuendo of plaintiffs' counsel, are confined to actual facts of driver fault and liability and the common law legal principles that relate to those facts. However, the bifurcation is not automatic. It must be requested by a motion to the court, made within 120 days of the defendants answering the complaint–a critical docket date for motor carriers. This bifurcation mechanism thus effectively segregates that first phase from the potentially more Reptilian second phase and should result in a dramatic decrease in vilification of the motor carrier itself for practices that are completely unrelated to the underlying facts of the actual accident.

The statute also limits the admissibility of evidence of failure to comply with non-pertinent Federal Motor Carrier Safety Administration ("FMCSA") regulations. Often in these cases, plaintiffs' counsel conduct exhaustive discovery into the full panoply of the motor carrier's policies and practices relating to FMCSA compliance, internal safety audits, maintenance programs, vehicle inspections, the company's "safety culture" as a whole, and a host of other operational facts, almost all of which typically have no direct bearing on the facts related to the accident. They do this, with an aim toward demonizing the trucking company, by finding some fault in an unrelated policy or practice and attacking that instead of the actual accident and its causation. The law should serve to dramatically limit this inflammatory practice.

Unfortunately, the Act does not apply retroactively,[1] but any MVA lawsuit filed in Texas after September 1, 2021–the Nuclear Disarmament Date ("NDD")–will be governed by the very logical, measured strictures of this statute. Not surprisingly, there was a tsunami of filings before the NDD. In the lone case that has cited to the Texas statute since its enactment, *Danny Herman Trucking, Inc. v. Miranda*,[2] the court, referencing the statute, and one of its provisions that is not particularly helpful to motor carriers, concluded that "negligent maintenance" of an employer motor carrier defendant, does not require a finding of negligence by an employee as a prerequisite. This is a correct statement of what the statute propounds. However, it is not one of the highlights for motor carriers. Other case interpretations coming soon!

Louisiana: A Bayou Bivouac

Under the Act, a plaintiff's recovery of medical expenses is limited if payment has been received by private health insurance or Medicare. The court may only award the plaintiff up to 40% of the difference between the amount billed by the health care provider and the amount actually paid by their hospital or service providers. If damages have been paid by Medicaid or workers' compensation, damages are limited to the amount actually paid. Then, the calculation of recoverable medical expenses is made by the trial judge after any plaintiff's jury verdict.

The Act also limits when evidence of insurance is admissible. Per Section 4873, evidence of the defendant's insurance policy amount is not admissible unless it is in dispute, meaning: (1) there is a factual

dispute related to the policy at issue, (2) the evidence would otherwise be admissible to attack the credibility of a witness, or (3) a cause of action is brought against the insurer itself. Evidence of the insurer's identity is admissible only to attack the credibility of a witness. Also, at the opening and closing of a case involving an insurer, the court must read jury instructions indicating there is insurance coverage for the damages claimed by the plaintiff.

Missouri: Show Me Just a Little Punitive Reform

Missouri's Senate Bill 591, codified in the Missouri Uniform Commercial Code §§ 407.020, 407.025, 538.205, 538.210 and in its rules of Civil Procedure § 510, makes it more difficult for Plaintiffs to recover punitive damages. It introduces a complicity rule for vicarious liability, limits the scope of discovery against employers in claims for compensatory damages, and changes the pleading procedure for punitive damages.[3] Section 510.261 raises the standard for punitive damages from negligence to intentional harm or reckless disregard: "punitive damages shall not be awarded unless the claimant proves by clear and convincing evidence that the Defendant intentionally harmed the Plaintiff without just cause or acted with deliberate and flagrant disregard for the safety of others." Punitive damages cannot be based upon a compensatory award of nominal damages, unless the claim is for a violation of privacy rights, property rights, or "rights protected by the Constitution of the United States or the Constitution of the state of Missouri." Finally, punitive damages "shall not be based, in whole or in part, on harm to nonparties."

This statute was recently applied in rather paradoxical fashion by a federal court, interpreting both the statute and its juxtaposition with the Federal Rules of Civil Procedure. In *Davis v. ALS Express Trucking, Inc.*,[4] the court did apply the Missouri statute in a 2023 case involving motor carrier ALS Express Trucking. The court concluded that, consistently with the statute's mandates, the plaintiff could not include a request for punitive damages without obtaining leave of court. However, the court contemporaneously found that the Federal Rules of Civil Procedure, specifically Federal Rule of Civil Procedure 8 regarding notice pleading, applied to essentially trump this portion of Missouri statute. Thus, the first application of the statute by a federal court was a bit self-defeating. This decision could weigh into defense counsel's decisions as to federal court removal in Missouri.

Montana: The Big Sky Is Not the Limit

Montana has recently sought to limit artificially inflated phantom damages involving alleged medical expenses. (The Montana Supreme Court has been included on the "Watch List" of the American Tort Reform's annual "Judicial Hell Holes" list for the past three years.) Montana Senate Bill 251 is codified in its statutes at Title 27 §§ 1-202, 302, and 307 limits compensatory damages for injuries or death to the actual amount paid or to be paid in medical costs.[5]

West Virginia: Take Me Home– But Not Without a Seat Belt

West Virginia House Bill 3029 allows evidence that the Plaintiff was or was not wearing a seat belt to be admitted for determining damages.[6]

Iowa: Getting Closer and Watching with a Hawkeye

Iowa HF 772/SF 537 limits employer liability and recovery for noneconomic damages in civil actions involving commercial motor vehicles.[7] It also modifies rules for pleading punitive damages. In these cases, the employer's liability would have to be "based solely upon respondeat superior and not on the employer's direct negligence in hiring, training, supervising, or trusting the employee, or other similar claims that the employer's negligence enabled the employee's harmful conduct." The Iowa statute also limits noneconomic damages for personal injury or death in civil actions involving commercial motor vehicles to $1 million, thus potentially eliminating the nuclear verdict risk. These limitations are bolstered by the passage of SF 228 in Iowa, which also state that if an employer admits that the driver in an accident is its employee and was acting under its direction and control, no claim for negligent hiring may be made at all.[8] In addition, the new statute places a $5M cap on pain and suffering damages in lawsuits involving crashes with trucks and other commercial motor vehicles.[9] Finally, in Iowa a claim for punitive damages cannot be included in any initial claim for relief until after the plaintiff establishes the existence of a triable issue (the court may then allow for additional discovery).

Conclusion: Leveling the Playing Field

The factfinding process, during discovery, pretrial proceedings and trial, in state and federal courts has always been intended to be fair, measured and deliberative, with each party in a civil case, the plaintiff–and the defendant–being able to tell their side of the story without an emotional rush to judgment. That process is intended to be guided by principles of logic and equity, and by a rationally balanced assessment of the facts under applicable law. It was never intended to be dominated by inflammatory, Reptilian efforts to inspire passion and prejudice for matters completely unrelated to the underlying facts of the accident. These principles are fair to both sides and are certainly not unfair to plaintiffs. The legislatures in the states discussed in this article have taken rational and measured responses to tactics that often result in bountiful bonanzas for plaintiffs' lawyers; windfalls beyond fair compensation to injured plaintiffs; and seismic, destructive reckonings for motor carrier defendants who are vilified, demonized, and pilloried for matters beyond the scope of the accident at hand, often driven out of business as a result of inflated nuclear verdicts. These state legislatures are taking action in response to a problem that is evolving within their state's borders and are seeking to do so in a manner that not only protects defendants from unfair and irrelevant inflammatory evidence, but simultaneously maintains the rational, logical and equitable judicial factfinding process for the plaintiffs. Time will tell how this legislation affects catastrophic accident litigation in the motor vehicle world, but at the very least–it is a start.

Endnotes

1 Section 6 makes clear that "[C]hanges in law made by this Act only apply to an action commenced on or after the effective date of this Act, which is September 1, 2021."
2 No. PE:21-CV-043-DC, 2022 WL 2719629 (W.D. Tex. Apr. 5, 2022).
3 *See* Mo. Ann. Stat. tit. 26 §§ 4.020; 4.025; 36 § 538.205, 210; 510.265.
4 No. 4:20-CV-1672 RLW, 2022 WL 3153712 (E.D. Mo. 2022).
5 *See* Mont. Code Ann., MONT. STAT. tit. 27 §§ 1-202, 302, 307-308.
6 *See* Code of W. Va. STAT. tit. § 17-C-15-49.
7 *See* Iowa Code Ann., IOWA STAT. tit. 4 § 3.147.136A.
8 Iowa Code Ann. § 668.12A (West).
9 Iowa Code Ann. § 668.15A (West).