

SUBJECT: Requiring showing of merit before allowing discovery of net worth

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Smithee, Clardy, Laubenberg, Schofield, Sheets

4 nays — Farrar, Hernandez, Raymond, S. Thompson

SENATE VOTE: On final passage, April 28 — 20–11 (Ellis, Garcia, Hinojosa, Lucio, Menéndez, Rodríguez, Uresti, Watson, West, Whitmire, Zaffirini)

WITNESSES: *(On House companion bill, HB 969)*

For — Mike Hull, Texans for Lawsuit Reform; Kathleen Hunker, Texas Public Policy Foundation; *(Registered, but did not testify)*: Jay Thompson, AFACT; Jon Fisher, Associated Builders and Contractors of Texas; Michael Peterson, AT&T Texas; Nelson Salinas, Texas Association of Business; Scott Norman, Texas Association of Builders; Carol Sims, Texas Civil Justice League; Daniel Womack, the Dow Chemical Company; Stephanie Simpson, Texas Association of Manufacturers)

Against — Bryan Blevins, Texas Trial Lawyers Association: *(Registered, but did not testify)*: Kristen Hawkins)

On — George Christian, Texas Association of Defense Counsel

BACKGROUND: Civil Practice and Remedies Code, sec. 41.001 defines exemplary damages as any damages awarded as a penalty or punishment but not for compensatory purposes, including punitive damages. Exemplary damages are neither economic nor noneconomic damages.

Under sec. 41.003, exemplary damages may be awarded only if claimants prove by clear and convincing evidence that their harm resulted from fraud, malice, or gross negligence, unless exemplary damages are established by statute. If the exemplary damages are established in statute, claimants must prove by clear and convincing evidence that their harm resulted from the specified circumstances or culpable mental state. A jury

would have to unanimously find that liability existed and that exemplary damages were warranted for these damages to be awarded.

Under sec. 41.011, a trier of fact, when determining exemplary damages, may consider, among other things, the net worth of the defendant.

In *Lunsford v. Morris*, the Supreme Court of Texas ruled in 1988 that a defendant's net worth is relevant to the issue of exemplary damages and is therefore discoverable under Tex. R. Civ. P. 166b(2), which states that a party may obtain discovery regarding any matter relevant to the subject matter.

DIGEST:

SB 735 would require a motion of a party, proper notice, and a hearing where a claimant would have to show a substantial likelihood of success on the merits of a claim for exemplary damages before a court authorized discovery of evidence of a defendant's net worth. Evidence for or against these motions could be in the form of an affidavit or a response to discovery.

If the court authorized discovery, it could authorize only the least burdensome method available to obtain the evidence.

Courts reviewing orders authorizing or denying discovery of net worth evidence could consider only evidence submitted by the parties to the trial court in support of or opposition to the motion.

This bill would take effect September 1, 2015, and would apply only to actions filed on or after that date.

**SUPPORTERS
SAY:**

SB 735 would help prevent claimants from using frivolous claims of exemplary damages and requests to discover a defendant's net worth to harass the defendant. The bill would accomplish this by requiring claimants to make a showing of the merits of their exemplary damages claim before discovering information related to a defendant's net worth. This bill would prevent claims of exemplary damages that were simply aimed to force defendants to settle to keep their net worth information

private, to expend resources compiling net worth information, or to bear the costs of fighting motions to compel discovery.

The reasons for allowing discovery of this information given in *Lunsford v. Morris* have been largely nullified by caps to punitive damages. Because these caps are relatively low, it is unlikely that a defendant's net worth would have a significant impact on an exemplary damages determination.

The bill would not place an overly restrictive burden on discovery of a defendant's net worth. The standard of "substantial likelihood" is a relatively low legal standard compared to the "clear and convincing evidence" or even "preponderance of the evidence" standards.

OPPONENTS
SAY:

SB 735 would place a burden on claimants in cases where a defendant's net worth could be critical to determining exemplary damages. It also is unnecessary because claimants already must meet a high bar in pleading exemplary damages. They are required to plead with specificity facts that, if true, would give rise to an award of exemplary damages. This requirement is sufficient to eliminate the most frivolous exemplary damages claims.

The burden placed on claimants seeking to discover information related to a defendant's net worth would be significant. They would have to prove with substantial certainty that a jury would unanimously find, by clear and convincing evidence, that exemplary damages were warranted. That would be a high obstacle to overcome, and it is unlikely that any judge would find that a claimant had met that standard.

NOTES:

The House companion bill, HB 969 by K. King, was placed on the May 8 General State Calendar, laid out on May 11 as postponed business, and returned to the Calendars Committee following a point of order. The bill later was placed on the May 14 General State Calendar but was not considered.