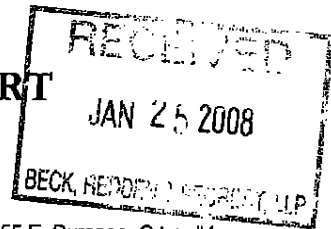


UNITED STATES DISTRICT COURT
Western District of Texas



Chambers of
U.S. District Judge
Royal Furgeson

655 E. Durango, Crtrm #4
San Antonio, Texas 78206
(210) 472-6570

January 22, 2008

Mr. Alistair Dawson
Beck Redden & Secrest, L.L.P.
One Houston Center
1221 McKinney St. Suite 4500
Houston, Texas 77010-2010

Dear Alistair:

Thank you for your outstanding job as moderator of the panel on the civil justice system at the Litigation Update. As usual, you were masterful.

I have thought some more about the argument made to you by "tort reform" advocates that, because Texas is limiting lawsuits against business interests, to include doctors, more firms and doctors are locating here, creating more jobs and more prosperity for Texans. Putting aside my skepticism about the empirical basis for this assertion (since correlation does not equal causation), may I venture a response to this argument?

It is important to remember first principles. There is no question that a well-functioning free market economy depends upon the rule of law. The attributes of the rule of law have recently been defined by the American Bar Association:

1. A system of self-government in which all persons, including the government, are accountable under the law;
2. A system based on fair, publicized, broadly understood, and stable laws;
3. A robust and accessible process in which rights and responsibilities based in law are enforced; and
4. Diverse, competent, independent, and ethical lawyers and judges.

In particular, I call your attention to the first and third elements in the definition: all persons are accountable under the law through a robust and accessible process to enforce rights and responsibilities. Without such accountability and such an accessible process, a free market system simply cannot exist.

Mr. Alistair Dawson
January 22, 2008
Page 2

Yet, for the rule of law to work, all persons must be accountable through that accessible process. Unfortunately, our "tort reform" friends are trying to structure a system where all persons are not accountable, by cutting off access to the process, which is the court system. Why are they so intent to do this? Because they distrust juries. They reason that, if the business community and doctors do not have to face juries in Texas, then business and medicine will flourish.

There are more than a few problems with this reasoning. First, if parts of a society are basically unaccountable for their actions, then the very rule of law is jeopardized. By definition, all must be accountable, not just some. As the rule of law is weakened and as fewer people can access the courts to redeem their rights, it follows that respect for law weakens as well, eventually undermining the foundations of our democracy. It may happen so gradually as to be imperceptible at any given moment, but it will indeed happen. It is exceedingly unwise to manufacture a system of justice which excludes certain members of society from the reach of the law, and that is exactly the goal of "tort reform" advocates.

Second, it is a long tradition in this nation, and especially in Texas, to do justice with juries. The Seventh Amendment is not an afterthought. Our people trust juries because juries are our people and they trust themselves. To create a justice system that basically eliminates juries in civil actions is again to build a system that will in time be suspected by our people. Certainly, we cannot risk losing the respect of our people for our justice system and for the rule of law that undergirds our system.

Finally, accountability is important for another reason. When people, either individually or corporately, are not accountable or responsible for their actions, they are essentially left to their own devices. If people were angels, it would not matter. But, as James Madison told us long ago, people are not angels and so it does matter. We know from experience, for example, that unregulated markets are eventually ruined by excesses. Unaccountable people do bad things, regardless of good intentions, not necessarily because they are bad, but because they are human. A society with large swaths of unaccountable people is a society which eventually will not function. Trust evaporates and everyone is harmed. Texas is already on that path. Based on recent legislation, for instance, consumers harmed by new home builders have very little access to the courts. If we do not turn back, the results will not be pretty.

This being said, I return to the argument by our "tort reform" friends that, by limiting accountability and access to the courts, Texas can build a thriving market system, creating jobs and prosperity. It is a false choice. Their argument is not unlike the argument that too many Americans now seem to accept: we must give up liberty for security. As Ben Franklin said, those who are willing to sacrifice liberty for security in the end get neither. It is equally true here: those who are willing to shred the rule of law for some promise of prosperity will, in the end, get neither.

Both logic and experience teach us that no sovereign state, not even Texas, can remove important segments of its society from accountability under the rule of law and still build an enduring foundation for prosperity. Certainly there can be gains in the short term. If there are no rules about

Mr. Alistair Dawson
January 22, 2008
Page 3

how much lead paint businesses can put in the toys of children, those businesses will be very profitable for a time, because they will cut corners with regard to health and safety. But, such enterprises cannot be the basis for profitability over a sustained period, for obvious reasons.

As the law in Texas becomes more and more rigged to close the courthouse doors to customers, consumers, employees, patients, clients and product victims, among others, prosperity in Texas will eventually decline. People simply will not trust the system and, without trust and accountability, markets do not work. At that point, our great state will become an empty shell, akin to a banana republic. I know our "tort reform" friends don't want such a result, but then again we are all too familiar with the proposition of unintended consequences. For these reasons, we must do everything possible to save them, and us, from their wrongheaded notions.

Very truly yours,



Royal Furgeson

RF:blg