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*Tort Law, Texas Style*by Douglas A. Kysar  
October 20, 2004

Conservative lawmakers and right-wing policy institutes would have us believe that one of the most pressing issues facing the nation today is the problem of "regulation through litigation." Across the country, power-hungry officials are said to be conspiring with greedy lawyers and activist judges to pursue regulatory agendas that have not, or could not, be successfully achieved through legislative channels. In addition to supposedly offending the constitutional system of checks and balances, this pattern of litigation is said to threaten manufacturers with potentially ruinous liability. As expressed earlier this year by John Cornyn, Republican senator from the tort reform battleground state of Texas, "When we talk about what causes job loss in this country, it is the regulation by litigation."

Given this relentless conservative refrain, it was surprising to learn that the latest example of "regulation through litigation" was launched by Cornyn's successor as Texas state attorney general, Greg Abbott – the very Greg Abbott whose political career has been heavily funded by a group known as Texans for Lawsuit Reform, whose campaign once proudly boasted that Abbott "helped cement tort reform" as a judge, and, indeed, whose 1995 appointment to a vacant Texas Supreme Court seat by then Gov. George W. Bush was seen as part of a larger Republican effort to restrict access to the courts and limit the amount of compensation available for personal harms. Nevertheless, Abbott recently announced with great fanfare that his office was suing "a major manufacturer of police protective body armor, alleging a failure to reveal potentially fatal flaws in the material from which many of its protective 'bullet-proof' vests have been made."

What the attorney general does *not* allege in his lawsuit is also striking. The vests are not alleged to have been made in violation of any specific statutes or regulations; they were every bit as legal to sell as cigarettes and Big Macs. Abbott instead is relying on a general state consumer protection statute – the same type of broad tort-based law that has provided the foundation for much of what is derisively called "regulation through litigation." Abbott alleges that the manufacturer, Second Chance Body Armor, knew as early as 2001 that its product contained flawed materials that could deteriorate when exposed to light, heat or moisture. Rather than alert police officers and other product users about this potentially lethal defect, Second Chance chose to remain silent until late 2003, only warning users *after* a Pennsylvania policeman was shot and seriously injured while wearing one of the company's vests.

If these allegations are accurate, then Attorney General Abbott's actions should be applauded. He and his staff have uncovered evidence of life-threatening corporate deceit. In this respect, Second Chance seems very similar to tobacco, asbestos, pharmaceutical and other companies that, we now know from countless documents uncovered in litigation, suppressed information about the hazards of their wares. But of course, these are the same companies who supposedly have been victimized by "regulation through litigation" and whose cause is being championed by the president, conservative lawmakers, and their think tank allies. Indeed, President Bush – who often cites the state tort reform measures he supported as governor of Texas as models for national reform – has been so successful at beating this particular drum that John Kerry and his trial lawyer running mate scrambled to put together their own package of tort reform measures. To say the least, then, Abbot's crusading lawsuit is difficult to square with the proud Texas tradition of disparaging the power and legitimacy of tort law.

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disparagement of tort law that has spewed forth from politicians in the Lone Star State in recent years. Perhaps, for instance, Second Chance's victims – police officers rendered more vulnerable in the line of duty – represent a more politically attractive beneficiary group than addicted smokers, poisoned factory workers, or the morbidly obese. Or perhaps Second Chance overlooked the basic command of corporate management to give liberally and indiscriminately to political campaigns and therefore exposed itself.

A more charitable explanation is that Abbott himself realizes that the tort law debate is more complicated than most politicians will admit. We should demand more than empty rhetoric before abandoning one of our most important and longstanding mechanisms for protecting lives and policing egregious corporate conduct. Because of Abbott's lawsuit, other companies will be more likely to take precautions in the future that might spare victims, even without being specifically told to by legislators or regulators. If the political storm over tort reform ever subsides long enough to let this point sink in, tort bashers of all stripes might come to realize that "regulation through litigation" actually helps to keep government smaller. Maybe then they would appreciate that tort law does have a place – even in Texas.

*Douglas A. Kysar is a member scholar of the Center for Progressive Regulation and an associate professor of law at Cornell Law School.*

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