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ARTICLE

SO LONG "SWEETHEART"—*STATE FARM FIRE & CASUALTY CO. V. GANDY* SWINGS THE PENDULUM FURTHER TO THE RIGHT AS THE LATEST IN A LINE OF SETBACKS FOR TEXAS PLAINTIFFS

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I. INTRODUCTION: THE PENDULUM OF TORT REFORM

Edgar Allan Poe's famous short story, *The Pit and the Pendulum*, opens with a panel of seven judges issuing a death sentence to a political prisoner of the Spanish Inquisition.[1] Although the prisoner is given no details of how or when his execution will be carried out, he is certain that he will suffer a prolonged and torturous death.[2] His suspicions are soon confirmed when he finds himself trapped in a dark, rat-infested dungeon that offers two apparently inescapable avenues to a horrible demise.[3] Crawling to one side of the dungeon, the prisoner stumbles upon a seemingly bottomless pit awaiting his fatal misstep.[4] Looking upward, the prisoner discerns the sweep of a large pendulum gaining in momentum and slowly descending toward him.[5] For a brief moment, as the prisoner contemplates his predicament, his thoughts provide the reader with a descriptive glimpse of the pendulum:

> It was the painted figure of Time as he is commonly represented, save that, in lieu of a scythe, he held what, at a casual glance, I supposed to be the pictured image of a huge pendulum, such as we see on antique clocks . . . While I gazed directly upward at it . . . I fancied that I saw it in motion. In an instant afterward the fancy was confirmed. Its sweep was brief, and of course slow. I watched it for some minutes somewhat in fear, but more in wonder.[6]

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1. Edgar Allan Poe, *The Pit and the Pendulum*, *in* SELECTED TALES AND POEMS 170 (Walter J. Black, Inc. 1943) (1843).
2. *Id.* at 172–73.
3. *Id.* at 172–76.
4. *Id.* at 173–74.
5. *Id.* at 176.
6. Edgar Allan Poe, *The Pit and the Pendulum*, *in* SELECTED TALES AND POEMS 252 (Walter J. Black, Inc. 1943) (1843).

Soon thereafter, the prisoner's initial feelings of "wonder" turn to sheer horror, as he realizes that the pendulum is not only gaining in speed but is also "formed of a crescent of glittering steel, about a foot in length from horn to horn; the horns upward, and the under edge evidently as keen as that of a razor."[7]

Interestingly, some legal commentators would analogize the prisoner's description of the pendulum to modern tort law and policy. Commentators frequently have analogized tort law to a pendulum.[8] Like a pendulum, tort law is always in motion,[9] swinging from ideological left to ideological right.[10] Throughout recent history, when-

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7. *Id.*

8. *E.g.*, John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND & WATER L. REV. 509, 553 (1996); James M. Cutchin, *The 1995 Illinois Civil Justice Reform Act: Has the Baby Been Thrown out with the Bath Water?*, 20 S. ILL. U. L.J. 117, 117 (1995); Judith M. Dworkin & Janet E. Kornblatt, *Plaintiffs' Expanding Concepts of Compensation and the Courts' Responses*, 30 GONZ. L. REV. 487, 488–89 (1995); Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992); Frank L. Maraist & Thomas C. Galligan, Jr., *The Ongoing "Turf War" for Louisiana Tort Law: Interpreting Immunity and the Solidarity Skirmish*, 56 LA. L. REV. 215, 228 (1995); Russell J. Weintraub, *An Approach to Choice of Law That Focuses on Consequences*, 56 ALB. L. REV. 701, 719 (1993); Glen Rothstein, Note and Comment, *Recreational Use Statutes and Private Landowner Liability: A Critical Examination of* Ornelas v. Randolph, 15 WHITTIER L. REV. 1123, 1143 (1994); Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 654, 661 (1990) (book review); Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1; Joseph William Moch & Shawn D. Wiersma, *Seat Suits: Techniques for Pursuing a Child Restraint Case*, PROD. LIAB. L. & STRATEGY, May 1996, at 1, 2.

9. *See* Bradley v. Appalachian Power Co., 256 S.E.2d 879, 889 (W. Va. 1979) (declaring that tort law "historically has not been a settled area of the law such as property or contracts, but has been subject to continual change by the courts and legislatures to meet the evolving needs of an increasingly mobile, industrialized and technological society"); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 1 (1994) (describing tort law as "a dynamic field" and recognizing that "[i]ts rules . . . continually evolve in response to the felt needs of society"); John Hasnas, Presentation given at University of Idaho College of Law (Feb. 3, 1996), *in* 32 IDAHO L. REV. 557, 557 (1996) (stating that "tort law is always undergoing reform"); *see also* El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987) (citing numerous examples in support of proposition that Texas courts "have consistently made changes in the common law of torts as the need arose in a changing society").

10. Although likely an overstatement in some ways, for purposes of this Article the ideological "left" is meant to represent a liberal, pro-plaintiff viewpoint, while the ideological "right" is intended to stand for a conservative, defense-oriented approach to tort law. This characterization is consistent with the views expressed by several other commentators on the subject. *See* James M. Cutchin, *The 1995 Illinois Civil Justice Reform Act: Has the Baby Been Thrown out with the Bath Water?*, 20 S. ILL. U. L.J. 117, 117 (1995) (commenting that defense-oriented tort reform legislation enacted by Illinois General Assembly in

ever tort law has swung dramatically in one of these directions, tort reform soon thereafter has swept it back in the opposite direction.[11]

1995 "has taken the Illinois political pendulum on a hard and fast swing to the right"); *cf.* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 121 (1987) (suggesting that divergent opinions regarding Supreme Court's proper role in constitutional interpretation can be summarized "by the loose terms 'Conservative' at the right hand pole and 'Liberal' at the left").

11. *See* Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992) (writing "[B]oth sides of the personal injury bar would be well served to remember the historical reality that tort law is ever-changing and that no one can predict exactly what the future will hold—pendulums eventually swing both ways."); Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 654 (1990) (book review) (explaining that "[a]s history suggests, the old tort reform constituted but one swing of a pendulum that later began to reverse itself in the wake of the crises of the 1970s and 1980s"); Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (observing "that the pendulum swings between plaintiffs and defendants"); *see also* John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND & WATER L. REV. 509, 553 (1996) (recognizing that "[w]hen the pendulum appeared to swing too far to favor plaintiffs, the [Wyoming] Legislature responded with a series of tort reform measures to adjust the balance."); Frank L. Maraist & Thomas C. Galligan, Jr., *The Ongoing "Turf War" for Louisiana Tort Law: Interpreting Immunity and the Solidarity Skirmish*, 56 LA. L. REV. 215, 228 (1995) (theorizing that judiciary and legislature balance each other in area of tort law, and explaining that "[w]hen either body believes that the other has gone too far, it can use its power to move the pendulum back to what it perceives to be the 'center'"); *cf.* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 2 (1994) (noting that tort law standards are constantly re-examined because "[r]ules once thought to strike a sound balance between competing interests may come to be regarded as out of step with changed circumstances"); John Hasnas, Presentation given at University of Idaho College of Law (Feb. 3, 1996), *in* 32 IDAHO L. REV. 557, 557 (1996) (noting constantly changing nature of tort law). Due to the constantly changing social, political, and theoretical forces that propel tort reform, the pendulum tends to vary between these extremes rather than coming to a rest at an equilibrium point. *Cf.* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY at xi-xii (1980) (summarizing drastic swings of tort law throughout history by noting that "[i]deas that were sufficiently embedded as to have been thought beyond refutation have been abandoned; ideas that were once regarded as on the lunatic fringe have become commonplace."). Although an in-depth discussion of the history of American tort law is beyond the scope of this Article, a brief overview of its development reveals the major pendulum swings this area of law has undergone. *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980) (discussing early development of tort law in United States). Up until the 1950s, "the tort system tended to protect the interests of defendants." Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 651 (1990) (book review); *see* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 714 (1996) (explaining that "the tort law of the nineteenth century and early twentieth century was characterized by special privileges, defenses and immunities that subsidized wrongdoers and prevented tort victims from obtaining redress for their injuries"); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109

Most recently, ever since the metaphorical pendulum of tort law reached a leftward apex sometime during the 1970s to mid-1980s, its sweep back to the defense-oriented right has been gaining momentum.[12] As a result, much like the doomed prisoner in Poe's

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HARV. L. REV. 1765, 1766 (1996) (recognizing pro-defendant flavor of tort law in first half of twentieth century). Beginning in the 1950s and 1960s, tort law quickly shifted in the other direction, as most attention was focused on increasing the rights and remedies available to plaintiffs. *See id.* (noting that tort system generally favored defendants until 1950s and commenting on attempts of progressive tort reformers in 1960s to shift focus "to enable plaintiffs to prevail more easily"); *see also* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1214–15 (identifying several substantive changes in tort law during 1960s that aided plaintiffs); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603–06 (1992) (asserting that "[b]etween 1960 and the early 1980s, there had been continuous liability-rule innovations in almost all areas of tort law" and documenting areas in which law changed to advantage of plaintiffs). Since the early 1980s, however, tort law has headed back in the opposite direction, as most changes and reform measures generally have favored the interests of defendants. *See* Matthew William Stevens, *Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, The Products Liability Act*, 74 N.C. L. REV. 2240, 2240 (1996) (addressing pro-defense tort reform movement that began in 1980s); *see also* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 *passim* (1992) (chronicling trend of plaintiffs' declining success in products liability cases since mid-1980s); Joseph Sanders & Craig Joyce, *"Off to the Races:" The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 218 (1990) (reporting that 48 states passed tort reform legislation between 1985 and 1988 in order to protect insurance companies and defendants from perceived crisis); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603 (1992) (acknowledging that, since early 1980s, tort law has seen courts take more conservative stance and halt expansion of liability). In addressing the drastic turnaround in the 1980s following two decades of pro-plaintiff advances, one commentator has observed:

> Tort cases from the 1960s and 1970s that were included in early 1980s coursebooks were almost all triumphs for plaintiffs; the collection of these cases could be referred to as 'plaintiffs' greatest hits'. The torts opinions from the last decade that will be included in the next round of coursebooks will have a quite different character. They will commonly entail substantial defense victories. At the very least, they will involve a mix of results—a mix that stands in sharp contrast to the pattern of plaintiffs' victories afforded by the previous two decades.

Id.

12. *See* Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 725 (1992) (recognizing that pro-plaintiff advances of 1960s and 1970s had resulted in dissatisfaction among conservatives by mid-1980s, thus leading state legislatures to undertake "the most active period of statutory reform of tort rules in western legal history"); *see also* James A. Henderson, Jr., *Why the Recent Shift in Tort?*, 26 GA. L. REV. 777, 777 (1992) (stating that "recent years have witnessed a substantial shift in the direction of the common law of torts, one favoring defendants to a marked degree"); Matthew William Stevens, *Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, The Products Liability Act*, 74 N.C. L. REV. 2240, 2240 (1996) (writing that defense-oriented tort reform swept across United States beginning in 1980s

short story feared the pendulum as the harbinger of his impending death, tort plaintiffs and their attorneys today are watching with horror as conservative courts and legislatures propel the pendulum of tort reform perilously close to the livelihood of their claims and remedies.[13] In fact, recent tort reform appears to have dismantled many of the progressive legal changes that led William Prosser to remark, in 1971, that the shift of tort reform "on the whole has been heavily toward the side of the plaintiff, with expanded liability in nearly every area."[14]

Perhaps nowhere has this modern retreat from a pro-plaintiff atmosphere been more apparent than in Texas. By the 1980s, a string of consumer-related legislation and rulings had created a favorable climate for Texas plaintiffs.[15] As a general rule, in Texas

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"[i]n response to a perceived onslaught of frivolous lawsuits and skyrocketing damage awards"); Russell J. Weintraub, *An Approach to Choice of Law That Focuses on Consequences*, 56 ALB. L. REV. 701, 720 (1993) (indicating that "[m]any states have enacted 'tort reform' legislation to rein in what have been perceived as doctrines that unduly favor plaintiffs"); Joseph William Moch & Shawn D. Wiersma, *Seat Suits: Techniques for Pursuing a Child Restraint Case*, PROD. LIAB. L. & STRATEGY, May 1996, at 1, 2 (commenting that initial gains for plaintiffs due to passage of strict liability statutes recently have been tempered because "the pendulum has swung toward protecting manufacturers and dealers"); James Cahoy, *Tort Reform Legislation Since 1994*, WEST'S LEGAL NEWS, Dec. 6, 1996 (noting that recent tort reform activity by Republican party has been "quite considerable" and compiling list of "all tort reform legislation that has been enacted at the state and federal level since Jan. 1, 1995"), *available in* 1996 WL 699299.

13. *See* Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1765 (1996) (characterizing recent tort reform pushed by Republican Party at both state and federal level as "a political juggernaut crushing virtually all obstacles in its path"); Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (commenting that Texas plaintiffs' attorneys are "in dire straits" and "are seeing their practices ravaged" due to recent tort reform efforts); *see also* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 770 (1992) (describing plaintiffs' lack of success in products liability field from 1985 to 1992 as "a slaughter"); Walt Borges, *Supreme Court's Term Showcases Defendants' Landslide*, TEX. LAW., Aug. 5, 1996, at 19 (reporting dismal results for plaintiffs in cases decided by Texas Supreme Court during previous two terms); Peter Brimelow & Leslie Spencer, *The Plaintiff Attorneys' Great Honey Rush*, FORBES, Oct. 16, 1989, at 197, 202 (contending that plaintiffs' attorneys are haunted by "specter of tort reform"), *available in* 1989 WL 2409349; Kathy Robertson, *Lawyers Fear Tort Reform Feeding Frenzy*, BUS. J.-SACRAMENTO, Mar. 25, 1996, at 1 (noting plaintiff attorneys' concerns about tort reform movement), *available in* 1996 WL 8578007.

14. WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS at xxi (5th ed. 1971).

15. *See* Raphael Cotkin, *Extracontractual Liability of Insurers in 1994: A Tale of Four States* (stating that "[f]or many years Texas had a reputation as a pro-plaintiff and proinsured jurisdiction"), *in* LITIGATION, at 177, 182 (PLI Litig. & Admin. Practice Course Handbook Series No. 518, 1995), *available in* WL 518 PLI/Lit 177; Mary J. Davis, *Individ-*

as across most of the country, plaintiffs' rights and remedies had been regularly expanded for several decades, until the late 1970s to mid-1980s.[16] These pro-plaintiff advances included, for example, the passage of the Texas Deceptive Trade Practices Act (DTPA),[17] the recognition of new and more expansive amounts of damages,[18]

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ual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability, 39 VILL. L. REV. 281, 312 n.106 (1994) (noting "extreme pro-plaintiff reputation" that Texas obtained in late 1970s and early 1980s); Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (reporting that Texas lawmakers and courts adopted pro-plaintiff measures throughout 1970s); Michael Totty, *Defense Rests: Texas' High Court Pounded Plaintiffs in Past Year*, WALL ST. J., July 17, 1996, at T1 (referring to pro-plaintiff rulings of Texas Supreme Court in 1980s); *see also* RICHARD M. ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES 1 (3d ed. 1994) (asserting that legislation enacted by Texas Legislature in 1973 significantly increased protection of consumers by replacing traditional defense-oriented concept of "caveat emptor" with plaintiff-friendly doctrine of "caveat venditor"). Prior to the 1970s, "there was a noticeable 'defense flavor' to Texas tort law." Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992); *see* RICHARD M. ALDERMAN, TEXAS DECEPTIVE TRADE PRACTICES 1 (3d ed. 1994) (noting that, prior to passage of DTPA in 1973, Texas consumers "were virtually defenseless when it came to dealing with unscrupulous, or simply careless, merchants" because available common-law remedies were inadequate, difficult to establish and generally defense-oriented).

16. *See* Raphael Cotkin, *Extracontractual Liability of Insurers in 1994: A Tale of Four States* (commenting on expansion of Texas tort law up to mid-1980s and crediting Texas Supreme Court with spearheading movement), *in* LITIGATION, at 177, 182 (PLI Litig. & Admin. Practice Course Handbook Series No. 518, 1995), *available in* WL 518 PLI/Lit 177; Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992) (reporting that "[s]ince the early 1970's, Texas tort law has undergone many dramatic changes—the result of which has been to create a general body of law which is now more favorable to plaintiffs."); *see also* James A. Henderson, Jr., & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1271 (1991) (designating 1970s and 1980s as "high water marks of . . . [an] expansionary, remarkably pro-plaintiff period"); Joseph Sanders & Craig Joyce, *"Off to the Races:" The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 253 (1990) (writing, in 1990, that "[t]he evident trend in the common law of torts for the last half century has been to expand plaintiffs' rights"); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603–06 (1992) (detailing continuous expansion of liability and numerous pro-plaintiff advances that characterized tort law between 1960s and early 1980s).

17. Deceptive Trade Practices-Consumer Protection Act, 63d Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322 (codified as an amendment to TEX. BUS. & COM. CODE ANN. §§ 17.41–.63 (Vernon 1991 & Supp. 1996)).

18. *See, e.g.*, Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551 (Tex. 1985) (recognizing child's right to recover damages for loss of companionship, society, and for mental anguish resulting from parent's wrongful death); Sanchez v. Schindler, 651 S.W.2d 249, 252–54 (Tex. 1983) (abolishing pecuniary loss rule and holding that parents may re-

the adoption of strict liability,[19] "the abrogation of contributory

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cover mental anguish damages under Texas Wrongful Death Act for child's death); Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978) (granting recognition for first time to spouse's common-law cause of action for loss of consortium arising from third party's negligent infliction of personal injuries to other spouse); *see also* Deceptive Trade Practices-Consumer Protection Act, 63d Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322 (codified as an amendment to TEX. BUS. & COM. CODE ANN. §§ 17.41–.63 (Vernon 1991 & Supp. 1996) (providing originally for mandatory treble damages if plaintiff prevailed in DTPA action); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981) (lessening plaintiff's burden for recovery of punitive damages by clarifying definition of gross negligence), *superseded by statute as stated in* Convalescent Servs., Inc. v. Schultz, 921 S.W.2d 731, 735 (Tex. App.—Houston [14th Dist.] 1996, writ denied); Woods v. Littleton, 554 S.W.2d 662, 669 (Tex. 1977) (interpreting 1973 version of section 17.50(b) of DTPA to provide for mandatory treble damages); *cf.* Raphael Cotkin, *Extracontractual Liability of Insurers in 1994: A Tale of Four States* (noting cases during 1970s and 1980s in which Texas Supreme Court expanded tort liability and damages), *in* LITIGATION, at 177, 182 (PLI Litig. & Admin. Practice Course Handbook Series No. 518, 1995), *available in* WL 518 PLI/Lit 177. *See generally* 1 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 17–18 (1991) (recognizing expansion of types and quantum of damages). Similarly, new causes of action were recognized. *See* Billings v. Atkinson, 489 S.W.2d 858, 860–61 (Tex. 1973) (recognizing cause of action for willful invasion of privacy); Tidelands Auto. Club v. Walters, 699 S.W.2d 939, 944 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (recognizing cause of action for intentional infliction of emotional distress). With respect to the types of damages that may be recovered, it appears that Texas actually continued its expansion up until the early 1990s. *See, e.g.*, Reagan v. Vaughn, 804 S.W.2d 463, 466, 468 (Tex. 1990) (recognizing child's cause of action for loss of parental consortium when parent suffers disabling permanent injuries); Freeman v. City of Pasadena, 744 S.W.2d 923, 923–24 (Tex. 1988) (allowing bystanders who witness traumatic accident to recover for emotional distress under rule first pronounced by 1968 California case *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, Cal. Rptr. 71 (Cal. 1968)); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987) (abandoning physical injury requirement for recovery of damages for mental anguish), *overruled in part by* Boyles v. Kerr, 855 S.W.2d 593, 595–96 (Tex. 1993); Moore v. Lillebo, 722 S.W.2d 683, 686 (Tex. 1986) (abolishing requirement of physical manifestation of injuries for recovery of mental anguish damages in wrongful death cases). During the 1990s, however, and especially as a result of the 1995 legislative reforms, this continued expansion was curtailed. *See* Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 5, 1995 Tex. Gen. Laws 2988 (codified as an amendment to TEX. BUS. & COMM. CODE ANN. § 17.50(b) (Vernon Supp. 1996)) (eliminating automatic trebling of damages and limiting recovery to economic damages except in cases of knowing or intentional violations); Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110 (codified as amendment to TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 1996)) (capping punitive damages and raising burden of proof for their recovery); *see also Boyles*, 855 S.W.2d at 595–96 (refusing to recognize independent cause of action for negligent infliction of emotional distress).

19. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 792 (Tex. 1967) (adopting strict products liability); *see also* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (embracing principles of strict products liability in California); RESTATEMENT (SECOND) OF TORTS § 402A (1965) (setting forth principles of strict liability for defective products); *cf.* 1 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL IN-

negligence and similar defenses,"[20] the abolition of common-law immunities,[21] and the expansion of common-law duties.[22] Since

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JURY—REPORTERS' STUDY 15 (1991) (recognizing adoption of strict products liability as "watershed event" of pro-plaintiff movement).

20. Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992); *see* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 429–32 (Tex. 1984) (adopting pure comparative causation scheme for apportioning liability among codefendants in products liability cases); Davila v. Sanders, 557 S.W.2d 770, 770–71 (Tex. 1977) (abolishing doctrine of imminent peril); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (abolishing voluntary assumption of risk as defense in negligence cases); *McKisson*, 416 S.W.2d at 790 (following rule of RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1977) that plaintiff's contributory negligence in failing to discover defect is not defense to strict products liability); *see also* 1 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 16–17 (1991) (explaining that common-law doctrines that barred plaintiff from recovery were "either overturned or sharply narrowed" during 1970s and 1980s).

21. *See* Texas Tort Claims Act, 61st Leg., R.S., ch. 292, § 3, 1969 Tex. Gen. Laws 874, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3322 (current version at TEX. CIV. PRAC. & REM. CODE § 101.021 (Vernon 1986) (creating limited waivers of governmental immunity in tort cases); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971) (limiting reach of parental immunity); Howle v. Camp Amon Carter, 470 S.W.2d 629, 630 (Tex. 1971) (abrogating charitable immunity); *see also* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605–06 (1992) (noting that pro-plaintiff changes after 1960 included widespread "abolition of immunities for charities, governments and family members"); Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—or Does It?*, 27 ST. MARY'S L.J. 679, 692–93 (1996) (explaining that Texas Tort Claims Act, which was enacted by Texas Legislature in 1969, provides waivers of governmental immunity under certain circumstances); Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, TRIAL, July 1, 1996, at 50 (attributing much of tort law's expansion during last 50 years to demise of "outmoded 'no-duty' rules" such as "sovereign immunity, charitable immunity, and the limited liability of landowners to trespassers or licensees").

22. *See, e.g.*, Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) (creating duty for employer to prevent incapacitated, off-duty employee over whom employer has control from creating unreasonable risk of harm to others); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983) (imposing duty on store owner to guard against injuries on premises if owner has actual or constructive knowledge of defective condition and if it is foreseeable that accident would occur); Parker v. Highland Park, Inc., 565 S.W.2d 512, 514–15 (Tex. 1978) (extending landowner's duty to tenants to include guests of those tenants); *see also* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167–68 (Tex. 1987) (recognizing tort duty of good faith and fair dealing in insurance context). Texas was not quite as progressive as several other states in the expansion of common law duties. *Compare* Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (abandoning common-law distinctions between trespassers, licensees and invitees in favor of general duty of ordinary care), *with* Buchholz v. Steitz, 463 S.W.2d 451, 454 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (maintaining common law premises liability categories and declining to follow *Rowland*). *But see* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 554 (Tex. 1985)

that time, however, plaintiffs in Texas have seen the courts and the legislature halt this expansion and consistently chip away at their gains.[23]

Commentators suggest that these defense-minded changes have come in three "waves"[24] or, more appropriately for this Article, "pendulum swings" of tort reform. The first of these swings was in response to a perceived crisis following sharp rate increases for

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(Kilgarlin, J., concurring) (calling for abolishment of common law premises liability classifications).

23. *See, e.g.*, Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971–75 (codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. ch. 33 (Vernon Supp. 1996)) (eliminating joint liability in cases where defendants are less than 51% at fault); Act of May 8, 1995, 74th Leg., R.S., ch. 138, § 1, 1995 Tex. Gen. Laws 978, 979 (codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (Vernon 1997)) (modifying venue rules to limit forum shopping); Act of May 8, 1995, 74th Leg., R.S., ch. 137, 1995 Tex. Gen. Laws 977 (codified at TEX. CIV. PRAC. & REM. CODE ANN. ch. 10 (Vernon 1997)) (adopting rule allowing courts to impose penalties for filing of frivolous lawsuits); Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110 (codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997)) (placing statutory cap on punitive damages, eliminating gross negligence as standard for recovery, and requiring proof by clear and convincing evidence); Cain v. Hearst Corp., 878 S.W.2d 577, 584 (Tex. 1994) (refusing to recognize cause of action for tort of false light invasion of privacy); *Boyles*, 855 S.W.2d at 594–96 (refusing to recognize independent cause of action for negligent infliction of emotional distress and overruling *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649 (Tex. 1987) to extent it held otherwise); Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992) (invalidating "Mary Carter" agreements); *see also* Joseph Sanders and Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 253 (1990) (implying that post-1980 tort law developments generally have not favored plaintiffs and analyzing 1987 tort reform package). Emblematic of this constant "chipping away" at pro-plaintiff advances is the Texas legislature's treatment of the Texas Deceptive Trade Practices Act (DTPA). *See* Eve L. Pouliot, *Deceptive Trade Practices and Consumer Protection Act*, 49 SMU L. REV. 871, 899 (1996) (recognizing "new trend to limit the DTPA"). In fact, since its initial passage in 1973, the DTPA has been amended to some extent in every legislative session. *Id.* at 872 n.3 (citations omitted). Despite the recent pro-defense shift, compared to other states, Texas tort law is still perceived as being rather conducive to plaintiffs. *See* Joe Nocera, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, at 60, 80 (classifying Texas, in 1995, as still being "a plaintiffs' mecca").

24. *See* Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 649 (1990) (book review) (contending that modern tort reform has come in "three distinct waves"); *see also* Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1767 (1996) (adopting view that pro-defendant tort reform is "the result of three separate torts crises"). Another commentator also characterizes the tort reform movement as having come in three distinct "waves," but provides different dates of their occurrences. *See* Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, TRIAL, July 1, 1996, at 50, 51 (stating that "[w]aves of 'tort reform' statutes swept through state legislatures in the mid-1970s, mid-1980s, and mid-1990s").

medical malpractice insurance in the late 1960s.[25] The second swing of reform, which took place in the mid-1970s, was spearheaded by the outcries of manufacturers who blamed out-of-control products liability laws for drastic increases in liability insurance premiums.[26] The third swing, which began during the mid-1980s[27] and enjoyed a notable resurgence during the 1995 legislative session,[28] has been much more sweeping in nature. Unlike the first two movements, which focused on narrower segments of tort

25. *See* Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 649 & n.1 (1990) (book review); *see also* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1217–19 (documenting reform measures taken in response to medical malpractice crisis); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1767–68 (1996) (addressing tort reform measures that followed medical malpractice crisis of late 1960s).

26. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1219–20 (naming products liability as "area of concern for tort reformers in the 1970s"); *see also* Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 649 & n.2 (1990) (book review) (reporting vacillating responses to tort reform); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1767 (1996) (designating manufacturers' concern over increased products liability premiums during late 1970s as crisis that triggered second major wave of tort reform).

27. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1220–23 (analyzing alleged insurance and litigation crisis that led to promulgation of widespread tort reform in mid-1980s); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1767 (1996) (noting general tort crisis in 1980s that spawned additional reform measures); Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 649–50 & n.3 (1990) (book review) (attributing third wave of tort reform to "a full-blown 'tort crisis'" that erupted due to overall increase in liability insurance rates).

28. *See* Robert M. Ferm & Jon M. Moellenberg, *Recent Developments in the Public Regulation of Insurance Law*, 31 TORT & INS. L.J. 447, 447 (1996) (writing, "State legislatures renewed substantial tort reform efforts during 1995, passing more tort reform bills than at any time since the mid-1980s."); *see also* Teel Bivins et al., *The 1995 Revisions to the DTPA: Altering the Landscape*, 27 TEX. TECH L. REV. 1441, 1442 (1996) (noting extensive areas touched by Texas legislature's tort reform efforts in 1995); Martha Middleton, *A Changing Landscape*, 81 A.B.A. J. 56, 56 (1995) (reporting widespread tort reform efforts at state and federal level following 1994 elections); James Cahoy, *Tort Reform Legislation Since 1994*, WEST'S LEGAL NEWS, Dec. 6, 1996 (outlining numerous tort reform measures that Texas legislature enacted in 1995 session), *available in* 1996 WL 699299. Once again, as discussed *supra* note 23 the Texas legislatures treatment of the DTPA reflects this trend. Although the legislature had repeatedly tinkered with the DTPA since its enactment, the 1995 legislative session enacted the most substantial revisions to date. *See* Teel Bivins et al., *The 1995 Revisions to the DTPA: Altering the Landscape*, 27 TEX. TECH L. REV. 1441, 1443 (1996) (distinguishing "sweeping amendments to DTPA" in 1995 from less noteworthy reform attempts in prior years).

law, this latest reform effort has resulted in across-the-board cutbacks for plaintiffs in many areas of the tort system.[29]

While Texas undoubtedly has felt the effects of all three of these major tort reform swings, the latest swing has been the most pronounced.[30] Political conservatism provides one explanation for the success of this most recent pro-defense reform movement,[31] while negative publicity generated by huge judgments in high profile cases provides another.[32] In Texas, where the insurance industry

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29. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1222 (noting that third wave of tort reform led to passage of wide range of tort reform measures in 48 jurisdictions between 1985 and 1988); Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 257–58 (1990) (comparing differences in tort reform of 1980s in comparison and earlier reform efforts); *see also* Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1768 (1996) (commenting on later rounds of tort reform, which "sought to eliminate pro-plaintiff common law rules across the board, rather than for particular sectors and industries"). In Texas, the 1995 tort reform measures touched upon numerous areas, including exemplary damages, medical malpractice, joint and several liability, venue, frivolous lawsuits, governmental liability, and the DTPA. *See* James Cahoy, *Tort Reform Legislation Since 1994*, WEST'S LEGAL NEWS, Dec. 6, 1996 (listing tort reform legislation in Texas since January 1, 1995), *available in* 1996 WL 699299.

30. *See* Robert M. Ferm & Jon M. Moellenberg, *Recent Developments in the Public Regulation of Insurance Law*, 31 TORT & INS. L.J. 447, 452 (1996) (classifying tort reform efforts of Texas legislature in 1995 as "one of the most dramatic examples of state tort reform").

31. *See* Teel Bivins et al., *The 1995 Revisions to the DTPA: Altering the Landscape*, 27 TEX. TECH L. REV. 1441, 1442 (1996) (explaining that "[a] combination of factors, including the election of a Republican Governor, a more conservative Texas Senate, and a more conservative approach to government nationwide, all contributed to an atmosphere that was conducive to the consideration of tort reform legislation during the 1995 session."); Michael Bradford, *Texas Tort Reform Outlook Improves: Alabama Remains Area of Concern for Businesses*, BUS. INS., Jan. 6, 1997, at 3, 20 (noting that Republican majorities in Texas Supreme Court and Senate have helped reverse state's pro-plaintiff atmosphere in last few years); *see also* James Cahoy, *Tort Reform Legislation Since 1994*, WEST'S LEGAL NEWS, Dec. 6, 1996 (acknowledging Republican victories in 1994 elections as factor contributing to considerable tort reform legislation since January 1, 1995), *available in* 1996 WL 699299; *cf.* Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043, 1045 (1994) (suggesting that Republican administration aided business and insurance lobbies in pushing tort reform during mid-1980s); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673 *passim* (1996) (criticizing Republican-led tort reform efforts of 1995).

32. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1207–08, 1220–21 (summarizing misconceptions about two "flagship" cases that attracted widespread public scorn and spurred tort reform in 1980s and 1990s); *see also* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women,*

and tort reform lobbies have a significant influence on law making,[33] the push to the right has also been fueled by tort reform campaigns that accentuate negative public perceptions of greedy plaintiffs' attorneys, frivolous lawsuits, spiraling insurance costs, and runaway juries.[34] Whatever the reasons, the legal climate clearly has taken a turn for the worse for Texas plaintiffs. It is not surprising, therefore, that amidst this context the Texas Supreme

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Blue Collar Workers and Consumers, 48 RUTGERS L. REV. 673, 719–21 & n.229 (1996) (referring to "poster children" cases and "tort horror stories" that tort reformers have utilized to portray image of out-of-control tort system); James Cahoy, *Tort Reform Legislation Since 1994*, WEST'S LEGAL NEWS, Dec. 6, 1996 (recognizing "several well-publicized tort verdicts such as the $2.86 million award to a woman injured by hot McDonald's coffee" as one motivating force behind state and federal tort reform since beginning of 1995), *available in* 1996 WL 699299.

33. *See* Mark Ballard, *Political Capital*, TEX. LAW., July 22, 1996, at 1 (reporting that political action committee, Texans For Lawsuit Reform, spent close to $600,000 on campaigning and lobbying efforts to ensure passage of tort reform measures during 1994 legislative session). The head of Texans For Lawsuit Reform has been credited "more than anyone else for passing the sweeping [1995 tort] reforms." *Id.* at 19.

34. *See* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 711 (1996) (recognizing that "[r]eformers consider Texas as a hot spot in the country for jury verdicts"); *see also* Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 111 nn.19 & 21 (1991) (noting role of businesses and insurance companies in launching pro-defendant tort reform campaign that portrayed tort law as cause of insurance crisis); Jeffrey Robert White, *Top 10 in Torts: Evolution in the Common Law*, TRIAL, July 1, 1996, at 50, 51 (stating that massive tort reform campaign led by insurers, manufacturers, and health care providers has consisted of "a steady drumbeat of jury bashing," which has portrayed juries "as emotional and irrational"). One commentator theorizes that "[t]ort reformers have successfully conveyed the impression to policymakers, the press and the public that juries victimize corporations by awarding 'too much' to injured plaintiffs." Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 719 (1996). The media has also furthered these unsavory images of the tort law system. During the summer of 1996, for example, the cover of a popular Texas magazine splashed the headline "Why We Hate Lawyers" in bold letters across the picture of a cartoon wolf wearing a suit. TEX. MONTHLY, June 1996. The cover story, entitled "The Lawsuit from Hell," focused on a Texas case styled *Sam Fowler, Jr., et al. v. Union Carbide Corp., et al.*, which the author described as "the largest mass products-liability lawsuit in the United States, a maddening morass of litigation that has ensnared hundreds of lawyers and generated untold millions of dollars in legal fees." Skip Hollandsworth, *The Lawsuit from Hell*, TEX. MONTHLY, June 1996, at 107, 108. The author of the article further characterized the decade-old and still pending lawsuit as "a case that seemed destined for a chapter in a law school textbook about frivolous lawsuits." *Id.* at 107–08; *see also* Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (offering general discussion of factors contributing to Texas tort law's defense-oriented shift).

Court has taken on a decidedly defense-oriented stance,[35] resulting in "a lopsided number of victories for defendants"[36] and leading one author to comment recently that "plaintiffs got hammered" in the court's 1996 decisions.[37]

State Farm Fire & Casualty Co. v. Gandy,[38] a 1996 decision of the Texas Supreme Court that has been hailed as "a long awaited decision of cardinal significance,"[39] represents the latest in this series of setbacks for Texas plaintiffs. In a narrow sense, *Gandy* is a decision that likely curtails the use of the "sweetheart deal," a practice in which an insured defendant in a tort case first settles with the plaintiff and then assigns any claims it may have against its liability

35. *See* Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1732 (1996) (commenting on "the sweeping move to the right by the Texas Supreme Court after 1991"); Carey C. Jordan, Comment, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 HOUS. L. REV. 473, 496 (1996) (noting "recent political shift of the Texas Supreme Court to the conservative right"); *Plaintiffs Lawyers Lose Big*, WALL ST. J., Nov. 11, 1996, at A16 (commenting on Republican control of Texas Supreme Court); Michael Totty, *Defense Rests: Texas' High Court Pounded Plaintiffs in Past Year*, WALL ST. J., July 17, 1996, at T1 (recognizing "solid 7-2 Republican majority" in Texas Supreme Court). The Texas Supreme Court came under attack during the 1988 elections after a string of pro-plaintiff decisions that were perceived as being influenced by large campaign donations from prominent plaintiffs' attorneys. Wayne E. Green, *U.S. Supreme Court Justice Swears in 5 Judges in Texas: Kennedy's Appearance Helps Polish Tarnished Images from Rough Campaigns*, WALL ST. J., Jan. 6, 1989, *available in* 1989 WL-WSJ 502022. The court's strong shift in favor of defendants likely began after the 1988 election, in which "candidates backed by the Texas business community won five of the six races." *Id.*; *see* Raphael Cotkin, *Extracontractual Liability of Insurers in 1994: A Tale of Four States* (reporting defense-oriented shift in Texas Supreme Court following 1988 elections, in which "moderate and conservative judges replaced the liberal judges who had decided [previous pro-plaintiff] cases"), *in* LITIGATION, at 177, 183 (PLI Litig. & Admin. Practice Course Handbook Series No. 518, 1995), *available in* WL 518 PLI/Lit 177.

36. Walt Borges, *Supreme Court's Term Showcases Defendants' Landslide*, TEX. LAW., Aug. 5, 1996, at 19. Between September 1, 1995, and July 12, 1996, defendants won 83% of the cases decided by the Texas Supreme Court. *Id.* Similarly, the court's decisions for the first half of 1995 favored defendants 82% of the time. *Id.* In 1996, the pro-defense trend was even more noticeable in the court's insurance, medical malpractice, and personal injury decisions, of which a staggering 91% produced wins for defendants. *Id.*

37. *Id.* The headline of another article announced that the Texas Supreme Court "pounded" plaintiffs during its 1995-96 term. *See* Michael Totty, *Defense Rests: Texas' High Court Pounded Plaintiffs in Past Year*, WALL ST. J., July 17, 1996, at T1 (discussing recent pro-defense rulings of Texas Supreme Court).

38. 925 S.W.2d 696 (Tex. 1996).

39. Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1237 (1996); *see also* Jim E. Cowles, *The Biggest Developments in . . .*, TEX. LAW., Dec. 16, 1996, at 24 (naming *Gandy* decision as one of two most important insurance law developments in Texas during 1996).

insurance carrier to that same plaintiff.[40] Beyond its important implications for the insurance industry and for the settlement of tort claims in general, *Gandy* typifies the prevailing attitude of the current Texas Supreme Court towards the underlying public policy justifications for tort law. On a broader scale, then, *Gandy* provides an example of judicial tort reform that fits into the continuing rightward swing of the tort law pendulum.[41]

Using the ongoing pro-defense reform efforts as a backdrop, this Article utilizes the *Gandy* decision as a vehicle to explore both the use of sweetheart deals and, more generally, the current state of affairs in Texas tort law. Part II provides a descriptive overview of the *Gandy* case and investigates the rationale behind the court's noteworthy decision. Part III seeks to provide Texas practitioners with insight as to the likely practical and theoretical ramifications of the *Gandy* decision. Part IV concludes with a reminder that tort law historically has been cyclical in nature and with a prediction that current defense-minded reform efforts ultimately will be countered by a retreat back toward the pro-plaintiff left.

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40. *See Gandy*, 925 S.W.2d at 713 (providing example of typical sweetheart deal in insurance context); Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 175 (1996) (defining "sweetheart deal" as agreement in which "an insured enter[s] into a deal with the claimant whereby the insured assigns any cause of action it may have against its insurer to the claimant in exchange for the claimant's agreement not to seek recovery of damages from the insured"); Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1237 (1996) (discussing *Gandy* and similar scenarios in which sweetheart deals may arise). Commentators assert that *Gandy* strikes a major blow against the future use of such sweetheart deals in Texas. *See id.* (asserting that "*Gandy* begins to sour the use of sweetheart deals."); *see also* Walt Borges, *Supreme Court's Term Showcases Defendants' Landslide*, TEX. LAW., Aug. 5, 1996, at 19 (contending that *Gandy* illustrates Texas Supreme Court's intention "to counter the gamesmanship that forces insurance companies to settle"); Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (reporting that *Gandy* decision "made it harder for plaintiffs to make sweetheart deals with insured defendants to reach the deep pockets of insurance companies").

41. *See* Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (recognizing *Gandy* as case that is "indicative of the trend" by Texas Supreme Court to favor defendants).

II. BACKGROUND: THE *GANDY* DECISION

A. *Factual Scenario in Gandy*

In *State Farm Fire & Casualty Co. v. Gandy*,[42] the plaintiff, Julie Gandy, brought suit against her stepfather alleging that he had sexually abused her as a child[43] and against her biological mother for "negligently fail[ing] to prevent" the abuse.[44] The sexual abuse was alleged to have taken place for a continuous period of three and one-half years at two separate locations: the family residence and a service station owned and operated by the stepfather.[45] For a significant period of time during which the sexual abuse was ongoing, the family residence had been insured under a homeowner's policy issued by State Farm Fire and Casualty Company.[46] Recognizing the potential for insurance coverage, the mother's attorney notified State Farm of the pending lawsuit, whereupon the insurer promptly investigated the claims.[47] Although State Farm concluded that coverage was questionable, it nonetheless agreed to pay for the defense of both the mother and the stepfather under a reservation of rights.[48]

After these initial events, and without notification to State Farm, the stepfather became dissatisfied with his original attorney and obtained new counsel.[49] Several months later, the stepfather's new attorney entered into a settlement agreement with Gandy, once

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42. 925 S.W.2d 696 (Tex. 1996).

43. *Gandy*, 925 S.W.2d at 698.

44. *Id.* Later, Gandy amended her pleadings to include another defendant: a doctor whom she had visited, at her stepfather's suggestion, for birth control pills. *Id.* In addition to the civil suit, criminal proceedings were also brought against the stepfather. *Id.* The stepfather eventually pleaded nolo contendere to the criminal charges and was given a five-year-probated sentence. *Id.* at 700.

45. *Id.* at 698.

46. *Id.* The sexual abuse began sometime in mid-1984, when Julie Gandy was just 13 years old, and persisted until December 1988. *Id.* The State Farm homeowner's policy went into effect in September 1987. *Id.*

47. *Id.* The mother and stepfather had retained separate counsel due to divorce proceedings initiated by the mother upon Julie Gandy's revelation of the abuse. *Id.*

48. *Gandy*, 925 S.W.2d at 698–99. State Farm notified the stepfather and his attorney of its agreement to defend under a reservation of rights in a series of letters that expressly set forth the questionable areas of coverage and which directed them to forward itemized billing statements to State Farm's offices. *Id.* at 699–700.

49. *Id.* at 700.

again without notifying State Farm.[50] Under the terms of this settlement, the stepfather consented to a judgment of over $6 million in damages and agreed to assign Gandy any and all claims that he might have against State Farm.[51] In return, Gandy signed a covenant not to execute, in which she promised not to attempt to collect the judgment from her stepfather.[52] Then, although it never saw the parties' assignment or covenant and never heard any evidence on the matter, the trial court perfunctorily signed and approved the Final Agreed Judgment.[53]

Soon after the trial court approved the agreed judgment, Gandy brought suit against State Farm.[54] Gandy alleged that State Farm owed her the full amount of damages set forth in the agreed judgment and, with the stepfather's assignment of claims in hand, sought additional damages for the insurer's failure to settle the claims and to defend her stepfather properly.[55] The district court concluded that the State Farm homeowner's policy did not cover the allegations of abuse and granted summary judgment for the insurer in regard to Gandy's attempt to collect damages under the agreed judgment.[56] However, the court reasoned that State Farm's voluntary agreement to defend the stepfather obligated it to do so properly. Finding sufficient fact issues as to whether State Farm had done so, the court allowed Gandy, as the stepfather's assignee, to pursue the various failure to defend claims.[57] At trial, relying heavily on the testimony of the stepfather and his initial attorney,

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50. *Id.* State Farm did not learn of the settlement until approximately one month after it was approved by the district court. *Id.* at 703.

51. *See id.* at 700–03 (setting forth terms of assignment and Final Agreed Judgment). In order to make the judgment final, Gandy nonsuited the two other defendants: her mother and the doctor. *Id.* at 703. Gandy's lawyer calculated the damages figure based on a "personal evaluation" of the claim. *Id.* Estimating 325 incidents of abuse at a figure of $12,500.00 per incident, actual damages were determined to total a little more than $4 million. *Id.* at 712. The remaining portion of the judgment consisted of exemplary damages in the amount of $2 million. *Id.* at 703.

52. *See id.* at 701–02 (reprinting terms of covenant to limit execution of judgment).

53. *Gandy*, 925 S.W.2d at 702–03.

54. *Id.* at 703.

55. *Id.* Gandy's claims were based on negligence, gross negligence, breach of contract, bad faith, violations of the DTPA, and violations of the Insurance Code. *Id.* Under a failure to defend claim, the plaintiffs sought $4 million in damages, and alleged that the judgment against the stepfather would have been in the $2 million dollar range (as opposed to the $6 million agreed judgment) had he been properly defended. *Id.* at 704.

56. *Id.*

57. *Id.*

the jury found State Farm liable for negligence and violations of the DTPA and awarded Gandy $200,000 in damages plus attorney fees.[58]

In a well-reasoned opinion, Texarkana's Sixth Court of Appeals reluctantly affirmed the district court's ruling,[59] but not without taking the opportunity to severely criticize the parties' agreed judgment. In particular, the court characterized the settlement agreement as a "fraud" and a "sham," reasoning that to allow "an assignee of the named judgment debtor in such a case to collect all or part of the judgment amount . . . bases the recovery on an untruth, i.e., that the judgment debtor may have to pay the judgment."[60] The court similarly voiced a concern that such assignments would encourage fraud and collusion.[61] Notwithstanding these concerns, the court of appeals interpreted Texas Supreme Court precedent to mean that the agreed judgment had to be accepted as evidence of damages to the stepfather.[62] Although it deferred to this interpretation of the law, the court implored the Texas Supreme Court to re-examine the issue and change its stance.[63]

B. *The Texas Supreme Court's Ruling*

In issuing this challenge, the appeals court set the stage for the Texas Supreme Court to squarely address an issue that it had "'skirted . . . more often than not in the past.'"[64] On appeal to the supreme court, State Farm roughly framed its argument around the appellate court's criticisms of the assignment of the stepfather's

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58. *Gandy*, 925 S.W.2d at 704.

59. *Id.*; *State Farm Fire & Cas. Co. v. Gandy*, 880 S.W.2d 129, 140 (Tex. App.—Texarkana 1994), *rev'd* 925 S.W.2d 696 (Tex. 1996).

60. *Gandy*, 880 S.W.2d at 138. The court further explained: "The judgment is a sham because it is not what it is represented to be. It cannot be collected from the judgment debtor, and that was the parties' intention when the judgment was taken." *Id.* at 138 n.5.

61. *Id.* at 138. The appeals court was quick to note that there was no finding that Gandy and her stepfather had engaged in fraud or collusion in reaching their settlement. *Id.*

62. *Id.* The appeals court reached this conclusion based upon its interpretation of *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994). *Id.*

63. *See id.* (writing, "To the extent that our Supreme Court would hold that the bare amount of the judgment constitutes damage in a case like this, we believe it is wrong, and we urge it to correct the matter when it has the opportunity.").

64. Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4.

claims.[65] Although the supreme court apparently disagreed with the appeals court's interpretation of precedent, it nonetheless agreed with its overall concerns about sweetheart deals such as the one before it.[66] In a lengthy opinion, the court ultimately reversed the lower court's decision and invalidated the assignment on public policy grounds.[67] In doing so, the court also established guidelines for future determinations of whether an assignment of a tort claim is invalid. In perhaps the most important language of the opinion, the court set forth a three-part test, holding that:

> a defendant's assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim.[68]

While this three-prong test alone sends out a rather clear pronouncement of the court's disfavor with pretrial assignments of insurance claims, the court did not stop there. It continued its attack on such deals by announcing that "[i]n no event . . . is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee."[69] This additional statement, while further revealing the court's strong disfavor with pretrial assignments by an insured defendant, may prove to be a source of confusion. For example, by emphasizing the test's first requirement—that a fully adversarial trial must be held before the assignment occurs—this statement appears to reduce the test's three prongs to just one meaningful prong in many circumstances.[70] The court then added to this confusion by implicitly leaving open the possibility that an

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65. *See Gandy*, 925 S.W.2d at 705 (stating that State Farm argued against enforcement of assignment based on "the reasons expressed by the court of appeals").

66. *See id.* (agreeing with appeals court that assignment should be invalidated, but explaining that it did not read its decision in *American Physician's Ins. Exch. v. Garcia* to require contrary result).

67. *Id.* at 714–15, 720.

68. *Id.* at 714.

69. *Id.*

70. In other words, this language appears to make the first prong determinative, thus rendering the second and third prongs meaningless for all practical purposes.

assignment lacking one of the elements of the three-prong test might nonetheless be valid.[71] Furthermore, the opinion merely sets forth the criteria that, if present, will invalidate an insured defendant's assignment to the plaintiff. The *Gandy* opinion does *not* establish the requirements for creating a valid assignment in this context.[72] Therefore, in order to wade through this confusion and fully understand the significance of the court's ruling, it is necessary to delve into the underlying rationale behind the decision.

C. *The Texas Supreme Court's Rationale*

1. Historical Overview of the Assignment of Tort Claims

In reaching its decision, the *Gandy* court first launched into an in-depth historical discussion regarding the assignment of "choses in action."[73] In this discussion, the court summarized three main periods of development regarding such assignments. First, the court addressed the early common law rule, which flatly refused to allow the assignment of a chose in action.[74] This common law prohibition apparently was premised on the fear that allowing such assignments would unduly promote litigation,[75] and on the belief

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71. *See Gandy*, 925 S.W.2d at 714 (stating, "We do not address whether an assignment is also invalid if one or more of these elements is lacking.").

72. *See* Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1238 (1996) (noting that *Gandy* does not state necessary conditions for avoiding assignment from tortfeasor to plaintiff).

73. *Gandy*, 925 S.W.2d at 705–07. A chose in action has been defined as: "[A] thing in action and is right of bringing an action or right to recover a debt or money." BLACK'S LAW DICTIONARY 219 (5th ed. 1979); *see* BARRON'S LAW DICTIONARY 76 (1996) (defining "chose in action" as "a claim or debt upon which a recovery may be made in a lawsuit"). More specifically, choses in action have been recognized to include "rights to damages arising from the commission of torts." 7 TEX. JUR. 3D *Assignments* § 1 (1997); *see also* Browne v. King, 196 S.W. 884, 887 (Tex. Civ. App.—San Antonio 1917) (stating, "A chose in action is a right to damages, arising either from the commission of a tort, the omission of a duty, or the breach of a contract. A right or a suit for damages for personal injuries would be a chose in action. . . ."), *aff'd* 111 Tex. 330, 235 S.W. 522 (1921); BLACK'S LAW DICTIONARY 219 (5th ed. 1979) (providing that chose in action includes "[a] right to receive or recover a debt, demand, or damages on a cause of action *ex contractu* or for a tort or omission of a duty" (citing Moran v. Adkerson, 79 S.W.2d 44, 45 (Tenn. 1935))).

74. *Gandy*, 925 S.W.2d at 705. The court cites numerous sources in support of this proposition, including a work by Dean James B. Ames in which he referred to the early common law rule preventing the assignment of choses in action "as being one 'of the widest application' and 'a principle of universal law.'" *Id.* at 705–06 (quoting James B. Ames, *The Inalienability of Choses in Action*, *in* LECTURES ON LEGAL HISTORY 210, 211 (1913)).

75. *Id.* at 706.

that a cause of action was a personal right of redress, which if separated from its holder would "risk unjust prosecution of claims."[76] Second, the court described a transition period, between the fifteenth and eighteenth centuries, during which the common law's aversion to the assignment of choses in action gradually eroded, due primarily to the emergence of the principles of inheritance and attorney.[77] Third, the court recognized that by the time the common law passed to America, the rule against alienating choses in action had disappeared in all but certain cases involving personal injuries or torts.[78] Over time, even these lingering restrictions faded away in many jurisdictions, including Texas.[79] Thus, the court concluded that under modern Texas practice, tort claims generally may be assigned.[80]

Despite recognizing that modern practice usually permits the assignment of tort claims, the court noted that some of the common law's concerns about alienating choses in action remain viable.[81] The court then proceeded to analyze several modern decisions in which Texas courts had invalidated assignments of claims based upon such public policy grounds.[82] In this analysis, the court focused on four cases: (1) *Zuniga v. Groce, Locke & Hebdon*,[83] in which a client's assignment of his cause of action for legal malpractice was held invalid;[84] (2) *Elbaor v. Smith*,[85] in which Mary Carter

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76. *Id.* In its discussion of this second rationale behind the common law rule, the court explained that "[a] claim or cause of action was part of a right of redress that was personal to the holder by virtue of the injury suffered and thus incapable of transfer. . . . A right or obligation could not be enforced apart from its context without risking distortion." *Id.*

77. *Id.*

78. *Id.* at 706–07.

79. *Gandy*, 925 S.W.2d at 707.

80. *Id.*

81. *See id.* (observing that "[p]racticalities of the modern world have made free alienation of choses in action the general rule, but they have not entirely dispelled the common law's reservations to alienability, or displaced the role of equity or policy in shaping the rule.").

82. *Id.* at 707–11.

83. 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd).

84. *Zuniga*, 878 S.W.2d at 318. *Zuniga* involved a personal injury plaintiff who sued a ladder manufacturer and another defendant. *Id.* at 314. Prior to trial, the manufacturer's insurance carrier became insolvent, and the plaintiff agreed to settle in exchange for an assignment against the manufacturer's attorney, who had purportedly made the mistake of admitting partial liability during discovery. *Id.* The *Zuniga* court recognized that assignments of legal malpractice claims advanced two legitimate purposes: (1) allowing the de-

agreements were declared void as against public policy;[86] (3) *International Proteins Corp. v. Ralston-Purina Co.*,[87] in which it was held that a tortfeasor could not "take an assignment of a plaintiff's claim as part of a settlement agreement with the plaintiff and prosecute that claim against a joint tortfeasor;"[88] and (4) *Trevino v. Turcotte*,[89] in which the court invalidated an assignment of interests in an estate.[90] After addressing these cases, the court drew on their common characteristics and rationales to reach the conclusion that the policy incentives for promoting settlement are nonexistent, and

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fendant client to avoid damaging personal liability; and (2) ensuring compensation to the original plaintiff. *Id.* at 317. It concluded, however, that these advantages did not outweigh problems associated with such assignments. *Id.*

85. 845 S.W.2d 240 (Tex. 1992).

86. *See Elbaor*, 845 S.W.2d at 250. The *Elbaor* court defined a Mary Carter agreement to exist "when the settling defendant retains a financial stake in the plaintiff's recovery and remains a party at the trial of the case." *Id.* at 247. The court further explained that "[t]hese agreements acquired their name from a case out of Florida styled Booth v. Mary Carter Paint Co., 202 So.2d 8, 10–11 (Fla. App. 1967)." *Id.* at 242 n.3. Although the *Elbaor* court acknowledged that public policy generally favored settlements, it ultimately found that any benefits of partial settlement were outweighed by the tendency of Mary Carter agreements to promote further litigation, "skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment." *Id.* at 250. Accordingly, the Texas Supreme Court declared such agreements to be "void as violative of sound public policy." *Id.*

87. 744 S.W.2d 932 (Tex. 1988).

88. *See Gandy*, 925 S.W.2d at 710 (quoting International Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932 (Tex. 1988)). In *International Proteins Corp.*, the Texas Supreme Court addressed the issue of "whether a defendant, who settles with the plaintiff and takes an assignment of the plaintiff's cause of action, may prosecute the plaintiff's original claims against the remaining defendants." *International Proteins Corp.*, 744 S.W.2d at 933. The Court recognized that such an assignment had the practical effect of preserving a settling defendant's contribution rights against any nonsettling defendants, a practice which had been disallowed by its decision in *Beech Aircraft Corp. v. Jinkins* the previous year. *Id.* (citing Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19 (Tex. 1987)). Along these lines, the *International Proteins Corp.* court concluded:

> As a general rule a cause of action may be assigned, but it is contrary to public policy to permit a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed. . . . [The settling defendant] could settle only its proportionate share of liability and could not preserve a right to contribution by taking an assignment of [the plaintiff's] cause of action.

Id. at 934.

89. 564 S.W.2d 682 (Tex. 1978).

90. *See Trevino*, 564 S.W.2d at 690. In *Trevino*, the court refused to permit a will to be defeated by two parties who obtained standing as interested parties by acquiring minute interests via assignments that were purchased for the sole purpose of defeating the will. *Id.* at 690.

pretrial settlements are thus invalid, if they "tend to increase and distort litigation."[91]

The court was quick to point out that the assignment in *Gandy* was invalid for those very reasons. Initially, the court contended that the parties' settlement agreement and the assignment prolonged the litigation because there was no genuine opportunity for Gandy to collect the judgment through means other than filing the second suit against State Farm.[92] In support of this argument, the court recognized that the litigation "forged on" even *after* the trial judge determined that State Farm's policy placed it under no duty to defend the stepfather against Gandy's claims.[93]

Next, the court found that the settlement and assignment "greatly distorted the litigation that followed" by causing the parties to take contradictory positions during the course of the lawsuit.[94] For instance, the court spotlighted the changing positions taken by the stepfather, noting that he shifted: (1) from an initial outright denial of the abuse allegations; (2) to the entrance of a nolo contendere plea in the criminal case and the execution of an agreed judgment of over $6 million that recited "that he had abused Gandy 325 times in two years" in the civil case; and (3) back to a denial of the abuse allegations and an assertion that he would have proved his innocence if State Farm had provided a proper defense.[95] Similarly, the court recognized that Gandy was forced to change positions in order to establish damages in the assigned failure to defend cases. In her original suit against the stepfather, Gandy alleged damages of $50,000 per incident of abuse.[96] In preparing the agreed judgment, however, that figure was reduced to $12,500 per incident out of a belief that it represented a more realistic and accurate evaluation of the claim.[97] According to the court, if this second figure was actually a "fair evaluation" of the claim, then the stepfather "got exactly what was coming to him

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91. *Gandy*, 925 S.W.2d at 711.

92. *Id.* at 712. In fact, the court determined that the likelihood of ending litigation "was virtually nil" once Gandy sought to collect the $6 million agreed judgment against State Farm. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Gandy*, 925 S.W.2d at 712.

97. *Id.*

in the agreed judgment [and] was not damaged by his alleged lack of competent counsel."[98] Therefore, in order to collect damages against State Farm in the second suit, Gandy was again forced to change her stance—this time alleging that the "fair evaluation" of $12,500 per incident was much more excessive than it would have been had the stepfather received a proper defense.[99]

Although parties frequently take inconsistent stances at various stages of a lawsuit, they do so permissibly only when they have valid reasons that find support in the law. For example, the Texas Rules of Civil Procedure explicitly allow the practice of pleading in the alternative,[100] which is perhaps the most common situation in which a party will openly take inconsistent and varying positions. In *Gandy*, however, the court was presented with an entirely different type of situation, observing that "the parties took positions that appeared contrary to their natural interests for no other reason than to obtain a judgment against State Farm."[101] Previously, in *Zuniga*, the court reasoned that it was inappropriate for attorneys and litigants "to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching."[102] While the *Gandy* court did not cite *Zuniga* for this proposition, it similarly concluded that the financial motives of the parties provided insufficient justification for their shifting positions and the distorted litigation that followed.[103] On these particular bases alone, the court found ample reasons to invalidate the assignment at issue, but it nonetheless ventured to address the general practice of pretrial assignments of claims in insurance cases.

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98. *Id.*

99. *Id.*

100. TEX. R. CIV. P. 48; *see* Zimmerman v. First Am. Title Ins. Co., 790 S.W.2d 690, 698 (Tex. App.—Tyler 1990, writ denied) (recognizing that "[a] party may plead and prove totally inconsistent claims and defenses in Texas").

101. *Gandy*, 925 S.W.2d at 712.

102. *Zuniga*, 878 S.W.2d at 318; *see* Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1232 (1996) (reiterating that "[l]itigants should not be permitted to create facts or alter testimony based on the locale of 'deep pockets.'").

103. *See Gandy*, 925 S.W.2d at 712–13.

2. "Sweetheart Deals" in General

In the second part of its analysis, the court thoroughly examined the practice of assigning tort claims and the motives behind such assignments.[104] The assignment involved in *Gandy* was prototypical of settlement agreements that commentators derogatorily have labeled as "sweetheart deals."[105] As explained by the court in *Gandy*, the scenario giving rise to a typical sweetheart deal in the insurance context occurs when:

> [A] plaintiff, P, asserts a claim against a defendant, D, who requests his insurer, I, to provide a defense and coverage under a policy of insurance. I ordinarily has three options: to accept coverage of P's claim and provide D a defense, to provide D a defense but reserve the right to contest coverage, or to deny coverage and refuse a defense. D may accept a defense tendered with a reservation of rights, or he may insist that I first accept coverage. D may be concerned about the prospect of personal liability to P if I denies coverage, or the coverage issue remains unresolved, or I mishandles the defense, or I refuses P's offer to settle the claim within policy limits. The principal justification for a settlement arrangement like the one in this case is that it provides D a means of avoiding personal liability by assigning P his claims against I for coverage, negligent defense, and refusal to settle. In return, P agrees to limit D's personal liability. The arrangement is especially attractive to P when his claim against D is weak, or when his chances of full recovery against D are small.[106]

Having explained sweetheart deals in general, the supreme court next proceeded to criticize them for the difficulty they cause in accurately evaluating claims.[107] Although the court initially appeared to base its decision primarily on concerns over the potential for prolonged and distorted litigation,[108] this subsequent language in the opinion makes it difficult to tell whether those policy grounds truly outweighed the court's concern for ensuring a proper evalua-

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104. *See id.* at 713–15 (examining assignments and motives behind assignments).

105. Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH. L. REV. 139, 175 (1996) (defining "sweetheart deal").

106. *Gandy*, 925 S.W.2d at 713.

107. *See id.* at 713–14 (explaining how sweetheart deals tend to confuse and distort parties' positions).

108. *See* discussion *supra* Part II.C.1.

tion of the plaintiff's damages claim. In this later portion of the opinion, for example, the court hinted that a settlement and assignment in which the value of the plaintiff's claim was fairly determined would not be invalidated.[109] More explicitly, the court stressed that "[t]he *principal problem* with the arrangement [in *Gandy*] is that once it is made, D no longer has any incentive to oppose P."[110]

By characterizing the difficulties posed to the accurate evaluation of claims as the "principal" problem with sweetheart deals, the court momentarily clouds its rationale. It is possible, however, to mesh this portion of the court's analysis with its prior examination of public policy concerns in regard to assignments. These worries about ensuring the accurate evaluation of claims do not have to represent an entirely separate reason for invalidating the sweetheart deal, but instead may be reconciled with the court's policy concerns over prolonging and distorting litigation. Viewed from this slightly different perspective, the court's logic is actually rather simple. In essence, the court seems to have reasoned that the stepfather "created" his damages for the alleged failure to defend by entering into a settlement with Gandy. In other words, by agreeing to the $6 million consent judgment, the stepfather provided Gandy with the ammunition she needed to attack State Farm under the assigned failure to defend claims.[111] As a result, the settlement arrangement was destined to prolong litigation because it would invariably spawn a second suit in which the plaintiff-assignee would attempt to collect both the agreed damages and the "created" failure to properly defend damages from the defendant's insurer. According to the court, these created damages skew the litigation process, causing it to be based on what amounts to an "untruth."[112]

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109. *Gandy*, 925 S.W.2d at 714.

110. *Id.* at 713 (emphasis added). As pointed out by the court, this problem leads to difficulties in placing a value on a claim. *See id.* (explaining that "[a]ppraisal of a chose in action, never an easy task because of the lack of any objective measure or market, is all the harder when D ceases to oppose P.").

111. *See id.* at 712–13 (examining how inconsistent positions of parties were necessary to plaintiff's damages argument); *see also* discussion *supra* Part II.C.1.

112. *Gandy*, 925 S.W.2d at 712.

3. Important Dicta: The Court Attacks the Evidentiary Value of Consent Judgments

Ultimately, the court's concern over accurately evaluating claims culminated in a broad prohibition on plaintiff-assignees' use of consent judgments for evidentiary purposes in actions against insurance companies. In dicta immediately following its pronouncement of the three-prong test for invalidating assignments,[113] the court reiterated its concerns about the evaluation of claims by emphasizing that, absent a fully adversarial trial, a plaintiff could not use a defendant's consent judgment to prove damages in a case against the defendant's liability insurer.[114] In sum, the court concluded that if a settlement is reached after a full-blown trial, as opposed to before trial or after nothing more than a brief evidentiary hearing in which the defendant participates minimally, then it is reasonable to assume that the value of the judgment accurately reflects the value of the claim.[115] If, however, a fully adversarial trial is not held, then evaluation of the plaintiff's claims is more precarious, and any judgment rendered should not be relied upon to establish damages.[116]

This additional statement regarding the evidentiary value of *pretrial consent judgments* should not be confused with the court's preceding three-part test for invalidating *assignments*. Nonetheless, the two are closely related. A consent judgment, just like an assignment, is an integral part of a sweetheart deal. Thus, the court's condemnation of consent judgments merely reinforces its broader attack on plaintiffs' tactical use of sweetheart deals. In other words, this dicta reveals the court's strategy of attacking the whole (sweetheart deals generally) by chipping away at its component parts (assignments and consent judgments).

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113. *Id.* at 714; *see also* discussion *supra* Part II.B.
114. *Gandy*, 925 S.W.2d at 714.
115. *Id.* at 713.
116. *Id.*

III. FUTURE IMPLICATIONS OF *GANDY*

A. *Practical Effects of the Gandy Decision*

1. Effects on the Settlement of Insurance Claims

Having explored the rationale and policy concerns behind *Gandy*, it is interesting to prognosticate how this important case will alter the legal landscape in Texas. From a practical standpoint, those involved with personal injury and tort law agree that the effects of the *Gandy* decision will be felt most readily in regard to the defense and settlement of insurance claims.[117] These same individuals disagree, however, as to exactly what those effects will be. On the one hand, leaders in the insurance industry and members of the insurance defense bar proclaim that *Gandy* takes a significant step toward "counter[ing] the gamesmanship that forces insurance companies to settle."[118] These individuals apparently believe that *Gandy* will eliminate the potential for fraud and collusion that accompanies sweetheart deals, but that it will not otherwise affect the manner in which insurance companies approach their policyholders' claims. In contrast, consumer advocates and the plaintiffs' bar contend that *Gandy* will regrettably lead insurance companies to "walk away" from their insureds and leave them stranded without a defense.[119] Rather than a noble attempt to eliminate fraud from the settlement of insurance claims, they portray *Gandy* as nothing more than a veiled attempt to "protect insurers from liability beyond the policy limits."[120]

Both sides of this argument raise several valid points. The pro-plaintiff groups who oppose *Gandy*'s sweeping restrictions on insurance assignments contend that assignments are a valuable tool in settlement negotiations with insurance companies. Previously, plaintiffs could rely on the looming threat of entering into a sweet-

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117. *See* Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (recognizing agreement between defense and plaintiffs' attorneys that *Gandy* will cause "a change in the way insurance companies reach settlements and decide whether to defend an insured").

118. Walt Borges, *Supreme Court's Term Showcases Defendants' Landslide*, TEX. LAW., Aug. 5, 1996, at 19.

119. Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (quoting Houston attorney Reagan M. Brown).

120. *Id.* (quoting Houston appellate specialist Russell McMains).

heart deal as a means to coerce insurance companies to settle.[121] This ploy worked because insurers faced the risk of incurring serious legal and financial consequences if they erroneously chose not to provide a defense.[122] Most notably, insurance companies feared that they would be foreclosed from contesting a finding of liability and damages in the underlying suit.[123] As a result, insurers often found it cheaper, safer, and more efficient to settle the case than to litigate, and possibly lose, a later indemnification or failure to defend suit. In sum, critics of the decision seem to view the sweetheart deal as a necessary device that "levels the playing field" by adding an additional weapon to the plaintiff's arsenal, thereby helping to counter the significant resources and expertise of the often large and powerful insurance companies.[124]

Similarly, plaintiffs' advocates argue that assignments protect policyholders by increasing the financial stakes involved in an insured's decision not to defend.[125] When making settlement decisions prior to the supreme court's ruling in *Gandy*, insurers were

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121. *See id.* (noting that "[i]n the past . . . plaintiffs could use the threat of obtaining the assignment of a consent judgment to force insurance companies to settle").

122. *See* Karon O. Bowdre, *"Litigation Insurance": Consequences of an Insurance Company's Wrongful Refusal to Defend*, 44 DRAKE L. REV. 743, 758 (1996) (indicating that insurer's erroneous decision not to defend generally results in loss of "the right to challenge the insured's liability or the right of the injured party to recover"); *see also* Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (explaining that plaintiffs were able to utilize sweetheart deals as device to promote settlement because "an insurance company couldn't contest the finding of liability or damages that exceeded policy limits if it failed to defend the case"); Peter F. Mullaney, *Liability Insurers' Duty to Defend*, 68 WIS. LAW., July 1995, at 10 (listing estoppel from contesting coverage and liability beyond policy limits as possible consequence of insurer's failure to defend).

123. Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4.

124. *Cf.* American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 869 (Tex. 1994) (Hightower, J., dissenting) (recognizing "equalization of the contenders' strategic advantages" as relevant consideration when reviewing "tactical weapons developed by claimants and insurers" (citing Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 801 (Cal. Ct. App. 1964))).

125. *See* Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (explaining that "insurers fear assignment because it raises the financial stakes of failing to defend"); *see also American Physicians Ins. Exch.*, 876 S.W.2d at 868 (contending that use of sweetheart deals "provides insurers with a strong incentive to give due consideration to the interests of [their] insureds"). In a closely analogous situation, the United States Court of Appeals for the Fifth Circuit used a similar rationale to explain the need for a rule allowing insured defendants to settle with plaintiffs in exchange for a covenant not to execute in certain cases. Foremost County Mut. Ins. Co.

forced to factor the possibility of assignment into the financial equation when determining whether to provide a policyholder's defense. Specifically, when faced with the possibility of a sweetheart deal, insurers ran the risk of "paying higher damages and double legal costs" if they failed to provide a defense.[126] After *Gandy*, this disincentive to denying coverage has essentially disappeared. Plaintiffs now contend that "defending the carrier from a claim by its policyholder or the plaintiff as a judgment creditor may actually be less costly than providing two defenses under the old scenario."[127] This contention is valid, plaintiffs insist, because of the reality that "[i]f a carrier repeatedly rejects a defense, some policyholders won't choose to fight, others can't afford to and damages from the few remaining claims won't negate savings for the insurer."[128] Plaintiffs thus predict that the favorable economic consequences of this post-*Gandy* scenario will lead insurance companies to make conscious fiscal-based decisions to walk away from their policyholders.

In contrast, individuals supporting the decision believe the likelihood that insurance companies will abandon their policyholders is minimal, primarily because other aspects of the law, such as statutory penalties, attorneys' fees awards, and potential bad faith damages, already provide significant disincentives to denying

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v. Home Indem. Co., 897 F.2d 754, 759 (5th Cir. 1990). In *Foremost*, the court concluded that such a rule was essential for the protection of the insured, reasoning that:

> Where the insurer refuses to tender a defense, the insured often can protect himself only with a covenant not to execute. Without such a covenant, the insured either would have to pay the plaintiffs enough to settle their claim or would have to incur defense costs himself, even though the insurer is contractually responsible for payment of such costs. Were a covenant not to execute to absolve the insurer of liability, plaintiffs would have no incentive to enter into such a covenant.

Id. (citation omitted).

126. Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4. The increased legal costs were attributable to the likelihood of two court proceedings. *See id.* (noting that insurer's legal expenses after failing to offer defense were likely to arise "first in the suit versus the plaintiff and then on the subsequent failure to defend claims").

127. *Id.*; *see* Karon O. Bowdre, *"Litigation Insurance": Consequences of an Insurance Company's Wrongful Refusal to Defend*, 44 DRAKE L. REV. 743, 744 (1996) (contending that insurance company may find it advantageous to refuse defense rather than undertake defense that might subject it to tort liability).

128. Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4.

coverage.[129] Apparently, the *Gandy* court also held this same view.[130] To bolster its claim that its holding would not lead insurers to abandon their policyholders, the court offered the facts of the case before it, noting that State Farm volunteered to pay for the cost of defending the stepfather and mother even though the intentional acts of sexual abuse clearly were not covered under the homeowner's policy.[131] The faulty logic of using the factual scenario in *Gandy* to support this view is immediately apparent. *Gandy* provides an unreliable test model because State Farm made its decision to defend at a time when, among the various legal disincentives to an insurer's denial of coverage or a defense, the threat of assignments remained very real. The *Gandy* decision, however, has significantly altered this landscape by virtually eliminating pretrial assignments as a factor for insurers to consider when determining whether to deny coverage. In this sense, the court's use of the case before it as support is not much different than a scientist who chooses members of a control group to support a hypothesis because they already possess the desired characteristics he or she is seeking to prove. In other words, it is impossible to determine precisely what role the potential for assignment played in State Farm's decision to provide a defense to the *Gandy* defendants. Accordingly, the insurer's actions in the *Gandy* case provide little support for the court's contention that the threat of assignment is not needed.

The above criticisms of the decision do not imply that the court and commentators are wrong in their contentions, but only that the evidence they offer is inconclusive. It is still too early to tell which side is most correct in its assessment of how the practical implications of the *Gandy* decision will be felt. One thing that is clear, however, is that *Gandy* virtually eliminates plaintiffs' use of sweetheart deals. As a result, the decision limits plaintiffs' options and removes a factor that both sides previously took under considera-

129. *See Gandy*, 925 S.W.2d at 714 (naming several available penalties as proof that "[a]n insurer has ample disincentives to deny coverage or a defense without good reason"); Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (recognizing Insurance Code penalties and awards of attorneys fees as existing measures that dissuade insurance companies from abandoning policyholders).

130. *Gandy*, 925 S.W.2d at 714.

131. *Id.*

tion during the settlement of claims and the pretrial resolution of coverage issues.[132]

2. Extending *Gandy* to Other Cases and Scenarios: The Scope of the Decision

Another practical consequence of the *Gandy* decision will be its application and interpretation in future decisions of Texas courts. Because of the fairly recent nature of the decision, the precedential value of *Gandy* obviously has not fully developed. To date, the case has been cited in a relatively small number of opinions, most of which have simply made a cursory application of its holding.[133]

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132. *See* Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (discussing *Gandy* and classifying ability to enter sweetheart deals as "a 'golden apple' for the plaintiffs' bar that is now gone").

133. *See* Psarianos v. Kikis, 941 F.Supp. 79, 81 (E.D. Tex. 1996) (declaring that, according to *Gandy*, Texas law does not allow settling insured, who remains party at trial, to offset payments from judgment against insurer); Vinson & Elkins v. Moran, 946 S.W.2d 381, 389–90 (Tex. App.—Houston [14th Dist.] 1997, no writ) (referring to *Gandy* discussion of assignments of claims and citing *Gandy* for proposition that personal injury claims are assignable in Texas); American Eagle Ins. Co. v. Nettleton, 932 S.W.2d 169, 177 (Tex. App.—El Paso 1996, writ denied) (acknowledging conditions under which *Gandy* court invalidated defendants' assignment of claims against insurers to plaintiffs). A number of cases that have cited *Gandy* have failed to explain or expand upon its holding, or bolster its precedential value. *See, e.g.*, Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821 (Tex. 1997) (deferring to *Gandy* decision to determine amount of damages); Upton County v. Brown, No. 08–96–00378–CV, Aug. 21, 1997 WL 543129, at *6 (Tex. App.—El Paso Sept. 4, 1997, n.w.h.) (citing *Gandy* as case interpreting Survival Statute in Texas); Herzgog Contracting Corp. v. Burlington Northern R.R., No. 14–96–00864–CV, Aug. 21, 1997 WL 473681, at *2 (Tex. App.—Houston [14th Dist.] 1997, n.w.h.) (not designated for publication) (adopting *Gandy* position that defendant can "settle only his proportionate share of the common liability of the plaintiff's cause of action"); Texas Property and Cas. Ins. Guar. Ass'n v. Boy Scouts of America, 947 S.W.2d 682, 692 (Tex. App.—Austin 1997, no writ) (noting Texas Supreme Court's disapproval in *Gandy* of notion that insurers cannot collaterally attack agreed judgments after wrongfully failing to defend claims); McGee v. McGee, 936 S.W.2d 360, 363 n.3 (Tex. App.—Waco 1996, writ denied) (recognizing *Gandy* but failing to address its implications due to failure of either party to raise issue); State Farm Lloyds Ins. Co. v. Maldonado, 935 S.W.2d 805, 811 n.5 (Tex. App.—San Antonio 1996, writ granted) (acknowledging potential for *Gandy* argument, but declining to apply case because of parties failure to preserve objection to assignment); State Farm Lloyds, Inc. v. Williams, 933 S.W.2d 740, 743 n.15 (Tex. App.—Dallas 1996, no writ) (concluding that *Gandy* was not controlling due to factual distinctions), *withdrawn*, No. 05–93–00191–CV, 1997 WL 531027 (Tex. App.—Dallas, Aug. 29, 1997); Polinard v. USAA, No. 04-95-00425-CV, 1996 WL 460040, at *4-*5 (Tex. App.—San Antonio Aug. 14, 1996, no writ) (not designated for publication) (finding that pretrial assignment was not violative of public policy under *Gandy* because second and third elements of invalidation test were absent, while recognizing that judgment in underlying cause did not constitute evidence of damages due to lack of fully adversarial trial); *see also* Continental Cas. v. Westerfield, 961 F. Supp.

Nevertheless, it is highly unlikely that *Gandy* will continue to go largely unnoticed by courts and litigants, given the scope and magnitude of the decision.

The rather egregious circumstances surrounding the settlement agreement and assignment in *Gandy* invited a broad ruling, and the court took advantage of that opportunity. However, the sweeping nature of the decision has come under attack from some critics. For example, Justice Craig Enoch, who has been referred to as "one of the court's most conservative members,"[134] has called the opinion's broad pronouncements into question. In his concurring opinion, Justice Enoch saw no reason for the majority to "move beyond criticism of assignments of claims in duty to defend cases and attack prejudgment assignments in insurance cases generally."[135] Instead, he viewed the fact scenario in *Gandy* as a much narrower situation analogous to the assignment of a legal malpractice claim[136] and, therefore, invalid under the *Zuniga* decision.[137] Moreover, he went so far as to question the accuracy of some of the court's extraneous discussions.[138] In essence, Justice Enoch offered a more direct route to invalidating the *Gandy* assignment that did not involve a broad attack on prejudgment insurance assignments in general.

1502, 1506 (D.N.M. 1997) (affirming *Gandy* position that Mary Carter-like agreements prolong litigation and distort issues); Cunningham v. Goettl Air Conditioning, Inc., No. 1 CA-CV 96-0233, 1997 WL 633728, at *5 (Ariz. App. Div. 1 Oct. 16, 1997) (upholding settlement agreement absent evidence of collusion or fraud consistent with *Gandy* opinion); Costello v. Lytle, No. 96-C-187, 1996 WL 666686, at *2-*3 (N.D. Ill. Nov. 14, 1996) (not designated for publication) (discussing *Gandy* but finding it inapplicable to facts of case); Keightley v. Republic Ins. Co., 946 S.W.2d 124, 129 (Tex. App.—Austin 1997, no writ) (citing *Gandy* to support proposition that law imposes duty of ordinary care upon individual who voluntarily undertakes course of action affecting interest of another), *withdrawn*, No. 03-06-00073-CV, 1997 WL 420787 (Tex. App.—Austin, July 24, 1997); McLaughlin v. Martin, 940 S.W.2d 261, 263 (Tex. App.—Houston [14th Dist.] 1997, no writ) (citing *Gandy* in support of decision to invalidate assignment of legal malpractice claim).

134. Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4.

135. *Gandy*, 925 S.W.2d at 720 (Enoch, J., concurring).

136. *Id.* Justice Enoch made this analogy by reasoning that "[t]he essence of [the stepfather's] claim is that had he been properly defended, he would have received a more favorable result in his lawsuit." *Id.*

137. *Id.* For a discussion of the *Zuniga* decision, *see supra* notes 83-84, 102 and accompanying text.

138. *See Gandy*, 925 S.W.2d at 720 (Enoch, J., concurring) (writing that "[t]he Court need not enter into these additional discussions to resolve this case, and I am not confident that the conclusions implicit in these discussions are correct.").

A more narrow approach, such as that suggested by Justice Enoch, would probably avoid some of the problems inherent in the court's sweeping decision. This is not to suggest that a broad ruling does not have some advantages. Admittedly, a judicially administrable decision that is broadly applicable in a wide variety of contexts may be beneficial. In fact, courts have recognized that administrative convenience and efficiency are highly relevant public policy considerations.[139] Therefore, in an already backlogged court system, the guidelines provided by a rule such as the three-part test in *Gandy* may prove to be beneficial in streamlining litigation and conserving the use of judicial resources.

Despite their good intentions, specific rules that are meant to be systematically applied to a wide range of fact scenarios are not always the best approach and can sometimes lead to unintended and unfair results.[140] In the famous case of *Rowland v. Christian*,[141] for example, the California Supreme Court chose to discard the deeply entrenched common law distinctions between trespassers, licensees, and invitees in premises liability cases.[142] Finding that these distinctions were outdated, arbitrary, and inflexible, the California court severely criticized them for producing much confusion and conflict.[143] In time, the broadly applicable yet rigid three-part test

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139. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 6 (1994) (discussing administrative convenience and efficiency and avoidance of "intractable inquiries" as public policy objectives of tort law); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 23–24 (5th ed. 1984) (examining convenience of administration as policy underlying tort law). *But see* Boyles v. Kerr, 855 S.W.2d 593, 612–13 (Tex. 1993) (Doggett, J., dissenting) (criticizing majority's reliance on administrative efficiency concerns as grounds for denying injured plaintiff's cause of action).

140. For example, consider the common law principle of contributory negligence. This common law rule was very predictable and administratively efficient, for *any* negligence on the plaintiff's part served as a 100% bar to recovery. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 15 (1994). In time, however, it was recognized that the administrative ease of applying this doctrine did not outweigh its fundamental unfairness in many cases. *Id.* As a result, the doctrine was modified or abrogated in favor of comparative principles in most jurisdictions. *Id.* at 15–16.

141. 443 P.2d 561 (Cal. 1968).

142. *Rowland*, 443 P.2d at 567. These common-law distinctions survived for as long as they did, in part, because they promoted administrative efficiency. *See* Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 18 (discussing "administrative function" of common law premises categories), *reprinted in* A TORTS ANTHOLOGY 145, 146 (Lawrence C. Levine et al. eds., 1993).

143. *Rowland*, 443 P.2d at 566–67; *see* Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L.

in *Gandy* may prove to yield comparably disappointing and unintended results.

Additionally, similar to Justice Enoch's concerns, the *Gandy* court's broad ruling unnecessarily creates new questions and potentially opens the door for increased litigation. In particular, although the court explicitly sets forth the three-prong test, it leaves many issues regarding the test's application largely unresolved. For example, it is unclear as to what will suffice to meet the test's first requirement that an assignment may not be "made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial."[144] In view of the requirement that the proceeding be "fully adversarial," it seems fairly certain that this phrase does not encompass a "friendly trial" or an agreed judgment.[145] Other situations are less clear. By definition, a "trial" is a "judicial examination of issues between parties . . . before a court that has jurisdiction over the cause."[146] More specifically, in an unpublished opinion that appears to offer one of the only attempts to interpret this phrase, a dissenting justice of the San Antonio Fourth Court of Appeals reasoned that a "fully adversarial trial" is the equivalent of an "actual trial."[147] In evaluating these definitions, several problem areas become apparent. Especially troublesome are those circumstances in which the court's policy justifications for

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REV. 15, 16 (criticizing premises liability status categories as "complicated, intricate and overlapping rules and exceptions with embarrassing ambiguities and inconsistencies"), *reprinted in* A TORTS ANTHOLOGY 145, 145 (Lawrence C. Levine et al. eds., 1993).

144. *Gandy*, 925 S.W.2d at 714.

145. *See* Emscor Mfg., Inc. v. Alliance Ins. Group, 879 S.W.2d 894, 908 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (declaring that "actual trial" requires more than mere "prove up," "friendly suit," or "consent judgment"); Wright v. Allstate Ins. Co., 285 S.W.2d 376, 379–80 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.) (explaining that phrase "judgment following actual trial" presupposes "a *contest* of issues leading up to final determination by court or jury, in contrast to a resolving of the same issues by agreement of the parties"); *see also* State Farm Lloyds Ins. Co. v. Maldonado, 935 S.W.2d 805, 825 (Tex. App.—San Antonio 1996, writ granted) (Rickhoff, J., concurring and dissenting) (contending that there was no "fully adversarial trial" based on "absence of objections, the absence of cross-examination, and the insured's failure to present a defense or any mitigating evidence").

146. BARRON'S LAW DICTIONARY 23 (1996); *see also* BLACKS LAW DICTIONARY 1348 (5th ed. 1979) (defining trial as "[a] judicial examination . . . of the issues between the parties . . . before a court that has proper jurisdiction").

147. *See Maldonado*, 935 S.W.2d at 805 (Rickhoff, J., concurring and dissenting) (reasoning that Gandy decision can be implied to define "fully adversarial trial" in same manner as "actual trial").

banning pretrial assignments of claims, particularly its concerns over the accurate evaluation of claims,[148] dissipate or are no longer viable. Consider, for instance, a default judgment in which the plaintiff presents evidence, a grant of summary judgment, or a settlement agreement reached outside of court through mediation or arbitration. Even court-ordered mediation and ADR, both of which are commonly used, seem to fall outside the ambit of these definitions. In all of these cases, concerns about ensuring accurate evaluation of the claims are negligible. Moreover, unlike the arrangement in *Gandy*, these procedures do not tend to promote or distort litigation.[149] Yet, none of these situations clearly falls within the literal definition of a "fully adversarial trial," either because they are nonadversarial in nature or because they take place outside of the courtroom.

Similar problems also arise in regard to other prongs of the *Gandy* test. The court was vague, for instance, in setting forth subpart (b) of the third prong, which requires the defendant's insurer to make "a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim."[150] In the *Gandy* case, State Farm merely investigated the claims and sent the defendants a letter agreeing to defend them under a reservation of rights.[151] The Texas Supreme Court did not label this effort as insufficient and, implicitly, found it sufficient to fulfill the third requirement for invalidation.[152] In a side note, the court discussed the availability of a declaratory judgment as a desirable method to resolve coverage issues before liability is incurred in the plaintiff's underlying suit.[153] The court's mention of declaratory judgments has led at least one

148. *See Gandy*, 925 S.W.2d at 713–14 (stating that problem with assignments of claims is resulting difficulty in valuating claims); *see also supra* notes 110–12 and accompanying text.

149. Instead, settlement procedures such as mediation are intended to do just the opposite by promoting fair and cost-efficient resolution of controversies. *See* Mark Brewster et al., Recent Development, 19 ST. MARY'S L.J. 507, 514, 518 (1987) (commenting that ADR is "designed to aid parties in . . . settling their disputes out of court" and that mediation guides parties "towards reconciliation and settlement"); *see also* Mark A. Cohen, *Lawyers Applaud New ADR Process at MCAD—Time, Cost Savings Seen in 'Landmark' Effort*, MASS. LAW. WKLY., Nov. 11, 1996, at A1 (describing benefits of new ADR program allowing parties to resolve cases through mediation or arbitration).

150. *Gandy*, 925 S.W.2d at 714.

151. *Id.* at 698–99.

152. *Id.* at 714.

153. *Id.*

commentator to doubt whether the actions taken by State Farm would be sufficient in future cases. This commentator has suggested that a declaratory judgment represents the proper method for an insurer to meet the third requirement of the *Gandy* test.[154]

Confusion also derives from the court's recognition that sweetheart deals are not limited to the basic format found in *Gandy*, but can arise in an wide variety of forms and contexts.[155] Although the court condemned this particular assignment as a "sham" and a "fraud,"[156] it left open the possibility, albeit a small one, that some sweetheart deals may serve valid purposes without violating public policy.[157] Similarly, the court announced that it had not decided what would happen if an assignment lacked one of the test's three conditions for invalidation.[158] Again, as referred to briefly in Part II.C.3. of this Article, the court confused matters when it added that "[i]n no event . . . is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee."[159] As made clear by the discussion below, this additional language basically forecloses the likelihood that any sweetheart deals—even those serving apparently legitimate purposes—will survive in light of *Gandy*.

In the absence of a "fully adversarial trial," it now appears that two things occur: (1) the first prong of the three-part test is met; and (2) an agreed judgment is unequivocally invalid under the

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154. *See* Walt Borges & Janet Elliott, *Supreme Court Throws out Some Insurance Assignments*, TEX. LAW., July 22, 1996, at 4 (advising that, in order to undercut assignment, insurance companies should secure declaratory judgment on coverage).

155. *See Gandy*, 925 S.W.2d at 713 (acknowledging that settlement arrangements such as that in present case may be used outside insurance context); *see also* Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1237 (1996) (providing examples of ways litigants might utilize assignments against liability insurance carriers when settling cases and noting that those examples "are subject to imaginative variations").

156. *Gandy*, 925 S.W.2d at 713.

157. *See id.* at 714 (writing that "[n]ot every settlement involving an assignment of rights in exchange for a covenant to limit the assignor's liability has the problems we have described. . . . We should not invalidate a settlement that is free from this difficulty [in evaluating claims] simply because it is structured like one that is not.")

158. *See id.* (declining to "address whether an assignment is also invalid if one or more of these elements is lacking.").

159. *Id.*

court's additional statement. A plaintiff obviously has no real incentive to enter a sweetheart deal if the consent judgment the plaintiff receives from the defendant is unenforceable and holds no evidentiary value. In some instances the practical effect of the court's additional statement is to elevate the requirement of a fully adversarial trial to the most important consideration in the invalidation not just of consent judgments, but of sweetheart deals in general. Such a result may contradict the court's claim that it is leaving unresolved the issue of whether an assignment that is missing one of the test's three prongs will be invalidated. Stated bluntly, because this result excludes some situations in which sweetheart deals might be desirable, the court contradicts its reassurance that it did not intend to undercut a settlement that is entered for valid reasons and in compliance with public policy "simply because it is structured like one that is not."[160] For example, consider the following situation presented by one commentator:

> [T]he insurer rejects the claimant's settlement demand within policy limits before suit is filed. The claimant then files suit against the insured, and the insurer fails to ensure an answer is timely filed, resulting in the rendition of a default judgment in excess of policy limits. After learning of the default, the insurer retains defense counsel to attempt to set aside the default on behalf of the insured. Before the default is set aside, plaintiff's counsel makes a proposal to the insured for a sweetheart deal.[161]

In this scenario, it would probably be in the insured defendant's best interest to sign on to the deal in order to protect himself or herself from potential liability above policy amounts.[162] In addition, the wrongful conduct of the insurer, particularly in breaching its *Stowers*[163] duty by failing to settle within policy limits, seems to justify the defendant's actions. In sum, the sweetheart deal in this

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160. *Id.*

161. Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH. L. REV. 139, 175 (1996).

162. *See id.* (explaining that in sweetheart deal claimant agrees not to seek damages from insured). The *Gandy* court even acknowledged that public policy concerns over sweetheart deals "must be balanced against the advantage to D of having a means of avoiding personal liability to P." *Gandy*, 925 S.W.2d at 714.

163. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

scenario serves a valid purpose and does not seem repulsive to public policy.

If the three-part test of *Gandy* was applied to this scenario, then it does not appear that the second prong for invalidating the assignment would be met because the insurer failed to tender a proper defense.[164] Accordingly, the arrangement would not be voided automatically, and a reviewing court might uphold the arrangement under one of the small "windows" left open in *Gandy*.[165] In practice, however, the court would never have the opportunity to decide the case on such a basis. Once again, the court's additional statement, by abolishing the evidentiary value of pretrial consent judgments, would eliminate virtually all probability that a plaintiff would enter into the deal *in the first place.* Therefore, despite the apparently innocuous nature of this scenario, the failure to conduct a fully adversarial trial would likely nullify any possibility that a sweetheart deal would arise.

3. A Proposed Approach to Interpreting *Gandy*

In cases such as those addressed above, courts will be presented with a quandary, for while the policy justifications behind *Gandy* would be inapplicable, the clear language of the decision would appear to ban a defendant's assignment of claims to the plaintiff. It is unclear how future courts will approach these issues because the *Gandy* court failed to provide explicit guidelines or to set clear parameters for its decision. A decision to apply strictly the three-part test and the dicta immediately following it according to their plain language basically would eliminate all pretrial assignments regardless of their safeguards, and would not be a surprising choice given the current pro-defendant slant of Texas courts. A better approach, and one that would further the policy goals behind the *Gandy* decision, may be for courts to borrow a canon of construction that they commonly employ when interpreting the legislative intent behind a civil statute. The Texas Government Code instructs that courts engaged in statutory interpretation shall attempt to de-

164. *See Gandy*, 925 S.W.2d at 714 (stating second part of test for invalidating assignment as whether "defendant's insurer has tendered a defense").

165. These "windows" refer to the aforementioned statements by the court that suggested its intention to leave open the possibility that some sweetheart deals may be valid. *See supra* note 160 and accompanying text.

termine the legislature's intent and shall "consider at all times the old law, the evil, and the remedy."[166] In the *Gandy* case, the Texas Supreme Court explicitly sets forth the historical law of assignments, addresses the "evils" to be cured,[167] and suggests a remedy,[168] such that future courts would have little problem applying a comparable method of interpretation. More importantly, the application of this principle to future cases would go a long way toward eliminating ambiguity and preventing results that contradict the supreme court's stated intentions.

B. *Theoretical Implications: Policies Shaping Tort Law*

Despite the uncertainties in the *Gandy* opinion, its clear expression of disfavor with sweetheart deals likely indicates that, in the future, Texas courts will be inclined to rule against plaintiffs in different but closely related scenarios. Therefore, beyond its practical implications, *Gandy* is also significant on a much broader level because the theoretical underpinnings of the decision reveal both the Texas Supreme Court's continued shift to the conservative right and its current policy priorities in tort cases. In order to appreciate the underlying policy implications of *Gandy*, it is first necessary to consider a few preliminary observations about the manner in which courts' decisions have traditionally reflected and been guided by public policy considerations.

1. General Overview of Tort Law and Policy

Numerous public policy objectives have played important roles in shaping tort law.[169] Among these multifarious objectives, no sin-

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166. TEX. GOV'T CODE ANN. § 312.005 (Vernon 1988). *E.g.*, Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1, 908 S.W.2d 415, 421 (Tex. 1995); City of San Antonio v. San Antonio Park Rangers Ass'n, 850 S.W.2d 189, 191 (Tex. App.—San Antonio 1992, writ denied); Dallas Mkt. Ctr. Dev. Co. v. Beran & Shelmire, 824 S.W.2d 218, 221 (Tex. App.—Dallas 1991, writ denied); *see also* Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980) (construing provisions of DTPA by considering old law, evil and remedy).

167. The primary "evils" addressed in *Gandy* were the court's public policy concerns over prolonged and distorted litigation. *Gandy*, 925 S.W.2d at 715.

168. Specifically, the "remedy" is the three-part test for invalidating assignments. *Id.* at 714.

169. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 4–7 (1994) (outlining several public policy arguments that have historically influenced tort law); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 15,

gle policy clearly dominates,[170] but "some [policy] arguments have been invoked with such regularity that their historical significance cannot be ignored."[171] Court decisions sometimes reveal these common policy objectives through direct statements of their rationale and, as a result, the influence of public policy can be quite noticeable at times.[172] In other instances, its influence is more oblique. Yet, even in those cases in which courts do not discuss policy goals explicitly,[173] commentators contend that they often can be implied from more general statements, or even found in silence.[174] Therefore, because tort law is inextricably intertwined with public policy, the *Gandy* decision can provide valuable insights for Texas practitioners—both expressly, through its announced policy statements, and implicitly, through either its general tenor or its silence.[175]

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§ 4, at 20–25 (5th ed. 1984) (labeling tort law as "battleground of social theory" and discussing various considerations affecting tort liability).

170. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20 (5th ed. 1984) (cautioning that no single tort policy objective "is of such supervening importance that it will control the decision of every case in which it appears").

171. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 4 (1994).

172. *See* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–1 (1984) (noting that judges sometimes specify policy goals upon which they base tort decisions).

173. *See id.* (recognizing that courts sometimes fail to announce tort policy goals shaping their decisions). The ABA Committee explained:

> Sometimes judges articulate these goals; often, it is left to commentators and critics to attempt to discover the 'rationale' for judicial decisions. Courts deciding tort cases, like courts dealing with the entire range of litigation, do not always identify the broad premises that lead them to judgment. It is not unusual to read opinions that string together logically connected sets of legal propositions without referring to underlying rationales.

Id.; *see also* PAGE KEETON & ROBERT E. KEETON, TORTS: CASES AND MATERIALS 759 (2d ed. 1977) (pointing out that tort opinions generally focus on interests of individual litigants and "tend to leave unstated some basic premises on which they depend").

174. *See* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–1 (1984) (explaining that sometimes commentators and critics must discover reasons underlying judicial decisions); *see also* PAGE KEETON & ROBERT E. KEETON, TORTS: CASES AND MATERIALS 759 (2d ed. 1977) (proposing that study of judicial opinions can uncover unarticulated tort policies).

175. *See* ABA SPECIAL COMM, ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–1 (1984) (indicating that legal commentators and critics are often left with job of uncovering policy justifications in tort cases); *cf.* VINCENT R.

Applying the aforementioned principles to *Gandy*, several policy concerns become apparent. First, the court expressly stresses the need to avoid prolonging litigation.[176] Coupled with the court's broad ruling and specific three-part test, this concern likely signifies a strong consideration for administrative efficiency. Second, the limitations placed on assignments and the concerns about accurately appraising damages suggest the powerful influence exerted by the policy goal of apportioning liability according to fault. Third, in a refreshing approach, the court emphasizes the need to maintain the integrity of the trial process and the goal of the law as a search for the truth in its discussion of the parties' shifting positions.[177] Finally, it is through silence that the court reveals perhaps its strongest policy statement, for it makes no apparent effort to address the fundamental and long-standing tort policy of compensating the plaintiff for his or her injuries. From this omission, one can arguably discern a significant decline in the importance of compensation as a guiding principal behind the resolution of torts cases in Texas.

2. The Reduced Importance of Ensuring Compensation to the Plaintiff

From the start, it is clear that the *Gandy* case involved a search for some way, any way, to compensate the plaintiff for her injuries. *Gandy* offers a classic example of artful pleading in an attempt to reach the "deep pockets" of State Farm. Inasmuch as the State Farm homeowner's policy excluded intentional conduct from its coverage, and because the stepfather was essentially "judgment proof,"[178] it was crucial for Gandy to frame her cause of action in terms of negligence if she hoped to recover under the insurance policy. Apparently recognizing that her tort claims were beyond the scope of insurance coverage, Gandy next sought and obtained a consent judgment and an assignment of claims from her stepfa-

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JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (1994) (suggesting that "[m]uch of tort law can be understood in terms of the congruence and competition between [public] policies").

176. *See Gandy*, 925 S.W.2d at 710 (reiterating court's assertion that settlements which discourage further litigation are preferred over those which prolong litigation).

177. *Id.* at 708 (criticizing shifting positions of parties for obscuring goal of discovering truth).

178. *See id.* (noting stepfather's "impecunious circumstances").

ther.[179] Again, she was attempting to reach a solvent defendant, and again her attempt was thwarted.

It is not all that surprising that Gandy was left uncompensated. Under the facts of the case, State Farm did not appear to bear any culpability. The stepfather's tortious conduct clearly was not covered by its policy, and the insurer willingly agreed to fund its policyholders' defenses. Although State Farm was potentially liable for a failure to properly defend,[180] those claims seemed "shaky" at best, and were overshadowed by the questionable conduct of the settling parties, who took inconsistent positions and forged the settlement without notice to the insurer. Viewed from this perspective, the court's decision seems to be based largely on a settled principle of tort law, namely that of limiting the defendant's liability in proportion to fault.[181] When viewed *solely* from the perspective of fault-based principles, State Farm's relatively innocent behavior suggests that the court reached the correct end result. Such a one-dimensional approach does not provide a complete picture of the court's rationale, however, because numerous and often unspoken policy interests shape tort decisions.[182] Moreover, the mere fact that the court reached the right result does not necessarily mean that it did so for the right reasons.

Commenting on this 'right result/wrong reason' dilemma, a former Texas Supreme Court justice once wrote that "[a] court should not . . . discard established principles of tort law sub silentio in an attempt to reach a 'right' result."[183] Yet, by omitting a discussion of the well-established tort policy favoring compensation to the plaintiff from its opinion, the *Gandy* court appears to have done just that. This omission becomes even more disconcerting when one considers that, not too long ago, ensuring compensation for the plaintiff's injuries was widely heralded as one of the main,[184] if not

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179. *Id.* at 700–03.

180. It should be noted that the jury found that State Farm acted negligently and in violation of the DTPA. *Id.* at 704.

181. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 377–429 (1994) (discussing notion of limiting defendants liability to proportion and fault as important principle of tort law).

182. *See supra* notes 169–77 and accompanying text.

183. Nelson v. Krusen, 678 S.W.2d 918, 930 (Tex. 1984) (Robertson, J., concurring).

184. *See* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–29 (1984) (denoting compensation as "one of the main

the main,[185] policy concerns of tort law. Policy concerns over compensating the plaintiff were reflected in and served as perhaps the primary motivating factor behind the rise of relatively modern theories such as strict liability,[186] enterprise liability,[187] joint and sev-

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announced goals of tort law"); PAGE KEETON & ROBERT E. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 2 (2d ed. 1977) (citing "concern with compensation" as influential factor behind tort law); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20 (5th ed. 1984) (asserting that "[a] recognized need for compensation is . . . a powerful factor influencing tort law"); *see also* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 11.5, at 99 (2d ed. 1986) (listing compensation theory as possible objective of tort law); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (1994) (identifying full compensation of accident victims as important policy goal of tort law).

185. *See* United States *ex rel.* Jones v. Rundle, 453 F.2d 147, 151 n.11 (3d Cir. 1971) (writing that "the underlying philosophy of tort law . . . [is] that the plaintiff should be compensated for the harm he has suffered."); *Nelson*, 678 S.W.2d at 932 (Kilgarlin, J., concurring and dissenting) (stating that "tort law's primary purpose is compensation for wronged plaintiffs"); Seattle First Nat'l Bank v. Shoreline Concrete Co., 588 P.2d 1308, 1312 (Wash. 1978) (announcing that "[t]he cornerstone of tort law is the assurance of full compensation to the injured party."); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1766 (1996) (declaring that "[p]rogressive reformists' hallmark concern for plaintiff compensation dominated tort reform ideas until the late 1960s"); *see also* E. ALLAN FARNSWORTH, INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 113 (2d ed. 1983) (indicating that "[t]he essential purpose of the law of torts is compensatory."). *But see* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1266 (Ill. 1977) (Ryan, J., dissenting) (criticizing majority for prioritizing "compensation of the individual above all other considerations"). An early and often vocal proponent of the compensatory principle of tort law, Professor Fleming James once wrote that "the cardinal principal of damages in accident cases is—in fact as well as theory—that of compensation." Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 583 (1956). Although Professors Prosser and Keeton doubt the accuracy of labeling compensation as tort law's main objective, they nonetheless recognize that "[i]t is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20 (5th ed. 1984). Courts and commentators have traced the underlying compensation theory of tort law far back into history. *See* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–29 (1984) (stating that tort law's goal of compensating plaintiff "has deep historical roots"); *see also* Bullerdick v. Pritchard, 8 P.2d 705, 706 (Colo. 1932) (referring to ancient authorities such as Code of Hammurabi in support of goal of fully compensating plaintiff for injuries).

186. *See* Note, *'Common Sense' Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1766–67 (1996) (recognizing desire to ensure compensation as motivating factor behind growth of pro-plaintiff developments such as strict liability); *see also* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703 (1980) (acknowledging that compensation theory was "embraced enthusiastically by courts and commentators seeking to justify the development of strict products liability"), *reprinted in* A TORTS ANTHOLOGY 357, 358 (Lawrence C. Levine et al. eds., 1993).

eral liability,[188] and market share liability.[189] Moreover, remembering that courts do not always announce the policy considerations guiding their decisions,[190] concerns about compensation can be reasonably implied from judicial and legislative actions that

187. *See* Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 467 (1996) (labeling compensation as "central" to theory of enterprise liability). Professor George Priest once explained that the concept of enterprise liability "provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce." George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985), *reprinted in* A TORTS ANTHOLOGY 348, 349 (Lawrence C. Levine et al. eds., 1993); *see* Kenneth W. Simons, *Doctrinal Change in Tort Law: Some Methodological Musings*, 26 GA. L. REV. 757, 767 (1992) (explaining enterprise liability as "the view that tort law should provide insurance against the risks of accidents, should achieve safety by having the entity that controls a risk internalize its costs, and should allocate liability without relying on contract law"); *see also* Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 3 n.1 (1991) (addressing enterprise liability theory); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 634 (1992) (outlining basic tenets of enterprise liability). Closely related to enterprise liability is the concept of social insurance. Not surprisingly, social insurance, which is reflected in systems such as workers compensation, also finds its genesis in concerns over compensating accident victims. *See* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 13.1, at 128–29, § 13.2, at 132–33 n.7 (2d ed. 1986) (recognizing compensatory function of workers compensation schemes and explaining social insurance to include "any plan for administering accident losses, however funded or administered, which is mandatory, which provides for compensation to accident victims based more on insurance principles than on fault principles, and which accomplishes a significant spreading of losses").

188. *See* Note, *'Common Sense' Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1775–76 (1996) (stating that plaintiffs "championed joint and several liability because it . . . ensured that plaintiffs received full compensation for their injuries").

189. *See* Sindell v. Abbott Lab., 607 P.2d 924, 936–37 (Cal. 1980) (ensuring compensation to plaintiff by allowing recovery of damages despite plaintiff's inability to identify which particular defendant manufactured product in question). Although a desire to ensure that injured plaintiffs did not go uncompensated can be implied from the theory of market share liability, the *Sindell* court is more explicit in promoting the closely-related policy of shifting losses to deeper pockets. *See id.* (justifying decision to impose market share liability based on view that "defendants are better able to bear the cost of injury resulting from the manufacture of a defective product"); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 718 (1996) (contending that "*Sindell* represented the crest of the wave of judicial tort reform that favored reallocating injury from the injured to corporate wrongdoers"); *see also infra* notes 192–98 and accompanying text.

190. *See* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–1 (1984) (stating that courts do not always specify rationales underlying their decisions).

made it easier for plaintiffs to prevail, such as the elimination of common law immunities and the abolishment of contributory negligence as a strict bar to recovery.[191]

With the increased focus on compensation, makers of tort law also looked for new ways to ensure that plaintiffs received redress. Thus, closely related to the tort policy of compensation, and also influential in the pro-plaintiff movement, were the concepts of shifting and spreading losses.[192] In fact, the concepts of compensation, loss shifting, and loss spreading are so interdependent that it is possible to group them together, for purposes of this Article, under the single rubric of "compensation."[193] In this respect, com-

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191. *See* Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992) (commenting on "abrogation of contributory negligence and similar defenses"); *see also* 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 23.8, at 449 (2d ed. 1986) (using compensation theory to justify argument that contributory negligence of injured spouse or child should not bar loss of consortium action brought by parent or spouse). Professors Harper, Fleming, and James propound that "[s]urely compensation for so real an injury as the parent's or spouse's should not be barred by a questionable extension of the least defensible rule (contributory negligence) among the concepts associated with fault." *Id.* at 447.

192. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5 (1994) (analyzing shifting and spreading rationales as policy objectives of tort law). The shifting rationale, also known as the "deep pockets" theory, seeks to allocate losses to those parties best able to bear them. *Id.*; *see* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 24 (5th ed. 1984) (stating that policy considerations involving parties' capacities to bear or distribute losses have played role in "the general extension of the tort law to permit more frequent recovery in recent years"); *see also* Andrew James Schutt, Comment, *The Power Line Dilemma: Compensation for Diminished Property Value Caused by Fear of Electromagnetic Fields*, 24 FLA. ST. U. L. REV. 125, 152–53, 160 nn.225–26 (1996) (discussing theory of loss shifting). The theory behind loss shifting is that "a loss will be less severely felt if it is placed on one with substantial resources than on one with limited wealth." VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5 (1994). The spreading rationale emerges as a corollary to the shifting principle and reasons that "the financial burden of accidents may be diminished by spreading losses broadly so that no person is forced to bear a large share of the damages." *Id.*; *see* Andrew James Schutt, Comment, *The Power Line Dilemma: Compensation for Diminished Property Value Caused by Fear of Electromagnetic Fields*, 24 FLA. ST. U. L. REV. 125, 153 (1996) (explaining that shifting rationale, when applied to field of products liability, assumes that "the loss is shifted to the manufacturer, who can then spread the loss among all consumers of the product by raising the price").

193. *See* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 681 (1980) (explaining strong correlation between tort goals of compensation, loss shifting, and loss spreading), *reprinted in* A TORTS ANTHOLOGY 357, 358 (Lawrence C. Levine et al. eds., 1993). Although he ultimately criticizes these three goals as underlying policy bases of products liability, Professor Owen provides an interesting overview of their overlapping nature, stating that "[e]ach of these concepts begins with the premise that the

pensation principles were also espoused in several influential court decisions of the pro-plaintiff era, such as Justice Roger Traynor's famous concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*,[194] and the California Supreme Court's later adoption of similar ideas in *Greenman v. Yuba Power Products, Inc.*[195] Similarly, Texas courts also focused on the compensation theory, as reflected in the case of *Kelly v. Williams*,[196] wherein the court upheld the constitutionality of a statute that required parents to pay for their child's malicious and wilful destruction of property.[197] In *Kelly*, the court revealed the predominant goal of compensating victims by concluding "that in all fairness, it is better that the parents of these young tortfeasors be required to compensate those who are damaged, even though the parents be without fault, rather than to let the loss fall upon the innocent victims."[198]

Pro-plaintiff changes and court decisions such as *Escola*, *Greenman*, and *Kelly* worked to overcome and, in some instances, eliminate unfair common-law doctrines that made it difficult for plaintiffs to prevail. Thus, all of these examples from the pro-plain-

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economic burden of an accident should for some reason be shifted away from the person on whom it falls, and to somebody else." *Id.* Professor Owen further notes the interrelation of these policy goals by explaining that "[t]he result . . . of finding for the plaintiff under any rule of civil liability . . . is usually to *compensate* the claimant and thus to *shift* his loss to the defendant who in turn will almost always somehow '*spread*' at least some of it among other people." *Id.* (emphasis added).

194. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring); *see* Andrew James Schutt, Comment, *The Power Line Dilemma: Compensation for Diminished Property Value Caused by Fear of Electromagnetic Fields*, 24 FLA. ST. U. L. REV. 125, 153 (1996) (citing Justice Traynor's concurrence in *Escola* as example of shifting and spreading rationales). In *Escola*, Justice Traynor invoked public policy arguments reflecting both the shifting and the spreading rationales, when he wrote that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

195. 377 P.2d 897, 901 (Cal. 1963); *see* William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 240–41 (1996) (reasoning that compensation was primary objective of Justice Traynor's opinion in *Greenman*, and explaining that "[i]t looked not to the conduct of the parties, but to their ability to shoulder the risk of loss—their respective wealth."). In adopting the loss shifting rationale in *Greenman*, the California Supreme Court noted that "[t]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Greenman*, 377 P.2d at 901.

196. 346 S.W.2d 434 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.).

197. *Kelly*, 346 S.W.2d at 437.

198. *Id.* at 438.

tiff movement have at least one thing in common: they pushed compensation of the plaintiff to the forefront of tort policy concerns.[199] Based upon modern trends, however, and reaffirmed by the language in *Gandy*, it is fairly certain that this policy is no longer the case.[200] In recent years, many of the compensation theories have come under attack and have declined in favor. Joint and several liability, for example, has been modified or abolished in over thirty states, including Texas.[201] Enterprise liability is on the decline.[202] Even the "citadel"[203] of the pro-plaintiff movement, strict products liability, has come under heavy attack for its concern with compensating the victim without regard to fault.[204] By

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199. *See* 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.3, at 128–29 (2d ed. 1986) (recognizing "modern trend to emphasize compensation of accident victims and a broad distribution of their losses rather than a more nearly perfect tracing out of the implications of the fault principle").

200. *See, e.g.*, Cain v. Hearst Corp., 878 S.W.2d 577, 584 (Tex. 1994) (rejecting proposed tort of false light invasion of privacy); Boyles v. Kerr, 855 S.W.2d 593, 594–96 (Tex. 1993) (refusing tort of negligent infliction of emotional distress); Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992) (abolishing Mary Carter agreements).

201. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.013 (Vernon 1997) (modifying joint and several liability rule in Texas); *see also* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 752–53 (1994) (illustrating efforts to modify or abolish joint and several liability); Paul Bargren, Comment, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453, 453 (reporting that tort reform efforts of last decade have led to modification of joint and several liability rules in 33 states).

202. *See* Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 467–68 (1996) (summarizing modern criticisms of enterprise liability); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 635–46 (1992) (critiquing enterprise liability theory). Notably, the American Law Institute's extensive 1991 report on enterprise liability drew heavy criticism. *See* Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 844 (1994) (indicating that enterprise liability report was criticized for exclusion of plaintiffs' attorneys by elitist groups and for utilizing corporate funding). *But see* Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 467–69 (1996) (advocating belief that modern criticisms of enterprise liability are misguided).

203. This reference is in regard to William Prosser's groundbreaking article on strict products liability. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

204. *See* Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 4 n.14 (1995) (providing long list of attacks on compensation theory of products liability law). It is somewhat of a misnomer to imply that attacks on strict products liability are a recent trend. Since its inception, products liability has been an oft-criticized area of law. *See* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703–13 (1980) (criticizing policy bases of strict products liability), *reprinted in* A TORTS ANTHOLOGY 357, 357–62 (Lawrence C. Levine et al. eds., 1993); *see also* Joseph A. Page,

taking a logical step, the recent decline of these plaintiff-friendly doctrines likely reflects a broader trend in which less importance is placed on the policy of compensation.

As further proof of this decline, courts have frequently rejected plaintiffs' pleas for compensation, often much more explicitly than did the *Gandy* court. When faced with a classical deep pockets argument in the case of *Indiana Harbor Belt Railroad v. American Cyanamid Co.*,[205] for example, Judge Richard Posner curtly replied: "Well so what?"[206] While most courts probably would not react to a compensation-based argument with the same degree of hostility as Judge Posner, the modern trend undoubtedly reveals a shift away from compensation as the first principle of tort law. In fact, it is questionable whether modern courts, including those in Texas, will give serious consideration to the policy of fully compensating the plaintiff, especially when other legitimate policy justifications are present.

This contention is bolstered by Justice Gonzalez's concurring opinion in the 1993 case, *Boyles v. Kerr*.[207] Although Justice Gonzalez agreed with the majority's decision not to recognize an independent tort for negligently inflicted emotional distress, he was troubled by the majority's failure to acknowledge "the pivotal role that insurance played in [the] case."[208] Justice Gonzalez proceeded to denounce the plaintiff's search for a "deep pocket" defendant, writing that "[i]f the purpose of awarding damages is to punish the wrongdoer and deter such conduct in the future, then the individuals responsible for these reprehensible actions are the ones who should suffer, not the people of Texas in the form of higher insur-

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Deforming Tort Reform, 78 GEO. L.J. 649, 650 & n.8 (1990) (book review) (commenting on pro-defense reform of products liability law).

205. 916 F.2d 1174 (7th Cir. 1990).

206. *Indiana Harbor*, 916 F.2d at 1182. The plaintiff's lawyer received this brisk response from Judge Posner when he "invoked distributive considerations by pointing out that Cyanamid is a huge firm and the Indiana Harbor Belt Railroad a fifty-mile-long switching line that almost went broke in the winter of 1979, when the accident occurred." *Id.*

207. 855 S.W.2d 593 (Tex. 1993).

208. *Boyles*, 855 S.W.2d at 603 (Gonzalez, J., concurring). In addressing the plaintiff's pursuit of insurance coverage, Justice Gonzalez proclaimed, "It does not take a rocket scientist to determine why Ms. Kerr's lawyers elected to proceed solely on the tort of negligent infliction of emotional distress." *Id.* at 604.

ance premiums for home owners."[209] This statement foreshadowed the decline in importance of the compensation theory in Texas by rejecting it in favor of the alternate policy goals of deterrence and fault-based liability. In retrospect, therefore, it should not be surprising that the supreme court took the stance it did in *Gandy*.

Based on the foregoing, it would be a mistake to dismiss *Gandy*'s silence in regard to the compensation goal of tort law as a theoretical aberration. Instead, the opinion reaffirms the modern decline in importance of compensation as a guiding principle of Texas tort law. Assuming that *Gandy* serves as a reliable indication of the current Texas Supreme Court's theoretical perspective on tort law, it now appears that securing compensation for the plaintiff has been relegated to a lower position on the list of tort policy concerns,[210] apparently falling behind goals such as limiting defendants' liability in proportion to their fault and promoting administrative efficiency. Texas practitioners need to be aware of this doctrinal shift and should be prepared to craft new arguments that emphasize these now dominant concerns.

3. Disparagement of Plaintiffs' Rights

Even more troublesome than the court's relegating compensation to a lower position on the totem pole of relevant tort policy justifications is the court's apparent disparagement of plaintiffs' rights. This disparagement is conveyed by some of the court's comments in *Gandy*. For example, the court exudes a hypercritical tone when it condemns the parties to the settlement agreement for "*obviously* attempt[ing] to take advantage of State Farm"[211] and when it asserts that "the parties took positions that appeared contrary to their natural interests *for no other reason* than to obtain a judgment against State Farm."[212] On a more general level, the overall tenor of the opinion gives the impression that the plaintiff's legitimate injuries are disregarded and brushed aside as less important than ensuring that State Farm is not held accountable in the absence of fault. This generally disparaging tone is also evident in

209. *Id.*

210. *Cf.* T. J. Milling, *Lawyers Hurry to Beat Tort Reform Deadline*, HOUS. CHRON., Aug. 31, 1996, at A44 (quoting proponent of recent tort reforms as saying "[t]he pursuit of the deep pockets is going to become a thing of the past").

211. *Gandy*, 925 S.W.2d at 713.

212. *Id.* at 712.

the following excerpt from the court's discussion of the plaintiff's shifting positions during the course of the lawsuit:

> In her suit against [the stepfather], her incentive, fueled by belief in her cause, was to obtain as large a judgment as possible. In her suit as Pearce's assignee against State Farm, her incentive, driven by the economic realities of obtaining a judgment against a solvent defendant, is to argue that [the stepfather] was not as liable as she earlier asserted.[213]

The court's choice of language in this passage impliedly suggests that Gandy's second suit was not prompted by any reasonable "belief in her cause," but by purely financial motives. In other words, the descriptive clause in the first sentence—"fueled by belief in her cause"—is unnecessary to the discussion. By its inclusion, however, the court implies that the second suit was not premised upon a similar belief. Thus, even if the general accuracy of these statements is conceded, the disparaging tone emerges not from *what* the court says but from *how* the court says it.

If there was any doubt, statements such as these show that the Texas Supreme Court has "bought into" the current tort reform movement. Most members of the legal community will argue that some reform is warranted in light of past abuses of the system by Texas plaintiffs and their attorneys. Nevertheless, one might question whether the approach taken by modern tort reformers truly represents the best available method, especially when it involves the general disparagement of tort and personal injury plaintiffs.

In answering this question, a brief comparison with recent trends in criminal law illustrates a significant point. The last few decades have been marked by widespread public outcry over a criminal justice system that is perceived as placing too much emphasis on the rights of the accused[214] and not enough emphasis on the rights of

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213. *Id.*

214. *See* Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1110 n.20 (1995) (providing illustrative list of substantial rights of criminal defendants); *see also* Rebecca Frank Dallet, Note, Foucha v. Louisiana*:* *The Danger of Commitment Based on Dangerousness*, 44 CASE W. RES. L. REV. 157, 157 (1993) (acknowledging public outrage over acquittals based on insanity defense). Undoubtedly, this perception has been fueled by high profile cases, such as John Hinckley's acquittal on an insanity defense and, more recently, the acquittal of O. J. Simpson. *See* WAYNE R. LAFAVE, MODERN CRIMINAL LAW 387 (2d ed. 1988) (discussing public outcry and legislative reform that transpired after verdict of not guilty by reason of insanity in prosecution of John Hinckley for assassination attempt on

their victims.[215] This outcry has culminated in a "victims' rights" movement and a backlash against the continued expansion of the protections afforded to criminal defendants.[216] This movement has elevated the attention focused on the rights of victims during the criminal process, while disparaging the rights of defendants.[217] In comparison, a simultaneous reform movement has yielded the opposite results in the context of tort and personal injury law.[218] During the tort reform movement of the last few decades, it is the plaintiffs—those individuals who suffer injuries and are most analogous to the victims in criminal cases—who have been disparaged,[219]

President Reagan); Ted Gest, *Revolution? We're Still Waiting*, U.S. NEWS & WORLD REP., Sept. 23, 1996, at 78 (suggesting that Simpson case has spawned widespread anger over acquittal of criminal suspects when there is strong evidence of guilt, and predicting that public backlash "is bound to 'make it easier to convict people.'").

215. *See* Carrie L. Mulholland, Note, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 734 (1995) (addressing perceived need to balance rights of crime victims more evenly against rights of criminal defendants); Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103, 1110–11 & nn.20–22 (1995) (recognizing that victims' rights have been downplayed in comparison to rights of criminal defendants, thus "leading to many victims' disenchantment with the entire criminal justice process").

216. *See* Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (recognizing "nationwide 'victims' rights' movement"); Jennifer S. Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings: A Particular Dilemma for Battered Women Inmates*, 27 SETON HALL L. REV. 33, 39 (1996) (explaining that "[t]he United States has experienced a 'victim's [sic] rights' movement over the past few years, recognizing that crime victims have a vital role that must be protected throughout the criminal process"); *see also* Carrie L. Mulholland, Note, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 734–35 (1995) (providing brief history of victims' rights movement in United States).

217. *Cf.* Jennifer S. Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings: A Particular Dilemma for Battered Women Inmates*, 27 SETON HALL L. REV. 33, 39–45 (1996) (analyzing practice employed in many states of allowing victims to submit protest letters as input in parole proceedings); Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L.J. 1103 *passim* (1995) (discussing practice of allowing crime victims or their family members to address defendants after sentencing and providing brief overview of victims' rights movement).

218. *See* Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (reiterating concern of personal injury attorneys that "jurors now look at plaintiffs like they're criminal defendants").

219. *See* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 721 (1996) (declaring that recent defense-oriented tort reforms have used "the basic strategy of 'blaming the victim' to attack injured plaintiffs and their lawyers"). Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (quoting Houston personal injury attorney Paul Waldner) (noting

while the rights of defendants have gained increasing legal protection.[220]

These attitudes apparently have influenced the court's opinion in *Gandy*. It is hard to argue with the court's logic that the assignment and consent judgment involved in the case appeared to be a sham. It is equally hard to argue, however, that the court displayed any outward signs of respect or compassion for the true victim in the case, Julie Gandy. In fact, the court paid little, if any, attention to her unquestionably legitimate injuries. The interests of this young girl, who was repeatedly subjected to horrible sexual abuse, seem to have been buried beneath the court's concern with protecting insurance companies from collusive deals and excessive liability.[221]

4. A Two-Tiered System?

Finally, it should be noted that some reformists will probably argue that the move away from compensation as the primary objective of tort law serves to restore fairness to the legal system in an entirely different way.[222] As noted previously, once the emphasis is

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that personal injury victims are now portrayed as "victimizers"). A Texas personal injury attorney recently summed up this common anti-plaintiff perception, stating: that "'They think our clients are swarthy humans living under a bridge somewhere. They slither out, fake an injury, get a million dollars and slither back.'" *Id.*

220. *See supra* notes 24–37, 200–09 and accompanying text; *see also* John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND & WATER L. REV. 509, 553 (1996) (naming defendants, and insurance companies in particular, as primary beneficiaries of recent tort reforms); Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 721 (1996) (complaining that "[f]ederal tort reform provisions chiefly benefit corporate wrongdoers, insurance companies and other wrongdoers").

221. It is both interesting and insightful to contrast the manner in which the court addressed Julie Gandy's claims with the compassionate tone it used in addressing the claims of another child plaintiff in Regan v. Vaughn, 804 S.W.2d 463 (Tex. 1990). In *Regan*, the court recognized for the first time in Texas a child's derivative right to recover damages for loss of parental consortium. *Id.* at 467. Justice Gonzales, writing for the court, recognized that the disruption of a parent-child relationship can cause "real harm" to a child as a result of the loss of ordinary care, love, protection, and guidance. *Id.* at 466. Justice Gonzales extended potential liability for such a loss to adult and minor children. *Id.*

222. *See* Paul A. Lebel, *Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 N. KY. L. REV. 457, 475 (1997) (suggesting that opponents of compensation system might criticize it for failing to make fine distinctions between types of conduct and degrees of harm); Michael Hoenig, *'Apex' Depositions, Excessive Awards for 'Suffering,'* N.Y. L.J., Apr. 10, 1996, at 3 (criticizing discrepancies in compensation awards for destroying fairness of judicial system).

placed on compensation, it next becomes necessary to determine who should bear the burden of paying for that compensation.[223] At one time, it was commonly argued that this burden should be shifted to "deep pocket" defendants who were in a better financial position to absorb the loss.[224] But, more recently, much emphasis has been placed on the inherent shortcomings of an American legal system that is perceived as providing two systems of justice: one for the poor and one for the rich.[225] Critics might argue that shifting the losses to a defendant solely because it can afford to pay a judgment perpetuates this perception.[226] In other words, the once popular tort policy of shifting the plaintiff's losses to a deep pocket defendant might be faulted for having created a two-tiered system: one for the insolvent defendant and one for the unlucky defendant who happened to have the resources to pay the judgment.[227]

This argument, however, also fails to take the plaintiff into account; and, in this instance, the continued move away from a loss-shifting method of compensation may do precisely what it purports to avoid. For example, a wealthy plaintiff might be able to absorb the costs of lost wages, medical bills, and other expenses associated with a personal injury case. In comparison, a poor plaintiff with the same injuries and expenses would face far more devastating losses.[228] A failure to promote the compensation goal of tort law would thus create a system that favored rich plaintiffs over poor plaintiffs. Consequently, the perceived unfairness of the two-tiered

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223. *See supra* notes 192–98 and accompanying text.

224. *Boyles*, 855 S.W.2d at 603 (Gonzales, J., concurring) (addressing typical deep pockets argument); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5 (1994) (discussing theory of deep pockets).

225. Analogizing once more to criminal law, the recent O.J. Simpson murder trial, showcasing Mr. Simpson's high-priced legal "dream team," is a clear example of this perception.

226. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5 (1994) (acknowledging criticisms of shifting rationale due to "great reluctance to applying one law to the rich and another to the poor"); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 24 (5th ed. 1984) (recognizing, in discussion of tort policy regarding capacity to bear loss that "juries, and sometimes judges, are not indisposed to favor the poor against the rich").

227. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5 (1994).

228. *Id.* In fact, this exact rationale is expressed by proponents of the shifting rationale. *Id.*

system would merely be shifted from the side of the defendant to the side of the plaintiff, once again yielding unsatisfactory results.

5. A Better Policy Approach

The potential for disappointing outcomes in each of the above examples might be mitigated if courts took a different approach toward the policies underlying tort law. In deciding cases, courts have long been forced to prioritize between competing tort policies.[229] Unfortunately, courts often make the mistake of viewing these policies as mutually exclusive, thereby promoting one policy while ignoring other viable concerns.[230] When, as was the case in *Gandy*, the policy of fault-based liability becomes a court's primary concern, it can mean not only "that an actor will not [be] held liable for an unforeseeable injury, but also that the victim of that accident will not be compensated."[231] In many cases, especially those in which the plaintiff suffers a devastating financial, emotional, or physical impact, this result will be unsatisfactory.

A better and often viable approach, therefore, is for courts to strive to harmonize competing tort public policy objectives.[232] Even if the policy of compensation is ultimately sacrificed in favor

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229. *See* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–1 (1984) (noting that various purposes and policies of tort law "may be at odds with one another in applications to particular cases"); *see also* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (1994) (acknowledging that various public policy goals of tort law "are sometimes antagonistic").

230. *See* Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 4 (1993) (describing typical one-dimensional focus in today's current tort reform debate). In the context of the recent tort reform movement, Donald Judges explains the problem with viewing tort policies as mutually exclusive:

> [T]he debate usually focuses on compromising the goals of deterrence, compensation, and fairness within the confines of an adversarial, zero-sum litigation paradigm in which gains for plaintiffs are purchased at defendants' expense and vice versa. Thus, one side of the reform debate includes reformers striving to save defendants (mostly business enterprises) money by shifting accident costs to plaintiffs. The other side includes advocates of plaintiff-oriented trends, such as the expansion or preservation of 'strict' products liability and comparative fault.

Id.

231. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (1994).

232. *See id.* (noting that "it is often possible for a decision on issues of accident compensation to advance more than one tort goal" and providing example of potential interrelation between competing tort principles).

of other policy objectives, the deciding court should at the very least affirm that securing compensation for the plaintiff was considered as a legitimate objective. If anything else, this affirmation would help the court avoid the appearance of downplaying or delegitimizing the plaintiff's injuries. Making this affirmation would also strengthen the court's credibility by showing that all relevant policy considerations were taken under advisement. Unfortunately, the supreme court in *Gandy* failed to make this effort, focusing instead on just the policies that disfavored the use of sweetheart deals.[233] Although the compensation theory has undeniably come under attack in recent years, this does not mean that it can justifiably be ignored.

IV. CONCLUSION: THE PENDULUM SWING (CONT.)

Whether *Gandy* will have profound effects on the insurance industry and the practice of assigning and settling tort claims remains debatable. To date, some cases have found grounds upon which to distinguish the *Gandy* decision.[234] Regardless of its ultimate precedential effect it remains indisputable that *Gandy* reflects the current hostile climate toward plaintiffs in Texas.[235] Due largely to perceived tort crises and recent tort reform campaigns, it has become quite clear, as reflected in *Gandy*, that compensating the plaintiff no longer reigns supreme in the hierarchy of public policy justifications for tort law.

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233. *See* State Farm Fire & Cas. Co. v. Gandy, 880 S.W.2d 129, 138 (Tex. App.—Texarkana 1994), *rev'd*, 925 S.W.2d 696 (Tex. 1996) (illustrating circumstances wherein court did not consider all relevant factors). The appellate court's *Gandy* decision made a point of recognizing that "Gandy was undoubtedly injured by [the stepfather's] actions." *Id.* Under a similar set of circumstances, the *Zuniga* court invalidated an assignment of legal malpractice claims, but first acknowledged that such assignments had the advantage of compensating the plaintiff. *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App.—San Antonio 1994, writ ref'd).

234. *See* State Farm Lloyds, Inc. v. Williams, 933 S.W.2d 740, 743 n.15 (Tex. App.—Dallas 1996, no writ) (distinguishing between value of plaintiff's claim when settlement agreement follows fully adversarial trial, as in *Gandy*, from value of claim following judgment of limited enforceability), *withdrawn*, No. 05-93-00191-CV, 1997 WL 531027 (Tex. App.—Dallas, Aug. 29, 1997); *see* McGee v. McGee, 936 S.W.2d 360, 364 n.3 (Tex. App.—Waco 1996, writ denied) (declining to consider *Gandy* decision where parties neglected to present "a *Gandy* argument in court"); State Farm Lloyds Ins. Co. v. Maldonado, 935 S.W.2d 805, 811–12 (Tex. App.—San Antonio 1996, writ granted) (refusing to apply *Gandy* since propriety of agreement was not preserved for appeal).

235. *See supra* notes 12–14 and accompanying text.

Nevertheless, although cases such as *Gandy* likely foreshadow the tough times that lay ahead for Texas plaintiffs, they may not represent, as some contend they do,[236] a death knell for this state's tort and personal injury attorneys. Completing the analogy to *The Pit and the Pendulum* clarifies this point. Rejoining Poe's short story where the introductory paragraph of this Article left off, the prisoner finds himself securely bound to a "low framework of wood."[237] Miraculously, as the pendulum draws perilously close to his body, he somehow manages to maintain his composure and is able to devise and implement a plan of escape.[238] After narrowly avoiding the pendulum's threatening sweep, he next finds himself being pushed toward the edge of the horrible bottomless pit, as the walls of the dungeon begin closing in on him.[239] Then, just before the prisoner is forced into the pit, Poe provides a surprise ending: trumpets herald the end of the Inquisition and the prisoner is liberated.[240]

Similarly, the final result of Texas' latest round of defense-oriented tort reform may be surprising to some. If history holds true, then tort and personal injury law in Texas is not quite dead. Ultimately, it is likely that current reformists will push the tort law pendulum too far to the right, resulting in a backlash of pro-plaintiff counter-reform.[241] Until then, Texas plaintiffs and their attorneys

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236. *See* Joseph Calve, *Poured Out*, TEX. LAW., Dec. 16, 1996, at 1 (quoting prominent personal injury attorney's lamentations over perceived demise of Texas tort law for plaintiffs).

237. Edgar Allan Poe, *The Pit and the Pendulum*, *in* SELECTED TALES AND POEMS 178 (Walter J. Black, Inc. 1943) (1843).

238. *Id.* at 178–79.

239. *Id.* at 180.

240. *Id.* at 181.

241. *Cf.* John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND & WATER L. REV. 509, 553 (1996) (contending that recent tort reform has transformed system to unduly favor defendants and calling for "tort reform that benefits plaintiffs, and thereby begins to restore fairness to all parties"). In addressing the changing landscape of comparative negligence, John M. Burman makes an argument that applies by analogy to the policy discussion presented in this Article:

> Comparative negligence was designed to 'ameliorate the harsh effects of the contributory negligence rule.' Now, the pendulum has swung so far that in some situations, claimants are worse off than they were under the 'harsh' contributory negligence rule. The result distorts the tort system to unfairly favor defendants. A system that unfairly favors one side over the other is not in the best interests of anyone but insurance companies, for they are the only entities that are invariably defendants.

Id.

will have to find some optimism in the realization that "pendulums eventually swing both ways."[242]

242. Terry L. Jacobson & Kevin L. Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 TEX. TECH L. REV. 769, 834 (1992); *see also* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 604 (1992) (writing that "[c]ertain of these reasons [stabilization and retrenchment] suggest that the recent years mark the actual termination of what had been a two-decade period of expanding liability. Other reasons, however, imply that these years may provide only a pause—a respite in what could turn out to be a continuing rise in liability.").