THE JOURNAL RECORD

Law

Study: 'Early offer' has its advantages in injury cases

June 25, 2008

OKLAHOMA CITY – A new study concludes there are advantages to an "early offer" system in business-related personal injury cases, including per-claim savings and getting payments to claimants faster than the existing court-based system.

An Oklahoma chamber official and the head of a state attorney association come down on opposite sides on the idea. A Tulsa attorney-mediator said the proposal appears to require a revolutionarily high level of proof in severe-injury cases.

The study, by University of Virginia Law School professor Jeffrey O'Connell and professor Patricia Born of California State University-Northridge, tested the early-offer concept by analyzing settlements in Texas and Florida personal injury cases involving businesses between 1988 and 2004.

O'Connell has helped craft no-fault auto insurance laws and took part in a similar study regarding the effect of early offers in medical malpractice cases.

The study tested a plan that would pay medical expenses and lost wages promptly, but eliminate payment for pain and suffering and other noneconomic damages.

It concluded that such a system would reduce general-liability claim costs by an average of $114,000, up to $670,000 for more severe injuries. The researchers determined that an early-offer system would save an average of $32,000 in legal costs, about $211,000 in severe-injury cases.

As explained by O'Connell, in such a no-fault system, a business would have the option of offering, within 180 days after a claim is filed, periodic payments toward a claimant's medical expenses and lost wages, plus 10 percent for attorney fees.

The claimant could turn down offers only in cases where the defendant's conduct was the result of gross misconduct, provable beyond a reasonable doubt. Noneconomic damages could be sought in what O'Connell has called "clear cases of aggravated error."

The study concluded that only 4 percent of business liability cases allege gross misconduct.

Tulsa attorney Guy Thiessen is president of the Oklahoma Association for Justice, formerly the Oklahoma Trial Lawyers Association.

Most businesses carry some type of liability insurance to address such claims, he said.

Thiessen said insurers tend to favor tangible damages, such as lost wages and medical expenses, and dislike and may discount the intangible, such as pain and suffering.

"It is the intangibles that typically, from my perspective, are the more important human losses that people suffer when they are injured," Thiessen said.

He said those range from permanent injury or loss of health to chronic pain, mental suffering and inability to enjoy one's life.

"This early-offer plan, first of all, eliminates everyone's constitutional rights to a jury trial, because the plan is being promoted as a mandatory plan, rather than some sort of optional, voluntary situation," Thiessen said.

Medical and lost-wages damages, as the early-offer plan provides, do not compensate for those human losses, he added.

"When you exclude that, you save money," Thiessen said. "At whose expense? At the injured person's expense."

Thiessen said payments for medical expenses go to health care providers or to pay back health insurance companies.

He said the early-offer idea allows corporations and insurance companies to avoid being accountable for the most significant losses an injured person suffers.

Tulsa attorney John Rothman, president of Oklahoma Mediation/Arbitration Service, said the level of proof required for the plan would amount to “a sea change in our civil justice system.”

Proof beyond a reasonable doubt is normally required only in criminal cases, he said.

Rothman said that attaching the reasonable-doubt standard would amount to a “radical tort reform.”

“The earlier a dispute can be resolved, the more efficient it is, both for the injured party – in this case talking about injury cases – and for the responsible defendant, whether it’s an insurance company or a business,” Rothman said. “Obviously, everyone’s happier if things can be done sooner.”

Generally, he said, mediation is probably not going to make a higher percentage of cases settle, as opposed to going to a verdict or court order, but it will make settlements happen sooner in the existing fault-based system.

“Human nature is to lessen risk and to avoid delay,” Rothman said.

He said mediation helps both sides focus on a resolution to a dispute, frequently before the substantial expenses for experts and other issues are incurred for trial preparation.

Rothman sees elements of the workers’ compensation structure in the early-offer concept.

“It guarantees some compensation, some relatively modest amount of compensation, but you don’t have to prove fault,” he said. “It’s not a liability-based system.”

Mike Seney, senior vice president of operations for The State Chamber, said it’s a good idea that the plan prevents future pursuit of a tort claim against a defendant who promptly offers to guarantee a claimant’s economic losses.

“The problem with no-fault insurance is, we already have experience with no-fault insurance, and it’s pretty much been a failure,” he said.

He said that workers’ compensation is no-fault insurance.

“The protection that is built in for early-offer has to be strong enough to withstand a future challenge by an attorney who wants to pierce that, and go beyond that as far as liability is concerned,” Seney said.

He said questions regarding gross misconduct and proof would still require court action.

“If it’s true no-fault, let’s pay it and go on down the road,” Seney said.

The chamber official said he can see some advantages to both sides from such a plan.

“Where harm has been done, restitution should be made,” Seney said. “It’s an interesting idea.”

101 N. Robinson Ave., Ste. 101, Oklahoma City, OK, 73102 |
P.O. Box 26370, Oklahoma City, OK, 73126-0370 | (405) 235-3100
415 S. Boston Ave., Ste. 101, Tulsa, OK 74103 | (918) 295-0098