

Keeping Common Sense Alive

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This session, the Oklahoma Legislature may address the issue of common sense. House Bill 3003 would add common sense as an affirmative defense under Section 2008(C) of the Oklahoma Pleading Code. The bill was approved by the House Judiciary Committee in February, with no action taken since then.

Section 2008(C) contains a nonexhaustive list of affirmative defenses that must be listed in an answer to a civil lawsuit. These defenses include waiver and statute of limitations. Section 2008(C) doesn't, however, identify the source or nature of these defenses. The rule was intended to catalog affirmative defenses available under common law and equity.

Oklahoma juries are already instructed to consider common sense when reaching verdicts. Jurors are allowed to use the knowledge they each possess in common with other people. Courts instruct jurors that they may reach conclusions that reason and common sense lead them to draw from facts established in the case. Trial lawyers often raise common sense as part of closing arguments.

Some attorneys are concerned that, if HB 2003 becomes law, they may lose the benefit of the instruction, or the ability to raise common sense, in closing arguments. If Section 2008(C) were to require common sense to be listed in an answer, a failure to plead common sense as a defense could mean that a judge might modify the jury instructions or limit closing arguments to prevent the jury from hearing or relying on common sense.

In his 1994 book, *The Death of Common Sense*, Philip K. Howard discusses how our regulatory system has become an instruction manual, removing common sense from most government decisions. Howard wrote: "Is it a coincidence that almost every encounter with government is an exercise in frustration?"

When I first came across this book while in law school, I wondered whether civil litigation and jury trials are a proper alternative to the regulatory state, providing an answer to the problem Howard identifies. I concluded then, and still believe, that jury trials are an answer to the problem, despite how difficult litigation can be on the parties.

As long as judges and juries are allowed to use common sense when resolving disputes, then

perhaps we can avoid the self-executing application of regulatory law and instead allow judgment and equity to solve our problems.

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