HB 274
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The contents of this paper are primarily derived from another paper written by R. Brent Cooper and Diana L. Faust addressing these and other provisions of the 2011 Legislative Session of the Texas Legislature as well as other issues.

I. INTRODUCTION

HB 274 that was passed by the Texas Legislature as part of the 2011 Legislative session was originally intended to be a true "loser pays" bill. It was touted by Governor Perry as part of his continued efforts at tort reform. The bill that ultimately got passed, however, was far different from the vision that Governor Perry and some of the legislators who carried the early versions of the bill in the Legislature intended. The original intent or design of the legislation appears to have been more akin to the old English rule where the loser in litigation actually pays the other side's fees and costs - hence, the name "loser pays." Proposals along those lines did not make it very far in the Legislature and what ultimately ended up becoming HB 274 was a combination of several different bills and changes. The proponents of the original concept, however, continue to cling to the name and, combined with the provisions of the bill shifting costs to the claimant if the claim is subject to the dismissal provisions of the bill, the name stuck.

II. LEGISLATIVE HISTORY – BACKGROUND AND OVERVIEW

One of the major pieces of legislation passed in the 2011 legislative session was the so-called "Loser Pays" bill (HB 274). Loser Pays started off as a fairly significant piece of legislation but by the time the bill left committee, there was little teeth left in the bill.

As part of the recent tide of tort reform nationally,[i] Governor Perry's State of the State address encouraged passage of "loser pays" legislation, and a controversial version of the Bill was filed March 10, 2011.[ii] As introduced, the bill languished for several months, but with the Governor's prodding, HB 274 was back on the table by early May. Indeed, May 9, 2011, the House Committee on Judiciary and Civil Jurisprudence approved its version, which then passed the House with a 96-49-3 vote.

HB 274 headed to the Senate, where the Senate Committee made several amendments that greatly reduced the impact of the legislation. The Senate passed the committee's version unanimously, and the House concurred in the Senate version (130-13-2). The House and Senate signed the bill May 27, 2011, and Governor Perry signed the bill May 30, 2011.

As is frequently examined in divining legislative intent, review of the statements of intent of HB 274's bill author and sponsor reveal the goal of reform to make the civil justice system more efficient, less costly, and more accessible, while reducing the overall costs to all taxpayers. The House Research Organization Bill Analysis and testimony of witnesses provides insight.

As enacted, supporters of the bill were of the view that the bill implements solid, fair, and necessary reform to the justice system to lower costs of litigation, while seeking to balance the plaintiff's access to the court and the defendant's right to avoid frivolous but costly lawsuits. This goal is achieved, say the supporters, through modifying the loser-pays rule, the offer of settlement rule, and by enacting a procedure for early dismissal of meritless claims.

Opponents attacked the premise of HB 274—that the civil justice system is clogged with frivolous lawsuits. They rely on a 2010 report by the Office of Court Administration, showing a 16% decrease in civil injury lawsuits filed between 1992 and 2010, while the Texas population increased during that period by 35%. Opponents point out that plaintiffs' attorneys work on commission and have a strong incentive to take only cases with merit, and that current law contains sufficient checks on frivolous lawsuits, including civil procedure rule 13 and Chapters 9 and 10 of the Civil Practice and Remedies Code. Finally, opponents point to a 2007 Baylor Law Review article surveying Texas state court judges for support that the system is not plagued with frivolous lawsuits or runaway juries.[iii] Remarkably, of the judges polled, a whopping 78% responded.

Of those, 83% reported no runaway jury awards of either actual or exemplary damages in the previous 4 years since the enactment of House Bill 4. Regarding frivolous lawsuits,

44% reported zero of all suits in their courts were frivolous, while 55% reported between 1% and 25% were frivolous, with 85% of judges reporting sanctioning litigants for filing a frivolous lawsuit one time or less. Of those responding, 86% reported they saw no need for further legislation addressing frivolous lawsuits.[iv]

Relying on these reported statistics, opponents remain convinced that "loser pays" provisions limit access to courts to only the wealthy—that fewer lower and middle class litigants can afford to pay both sides' attorneys' fees, and that the statute wrongly assumes that the losing plaintiff brought a "junk" lawsuit. Lawyer groups—plaintiff and defense alike—who take a stance do not wholly support the legislation. Importantly, however, these groups have worked together, with the Rules Committee of the Texas Supreme Court to provide proposals regarding the rules necessary for implementation of the various amendments and enactments through HB 274.[v]

III. SIGNIFICANT PROVISIONS

HB 274's provisions have several features. First, some of the bill's provisions ("loser pays" and expedited civil lawsuits) require the Texas Supreme Court to adopt rules to implement the statutory provisions. The amendment to the interlocutory appeal provisions may also need new appellate rules. Additionally, the Bill amends section 33.004 of the Civil Practice and Remedies Code governing third party practice and the designation of responsible third parties as well as revising chapter 42 concerning offers of settlement.

A. Motions To Dismiss

HB 274 instructs the Texas Supreme court to adopt rules to provide for the early dismissal of meritless lawsuits "that have no basis in law or fact," through motion and without evidence.[vi] Whether this will introduce a Texas motion to dismiss practice similar to Rules 9 and 12 dismissals in federal court and 42 other states remains to be seen. The bill also requires the court to assess fees and costs against losing parties in such cases.[vii] This fee-shifting provision became much stronger in the Senate/enrolled version of the bill, as the House version provided for discretionary fee-shifting. According to the testimony and statements of the legislators, the provision is not intended to amend or repeal Texas Rule of Civil Procedure 45, currently requiring only "fair notice" pleading of both claims and defenses. Interestingly, the language "no basis in law or fact" is the same as that contained in Rule 13 of the Texas Rules of Civil Procedure, but it is not yet clear whether the Rule 13 standards will apply.

B. Expedited Jury Trials

HB 274 also encourages more efficient and speedier resolution of claims in which the amount in dispute is $100,000 or less; the Texas Supreme Court is to adopt rules to streamline the resolution of these claims, to address the need for lowering discovery costs in these actions, and to ensure the actions will be expedited in the system.[viii] Notably, the rules must not conflict with the rules and procedures currently contained in Chapter 74 of the Civil Practice and Remedies Code.

Since the passage of HB 274 a good bit of work has been done on the proposed rules that the Supreme Court is going to consider on this issue. While the Supreme Court is supposed to adopt rules on dismissals as referenced above, it appears that the majority of discussion and debate concerning the rules that the Supreme Court is going to adopt pursuant to HB 274 has involved and centered around the expedited jury trial process. There have been a number of different parties involved in the work on the proposed rules. The various trial lawyer groups have been studying the issue, including the Texas Trial Lawyers Association ("TTLA"), the Texas Association of Defense Counsel ("TADC"), and Texas Chapter of ABOTA (American Board of Trial Advocates). The Supreme Court has included the thoughts and opinions of those groups in the process of promulgating the rules. At the request of the Supreme Court, former Supreme Court Justice Tom Phillips has also been involved in the group of people working on the proposed rules.

While these groups have been discussing the proposed rules in general, much of the debate is centered around whether the rules will be voluntary or involuntary for cases that qualify for expedited jury trials. Proponents of an involuntary/mandatory rule fear that if the process is voluntary no one will elect to use it. Opponents of having a mandatory rule are concerned about limited discovery and evidence in cases where the monetary value of the case may not be great but the importance of the issues to one or both of the parties may far outweigh the case's monetary value. While the rules have not yet been promulgated, it appears that the proponents of a mandatory procedure are likely to win out.

C. Interlocutory Appeals

HB 274 also allows for easier access to interlocutory appeals from pretrial rulings where there is uncertainty about legal issues so that the appellate courts can address the controlling issues of law without the necessity of a trial. Under the prior version of the statute, both sides and the court must have agreed to the certification of the question to the court of appeals, which greatly limited its use. Under the HB 274 amendment, the trial court itself, or on motion by one of the parties, may permit appeal of an interlocutory order regarding controlling questions of law as to which there is substantial ground for difference of opinion and where immediate appeal from the order will materially advance the ultimate termination of the litigation.[ix] Thus, the trial court may certify the question to the court of appeals and an interlocutory appeal is available even if one of the parties is opposed to it.

D. Offers of Settlement

HB 274 also amends the Allocation of Certain Litigation Costs provisions of Chapter 42 of the Texas Civil Practice and Remedies Code. If a qualifying settlement offer has been made, the defendant or the plaintiff may recover litigation costs from the rejecting party. If the defendant triggers the statute, he is entitled to recover the litigation costs if the plaintiff's recovery (before adding an award of litigation costs or subtracting an offset) does not exceed 80% of the offer. If the plaintiff invokes the statute, he or she must recover more than 120% of the offer. In either event, the recovery of attorney fees and costs is limited to the amount of the verdict.[x]

We have had an offer of settlement provision under the Texas Civil Practice & Remedies Code for several years. Many practitioners, however, found the former offer of settlement statute to be unworkable and of little practical use. It remains to be seen whether the amended statute will foster more use of the statute.

E. Responsible Third Parties

Finally, HB 274 repeals section 33.004(e), which allowed for a claimant to bring claims directly against a party who had been designated as a responsible third party even outside the statute of limitations. In addition to eliminating that provision which provided an exception to the statute of limitations, HB 274 provides that a defendant may now possibly be prohibited from designating a responsible third party after the expiration of the statute of limitations if the defendant has failed to comply with its obligations under the Texas Rules of Civil Procedure to timely disclose the party designated as a responsible third party.

The former version of the statute not only included the mechanism by which a party could designate a responsible third party, but also provided a sixty (60) day window in which the claimant could bring claims directly against the designated responsible third party regardless of whether the statute of limitations had run on the claimant's claims against that party. HB 274 completely closes that "loophole" in the statute of limitations by simply deleting that subsection of chapter 33 of the Civil Practice & Remedies Code. This is the most significant aspect of this portion of HB 274. Opponents of the sixty (60) day window that existed under the old version of the statute believed there was an injustice in allowing a plaintiff to bring a claim directly against a party after limitations on any claims against that party had already run, sometimes long after limitations had already run. As a practical matter, the change in the statute may do little to prevent parties from being dragged into

litigation even though the claimants' claims against that party are barred by the statute of limitations. A party other than the plaintiff (defendant/third party defendant), can generally accomplish bringing another party or parties into the litigation by way of a third party claim, usually a claim for contribution, and limitations do not run on a claim for contribution until liability for the party asserting the contribution has been fixed i.e., when that party is hit with a judgment. Claims against additional parties for contribution, indemnity and the like will continue to be a major part of multi party litigation and will continue to be a major part of construction defect litigation.

Perhaps the more subtle change to the chapter 33 responsible third party practice will be the subject of more controversy and litigation. The statute appears to prohibit a defendant from designating a responsible third party after the expiration of the statute of limitations if the defendant has failed to comply with its obligations to timely disclose that the party may be designated as a responsible third party. One of the standard disclosures under the Rules of Civil Procedure requires a party to identify any potentially responsible parties. While parties often do identify additional potentially responsible parties in response to disclosures, such parties are routinely not identified until the litigation has been going on for some time, often through supplemental responses of the parties to the litigation. If a party does not identify a potentially responsible party early on, that party could be said to have not timely disclosed such a potentially responsible party and run into problems when they later attempt to designate that potential party as a responsible third party.

IV. CONCLUSION

HB 274 requires much implementation with civil and appellate procedural rules still being promulgated by the Texas Supreme Court. The Court's rules Advisory Committee must make recommendations regarding implementing HB 274 and other legislation. The Committee made recommendations to the offer of settlement and interlocutory appeals provisions (Texas Rule of Civil Procedure 167 and Appellate Rule 28) in August 2011, and has a March 1, 2012 deadline for recommendations regarding dismissals of frivolous claims and expedited civil actions.

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[i] Currently, some version of this fee-shifting law exists in Alaska, California, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Montana, North Carolina, Oklahoma, Oregon, South Carolina, Washington, and Wisconsin.

[ii] As introduced, the bill provided, *inter alia*, litigation costs and attorneys' fees for "abusive civil actions," and that counsel could be held jointly and severally liable under those proposed fee-shifting provisions. The bill also provided that whether an action constituted an "abusive civil action" was a fact question for the jury.

[iii] Lyon, Larry, et al., *Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform,* 59 Baylor L. Rev. 419 (Spring 2007).

[iv] *Id.* at 427-33.

[v] *See* http://chmc-law.com/expedited_trials; http://chmc-law.com/dismissal_practice (last visited October 10, 2011).

[vi] The bill adds section 22.004(g) to the Texas Government Code, requiring that the motion to dismiss "shall be granted or denied within 45 days of the filing of the motion to dismiss." The rules shall not apply to actions under the Texas Family Code.

[vii] HB 274 adds section 30.021 to the Texas Civil Practice and Remedies Code, to provide that on a trial court's granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the Texas Supreme Court per section 22.004(g) of the Government Code, the court shall award costs and reasonable and necessary attorneys' fees to the prevailing party. This section does not apply to actions by or against the state, other governmental entities, or public officials acting in official capacities.

[viii] The bill added section 22.004(h) to the Government Code. The rules adopted by the Texas Supreme Court shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive

of all claims for damages of any kind, whether actual or exemplary, penalty, attorneys' fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. In addition to health care liability claims filed under Chapter 74, the rules may not conflict with provisions of the Family Code, Property Code, or Tax Code.

This provision may do away with the Level 1 discovery rule under Texas Rule of Civil Procedure 190.2, which is not often invoked and is limited to cases involving $50,000 or less. Lawyer groups are advocating this procedure should be voluntary and not mandatory, and are asking the Texas Supreme Court to consider rules on limited discovery, ADR, timed trial, and limited appeal for the actions subject of this provision. *See supra*, n.5.

[ix] This provision does not stay the trial court proceedings unless the parties agree or the trial or appellate court orders a stay pending appeal. The party seeking interlocutory review must petition the court of appeals to accept the appeal, and if accepted, the appeal proceeds like an accelerated appeal under Texas Rule of Appellate Procedure 28. A petition for review to the Texas Supreme Court is also allowed, without the need for a showing of conflicts jurisdiction. The provision's language is nearly identical to the federal law allowing permissive interlocutory appeal, 28 U.S.C. § 1292(b).

Opponents of HB 274 contend this provision will clog the appellate courts, particularly with appeals from motions to dismiss under the new provisions of HB 274. Supporters maintain the legislation will not do so because of the two-tiered gate-keeping system requiring both trial court and appellate court permission to appeal.

[x] The bill amended the definition of "litigation costs" to include deposition costs, and makes clear that the parties are not required to file a settlement offer with the court. An offer that does not comply with section 42.003 or an offer in an action to which Chapter 42 does not apply does not entitle any party to recover litigation costs.