

The background of the slide features a pattern of overlapping autumn leaves in various shades of brown and orange, set against a darker brown gradient background.

**HB 274 – “Loser Pays”
and Other 2011
Tort Reform**

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Outline

- Origins, Trends
- Path of HB 274
- Legislative Intent
- Opinions of Supporters and Opponents
- Individual Provisions and Thoughts
- Effective Date and Implementation

General Content of HB 274

- Motions to dismiss frivolous claims
- Attorneys' fees for motion to dismiss
- Expedited civil actions for claims under \$100,000
- Offers of settlement, allocation of litigation costs
- Responsible third parties

Origins

- From the English Rule: the party who loses in court pays the other party's attorneys' fees
- All Western democracies – except the United States – follow the English Rule
- U.S. follows the American Rule: each party bears its own expenses of litigation
- Is that changing?

Tort Reform

- As part of the recent tide of tort reform, more U.S. states are adopting some version of “loser pays” laws
- Currently some version of this law exists in Alaska, California, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Montana, North Carolina, Oklahoma, Oregon, South Carolina, Washington, Wisconsin

Path to Enactment

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How HB 274 Became Law

- February 8, 2011 – Governor Perry’s State of the State address encourages passage
- March 10, 2011 – Bill filed but languishes
- May 5, 2011 – Governor’s prodding gets HB 274 back on the table
- May 9, 2011 – House Committee on Judiciary and Civil Jurisprudence approves its version, which then passes the House (96-49-3)

How HB 274 Became Law

- Senate Committee on State Affairs makes several amendments
- May 24, 2011 – Senate passes amended version by unanimous vote (31-0)
- May 25, 2011 – House concurs in Senate amendments (130-13-2)
- May 27, 2011- Signed by House and Senate
- May 30, 2011 – Signed by Governor Perry

Legislative Intent

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Statements of Intent

- House bill author and Senate sponsor gave their statements of intent
- House (Creighton): HB 274 proposes reforms to the civil justice system to make it more efficient, less costly, and more accessible by reforming procedures and making available new procedures

Statements of Intent

- Senate (Huffman): HB 274 allows for efficient resolution of civil matters in certain Texas courts. Changes will make the civil justice system more accessible, more efficient, and less costly to all Texas while reducing the overall costs of the civil justice system to all taxpayers

Pros and Cons

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What Supporters Say

- HB 274 implements solid, fair, and necessary reforms to civil justice system to lower costs of litigation
- Seeks to balance plaintiff's access to court and defendant's right to avoid frivolous but costly lawsuits

- Implements modified loser-pays rule, offer of settlement rule, and early dismissal of meritless claims, among other reforms.
- Would provide an ideal balance between lowering costs and improving fairness while still protecting access to civil court system.
- (From House Research Organization Bill Analysis, testimony of witnesses)

What Opponents Say

- Premise of HB 274 that the courts are clogged with frivolous lawsuits is false.
- 2010 report by Office of Court Administration showed 16 percent decrease in civil injury lawsuits filed between 1991 and 2010, while Texas population increased during that period by 35 percent.

- Plaintiffs' attorneys work on commission – they have strong incentive to take only cases they believe have merit, so as to maximize chances of winning and receiving their commission
- Current law contains sufficient checks on frivolous lawsuits, including civil procedure rule 13 and Chapters 9 and 10 of CPRC

- 2007 Baylor Law Review article – surveyed Texas state court judges with 78 percent response rate (303 of 389 judges)
- 83% of judges said they'd seen no “runaway jury” awards of either actual or exemplary damages in previous 4 years
- 99% of judges said, of all suits they'd seen in last 4 years, only 1-25% were frivolous

- 85% of judges said they'd sanctioned lawyer for filing frivolous suit one time or less in previous 4 years
- 86% of judges said they saw no need for further legislation addressing frivolous lawsuits

- “Loser pays” provisions limit access to courts to only the wealthy – few lower and middle class litigants can afford to pay both sides’ attorneys’ fees
- Statute wrongly assumes party that loses a lawsuit brought a “junk” lawsuit

Lawyer Groups

- Most lawyer groups – plaintiff- and defense-oriented alike – do not support the law:
 - Texas Association of Defense Counsel (TADC)
 - Texas Trial Lawyers Association (TTLA)
 - Texas chapter of American Board of Trial Advocates (TXABOTA)
 - Litigation Section of State Bar of Texas



HB 274 Provisions

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Overview

- Two provisions – “loser pays” provision and expedited civil lawsuits – will require Texas Supreme Court to adopt rules
- Interlocutory appeal provisions may need new appellate rules (also Texas Supreme Court)
- Offer of settlement provisions amend Chapter 42 of CPRC (“Settlement”)
- Changes to section 33.004 of CPRC

Early Dismissal of Actions

- Adds section 22.004(g) to Government Code:
 - Supreme Court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide 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 Family Code.

Attorneys' Fees

- Adds section 30.021 to CPRC:
 - 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 Supreme Court per section 22.004(g) of Government Code, the court shall award costs and reasonable and necessary attorney's fees to the prevailing party.
 - Does not apply to actions by or against the state, other governmental entities, or public officials acting in official capacities.

Thoughts

- Appears similar to federal court practice of seeking dismissal for failure to state a claim (rule 12(b)(6) motion)
- But, testimony of legislators: this provision is not intended to amend or repeal civil procedure rule 45, which currently requires only “fair notice” pleading of both claims and defenses

More Thoughts

- Language “no basis in law or fact” same as in rule 13 but not yet clear whether those standards will apply
- Fee-shifting provision is mandatory (“shall”) (House version used “may”)

Expedited Civil Actions

- Adds section 22.004(h) to Government Code:
 - Supreme Court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions.
 - The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which 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.

Expedited Civil Actions

- The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system.
- The rules adopted may not conflict with provisions of Chapter 74 CPRC (med mal), Family Code, Property Code, or Tax Code.

Thoughts

- Although Level 1 discovery rule currently exists (TRCP 190.2), it is not used often and is limited to cases involving \$50,000 or less
- No other rules exist to expedite trial process
- Lawyer groups are advocating for this to be voluntary and not mandatory
- Also asking TSC to consider rules on limited discovery, ADR, timed trial, limited appeal

Interlocutory Appeal

- Amends section 51.014 of CPRC (permissive interlocutory appeal statute):
 - Trial court itself, or by order on party's motion, may permit appeal of an order not otherwise appealable if:
 - Order to be appealed involves controlling question of law as to which there is substantial ground for difference of opinion; and
 - Immediate appeal from order may materially advance the ultimate termination of the litigation.

Interlocutory Appeal

- Does not apply to action under Family Code.
- This appeal does not stay trial court proceedings unless parties agree or trial or appellate court orders a stay pending appeal.
- Must also petition court of appeals to accept the appeal; if accepted, proceeds like accelerated appeal under TRAP 28
- Petition for review to TSC allowed

Thoughts

- Language is nearly identical to the federal statute allowing permissive interlocutory appeal – 28 U.S.C. § 1292(b)
- May require additions to Texas appellate rule 28 to clarify deadlines, contents of petition and response, other procedures
- Supporters say this would allow appeals on controlling issues without requiring expense of full trial first

More Thoughts

- Opponents say this statute will clog the appellate courts – particularly appeals from motions to dismiss under HB 274
- Supporters say this will not flood the appellate courts because of the two-tiered gate-keeping system: both trial court and appellate court have to give permission to appeal

Settlement and Allocation of Costs

- Several amendments to CPRC Chapter 42, Settlements (passed in 2003 as part of HB 4)
- Required defendant to file declaration that Chapter 42 settlement procedure is available in action.
- Then, if settlement offer made and rejected, and judgment will be “significantly less favorable” to rejecting party, offering party recovers litigation costs from rejecting party.

- “Significantly less favorable” means:
 - If rejecting party is claimant, award will be less than 80 percent of rejected offer
 - If rejecting party is defendant, award will be more than 120 percent of rejected offer
- Original statute set out caps on amount of litigation costs recoverable
- Original statute provided for offset of litigation costs if they were to be awarded against claimant

HB 274 Changes

- Amends two definitions:
 - "Litigation costs" means money actually spent and obligations actually incurred that are directly related to action in which settlement offer is made.
 - The term includes: court costs; reasonable deposition costs (new); reasonable fees for not more than two testifying expert witnesses; and reasonable attorney's fees.
 - "Settlement offer" means an offer to settle or compromise a claim made in compliance with Section 42.003.

HB 274 Changes

- Adds “small claims court” claims to the list of claims to which Ch. 42 does not apply.
- Adds that parties are not required to file a settlement offer with the court.
- Clarifies that an offer of settlement that does not comply with section 42.003, or an offer of settlement made in an action to which Ch. 42 does not apply, does not entitle any party to recover litigation costs.

HB 274 Changes

- Amends section 42.004(d):
 - Removes the caps on litigation costs from 2003 version of statute
 - Adds: The litigation costs that may be awarded under this chapter to any party may not be greater than the total amount that the claimant recovers or would recover before adding an award of litigation costs in favor of the claimant or before subtracting as an offset an award of litigation costs in favor of the defendant.

Thoughts

- An offer of settlement is still a risky proposition, just as it has been since 2003
- The main difference: now, claimant will never have to pay anything out-of-pocket for “litigation costs” because award of “litigation costs” is offset against any recovery, and award cannot be greater than total amount claimant recovers (or would recover, plus or minus “litigation costs”)

Responsible Third Party

- Repeals former section 33.004(e), which provided that claimant is not barred by limitations from seeking to join a person designated as an RTP, even though such joinder would otherwise be barred by limitations, if claimant seeks joinder not later than 60 days after person is designated as an RTP.

Responsible Third Party

- Adds section 33.004(d) of CPRC:
 - A defendant may not designate a person as a RTP with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the RTP if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a RTP under the Texas Rules of Civil Procedure.

Thoughts

- This is a trap for the unwary!
- Might push plaintiffs to file suits well in advance of limitations
- Might push plaintiffs to serve requests for disclosures with petition and even follow up with admissions on potential parties
- Places burden on defendants to research potential parties within limitations period and to promptly disclose

Effective Date and Implementation

September 1, 2011

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Effective Date

- Changes in the law apply only to a civil action commenced on or after the effective date – September 1, 2011.
- A civil action commenced before the effective date of the changes is governed by the law in effect immediately before the effective date of the change in law, and that law continues in effect for that purpose.

Implementation

- Much of HB 274 must be implemented with civil procedure rules and appellate rules
- Supreme Court Advisory Committee (SCAC) makes recommendations to Texas Supreme Court regarding proposed rules
- Supreme Court has set a schedule by which SCAC must make recommendations regarding HB 274 and other legislation

Implementation

- Representatives from the four lawyer groups also have a working group making recommendations to SCAC for the new rules
- SCAC met Aug. 27, 2011 to discuss first two sets of rules relating to offer of settlement and interlocutory appeals
- These recommendations would amend existing rules, such as TRCP 167 and TRAP 28

Implementation

- Deadlines for SCAC to submit other recommendations to Supreme Court:
 - March 1, 2012:
 - Dismissal of frivolous claims
 - Expedited civil actions



The End

Thank you!