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The Loser Pays (Sometimes) - Texas Legislature Passes Judicial Reforms

By William D. Ellerman

One of the most hotly-contested topics of the current legislative session has been whether to adopt provisions requiring unsuccessful litigants to pay the attorneys' fees of their opponents. On May 25, 2011, the Texas House concurred with the Senate's amendments to H.B. 274, which contains several significant judicial reforms, including certain versions of this "loser pays" concept. The bill is currently awaiting Governor Perry's signature. Although many of the "loser pays" provisions that were originally proposed have been substantially altered (or removed altogether) during the bill's journey through the legislature, the final product will impact Texas litigation practice in a number of ways.

I.

SUMMARY OF RELEVANT PROVISIONS

H.B. 274 will amend certain provisions of the Texas Government Code and the Civil Practice and Remedies Code, and it will require the Texas Supreme Court to make some changes to the Rules of Civil Procedure. The form of any rules of civil procedure to be adopted will be referred to the Supreme Court Advisory Committee, which is chaired by our partner, **Chip Babcock**. The rules enacted by H.B. 274 will apply to all civil actions filed on or after September 1, 2011 (excluding application of certain of its provisions to Family Court actions). The most significant changes that this law will make to Texas litigation practice are summarized below.

A. Rules Allowing for the Early Dismissal of Actions

Until now, and differing from most states, Texas has had no counterpart to a Federal Rule 12(b)(6) motion to dismiss for failure to state a claim. H.B. 274, however, requires that a similar mechanism be adopted in the Texas Rules of Civil Procedure. Specifically, the new law directs the Supreme Court to adopt rules of civil procedure "to provide for the dismissal of causes of action that have no basis in law or in fact on motion and without evidence." 82nd Leg., R.S., H.B. 274, § 1.01. The law further requires that any such motions be determined within 45 days of their filing. *Id.* The particular rules to be implemented under this mandate will fall within the rulemaking authority of the Texas Supreme Court.

Differing substantially from Federal Rule 12(b)(6) practice, however, H.B. 274 imposes a "loser pays" penalty in conjunction with the motion to dismiss procedure. In particular, H.B. 274 contains an amendment to Chapter 30 of the Texas Government Code that *requires* trial courts to award attorneys' fees to parties who successfully prosecute or defend motions to dismiss. According to the new law, if a trial court grants or denies, "in whole or in part," a motion to dismiss, "the court *shall* award costs and reasonable and necessary attorney's fees to the prevailing party." *Id.* at § 1.02 (emphasis added). Thus, under this provision, trial courts will be required to award fees to defendants who successfully obtain

dismissal, or to plaintiffs who successfully avoid it. The obvious intent of this provision is to deter plaintiffs from filing frivolous lawsuits, while simultaneously discouraging defendants from seeking to dismiss meritorious ones. Because these mandatory fee awards are a two-way street, it remains to be seen whether defendants in Texas state courts will avail themselves of this procedure as regularly as in federal courts.

B. Amendments to the Offer of Settlement Statute

Chapter 42 of the Texas Civil Practice and Remedies Code allows parties to recover some amount of their attorneys' fees and costs (which would not otherwise be recoverable) if (1) they make a settlement offer that complies with the requirements of the statute, and (2) the judgment that is ultimately rendered is "significantly less favorable to the rejecting party than was the settlement offer." Tex. Civ. Prac. & Rem. Code § 42.003-004 (Vernon 2008). The amount of fees that are recoverable are capped, so that they may not exceed 50% of a plaintiff's economic damages or 100% of any noneconomic or exemplary damages. *Id.* at § 42.004(d). The effect of this law is that any fees that a defendant may recover will never come out of a plaintiff's pocket; rather, they will simply be offset against the plaintiff's recovery. In the instance of a take-nothing judgment, a successful defendant cannot recoup any amount of fees.

As originally proposed, H.B. 274 would have made sweeping revisions to Chapter 42 by completely eliminating the caps on recovery of attorneys' fees, thus subjecting unsuccessful plaintiffs to the risk of personal liability for defendants' fees. However, parties on both sides of the debate over this controversial aspect of the bill appear to have reached a compromise in the final version. As passed, H.B. 274 does not eliminate the caps on recovery of fees—it merely expands them. Now, rather than prohibiting the recovery of fees that exceed 50% of a plaintiff's economic damages, Chapter 42 will provide that any fees to be awarded "may not be greater than the total amount that the claimant recovers." 82nd Leg., R.S., H.B. 274, § 4.04 (to be codified at Tex. Civ. Prac. & Rem. Code § 42.004(d)). The net effect of this is that plaintiffs who reject qualifying settlement offers will face the risk of having their entire recovery offset, but they still will not be required to pay any amount of fees that exceed their total recovery (or any fees whatsoever in the event of a take-nothing judgment).

C. Rules Allowing for Interlocutory Appeals

Interlocutory appeals are allowed only in very narrow circumstances. In one such circumstance, the Texas Civil Practice and Remedies Code permits interlocutory appeals of orders that involve "controlling question[s] of law as to which there is a substantial ground for difference of opinion." Tex. Civ. Prac. & Rem. Code § 51.014(d) (Vernon 2004). The only catch is that the current law prohibits a trial court from certifying such an appeal unless the parties to the case agree to it. *Id.* at § 51.014(d)(1). H.B. 274, however, removes that impediment, allowing a trial court to permit an interlocutory appeal on a motion by any party, or on its own initiative. 82nd Leg., R.S., H.B. 274, § 3.01 (to be codified at Tex. Gov't Code § 51.014(d)). Appellate courts would have the discretion to accept or reject such an appeal. *Id.* at § 51.014(f). This change in the law appears to bring Texas procedure in line with federal procedure, which allows interlocutory appeals in similar circumstances. See 28 U.S.C. § 1292(b) (2006).

D. Rules Requiring Certain Actions to be Expedited

H.B. 274 directs the Texas Supreme Court to adopt rules of civil procedure that will facilitate the prompt resolution of certain actions. Specifically, the contemplated rules would require that any action in which the amount in controversy does not exceed \$100,000 be expedited, and that discovery costs in such actions be lowered. *Id.* at § 2.01 (to be codified at Tex. Gov't Code § 22.004(h)). The particulars of implementing this directive will fall to the Supreme Court, under its rulemaking authority.

E. Rules Governing the Designation of Responsible Third Parties

Finally, H.B. 274 contains amendments designed to close a perceived loophole in the procedure of designating "responsible third parties." Currently, the Texas Civil Practice and Remedies Code permits the joinder of responsible third parties even if such joinder would otherwise be barred by a statute of limitations. Tex. Civ. Prac. & Rem. Code § 33.004(e) (Vernon 2008). H.B. 274 revises that provision, such that limitations *can* bar a defendant from joining a responsible third party, but only if the defendant failed to timely disclose the party as a potential responsible third party in accordance with the Texas Rules of Civil Procedure. 82nd Leg., R.S., H.B. 274, § 5.01 (to be codified at Tex. Civ. Prac. & Rem. Code § 33.004(d)).

II. CONCLUSION

H.B. 274 makes a number of changes to Texas litigation practice; however, the scope of its impact remains to be seen, and it is unclear at this point whether it will have any material effect on the number of lawsuits filed in Texas. For instance, while many would argue that the motion to dismiss procedure is long overdue in Texas, the automatic "loser pays" provisions might serve as a deterrent to filing those motions in all but the most egregious of circumstances. Undoubtedly, many defendants will opt to pursue summary judgment instead, since that procedure poses no risk of a fee penalty if unsuccessful.

If you have any questions about this e-Alert, please contact **Retta Miller** at 214.953.6035 or rmiller@jw.com or **William D. Ellerman** at 214.953.6033 or wellerman@jw.com.

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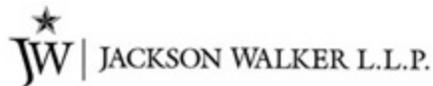
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