



## TEXAS GOVERNOR SIGNS TORT REFORM LEGISLATION AIMED AT ATTRACTING BUSINESSES TO TEXAS

After winning reelection to an unprecedented third consecutive term as governor of Texas based, in part, on a record of attracting jobs to the state, Rick Perry vowed to make tort reform legislation aimed at eliminating frivolous lawsuits one of his top priorities in the 2011 legislative session. On May 30, Governor Perry signed legislation that, he claims, “will help make Texas that much more attractive to employers seeking to expand or relocate from countries all over the world by allowing them to spend less time in court and more time creating jobs.”<sup>1</sup> While the legislation contains provisions that are likely to have an impact on procedure in Texas courts, perhaps the most notable aspect of the legislation is what did not make it to the governor’s desk.

### “LOSER PAYS”

The most heralded aspects of the proposed legislation, which passed the Texas House virtually intact in the form of House Bill 274, were “loser pays” provisions that would have dramatically changed the litigation landscape in Texas. The proposed legislation essentially adopted the traditional English rule, whereby the loser in a lawsuit is required to pay the attorney’s fees of the prevailing party. While a few states have adopted loser pays models involving a modest degree of fee shifting, two seemingly innocuous provisions of House Bill 274 would have constituted the boldest foray into fee shifting in the United States.

<sup>1</sup> Press Release, Gov. Perry: “Loser Pays Lets Employers Spend Less Time in the Courtroom, More Time Creating Jobs” (May 30, 2011) (available at [www.governor.state.tx.us/news/press-release/16203/](http://www.governor.state.tx.us/news/press-release/16203/)).

Current Texas law allows a prevailing plaintiff in a breach of contract case to collect attorney's fees and provides for recovery of attorney's fees accrued during the period following the rejection of a settlement offer in tort cases in certain circumstances. Once a defendant makes a settlement offer in tort cases, the defendant may recover attorney's fees if the verdict is less than 80 percent of the rejected offer, but recovery is limited to the amount of the verdict.<sup>2</sup> Thus, if a defendant makes a settlement offer and then prevails at trial, the defendant would not recover any attorney's fees. Once the claimant makes a settlement demand in tort cases, the claimant may recover attorney's fees if the verdict is more than 120 percent of the rejected offer.<sup>3</sup>

House Bill 274 originally provided for the recovery of attorney's fees for whichever party prevailed in a contract case. The provision elicited strong resistance from those championing the rights of individuals and small businesses, who generated opposition by using the example of insurance companies who fail to pay for covered losses. They argued that insurance companies would be free to deny claims with impunity because individuals and small businesses could not risk having to pay the insurance company's attorney's fees if they sued and lost. The bill also did away with the limitation on a defendant's recovery in tort cases, meaning that if a defendant won or the plaintiff obtained a verdict less than 80 percent of the defendant's settlement offer, the defendant could recover *all* of its attorney's fees. This led Rep. Craig Eiland (D-Galveston) to quip that the legislation is really "the loser pays and sometimes the winner pays, too" bill. Opponents argued that a lawsuit in which the plaintiff prevailed was, by definition, not frivolous. Therefore, forcing a plaintiff to pay attorney's fees in an amount that exceeded the plaintiff's recovery in a case the plaintiff won did not further the goal of eliminating frivolous lawsuits. Strong opposition to this possibility contributed to the Senate removing this provision from the final bill. Perhaps the most striking aspect of the opposition to the "loser pays" provision was the fact that attorneys from both sides of the docket spoke out against the legislation.

In the end, the most significant provision of the legislation that could fall under the heading of "loser pays" is the adoption of a motion to dismiss practice that requires an award of attorney's fees to the defendant when the court determines that a cause of action has no basis in law or fact.<sup>4</sup> To date, Texas has not had a procedural mechanism equivalent to Federal Rule of Civil Procedure 12(b) that allows a court to dismiss a case based solely on the pleadings. The new legislation also expands slightly the costs and attorney's fees recoverable by plaintiffs in tort cases, but it is unlikely this change will have much impact.

## MAJOR LANDMARK LEGISLATION OR MODEST CIVIL PRACTICE REFORM?

While the legislation is still touted by the governor and the press as "loser pays," and Rep. Brandon Creighton, R-Conroe, has proclaimed it a "major landmark for tort reform," once the Senate removed the controversial "loser pays" provisions, the finalized legislation presents only helpful but likely modest reforms.

In addition to adopting a motion to dismiss practice, the legislation mandates that the Texas Supreme Court adopt new rules to promote the "prompt, efficient and cost-effective resolution" of civil actions where the amount in dispute is between \$10,000 and \$100,000.<sup>5</sup> The legislation also provides for immediate appeals of controlling questions of law. Previously, only if the parties agreed that an immediate appeal was necessary could a trial court ruling be appealed before the case was concluded at the trial court.<sup>6</sup> Under the new legislation, an appeal is permitted if: (1) "the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion"; and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."<sup>7</sup>

Finally, in what some say may have the greatest impact on litigation in Texas, the legislation alters the responsible third

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2 Tex. Civ. Prac. & Rem. Code § 42.004.

3 Tex. Civ. Prac. & Rem. Code § 42.004.

4 Tex. Civ. Prac. & Rem. Code §30.021 (effective Sept. 1, 2011).

5 Tex. Gov't Code §22.004 (effective Sept. 1, 2011).

6 Tex. Civ. Prac. & Rem. Code § 51.014(d)(1)-(2).

7 Tex. Civ. Prac. & Rem. Code §51.014(d).

party practice in Texas. Under existing law, a defendant may designate a responsible third party up to 60 days before trial and have that party listed on the verdict form for purposes of the jury's determination of percentage of responsibility.<sup>8</sup> Once a defendant designated a third party, a plaintiff could join that party to the lawsuit in order to recover from that party even if the statute of limitations had otherwise run on that claim.<sup>9</sup> The new legislation eliminates a plaintiff's ability to recover from a designated third party if the claim is not timely and a defendant cannot designate a responsible third party after the statute of limitations has run if the defendant failed to comply with an obligation to timely disclose the existence of that party.<sup>10</sup>

Mike Gallagher, past president of the Texas Trial Lawyers Association, thinks this change may cause plaintiff's attorneys to sue more defendants so as to avoid the questions that would arise from their clients if a defendant designates a responsible third party after the statute of limitations has run and the plaintiff is not able to then seek damages from that party. On the other hand, this change eliminates the need for defense attorneys to try to explain how it is that plaintiffs can collude with a defendant to name their client as a responsible third party so that the plaintiff can then sue the client even though the statute of limitations has already run.

## CONCLUSION

On May 9, 2011, when the Texas House initially passed House Bill 274 by a vote of 96-49,<sup>11</sup> the idea that Texas might become a strict "loser pays" state suddenly attracted substantial attention. The Texas legislature meets only for the first five months of every odd year. Thus, 2013 is the next time expansive "loser pays" legislation could once again gain traction in Texas. Of course, given Governor Perry's uncertain political future, it may not be two years before we once again hear him championing revolutionary changes to the litigation landscape as a means of promoting job growth and economic stimulus.

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<sup>8</sup> Tex. Civ. Prac. & Rem. Code §33.004.

<sup>9</sup> Tex. Civ. Prac. & Rem. Code §33.040(e).

<sup>10</sup> Tex. Civ. Prac. & Rem. Code §33.040(d) (effective Sept. 1, 2011).

<sup>11</sup> H.B. 274, 82nd Leg. R.S. (TX 2011).

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