

HB 274 – Attorney’s Fees in Contract Actions: Analysis and Alternatives

ISSUE: HB 274, as passed by the Texas House on May 9, 2011, includes a number of provisions intended to enact “loser pays” system in Texas courts. Much commentary has focused on the “offer of settlement” provisions. But HB 274 also fundamentally alters the statutory basis in Texas for awarding attorney’s fees in contract actions, and *only* in contract actions. This proposed change is unwarranted, unwise, and unworkable. This paper addresses the reasons and proposes several alternatives to make the HB 274 provisions more balanced and workable.

Article 5 of HB 274: Article 5 of HB 274 would amend Chapter 38 of the Texas Civil Practice and Remedies Code in several respects, by deleting the existing provision for contracts in §38.001, adding a new §38.0015, and modifying the procedure for recovering fees in §38.002:

Section 5.01 – Amend §38.001:

Sec. 38.001. RECOVERY OF ATTORNEY'S FEES. A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an appeal to the court under Section 11.43, Tax Code, or an appeal to the court of a determination of an appraisal review board on a motion filed under Section 11.45, Tax Code [~~an oral or written contract~~].

Section 5.02 – Add §38.0015:

Sec. 38.0015. ORAL AND WRITTEN CONTRACTS. Unless otherwise provided in a written contract, the prevailing party may recover reasonable attorney's fees from an individual, corporation, or other legal entity if the claim is for breach of an oral or written contract.

Section 5.03 – Amend §38.002:

Sec. 38.002. PROCEDURE FOR RECOVERY OF ATTORNEY'S FEES. To recover attorney's fees under this chapter:

- (1) the person seeking to recover attorney's fees [~~claimant~~] must be represented by an attorney;
- (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
- (3) payment for the just amount owed, if any, must not have been tendered before the expiration of the 30th day after the claim is presented.

ANALYSIS

Existing §38.001 awards fees in a contract action only to a party who proves a breach and damages. A party who merely defends against a contract claim cannot recover fees. *MBM Fin. Corp.v. Woodlands Oper. Co.*, 292 S.W.3d 660 (Tex. 2009). The proposed §38.0015 awards fees to any party that prevails in a contract action. This is unwarranted, unwise, and unworkable:

- A primary goal of civil justice reform is to eliminate frivolous lawsuits. There has been no outcry or assertion of a “commercial litigation explosion” in Texas.
- As with commercial litigation, there are no claims of lawsuit abuse in Texas in cases involving oral contracts.
- A free enterprise system depends upon enforcing contracts and protecting property rights. Contracting parties should not be hindered in enforcing their contracts.
- Contract actions differ from tort lawsuits. Contracting parties have had prior contact and often have ongoing relationships that already encourage settlement of disputes.
- Contract actions often turn on legitimate disputes over contract terms and compliance. Contracts can be ambiguous. Unforeseen circumstances occur. Contracts have provisions that support conflicting positions, and which one prevails is a valid commercial question. Reasonable people can in good faith differ over whether a contract has been breached.
- Contracts govern all aspects of commerce, such as employment, construction, leases, repair, purchases, and services. Individuals contract with financially substantial parties, e.g., landlords, homebuilders, rental companies, employers, and the like. Economically unequal parties with disparate levels of fees exist. Even middle-class persons cannot afford to enforce their contracts if they risk paying a well-heeled defendant’s legal bills.
- Even sophisticated parties have legitimate contract disputes. Punishing one side for losing such a dispute would promote breaching contracts in all realms.
- Oil & gas royalty owners would be particularly impacted by the proposed change. They are often individuals of limited means, while their lessees are typically highly capitalized and well-funded. Lessees own the minerals during the life of a lease, control all operations, and have sole control over information and cash flow. Royalty owners of modest means could not risk enforcing a lease, encouraging lessees to breach them.
- Lawsuits can be lost for many reasons besides lack of merit. Missed deadlines, procedural missteps, and the like can result in losing a case, regardless of the substance of a claim. There is no justice or fairness in punishing a losing party in such instances.
- The declaratory judgment statute allows awarding costs and fees to a prevailing party “as are equitable and just” (TCP RC §37.009). But HB 274’s award would be mandatory. Contract actions are often complex, with multiple parties and provisions. When several provisions are in dispute, a party can win some issues and lose others. It is not clear who “prevails” in such cases. Contract cases are uniquely dependent on the contract language, so there should at least be discretion given the judge in awarding fees in such cases.
- HB 274’s proposed §38.001 retains “sworn accounts,” which include contractual relationships governed by its new §38.0015. This ambiguity will cloud the law.
- HB 274’s proposed §38.0015 applies unless “otherwise provided in a written contract.” What is required to “otherwise provide”? How would a common attorney’s fees provision, drafted in reliance on existing law, be applied? Could a prevailing party still recover fees if the contract merely said fees could be recovered in case of breach?

- HB 274's proposed §38.002(2) retains the "presentment" provision for claimants. This requires the party claiming breach of contract to "present the claim" to recover fees. Thus, a prevailing party could recover fees only if the claimant "presented" the claim.
- HB 274's proposed §38.002(3) retains the existing requirement that the "just amount owed" was not paid. How this would apply to a non-claimant seeking fees is unclear.
- TCPRC §38.003 deems "usual and customary" fees as reasonable for claims in §38.001. This would not apply to the new section §38.0015, as HB 274 does not change §38.003.

ALTERNATIVE AMENDMENTS

HB 274's proposed rewrite of Chapter 38 of the TCPRC should be rejected. Nevertheless, if it is to be adopted in some form, the following are alternative versions of HB 274's Section 5 that would address some of the deficiencies discussed above.

AMENDMENT NO. 1 (Retain existing law on fees for a claim for breach of contract):

Amend HB 274 as follows:

- **Delete Article 5 of HB 274.**

AMENDMENT NO. 2 (Delete statutory basis for fees in contract cases; let contracting parties decide):

Amend HB 274 as follows:

ARTICLE 5. RECOVERY OF ATTORNEY'S FEES

- **Delete Sections 5.02 and 5.03 of HB 274.**

AMENDMENT NO. 3 (Allow fees for contract disputes that are equitable and just, using same terms as declaratory judgments and that HB 274 uses for motions to dismiss):

Amend HB 274 as follows:

- **Amend Section 5.02 of HB 274 to read as follows:**

ARTICLE 5. RECOVERY OF ATTORNEY'S FEES

SECTION 5.02. Chapter 38, Civil Practice and Remedies Code, is amended by adding Section 38.0015 to read as follows:

Sec. 38.0015. ORAL AND WRITTEN CONTRACTS. Unless otherwise provided in a written contract, the prevailing party may recover reasonable and necessary attorney's fees that the court determines are equitable and just from an individual, corporation, or other legal entity if the claim is or breach of an oral or written contract.

AMENDMENT NO. 4 (Clarify procedure for non-claimant to recover fees and allow recovery for only unjustified claims):

Amend HB 274 as follows:

➤ **Amend Section 5.03 of HB 274 to read as follows:**

ARTICLE 5. RECOVERY OF ATTORNEY'S FEES

SECTION 5.03. Section 38.002, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 38.002. PROCEDURE FOR RECOVERY OF ATTORNEY'S FEES. To recover attorney's fees under this chapter:

(1) the person seeking to recover attorney's fees [claimant] must be represented by an attorney;

(2) For a the claimant:

(a) the claim must be presented the claim to the opposing party or to a duly authorized agent of the opposing party; and

(3) (b) payment for the just amount owed, if any, must not have been tendered before the expiration of the 30th day after the claim is presented.

(3) For a non-claimant under Section 38.0015, the claim is found not to be substantially justified.