



STATE BAR LITIGATION SECTION NEWS for the BAR

Fall 2011



CHAIR'S MESSAGE: Wrap Up of Legislative Session

by Linda McDonald

It was a fascinating and tumultuous 82nd legislative session. Rumors and stories (some true, some not) abounded as to what would result from this process and how it would impact the practice of law in Texas. From "Loser Pays" to "Responsible Third Party," it originated as a purely business-backed effort that a number of legal groups feared would radically reduce every person's access to justice through the civil trial system. As Immediate Past Chair Walker Friedman reported in the Summer Advocate, the Litigation Council took the unprecedented step of voting unanimously to request the State Bar for authority to oppose, in the Section's name, certain aspects of H.B. 274. The Bar granted that authorization; however, as negotiations continued over the language and import of the bill, the Section took a "wait and see" view.

The end result was a rewritten bill that was widely endorsed by business, consumer, and legal groups, supported along non-partisan lines, and signed into law by Governor Perry. The law went into effect September 1, 2011 and applies only to a civil action commenced on or after the effective date of the change in the law.

This News for the Bar analyzes the changes in the law wrought by HB 274 as well as other actions of the 82nd Legislature. It includes interviews of some key players in the process that ended with passage of H.B. 274, including Senator Bob Duncan. We start with an overview of all legislation pertinent to the Litigation Section, and following our "insider" interviews is more in depth analysis of key provisions like "RTP," "Loser Pays," and "Expedited Appeal."

I remember the hue and cry that went up when "Designation of Responsible Third Parties" ("RTP") was first enacted. Plaintiffs' attorneys and the defense bar both thought it gave the other an unfair advantage. But we sorted it out and made it work for

all parties in litigation. The fear at the time was that it could be used to circumvent the statute of limitations for those that were designated as responsible third parties after limitations—and in fact, this came to pass. But the new law does away with this by repealing Section 33.004 (e) CPRC.

What remains now is for the Supreme Court to adopt rules, as instructed by the Act, to implement these changes fairly and equitably. Many lawyer groups that worked hard, as non-partisans, on H.B. 274 are eagerly working on suggested rules to aid the work of the Texas Supreme Court Rules Advisory Committee. Your Litigation Section Council is monitoring this work and as drafts are presented to the Supreme Court Rules Advisory Committee for consideration, they will be circulated to the Section membership for review and comment. I am sure that the end result will be fair and equitable, but the process will, as always, remain fascinating.

As you may notice, Geoff Gannaway and many of his editorial staff have passed the torch. Steve Hayes and George Parker Young, who joined the Litigation Council this year, have taken on the enormous task of co-chairing the editing and production of News for the Bar. Our many, many thanks to Geoff Gannaway and his team for their past work and to Steve, George, and their team for taking on this task. We are always looking for articles, ideas and feedback, and welcome your input at any time. Please feel free to contact me at lmcdonald@langleybanack.com. ■

"Working Group" Proposals

Representatives from ABOTA, TADC, and TTLA have formed a group to provide suggested language to the Texas Supreme Court Rules Advisory Committee on both issues, as well as a letter to Justice Nathan Hecht (as the Court's liaison to the advisory committee) regarding the expedited trial rule:

[Proposed Language - Motion to Dismiss - *Corrected*](#)

[Proposed Language - Expedited Trial](#)

[Letter to Justice Hecht re Expedited Trial](#)

Any thoughtful comments or suggestions you may have to these proposals may be sent to the Texas Supreme Court Rules Attorney, [Marisa Secco](#).

Click on a title below to link to the article. Throughout the News, click on blue underlined text to link to other sources.

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SUMMARY OF RECENT LEGISLATION of Interest to the Litigation Section

by Jerry Bullard

The 82nd Legislature ended its regular session on May 30, 2011 and its special session on June 29, 2011. A total of 10,889 bills and resolutions were introduced during both sessions. Of that total, 1,387 bills were passed and sent to Governor Rick Perry. 25 were vetoed. The remainder were either signed by the Governor or allowed to become law by the Governor's failure to exercise his veto power. Of particular interest to civil trial and appellate practitioners are bills that cover barratry, address anti-SLAPP lawsuits, and make general reforms to the legal system.

Barratry

S.B. 1716 penalizes the practice of barratry. It allows a client to bring a cause of action to void a contract for legal services if the contract is procured by barratry. A prevailing plaintiff can recover all fees and expenses paid to the defendant under a voided contract, the actual damages caused by barratry, and reasonable and necessary attorney's fees. TEX. S.B. 1716, 82nd Leg., §2 (2011) (to be codified at TEX. GOV'T CODE ANN §82.0651(a)-(b) (2011)). A person who was solicited, but did not sign a barratrous contract, can also file suit. *Id.* (to be codified at TEX. GOV'T CODE §82.0651(c)). In these cases, a prevailing plaintiff can recover a penalty of \$10,000.00, actual damages caused by the prohibited conduct, and reasonable and necessary attorney's fees. *Id.* (to be codified at TEX. GOV'T CODE §82.0651(d)).

An attorney can recover in quantum meruit if the plaintiff is unable to show the attorney committed barratry or had actual knowledge that the representation was procured through barratry. *Id.*, §1 (to be codified at TEX. GOV'T CODE §82.065(c)). However, in order to recover, the attorney (or another individual) must have reported the misconduct or reasonably believe that reporting the misconduct would substantially prejudice the client's interests. *Id.*

Governor Perry signed S.B. 1716 on May 19, 2011. The bill's effective date is September 1, 2011. *Id.* at §4. S.B. 1716 applies to contracts for legal services entered into on or after September 1st. *Id.* at §3.

House Bill 274: Legal Reforms

In his State of the State Address, Governor Perry called for legal "reforms" that included a request to add a "loser

pays" component and an "early dismissal" option to the civil justice system. Perry, Rick, *State of the State Address* (February 8, 2011). **H.B. 274**, authored by Rep. Brandon Creighton (R-Conroe), was intended to address these legal reforms. After substantial modifications in the Senate, H.B. 274 was passed by both chambers. H.B. 274 provides for, among other things, the following:

Early Dismissal of Claims: The Supreme Court is required to 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." TEX. H.B. 274, 82nd Leg., art. 1, §1.01 (to be codified at TEX. GOV'T CODE §22.004(g)). On a trial court's granting or denial of the motion, the court "shall award costs and reasonable and necessary attorney's fees to the prevailing party." *Id.* at art. 1, §1.02 (to be codified at TEX. CIV. PRAC. & REM. CODE §30.021). However, the motion to dismiss provisions will not apply to actions by or against governmental entities or public officials. *Id.*

Expedited Civil Actions: The Supreme Court is required to adopt rules to promote the "prompt, efficient, and cost-effective resolution of civil actions" in which the amount in controversy does not exceed \$100,000. TEX. H.B. 274, 82nd Leg., art. 2, §2.01 (to be codified at TEX. GOV'T CODE §22.004(h)). However, the Supreme Court may not adopt rules that conflict with any provision of the medical liability provisions in Chapter 74 of the

¹ Legislative Reference Library of Texas, 82nd Legislature Legislative Statistics (August 25, 2011).

² *Id.*

³ As a general rule, the governor has ten (10) days upon receipt of a bill to sign it, veto it, or allow the bill to become law without a signature. However, if a bill is sent to the governor within ten (10) days of final adjournment, he has until twenty (20) days after adjournment to act on the bill. If the governor neither signs nor vetoes the bill within the allotted time, the bill becomes law. TEX. CONST. art. 4, §14.

Civil Practice and Remedies Code, the Family Code, the Property Code, or the Tax Code. *Id.*

Permissive Interlocutory Appeals: Section 51.014 of the Civil Practice and Remedies Code (“CPRC”), as amended, will authorize a trial court to permit an appeal from an order that is not otherwise appealable if the order “involves a controlling question of law as to which there is a substantial ground or difference of opinion” and “an immediate appeal from the order may materially advance the ultimate determination of the litigation.” TEX. H.B. 274, 82nd Leg., art. 3, §3.01 (to be codified at TEX. CIV. PRAC. & REM. CODE §51.014(d)). An appellate court may accept the appeal if the appealing party petitions within fifteen days from the date the trial court signed the order and the party explains why the appeal is warranted. If accepted, the appeal will be treated as an accelerated appeal. *Id.* (to be codified at TEX. CIV. PRAC. & REM. CODE §51.014(f)). The appeal will not stay the underlying proceeding unless the parties agree or the trial or appellate court orders the stay. *Id.* (to be codified at TEX. CIV. PRAC. & REM. CODE §51.014(e)).

Offer of Settlement Provisions: The “offer of settlement” statute has been amended. Now, a party cannot recover litigation costs (i.e. costs and attorney’s fees) that total more than the party either recovers or would recover:

- Prior to adding an award of costs under Chapter 42 of the CPRC; or
- Prior to subtracting, as an offset, an award of litigation costs given to the other party.

TEX. H.B. 274, 82nd Leg., art. 4, §4.04 (to be codified at TEX. CIV. PRAC. & REM. CODE §42.004(d)). Section 42.001(5) is also amended to include “reasonable deposition costs” in the definition of “litigation costs.” *Id.* at art. 4, §4.01 (to be codified at TEX. CIV. PRAC. & REM. CODE §42.001(5)).

Designation of Responsible Third Parties: If a defendant fails to timely disclose a person as a responsible third party (“RTP”) and limitations runs on the claimant’s lawsuit (meaning the RTP can no longer be sued), then Section 33.004 of the CPRC now prohibits the defendant from designating the person as a RTP. TEX. H.B. 274, 82nd Leg., art. 5, §5.01 (to be codified at TEX. CIV. PRAC. & REM. CODE §33.004(d)).

Governor Perry signed H.B. 274 on May 30, 2011. H.B. 274 will be effective on September 1, 2011 and will apply to all civil actions commenced on or after September 1st. TEX. H.B. 274, 82nd Leg., art. 6, §6.01 - §6.02.

Anti-SLAPP Legislation

In what is commonly referred to as an “Anti-SLAPP”⁴ law,

⁴ SLAPP stands for Strategic Lawsuit Against Public Participation.

H.B. 2973 seeks to prevent lawsuits filed against those who elect to exercise their constitutional rights “to petition, speak freely, associate freely, and otherwise participate in government” through self-publishing, citizen journalism, and other forms of speech.”⁵

H.B. 2973 adds Chapter 27 to the CPRC and creates a procedural mechanism that allows defendants to file a motion to dismiss, at which point the plaintiff will be required to show that he or she had a genuine case for each essential element of the claim. If the motion is granted, the plaintiff may be required to pay the defendant’s attorney’s fees. TEX. H.B. 2973, 82nd Leg., §2 (to be codified at TEX. CIV. PRAC. & REM. CODE §27.003).

H.B. 2973 does not apply to: (1) suits brought in the name of the state or a political subdivision of the state by the attorney general, a district attorney, a criminal district attorney, or a county attorney; (2) suits based on statements or conduct concerning the sale or lease of goods brought against the seller where the intended audience is the customer; or (3) suits seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding legal action. *Id.* (to be codified at TEX. CIV. PRAC. & REM. CODE §27.010(a)-(c)).

Governor Perry signed H.B. 2973 on June 17, 2011. It became effective on June 17th and applies to all causes of action commenced on or after the effective date. TEX. H.B. 2973, 82nd Leg., §3 and §4.

House Bill 79: Other Legal Reforms

H.B. 79 is a judicial operations & administration bill. The version of H.B. 79 that ultimately passed during the first called session includes the following provisions:

Appeal of Eviction Cases

H.B. 79 now allows eviction cases to be appealed to the court of appeals, including evictions from commercial properties. TEX. H.B. 79, 82nd Leg., 1st Called Sess., art. 2, §2.02(a) (to be codified at TEX. PROP. CODE §24.007 (a)-(b)).

Transfer Cases/Exchange Benches

H.B. 79 also permits district court judges to transfer cases and/or “exchange benches” with other district court judges within the same county. *Id.* at art. 3, §3.02 (to be codified at TEX. GOV’T CODE §24.003).

Small Claims Cases/Courts

H.B. 79 introduced numerous changes to the operation of small claims cases. It requires a justice court to conduct a small claims case according to the rules of civil procedure in order to ensure a “fair, expeditious, and inexpensive resolution.” These rules will require the judge to: (1) hear the case if both parties appear; (2) state that formal pleadings are not required; (3) hear testimony from the parties and witnesses that the parties produce and consider any other evidence offered; (4) state that the hearing is informal; and (5) limit discovery as deemed

⁵ TEX. H.B. 2973, 82nd Leg. (2011).

appropriate. Id. at §5.02 (to be codified at TEX. GOV'T CODE §27.060(a)-(c)).

These rules will prohibit (1) a requirement that a party be represented by an attorney; (2) procedural rules so complex that a reasonable person without legal training will have difficulty understanding or applying the rules; or (3) requirements that the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied except to the extent that the justice of the peace determines that the rules must be followed to ensure a fair proceeding. Id. (to be codified at TEX. GOV'T CODE §27.060(d)).

H.B. 79 abolishes “small claims” courts effective May 1, 2013, at which time justice courts will conduct all proceedings in a small claims case. Id. at §5.06 - §5.09.

Vexatious Litigants

H.B. 79 also contains provisions affecting the vexatious litigants chapter of the CPRC. It grants vexatious litigants a right to: (1) appeal the entry of a pre-filing order by a local administrative judge who designates a person as a vexatious litigant and prevents the litigant from filing additional lawsuits, and (2) apply for a writ of mandamus with the court of appeals within thirty (30) days after a local administrative judge denies a litigant permission to file a lawsuit. Once a litigant is added to the vexatious litigant list, OCA must post on its website an updated list of vexatious litigants. Upon request of a person designated as a vexatious litigant, the list will have to indicate whether the person has appealed that designation. Id. at art. 9, §9.01 - §9.06 (to be codified at TEX. CIV. PRAC. & REM. CODE §11.001 - §11.104).

Additional Resources for Civil Cases

H.B. 79 requires the Supreme Court to adopt rules that will allow trial courts to request additional resources to assist them in trying complex cases. In developing the rules, the Supreme Court is instructed to include considerations as to whether a case involves or is likely to involve:

- a large number of parties separately represented by counsel;
- coordination with related actions pending in one or more courts in other counties of the state or in one or more federal district courts;
- numerous pretrial motions that present difficult or novel legal issues that will be time-consuming to resolve;
- a large number of witnesses or substantial documentary evidence;
- substantial post-judgment supervision;
- a trial that will last more than four weeks; and
- a substantial additional burden on the trial court's docket and the resources available to the trial court to hear the case.

TEX. H.B. 79, 82nd Leg., 1st Called Sess., art. 7, §7.04 (to be codified at TEX. GOV'T CODE CH. 74, §74.251 - §74.252).

A trial judge, on a party's motion or on the court's

own motion, may review a pending case and determine whether, under the rules adopted by the Supreme Court, the case will require additional resources to ensure effective judicial management. The determination does not require an evidentiary hearing, but the trial judge may confer with the parties in order to assist the judge in determining whether additional resources are required. If the trial judge determines additional resources are needed, the judge must notify the presiding judge of the administrative region in which the court is located and request any specific additional resources. If the presiding judge of the administrative region agrees with the trial judge, the presiding judge must use resources previously allotted to the administrative region to fulfill the request or submit a request for additional resources to the Judicial Committee for Additional Resources (JCAR), which is a committee that will be composed of the Chief Justice of the Supreme Court and the nine (9) presiding justices of the administrative judicial regions. Id. (to be codified at TEX. GOV'T CODE CH. 74, §74.253).

The JCAR will determine whether a case requires additional resources. If it determines that additional resources are required, the JCAR shall make available to the trial judge the resources requested to the extent such funds are available. The additional resources may include:

- the assignment of an active or retired judge;
- additional legal, administrative, or clerical personnel;
- information technology or software;
- specialized continuing legal education;
- an associate judge;
- special accommodations or furnishings for parties; and
- other services or items deemed necessary and appropriate by the committee.

Id. (to be codified at TEX. GOV'T CODE CH. 74, §74.254). The filing of a motion seeking additional resources is not grounds for a stay or continuance of the proceedings in the court in which the case is pending. Id. (to be codified at TEX. GOV'T CODE CH. 74, §74.256).

A determination made by the trial court judge, the presiding judge of an administrative region, or the JCAR is not appealable or subject to mandamus. Id. (to be codified at TEX. GOV'T CODE CH. 74, §74.257).

The Supreme Court must adopt rules relating to additional resources no later than May 1, 2012. Id. at §7.05.

Legislation That Failed

The 82nd Legislature passed several pieces of legislation that directly affect the judicial branch. Other legislation failed to pass that would have significantly impacted practicing attorneys. Based on the interest generated by such legislation and the forces at work behind them, some, if not all, of the failed measures may be addressed via interim charges (i.e., between-session studies), resurrected during the 2013 legislative session, or both. The following summarizes some of the more relevant pieces of legislation that failed.

S.B. 13: Early Dismissal, Expedited Proceedings, Offers of Settlement, and Other Reforms

S.B. 13, authored by Sen. Joan Huffman (R-Houston/Southside Place), was the companion bill for H.B. 274. Like the original version of H.B. 274, S.B. 13 would have required the Supreme Court to adopt rules providing for the early dismissal of “non-meritorious cases” and to create a procedure for the “prompt, efficient, and cost-effective resolution” of civil actions in which the damages sought are between \$10,000 and \$100,000.⁶

S.B. 13 would have also prohibited courts from creating “implied causes of action” and would have amended CPRC §38.001 to permit the recovery of attorney’s fees for defamation claims.⁷

The bill also sought to amend the offer of settlement provisions in Chapter 42 of the CPRC to: (1) include reasonable deposition costs in the definition of “litigation costs;” and (2) require a claimant to pay a defendant’s litigation costs if the defendant offers to settle, the claimant refuses, the amount of monetary relief awarded to the claimant is “more favorable to the defendant who made the settlement offer than the settlement offer;” and the difference between the settlement offer and the monetary relief awarded in the judgment is “equal to or greater than 10 percent of the amount of the settlement offer.”⁸ S.B. 13 died in the Senate Committee on State Affairs.

S.B. 21: Voluntary Compensation Plan as an Alternative to Litigation

S.B. 21, co-authored by Sen. Tommy Williams (R-The Woodlands) and Sen. Huffman, sought to create a mechanism for a potentially liable person to establish a voluntary compensation fund to compensate claims involving an event or product that causes (1) at least two deaths; (2) bodily injury to at least five persons; or (3) damage to real property owned by at least five people. According to Sen. Williams, S.B. 21 authorized the creation of “voluntary compensation plans” in order to “provide victims quick, fair and non-adversarial compensation for legitimate claims” in hopes of reducing “expensive, risky, and emotionally-draining litigation.” S.B. 21 died in the Senate Committee on State Affairs.

H.B. 2437: Litigation Costs After Rejection of Certain Settlement Offers

H.B. 2437, authored by Rep. Kenneth Sheets (R-Dallas), would have amended the offer of settlement provisions in Chapter 42 of the CPRC to provide that the amount of litigation costs awarded under the statute must be determined by the court prior to the entry of judgment. Further, if damages were not awarded to the claimant, the litigation costs that could have been awarded under the statute could not be greater than the amount of the defendant’s most recent settlement offer. H.B. 2437 died in the House Committee on Judiciary & Civil Jurisprudence. ■

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

**WHAT PASSED
AT A GLANCE**

S.B. 1716 Voidability of Contracts Procured Through Barratry and Liability Arising from Barratry



H.B. 274 Attorney’s Fees, Early Dismissal, Expedited Trials, and Reform of Certain Civil Remedies and Procedures



H.B. 2973 Encouraging Public Participation by Protecting a Person’s Right to Petition, Right of Free Speech, and Right of Association from Meritless Lawsuits



**H.B. 1/
S.B. 1** General Appropriations



H.B. 79 Relating to Fiscal and Other Matters Necessary for Implementation of the Judiciary Budget



S.B. 13 Early Dismissal, Expedited Proceedings, Offers of Settlement, and Other Reforms of Certain Remedies and Procedures



S.B. 21 Establishment of a Voluntary Compensation Plan as a Litigation Alternative



S.B. 297 Juror Questions and Note Taking



S.B. 358 Waiver of Sovereign and Governmental Immunity



H.B. 156 Requiring Recusal Based on Political Contributions





INTERVIEW of SEN. ROBERT DUNCAN on H.B. 274

by Kelli Walter

Senator Robert Duncan, a prominent leader in the Texas Senate, has represented District 28, a district now comprised of 46 West Texas counties, since 1996. Senator Duncan has earned the respect not only of his constituents, but also his peers, being appointed to the Senate Finance Committee each legislative session dating back to 2001, as well as being appointed to the Finance Conference Committee, the group given responsibility for developing the final appropriations bill establishing the state budget. Senator Duncan is also a member of the Senate Natural Resources Committee and the Senate Jurisprudence Committee.

Senator Duncan's leadership does not end there. He has served in several key chairmanships throughout his Senate tenure. During the past three legislative sessions, including the most recent 82nd Legislature, Senator Duncan led the Senate State Affairs Committee as chairman. This committee addresses crucial statewide issues impacting all Texans, and notably, tackled revision of the infamous "Loser Pays" legislation introduced by the House in the last session.

A longtime resident of Lubbock, Senator Duncan earned his Bachelors of Science in Agricultural Economics from Texas Tech University and earned his Doctorate of Jurisprudence from the Texas Tech University School of Law. In addition to his fifteen years of leadership in the Texas Senate, Senator Duncan also practices law as a Partner with Crenshaw, Milam & Dupree, L.L.P. Texas Monthly has five times named him among the state's 10 best legislators and has also selected Senator Duncan as a "Texas Super Lawyer."

Senator Duncan, a key contributor in the 82nd Legislative session, kindly agreed to answer questions concerning H.B. 274, the once highly controversial piece of legislation that eventually achieved consensus in the House and Senate. As Chairman of the Senate State Affairs Committee, Senator Duncan provides a unique perspective on the controversial nature of the initial bill proposed by the House and the steps taken to transform that bill into a universally accepted piece of legislation that improves the Texas justice system. Below is a rare look into the behind-the-scenes "sausage-making" of H.B. 274.

* * * * *

Of the over 10,000 bills introduced in the 82nd legislative session, one particular bill (H.B. 274) caused a lot of controversy among Texas lawyers. It was even opposed by both the defense bar (TADC) and plaintiffs' bar (TTLA). In your opinion, what made H.B. 274 so controversial?

The original "Loser Pays" legislation, H.B. 274, was perceived by members of the bar as onerous. Legislators

received numerous comments about the potential unfairness of such a law. While many in the Capitol had the view that it most greatly impacted personal injury plaintiffs, we also received pointed and concerned comments on the negative impact the provision would have on small business plaintiffs as well. The overall perception was that the original bill would have had a chilling effect on the bringing of lawsuits across the spectrum.

Who was pushing this version of the bill in the House?

The Governor's office backed this legislation. Representative Brandon Creighton introduced the filed version of the bill, which as I recall, had been modified from earlier, working drafts. I think it received a cool welcome, based on the input House members received from practitioners in their districts. The House author along with Representative Tryon Lewis and others did tremendous work to improve this version. Chairman Jim Jackson was instrumental in helping improve the House filed version and conducting the House committee hearings.

What happened to H.B. 274 once it got to the Senate?

Once the bill was received by the Senate, Senator Huffman (who was the sponsor of the bill in the Senate) and I met to discuss the negotiation process. The bill had been amended and improved during the preceding months in the House, but several controversial provisions remained. One was the offer of settlement amendments that would have eliminated the claimant offset as a floor in the recovery of litigation costs. We received testimony that claimants would be discouraged in a manner similar to the original "loser pays" provisions when faced with the prospect of having to pay out of pocket in the event of obtaining a judgment less favorable than the offer. During Senator Huffman's negotiations, we decided to reinstate the offset, but provided that the recovery could only be taken down to zero after payment of litigation costs, which was a significant change from current law.

In addition, we took a close look at the floor amendment by Representative Lewis that repealed the provision allowing a claimant to join a responsible third party (RTP) within 60 days of the defendant's designation of the RTP regardless of the statute of limitations. The proponents of the provision illustrated anecdotes of plaintiffs gaming with defendants in order to add new defendants to pursue after limitations had run, while settling with original defendants. There was also a strong interest to strictly enforce limitations. In the end,

we agreed to this provision, but added safeguards to ensure a defendant doesn't delay in designating RTPs until after the statute runs. The compromise provides that a defendant may be prohibited from designating an RTP after limitations has run if such potential party was not timely disclosed.

Were there any changes desired by members of the Senate that were compromised in the final bill? What did you think of these compromises?

I think the Senate was comfortable with the final version because we negotiated to full agreement with the stakeholders, the Governor and the House proponents.

The version of H.B. 274 advocated by the House would have, in some instances, required the plaintiff to pay the defendant more than the plaintiff received in a judgment after the plaintiff prevailed. Would you agree that the initial drafts of the bill resembled more of a "plaintiff pays" system, and not necessarily "loser pays" system?

I think there is some truth in that view of the original bill as creating a "plaintiff pays" system because it would have allowed a defendant to penetrate the plaintiff's pocketbook under a repeal of the proposed claimant offset provision in combination with the 20 Percent rule.

How did this bill change so quickly from deeply divisive and controversial to being overwhelmingly supported by huge margins in both the Senate and the House on final passage? (Senate: 31Y-0N; House: 130Y-13N-2Present, Not voting) Did you expect such overwhelming approval to the Senate's changes by the members of the House (including the support of all of the authors of the original bill)?

That was a pleasant surprise. We knew this bill had the political momentum to pass. Our goal was to address the desired reform objective, without doing harm. Senator Huffman, Representative Creighton, Representative Lewis, Chairman Jackson, along with the stakeholders, worked long and hard. This bill illustrates the need to negotiate important changes in policy and law. When you have stakeholders committed to finding resolution, an appropriate compromise is satisfying.

During the past two legislative seasons, you led the Senate State Affairs Committee as chairman, and we've been told you were a leading force in helping achieve common ground among the members of the Senate and the House on the final version of "Loser pays." How did you do that?

Senator Huffman and I brought interested stakeholders into the room, and we negotiated. I think that the advocates on both sides of the civil justice system have a true desire to

improve the system. Their views may differ, but when you engage knowledgeable parties to participate in good faith, there is sufficient motivation to reach a solid end product.

Who were the players at the table crafting and voting on the bill passed in the Senate?

Along with Senator Huffman and the House participants, Jeff Boyd and Michael Schofield with the Governor's office, Lee Parsley with the Texas Civil Justice League, Alan Waldrop with Texans for Lawsuit Reform, Mike Gallagher with the Texas Trial Lawyers Association, and David Chamberlain with the Texas Chapters of the American Board of Trial Advocates. We also received input from Representative Creighton, Representative Lewis and the Texas Association of Defense Counsel.

When you gathered all of the players in the same room, what did you tell them?

We told them we had confidence in their ability to reach a solution. We told them to do no harm.

Senator Huffman and I were confident that the group we composed to negotiate the bill would critically and technically analyze the House engrossed version and make a determination of what areas could be improved. Each party had a wish list. But each party was extremely talented and motivated to achieve resolution, so there was not much need for negotiation guidance or pep talk. "Walk outs" were few.

What do you anticipate will be the biggest change in our civil justice system as a result of this bill?

I think there will be a real opportunity to revitalize jury trials under the "Expedited Civil Actions" provisions of the bill because a less expensive system allows litigants to more fully utilize it. It remains to be seen how the Supreme Court will draft rules on this, but I think it is safe to assume we will see streamlined opportunities for litigants to try cases with relatively modest damages under limited discovery and quick trial timeframes. There are a lot of details to work out, but there is a real hope among practitioners that it will better serve clients with predictability and quick disposition. In my view, the potential benefit to the Bar is that young lawyers may be given the opportunity to gain courtroom experience in cases where the exposure is limited and procedure is expedited.

What impact do you foresee the addition of a procedural option for early dismissal/motion to dismiss having on litigation in Texas? How is it different than the rules already in place on frivolous lawsuits?

The Supreme Court will be writing rules on this, but testimony indicated a desire to see an analog to Rule 12(b)(6)

of the Federal Rules of Civil Procedure. I think the rule will ultimately add another procedural layer to ensure that plaintiffs fully analyze whether their claim is based in law and fact. I would expect that the major difference would be a direct hit to the underlying case, as opposed to an order of sanctions, which is the remedy available under current law. In addition, we heard testimony last interim that suggested that defendants rarely employ the current law on frivolous lawsuits in large scale. Because the Supreme Court will be promulgating a civil procedure rule, we may see this issue raised more often by this new motion. But the cost-shifting provision associated with the motion to dismiss will encourage the moving party to seriously consider the merits of the motion prior to filing.

We have generally seen a big push for tort reform every eight years or so. Do you think we are done for a while (that we won't see any big tort reform issues in the next session)?

I hope so. Change for the sake of change does not necessarily yield good policy. There will always be specific issues that need to be addressed based on decisional law. But in terms of comprehensive reform, I have not heard from any Texas lawyer representing clients in the civil justice system that any immediate tort reform is necessary.

If you think we will see some big tort reform issues in the next session, what do you predict will be the next big push in the upcoming years?

What I would like to see is greater support for our judiciary, mainly by appropriations. We finance the judicial branch of government with 0.4 percent of our state's budget. Insufficient funding, inadequate staffing, and outdated technology results in delay. In the civil justice system, time is money. Moreover, delays and backlogs frustrate litigants' confidence in the system.

As a former graduate of Texas Tech University and Texas Tech School of Law, what are your predictions for the Raiders' upcoming football season?

All of our conference games will be played in the Big XII.

* * * * *

While it seems Senator Duncan may be playing it safe with his predictions for the Texas Tech 2011 football season, he is willing to make more extensive predictions about the hopeful future of the Texas Bar. We greatly appreciate his insight into the evolution of legislation that will impact the practice of litigators all over Texas.



**Interviews of
DAVID CHAMBERLAIN
and BRAD PARKER**

by Vinny Circelli



David Chamberlain and Brad Parker have emerged as well-respected, serious leaders of the Texas bar, as well as in their own local bar associations. In 2011, both Mr. Parker and Mr. Chamberlain helped reform and reshape the controversial House Bill 274 into a bill that enjoyed near unanimous support from the Texas House and Senate, the Texas Governor and Lieutenant Governor, and (perhaps most impressively) both the plaintiffs and defense bar.

Background on David E. Chamberlain

Mr. Chamberlain is an officer of both the Austin Chapter and Texas Chapters of the invitation only American Board of Trial Advocates, and currently also serves as Tex-ABOTA's legislative co-chair. Mr. Chamberlain was honored in 2006 as The Outstanding Defense Bar Leader in the nation by DRI, the largest international association of defense trial lawyers in North America and Europe (Fred Sievert Award). In 2011 Mr. Chamberlain was elected to serve as President of the Austin Bar Association, and in 2010, he was elected to serve on DRI's National Board of Directors.

In 2008, he was named The Outstanding Board Director of the Austin Bar Association. He recently served as President of the Texas Association of Defense Counsel (2005) and in 2009 received the Association's Founder's Award for outstanding leadership and service to the profession. He has been named Texas Super Lawyer for seven straight years in Texas Monthly Magazine (2005-2011) and has also been named National Super Lawyer, Corporate Counsel Edition for the past four years (2008-2011). He is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization. He is the senior partner in the Austin civil trial firm of Chamberlain McHaney and has had the highest peer review rating (Pre-eminent A.V.) issued by Martindale-Hubbell for over 25 years. He served as the Course Director of the 2007 Texas Advanced Personal Injury Law Course, sponsored by the State Bar of Texas.

Mr. Chamberlain obtained his bachelor's degree from the University of Texas at Arlington in 1975 and his law degree from St. Mary's University of San Antonio in 1978.

Background on Brad Parker

Mr. Parker is a Director and Vice President of Legislative Affairs for the Texas Trial Lawyers Association. Mr. Parker has focused exclusively in the area of trial work since he was licensed in 1985. For more than 20 years his practice has been centered almost exclusively in the area of wrongful death, catastrophic personal-injury, and commercial litigation. He is a senior partner in the Fort Worth law firm of Parker McDonald and maintains an AV rating with Martindale-Hubbell.

Mr. Parker is Board Certified by the Texas Board of Legal Specialization in Personal Injury Trial Law. He is past President of the Tarrant County Trial Lawyers Association, past Chairman of the Texas Trial Lawyers Association Advocates, sustaining member of the American Association of Justice, member of the Dallas and Tarrant County Trial Lawyers, Tarrant County Bar and Tarrant County Bar Foundation. Mr. Parker has also been repeatedly recognized by Fort Worth Magazine as one of Fort Worth's attorneys "worth knowing" and a Texas Super Lawyer by Texas Monthly magazine and is a member of the American Board of Trial Advocates.

Mr. Parker currently serves as Immediate Past President of the Tarrant County Bar Association and has been selected as a member of the American Board of Trial Advocates. He obtained his bachelor's degree from the University of Texas in 1982 and his law degree from Texas Tech University School of Law in 1985. Brad Parker was Mike Gallagher's right hand advisor throughout the negotiations over HB 274.

* * * * *

Of the over 10,000 bills introduced in the 82nd legislative session, one particular bill (HB 274) caused a lot of controversy among Texas lawyers. It was even opposed by both the defense bar and plaintiffs' bar. In your opinion, what made HB 274 so controversial?

Chamberlain: Looking at the original version of HB 274 as a whole, it really constituted a series of other bills that would have created the only "loser pays" system of this type in the country or in the world. By way of example, one provision in the HB 274 would have allowed a defendant to make an offer of settlement to the plaintiff, and if the plaintiff didn't recover at least 90% of that offer, the plaintiff would have to pay the defendant all costs and fees incurred by the defendant after the offer was made. Such a rule could mean that even if the plaintiff won the case, he or she could be liable to the defendant for costs and fees in excess of the amount the plaintiff recovered. Even more far-reaching was the fact that the plaintiff's attorney could be held jointly and severally liable with the client for those costs and fees. This provision would not have been mutual or reciprocal in affecting both plaintiffs and defendants, but would only have worked to the detriment of the plaintiff. This would have resulted more in a "plaintiff pays" than a "loser pays" system.

In another example of why HB 274 was so controversial, one provision of the bill would have prevented the courts from creating an "implied cause of action" from statutes unless a cause of action was expressly authorized by the statute. That raised major concerns about the effect this provision would have on Texas courts' ability to rely on and shape common law, as well as the effect on the long established law regarding negligence per se cases.

Ultimately, the original version of HB 274 would have changed the civil justice system and the way we try cases here in Texas.

Parker: Unlike some of the tort reform efforts we've seen in the past, which typically would target specific areas of litigation (such as medical malpractice, expert witness issues, worker's compensation, etc.) HB 274, in its original form was really a full-scale attack on the civil justice system as a whole. The original form of this bill would

have resulted in a shutdown of all damage suits and would have had dramatic and far-reaching results for almost all lawyers in Texas.

Who was pushing the original version of the bill in the House?

Chamberlain: Regarding who was pushing this bill, it really differed from past efforts where we've seen outside groups pushing for the changes. This time we really didn't detect much outside pressure. The primary force behind the bill, especially the early dismissal and expedited trial provisions, was Governor Perry. Governor Perry made the passage of a new round of tort reform a priority in his State of the State address.

Parker: Obviously in addition to the authors of the bill and the groups that typically support tort reform (Texans for Lawsuit Reform and the Texas Civil Justice League), Governor Perry made it clear in his State of the State address that "loser pays" would be a high priority item and then he declared it an emergency item during the session.

I understand that Senator Duncan called together various groups to hash out a revision of HB 274 that could be considered by the Senate, what were your instructions?

Chamberlain: Senator Duncan gave us two clear directions: First, do no harm to the civil justice system, and second, make it the best bill you can.

How long were you stuck together trying to craft an acceptable form of the bill?

Chamberlain: The negotiations stretched over 8 full, consecutive days. The negotiations and the debate were lively during those 8 days.

Parker: It was a marathon 8-day session.

What group were you representing during the negotiation process of this bill?

Chamberlain: I was there at Senator Duncan's invitation on behalf of the Texas Chapter of the American Board of Trial Advocates ["TexABOTA"], where I am co-chair of the Legislative Committee. Our group is split pretty evenly between plaintiff's attorneys and defense attorneys. One of our chartered principles is to defend the Seventh Amendment and to protect a fair and balanced civil justice system.

Parker: I was there on behalf of the Texas Trial Lawyers Association ["TTLA"], where I am the Vice President of Legislative Affairs. We track bills upon filing if they have some impact on the civil justice system. This was a major tort/civil justice issue that hit our radar pretty quickly, and I testified about half a dozen times in the house on behalf of TTLA. I think one of the things we do really well is to point out the unintended consequences of these bills and to help identify and work together on solving the real problems underlying the bills.

Who all were the players at the table crafting the bill that was eventually passed and how did it go from being so controversial to being supported so broadly?

Chamberlain: The main players included the TexABOTA, TTLA, Texans for Lawsuit Reform [“TLR”], the Texas Association of Defense Counsel [“TADC”], and the Civil Justice League. In addition, representatives from the Governor’s office and the Lieutenant Governor were at the negotiating table. Given that all those groups came together and Senator Duncan’s instructions to us, I knew we’d be able to come to some sort of an agreement in the end; we were just not sure what form that agreement would finally take.

Parker: [Players - same as above.] We were able to make this bill work in large part, due to the act that there weren’t just the “usual players” involved in fighting over tort reform. The negotiations weren’t just about TTLA and TLR. Instead, we had TexABOTA, TADC, contract lawyers, commercial litigators, and others all involved in helping reshape this bill.

Why did you feel it was important to take a stand on the bill?

Chamberlain: I think the original version of this bill made it clear that it is absolutely imperative for all segments of the trial bar to start working together on the big issues to help protect our system. We can no longer simply play defense when these issues come up, but we also need to play offense.

If we as members of the bar don’t take a leadership position on these issues, there can be a real vacuum of leadership. In the past, that vacuum has been filled by the various tort reform groups without any guidance from us. Therefore, this bill really demonstrates the importance for the specialty bar groups, like TexABOTA, TTLA, TADC, and others to step up and take an active role in working on these issues.

Parker: This was a major tort/civil justice issue that came on our radar pretty quickly. The fact that so many different groups came together to get involved underscores my theory that this bill in its original form was a whole scale attack on the civil justice system which was unprecedented in previous legislative sessions.

Did you expect such overwhelming approval to the changes by the members of the House (including the support of all of the authors of the original bill), the Senate, the Governor, Lieutenant Governor, TTLA, TADC, and ABOTA?

Chamberlain: I really did, given that on the last Saturday of our negotiations, Lieutenant Governor Dewhurst was in the room (and actually brought lunch for all of us). In addition, Jeff Boyd, the Governor’s General Counsel, was in the room all day during that final day of negotiations. As I stated, I knew we’d be able to come to a wide-ranging agreement, I just wasn’t sure how it would look in the end.

Parker: If you had asked me at the beginning of the session whether the final bill would have been as fair as it ended up being, I’m not sure I could have guessed that. I was very encouraged. It

was comforting to know that the system worked, and every day that went by during the marathon negotiation session, it became less of a surprise to me how widespread the support would end up being. It achieved everyone’s purpose but did not destroy the system.

What do you think will be the biggest change as a result of this bill?

Chamberlain: I believe the amendments to the Responsible Third Party rules will result in the biggest change. I think the changes could result in more lawsuits being filed earlier, and more defendants being added during the early stages of litigation. Unfortunately, I think plaintiffs’ attorneys are going to get the message that they should avoid lengthy pre-suit negotiations—though that’s what we should be encouraging, both from an economic and policy standpoint. These rule changes may well foment more litigation and more expensive litigation, particularly in the fields of construction and products liability lawsuits. We’ll need to keep an eye on this provision and see how it really works out.

On a positive note, the changes to the expedited discovery present a great opportunity to get more young lawyers (and lawyers in general) trial experience in an economically efficient way. I view this as an opportunity that could be an interesting positive change.

Parker: I think it will be the Responsible Third Party provision changes. Ironically, I think it hurts the defense bar worse than anybody. I believe the changes open more Pandora’s boxes than it tries to close.

What effect do you think the addition of a procedural option for early dismissal/motion to dismiss will have on litigation in Texas? How is it different than the rules already in place on frivolous law suits?

Chamberlain: There’s a misconception that the new Texas rule on early dismissal will be an adoption of the Rule 12(b)(6) dismissal options under the Federal Rules of Civil Procedure. In reality, the enabling statute that allows for this new early dismissal procedure states it is for early dismissal of suits without basis in law or fact and **without consideration of evidence**. After *Twombly*, lots of federal district courts are converting 12(b)(6) motions to summary judgment motions so they can consider evidence. The Texas dismissal rules will specifically bar courts from considering such evidence.

The Texas dismissal rule should really only be used to dismiss slam dunk frivolous cases, as courts **must** grant attorney’s fees to the party prevailing on a motion to dismiss. I don’t think it will be used very often given the mandatory fee provision, but when it is used, it will probably be properly used.

Ultimately, the Governor wanted something on Page 1 of HB 274 that had a “loser pays” component, and that is probably what the early dismissal rules will accomplish.

Parker: Texas already has two statutes and a rule that take care of frivolous lawsuits, in addition to this new change. If an

attorney isn't bright enough to plead his case in a way that is supported in law and fact, then he deserves to have his case dismissed. But nobody wanted to see a situation where every single case had a motion to dismiss filed, which is why this mandatory cost provision is so important. The mandatory cost-shifting provision will prevent frivolous motions to dismiss and will ensure that only truly frivolous lawsuits are dismissed.

What was the rationale for the change made to designating a third party defendant (i.e., no longer can designate AFTER limitations if possible responsible third party is disclosed before limitations)?

Chamberlain: This was one issue that we were still negotiating right down to the wire. Both TexABOTA and TTLA were firmly opposed to the change that was eventually incorporated, while TLR and Civil Justice League supported it.

This issue was extremely important to Representative Tyron Lewis. Representative Lewis was involved in the negotiations and both sides advocated very firmly. I feel that our side offered several compromises including a 60/30 day option, whereby a defendant would have only 60 days to designate a responsible third party after the statute of limitations expired, and then the plaintiff would have only 30 days to add that designee as a party. Therefore, the most you'd ever go beyond the statute of limitations would be a maximum of 90 days. However, that compromise was ultimately rejected by Representative Lewis.

We got down to the eleventh hour on the negotiations, and we just simply ran out of time. Senator Duncan eventually said we just need to go with Representative Lewis' provision if that's the best we can do.

I believe we may still have some work to do on this in the next session or two. It's not fair to plaintiffs, and it's certainly not fair to defendants in its current form. In fact it may be more unfair to defendants.

Parker: Representative Tryon Lewis, who is proponent of the change, holds the firm belief that the statute of limitations is the statute of limitations, and that once it has run, you don't get to bring a defendant back in. Representative Lewis and I have an honest intellectual disagreement on that point.

TTLA was in favor of the 60/30 day compromise instead of Representative Lewis' version (which was eventually passed), and I think most of the defense bar was too. I'm not sure why the 60/30 version wasn't the one adopted, but I think it's something that will need to be revisited.

We have generally seen a big push for tort reform every eight years or so. Do you think we are done for a while (that we won't see any big tort reform issues in the next session)?

Chamberlain: That's always hard to predict, but the proponents of tort reform and lawsuit reform are here to stay. In the last election cycle, TLR raised and spent \$6.5 million in political donations. If you're going to continue to raise that kind of money, you're going to have to deliver a product.

I believe we will continue to see new tort reform efforts every legislative session, but my goal and hope is that we can find ways to work with tort reform groups in a positive way. For instance, we've got a list of conclusions and recommendations from the Court Administrative Task Force the State Bar conducted 3 years ago. TLR participated in that Task Force, and it pretty much had a unanimous support in the Senate. Most of those recommendations still haven't passed, but I believe those recommendations represent one area where we can work with the tort reform folks in the future.

Parker: This State has had comprehensive tort reform going back to the 1980s, and there have been dramatic changes over the years. I don't feel there's a lot more that can be done without causing real harm to the civil justice system. And I think that's why we saw what we did with the original version of HB 274. We've got more pressing issues in this State than additional tort reform, but I'm sure we'll see more efforts in the future.

What effect do you think Governor Perry's potential presidential run had on his decision to support the final version of this bill?

Chamberlain: I'm not sure. It could be that Governor Perry is a true believer in tort reform issues, or if, one is more cynical, that Governor Perry wanted to get this passed in connection with his run. However you look at it, Governor Perry certainly pushed for the passage of this bill, as he made clear in his State of the State address.

Parker: I think anything a politician does in the year he or she runs for President is directly guided by their desire to be President. Certainly it had some impact, to what extent I don't know, but he didn't do it blindly.

What lessons from the nearly unanimous passage of this bill can be learned from other states and bars as they tackle their own tort reform issues?

Chamberlain: As I stated, I think this makes it clear that all segments of the trial bar are going to have to start working together on the big issues. It is crucially important for specialty bar groups, like TexABOTA, TTLA, and TADC, to step up and play offense when these big issues come up.

To that end, Senator Duncan has recently organized a meeting of TexABOTA, TTLA, and TADC for September to come up with a plan for the next legislative session to help us identify issues that we can work together with TLR and other similar groups on.

Parker: I think what other groups can take from this experience is that if a bar is confronted with a whole-scale attack on its civil justice system, like we were, it can rally all segments of the bar to protect the system and help uphold the Seventh Amendment to the U.S. Constitution. I think it should encourage other bars and organizations to reach out early and help stop these kinds of attacks from going forward at an early stage.





Closing a Loophole and Opening a Can of Worms – UNDERSTANDING THE NEW AMENDMENT TO CHAPTER 33

by Josh Borsellino

For many years, Chapter 33 of the Texas Civil Practice and Remedies Code has allowed a plaintiff to assert claims against one designated as a responsible third party (“RTP”), even if those claims would otherwise be time-barred under the applicable statute of limitations. Known as the “limitations loophole,” Section 33.004(e) provides:

If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.¹

TEX. CIV. PRAC. & REM. CODE § 33.004(e). This provision has come under increasing scrutiny by both legislators and appellate courts. Twice in the past few years, the Texas Supreme Court limited its applicability. *See, e.g., Galbraith Eng. Consulting, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009) (ten-year statute of repose under TEX. CIV. PRAC. & REM. CODE § 16.008 is an absolute bar on construction claims, and § 33.004 cannot be used to revive claims barred by statute of repose); *see also Molinet v. Kimbrell*, 2011 Tex. LEXIS 68, 54 Tex. Sup. Ct. J. 491 (Tex. 2011) (two-year statute of limitations for healthcare claims under Section 74.251 of TEX. CIV. PRAC. & REM. CODE trumps § 33.004, and thus time-barred healthcare liability claims cannot be “revived” following RTP designation). The “limitations loophole” has been criticized by many in the defense bar as being unfair to nonparties, who might suddenly find themselves as parties well after claims against them would otherwise have been time-barred. Critics have also claimed that the provision is subject to collusion, as a plaintiff could (at least theoretically) convince a defendant to designate a nonparty as a responsible third party solely for the purpose of “reviving” a time-barred claim.

On May 30, 2011, Governor Perry signed new legislation that repeals the limitations loophole. H.B. 274 provides that “33.004(e), Civil Practice and Remedies Code, is repealed.”

¹ If the claimant joins the RTP more than 60 days following the designation, the limitations loophole does not apply, and summary judgment in favor of the newly joined defendant based on limitations is appropriate. *Kilpatrick v. Vasquez*, 2011 Tex. App. LEXIS 2422 (Tex. App.—Houston [1st Dist.] Mar. 31, 2011, no pet.) (mem. op.).

This repeal comes with an important caveat, however. The new amendment adds a provision that places a burden on defendants to “timely” disclose potential RTPs. This new provision, § 33.004(d), provides as follows:

A defendant may not designate a person as a responsible third party 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 responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure.

Texas Rule of Civil Procedure 194.2 requires a party to disclose “the name, address, and telephone number of any person who may be designated as a responsible third party.” Before the new amendment to Chapter 33, defendants were in no rush to make such disclosures. The new RTP amendment makes it clear that a defendant cannot “lay behind the log” and designate a previously undisclosed RTP as trial nears. Thus, when applying this new amendment, the court will need to inquire as to whether the defendant withheld information about a potential responsible third party. If so, the defendant will likely be barred from designating an RTP if limitations against the RTP have already run. Thus, the new amendment creates both a messy inquiry for the court (the defendant’s knowledge) and a harsh remedy (denial of a proposed RTP designation). As a result, it will now be critical for defendants to disclose potential responsible third parties early in the case (and, to be safe, to designate them early as well). Failure to do so could result in the denial of a motion for leave to designate responsible third parties.

The new provision also makes it more important for a plaintiff to sue all parties that may have caused the harm for which damages are being sought. A plaintiff can no longer sue the primary tortfeasor and wait to see whether the defendant designates others as responsible third parties before joining them, as the plaintiff’s claims against the secondary tortfeasors could be time-barred and not capable of being “revived.”

This amendment applies to cases filed on or after September 1, 2011. For cases filed before this date, the limitations loophole still applies.





A More “In Depth” Look at WHAT’S LEFT OF “LOSER PAYS”

by Roy T. Atwood and Scott F. Mascianica

After winning reelection to an unprecedented third consecutive term as governor of Texas 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.”¹ 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 first 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.

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.² 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.³

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 prevailing party (whether plaintiff or defendant) when a court rules on a motion to dismiss.⁴ 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. Given the ability of a plaintiff to recover attorney’s fees if the court denies a defendant’s motion to dismiss, the new Texas rule is more plaintiff friendly than the federal rule. 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 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

⁴ TEX. CIV. PRAC. & REM. CODE §30.021 (effective Sept. 1, 2011).

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

² TEX. CIV. PRAC. & REM. CODE § 42.004.

³ TEX. CIV. PRAC. & REM. CODE § 42.004.

THE LUTHER (LUKE) H. SOULES III AWARD FOR OUTSTANDING SERVICE TO THE PRACTICE OF LAW NOMINATION

The Luther (Luke) Soules III Award is given each year by the Litigation Section at the Annual Litigation update. It honors Luke Soules and embodies excellence in the practice of the law and exemplary service to the Bar. It recognizes Texas legal practitioners who demonstrate outstanding professionalism and community impact. The award recipient will be the guest of the Litigation Section with all expenses paid.

Nominations will be reviewed by a select committee chosen by the Litigation Section and must be submitted by November 4, 2011. Nomination applications should be mailed or emailed to:

Pat Long Weaver
Two Fasken Center, Suite 800
550 West Texas Avenue
Midland, Texas 79701
plongweaver@stubbemanlawfirm.com

Selection criteria for the Soules Award include:

- Demonstrated commitment to equal justice under law.
- Conduct promoting the rule of law
- Outstanding examples of professionalism.
- Community impact as a result of the practice of law.
- One or more significant contributions as a result of legal representation.

Rules for nomination are:

- Must be an attorney admitted, in good standing, in the State of Texas, for a minimum of ten years.
- Nominee cannot appear on a ballot in a contested race for elected office in the same year as nominated for the award.
- Nominee cannot currently serve as a member of the Litigation Section Council of the State Bar of Texas

The Nomination Application should include:

- Name, address, telephone number, and email for nominator and nominee
- The following information about the nominee (in either a curriculum vitae or in a one-page synopsis):
 - Schools attended (degrees, honors)
 - Professional affiliations
 - Published works, legal presentations
 - Other background information

A statement highlights examples and reasons the nominee should be selected to receive the award based on the selection criteria. ■

between \$10,000 and \$100,000.⁵ 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.⁶ 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.”⁷

Finally, in what some say may have the greatest impact on litigation in Texas, the legislation alters the responsible third 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.⁸ 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.⁹ 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.¹⁰ Mike Gallagher, past president of the Texas Trial Lawyers Association, thinks this change may cause plaintiff’s attorneys to sue more defendants 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 “Loser Pays”

On May 9, 2011, when the Texas House initially passed House Bill 274 by a vote of 96-49,¹¹ 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.



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).

⁸ TEX. CIV. PRAC. & REM. CODE §33.004.

⁹ TEX. CIV. PRAC. & REM. CODE §33.040(e).

¹⁰ TEX. CIV. PRAC. & REM. CODE §33.040(d) (effective Sept. 1, 2011).

¹¹ H.B. 274, 82nd Leg. R.S. (TX 2011).



New Texas Statute Allows Permissive Interlocutory Appeals – Without Agreement of Parties

by Anne M. Johnson

The 2011 Texas Legislature has relaxed the requirements for seeking permissive appeals of interlocutory orders. Previously, the permissive interlocutory appeal statute – Texas Civil Practice and Remedies Code §51.014 (d) – permitted permissive appeals of orders not otherwise subject to interlocutory appeal when (1) the order involved a controlling question of law with substantial ground for difference of opinion, (2) an appeal would materially advance ultimate termination of the litigation, and (3) both parties agreed to the appeal.¹ The current statute, effective September 1, 2011,² removes the impediment of the parties' agreement, allowing a trial court to permit an interlocutory appeal on a motion by any party, or on its own initiative.³

In House Bill 274, the 82nd Legislature amended Section 51.014 (d) of the Remedies Code to provide that, on a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable 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. The only change to the prior version of subsection (d) is elimination of the requirement that the parties must agree to the order. As a practical matter, the requirement of agreement had rendered the permissive appeal provision virtually unusable, as few cases involve an order that both parties will agree should be immediately appealed.⁴ With the elimination of agreement requirement, Texas interlocutory appeal procedure is now in line with federal procedure, which allows interlocutory appeals in similar circumstances.⁵

¹ In 2005, the Legislature amended section 51.014 to allow a trial court, with agreement of the parties, by written order to certify an interlocutory appeal on a "controlling question of law as to which there is substantial ground for difference of opinion." Act of May 27, 2005, 79th Leg., R.S., ch. 1051 § 1, 2005 Tex. Gen. Laws 3512, 3512-13 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(d)).

² The amended Section 51.014(d)-(f) is applicable to a civil action commenced on or after September 1, 2011. Act of May 24, 2011, 82nd Leg., R.S., H.B. 274, §§ 6.01, 6.02. Thus, the prior statute – requiring agreement of the parties for permissive appeals – remains in effect for all actions commenced prior to September 1, 2011.

³ Act of May 24, 2011, 82nd Leg., R.S., H.B. 274, §3.01 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(d)).

⁴ *But see Carreras v. Marroquin*, __ S.W.3d __, 2011 WL 1206377 (Tex. June 10, 2011) (resolving a split in the courts of appeals as to the minimum filing required to toll the statute of limitations in light of the medical report requirements for malpractice claims pursuant to the prior version of §51.014(d)); *Molinet v. Kimbrell*, __ S.W.3d __, 2011 WL 182230 (Tex. Jan. 21, 2011) (reviewing denial of summary judgment on limitations pursuant to the prior version of §51.014(d)).

⁵ A federal district court may certify an otherwise non-final order to permit an interlocutory appeal under 28 U.S.C. 1292(b) when its

As in all interlocutory appeals, a key factor in determining whether to pursue the appeal is whether it will stay the underlying trial court proceeding. Under the current version of §51.014 (d), there are three ways that a permissive interlocutory appeal can stay proceedings in the trial court: (1) if the parties agree to a stay, (2) if the trial court orders a stay of proceedings pending appeal, or (3) if the appellate court orders a stay of proceedings pending appeal.⁶

In addition to eliminating the requirement that the parties agree to an appeal, the Legislature reinstated a requirement that the court of appeals must also permit the appeal. The 2011 amendments added subsection (f) which makes clear that obtaining a permissive interlocutory appeal is a two-step process, requiring not only an order from the trial court, but also acceptance of the appeal by the appellate court. Subsection (f) provides:

An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

The 2005 Legislature had repealed subsection (f), indicating that the appellate court lacked discretion to decline a permissive interlocutory appeal. The amended subsection (f) makes clear that an appellate court *may* accept an appeal upon application by the appealing party within 15 days after the trial court order is signed.

To implement the new permissive appeal statute, the Texas Supreme Court adopted Texas Rule of Civil Procedure 168 and amended Texas Rule of Appellate Procedure 28 on August 31, 2011.⁷ The rules guide the two-step process for obtaining permission to appeal under Section 51.014(d).

Step one is to obtain an order from the trial court that conforms to the requirements of Texas Rule of Civil Procedure 168. Rule 168 provides that, on a party's own motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Importantly, permission must be stated in the order to be appealed. If permission to appeal is obtained after the order is issued, the previous order should be amended to include permission. Specifically, the permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and why an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Step two is to obtain permission to appeal from the court

decision (1) involves a controlling question of law, (2) there is a substantial ground for difference of opinion about the controlling question, and (3) an immediate appeal would materially advance the ultimate termination of the litigation.

⁶ TEX. CIV. PRAC. & REM. CODE §51.014(e).

⁷ See Misc. Docket No. 11-9176 (Tex. Aug. 31, 2011).

of appeals. Texas Rule of Appellate Procedure 28.2 sets out the corollary requirements for permissive appeals in the courts of appeals which include:

- The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.⁸
- The petition must include the basic elements of a brief (tables, issues presented and a statement of facts), as well as "clear and concise" argument focused on the statutory requirements: "why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation."⁹ The petition can be no more than 15 pages.¹⁰
- The court of appeals may grant an extension of time to file this petition.¹¹
- A response is due within 10 days, and any reply is due within 7 days.¹²
- The court of appeals will generally decide whether to take the petition without oral argument and "no earlier than 10 days after the petition is filed" (giving the appellee a chance to respond).¹³

The last sentence of the comments to the 2011 amendments to Rule 28 states that "[t]he petition procedure in Rule 28.2 is intended to be similar to the Rule 53 procedure governing petitions for review in the Supreme Court."¹⁴

Perhaps this final comment provides the best insight into how practitioners should approach petitions for permission to appeal. Just as a party must convince the Texas Supreme Court to accept review of a case because there is a conflict among intermediate appellate courts or the issue is of importance to the jurisprudence of the state, petitioners seeking permissive appeals must convince appellate courts that judicial economy requires an immediate appeal of a controlling question of law. For now, Texas practitioners may look to federal law where there is a well-developed body of case law interpreting the requirements of the Texas statute's federal counterpart, 28 U.S.C. 1292(b).

For cases commenced after September 1, 2011, the permissive interlocutory appeal statute should be a useful tool to seek interlocutory review of orders and prevent unnecessary trials.

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⁸ TEX. R. APP. P. 28.2(c).

⁹ TEX. R. APP. P. 28.2(e).

¹⁰ TEX. R. APP. P. 28.2(g).

¹¹ TEX. R. APP. P. 28.2(d).

¹² TEX. R. APP. P. 28.2(f).

¹³ TEX. R. APP. P. 28.2(j).

¹⁴ TEX. R. APP. P. 28 (Comment to 2011 Change).

A Closing Message FROM YOUR CO-EDITORS

Welcome to the first issue of *News for the Bar* for the 2011-2012 Bar Year! We start this issue with a heartfelt thanks to **Geoff Gannaway**, who, along with his Board of Editors, did a stellar job as the Editor in Chief of the *News* for years. Geoff has moved on to a well-deserved break, and we will take the great job he and his group did as inspiration for future issues of the *News*.

Some of Geoff's editorial team will stay with us, doing their same great work. **Tracy Nuckols** of the State Bar will continue to make sure we stay out of the barrow ditches on both sides of the road, while **David Kroll** of the State Bar will continue to design and layout the *News* in the creative, pleasing, and useful way you have seen in the past. **Richard Salgado** of Jones Day will continue to handle the Appellate Updates, and **Gretchen Sween** will take us in a little bit different direction with *Humor for the Legal Mind*. In addition to these stalwarts for the *News*, we round out the Editorial Board with the good services of Section Secretary **Paula Hinton**, **Karen Johnson**, **Jennifer Haltom Doan**, **Elizabeth Mack**, **Marcos Rosales**, **Jason Fulton**, **Andy Ryan**, **Vincent Circelli**, **Kelli Walter**, and Chair-Elect **Michael Smith**.

For this issue, a special thanks to **Jerry Bullard**, who always does a great job during the Legislative session covering pending bills, and afterward explaining what it all means.

We anticipate publishing three issues of the *News* this fiscal year. For our initial issue, we decided to publish this Legislative Update. The second issue, which we anticipate distributing in early December, will contain the traditional Chair's Update and *News from the Bar*, the first of a series of articles by renowned jury consultant **Barry Nash** on witness preparation, jury selection, and persuasion, an article by **Andy Ryan** on the recent *Rupe* decision out of the Dallas Court, Gretchen's aforementioned humor column, as well as Federal and Appellate Updates by **Jason Fulton** and **Richard Salgado**, respectively, plus other features. Our third issue for the year should come out in early March.

If you would like to submit an article for us to consider running in the *News*, please let us know. If you know of some item that we need to include in "News from the Bar," please do the same. Always let us know if you have ideas or suggestions for this publication—it belongs to you, the members of the Litigation Section, and should address your needs. Thanks for giving us the chance to serve you.

Yours,



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