TEXAS LEGAL LIABILITY ADVISOR

INFORMATION TO AVOID LIABILITY SUMMER 2011

TEXAS TORT REFORM 2011

INTRODUCTION

Tort reform continues to be a popular subject for Texas politicians. On May 30, 2011, Texas Governor Rick Perry signed into law H.B. 274[1] which makes further changes to the playing rules for civil actions in the State of Texas, including changes to Texas' settlement statute. These changes are applicable to civil actions commenced on or after September 1, 2011.[2] This article explores the changes to the five areas of law affected by the 2011 tort reform legislation.

1. CHANGES TO THE TEXAS SETTLEMENT STATUTE

In 2003, Texas enacted a settlement statute for claims seeking monetary relief, which provides a framework for the recovery of litigation costs, including attorneys fees, after a plaintiff's rejection of a favorable settlement offer.[3] In the 2011 tort reform legislation, the Texas Legislature changed the formula for determining the maximum amount of recoverable litigation costs. Even with these changes though, the settlement statute will likely continue to be a seldom used and seldom recommended device. Despite being labeled by the media as "loser pay" legislation, in reality, it does not make the loser pay anything out of pocket. Rather, once invoked, defendants can only use the favorable but rejected settlement offers as an offset against a plaintiff's recovery. While in some cases involving huge defense costs the offset could be very valuable, in most cases, there is simply no incentive to invoke the statute. For example, in cases where plaintiff's perceived recoverable damages are minimal, the defendant will not be able to recover defense costs in the event the plaintiff recovers nothing or minimal damages. Another disincentive arises in cases where attorney's fees are not already a recoverable element of damages. By invoking the settlement statute a defendant may actually expand the type and amount of damages that would be recoverable by the plaintiff. Because a defendant's failed settlement offer can make the defendant liable for plaintiff's litigation costs,

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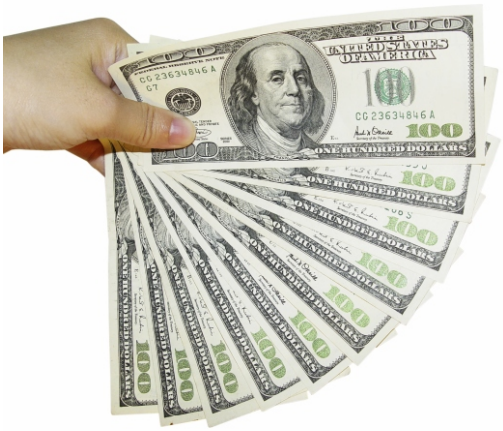
including attorneys fees and expert witness fees, if those costs were not already an element of recoverable damages in the plaintiff's causes of action, many defendants and their insurance companies choose not to extend such an offer for fear of adding to the damages that a plaintiff may otherwise recover.



The 2011 changes provide for the recovery of deposition costs for the prevailing party, makes the statute inapplicable in small claims court cases, and most importantly changes the formula for calculating the limitation on the amount of recoverable costs. For cases filed on or after September 1, 2011, the statute works in the following way: If a settlement offer is made and rejected and the judgment of the trial court is significantly less favorable to the rejecting party than the settlement offer, the offering party is entitled to recover from the rejecting party, litigation costs incurred by the offering party after the date of the rejection.[4] A judgment is deemed significantly less favorable to the rejecting party than the settlement offer if either: 1) the rejecting party is a claimant and the award is less than 80 percent of the rejected offer; or 2) the rejecting party is a defendant and the award is more than 120 percent of the rejected offer.[5] The term "litigation costs" refers to money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made and includes reasonable attorney's fees, reasonable deposition costs, court costs, and reasonable fees for not more than two testifying expert witnesses.[6] Litigation costs recoverable for actions filed after September 1, 2011 are limited to the greater of the total amount that the claimant recovers or would recover before adding an award of litigation costs under this chapter in favor of the claimant or subtracting as an offset an award of litigation costs under this chapter in favor of the defendant.[7] If litigation costs are to be awarded against a claimant, those litigation costs will be awarded to the defendant in the judgment as an offset against the claimant's recovery from that same defendant.[8]

This settlement procedure does not apply until a defendant files a declaration indicating that this particular settlement procedure is available in the action. The declaration must be filed no later than 45 days before the case is set for trial.[9] If there is more than one defendant, this settlement procedure is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant.[10] To be in compliance with this law, a settlement offer must: (1) be in writing; (2) state that it is made pursuant to Rule 167 of the Texas Rules of Civil Procedure and Chapter 42 of the Civil Practice and Remedies Code; (3) identify the parties making the offer and the parties to whom the offer is made; (4) state the terms by which the monetary claims may be settled; (5) state a deadline by which the settlement offer must be accepted; and (6) be served on all parties to whom the settlement offer is made.[11] An offer under this law, must not include non-monetary claims.[12] The offer may be made subject to reasonable conditions such as the execution of appropriate releases and other documents. Unless an offeree objects by written notice within the specified time deadline, the condition is presumed reasonable.[13] Rejection of an offer subject to a condition that is

subsequently found to be unreasonable by the trial court cannot be the basis of an award of litigation costs.[14]

An offer made under this statute may not be made before a defendant files a declaration, and may not be made within 60 days after the appearance in the case of the offeror or offeree, whichever is later.[15] Additionally, the offer may not be made within 14 days before the case is set for conventional trial on the merits, except that an offer may be made within 14 days of trial if it is in response to and within seven days of a prior offer.[16] A party is permitted to make an offer after having made or rejected a prior offer.[17] An offer can be withdrawn in writing before it is accepted.[18] Acceptance of an offer can only be done by written notice served on the offeror before the deadline stated in the offer.[19]

This statute does not apply to class actions, share-holder derivative actions, actions by or against a governmental unit, actions brought under the Family Code, actions to collect workers' compensation benefits, or actions filed in justice of the peace court[20] or a small claims court.[21] If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law. This procedure does not affect the ability of any party to make an offer to settle a case, or any other law regarding settlement offers in a particular case,[22] but an offer not made in compliance with this settlement procedure or in a case where this provision is not applicable does not allow the offering party to recover litigation costs.[23]

2. TEXAS' NEW DISMISSAL MOTION

Texas will soon have a procedural motion in non-Family Code cases, that should in function mimic a Rule 12(b)(6) motion under the Federal Rules of Civil Procedure. Specifically, this legislation directs the Texas Supreme Court to adopt rules for non-Family Code cases, for the dismissal of causes of action that have no basis in law or fact on motion without evidence.[24] The rules must provide for the dismissal motion to be granted or denied by the trial court within 45 days of filing. However, defendants will likely think twice about filing such a motion as the trial court is required to award costs and reasonable and necessary attorney's fees to the prevailing party on the trial court's granting or denial, in whole or in part, of a motion to dismiss.[25] The award of costs does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.[26]

If the procedural mechanics of this new motion are indeed modeled after the Federal practice, this new procedure will not likely result in a significant change in how cases are handled in Texas state courts. The problem is not reviewing claims to see if there is a basis in law for making the claim, the problem is the provision that allows for the dismissal of a claim when there is no basis in fact without hearing any evidence. Federal Rule of Civil Procedure Rule 12(b)(6) relates to defenses based on pleading deficiencies; that is, failing to state a claim upon which relief can be granted. Unfortunately, this legislation is not, by its own terms, limited to pleading deficiencies. Moreover, Texas already utilizes a procedural device for courts to hear no evidence motions for summary judgment, but

that procedure can only be initiated after an adequate time for discovery has elapsed. If this change represents a different procedure, then the question arises: what is the trial court to look at in determining whether there is no factual basis for the claim? For example, is the trial court simply looking at the claim asserted, assuming as true those allegations, and then determining if the pleading states a claim for relief? If so, then it is akin to the federal court dismissal motion, where the trial court reviews the allegations, accepts the allegations as true, and ascertains whether they state a claim for relief that is plausible on its face.[27] If the Texas Supreme Court implements rules reflecting how the federal courts consider such dismissal motions, then it should not have any significant impact on how cases are currently handled in Texas. However, if the Court does otherwise, then this legislation, and the rules implementing it, could force plaintiffs to undertake different procedural tactics to develop evidence for their case *before* filing the actual lawsuit. For example, we may see a rise in the use of the Rule 202 procedure to obtain depositions before suit or to investigate claims. These issues will be addressed more definitively when the Texas Supreme Court implements the new rules regarding this new motion to dismiss procedure.

3. EXPEDITED RULES COMING FOR CIVIL MATTERS UNDER $100,000

The Texas Supreme Court has also been directed to adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000.[28] According to the legislation, the rules are required to address the need for lowering discovery costs in these small dollar actions and the procedure for ensuring that these actions will be expedited in the civil justice system.[29] But, "the Texas Rules of Civil Procedure already contain provisions for limiting discovery based on the level of the case,[30] and the Texas court system has county courts and district courts with varying amounts of jurisdiction. So it is not clear why this part of the legislation was necessary at all aside from arguably the political capital provided to the bill sponsors.

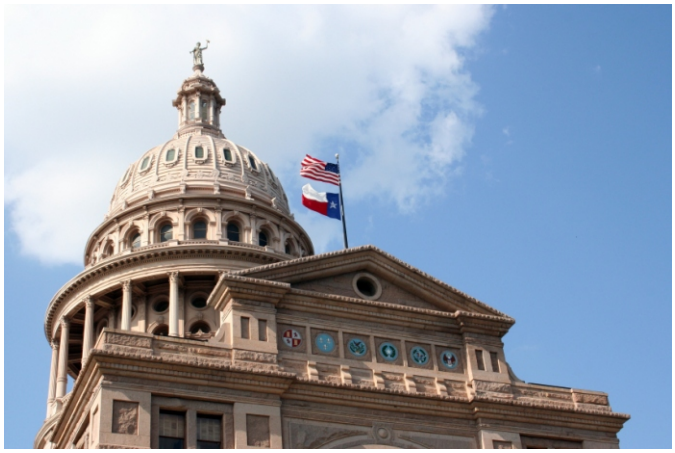
4. INTERLOCUTORY APPEAL OF CONTROLLING QUESTION OF LAW

Under current law, in most cases an appeal of an interlocutory order that involves a controlling question of law is not permitted unless the parties and the court agreed. For actions filed after September 1, 2011, trial courts may, on any party's motion or on its own initiative, permit an appeal of an interlocutory order if the order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.[31] An appellate court may accept an appeal of the interlocutory order 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 this section. 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.[32] Since the legislation only gives 15 days within

which to file an application for appellate review of an interlocutory order, parties wishing to appeal such an order should prepare to present their had better have a motion to the trial court to permit that appeal at the same time the interlocutory order itself is heard. Because this special appeal requires the discretionary approval of both the trial court and court of appeals, its use will not likely be very common.

5. CHANGES TO DESIGNATION OF RESPONSIBLE THIRD PARTIES.

The procedure for a defendant to designate a responsible third party changes slightly for all actions filed on or after September 1, 2011.[33] The new rule provides that 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 already 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.[34] This does not change in any substantive way the responsible third-party practice but does make it more critical for defendants to timely name those parties that the defendant may want to name as a responsible third party in responses to request for disclosure.



CONCLUSION

The 2011 tort reform changes should be minor in nature and should not, in any dramatic way, impact how Texas state court civil matters are handled. While headlines may trumpet or castigate Texas tort reform in the coming months as election time draws near, the reality is that many of the devices that the Texas legislature passed in the name of tort reform are accompanied by procedural complications, or have limited applicability in the real world of litigation. The end result of this new legislation is that no real significant changes are expected in how civil cases are handled in Texas.

Notes

1. Act of May 27, 2011, 82nd Leg., R.S., H.B. 274.
2. Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §6.01.
3. TEX. CIV. PRAC. & REM. CODE § 42.001 *et seq.*
4. TEX. CIV. PRAC. & REM. CODE § 42.004(a),(c).
5. TEX. CIV. PRAC. & REM. CODE § 42.004(b).
6. TEX. CIV. PRAC. & REM. CODE § 42.001(5).
7. Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §4.04 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE § 42.004(d)).
8. TEX. CIV. PRAC. & REM. CODE § 42.004(f).
9. TEX. R. CIV. P. 167.2(a).
10. TEX. CIV. PRAC. & REM. CODE § 42.002(c).
11. TEX. CIV. PRAC. & REM. CODE § 42.003; TEX. R. CIV. P. 167.2(b).
12. TEX. R. CIV. P. 167.2(d).
13. TEX. R. CIV. P. 167.2(a).
14. *Id.*
15. TEX. R. CIV. P. 167.2(e)(2).
16. TEX. R. CIV. P. 167.2(e)(3).
17. TEX. R. CIV. P. 167.2(f).
18. TEX. R. CIV. P. 167.3(a).
19. TEX. R. CIV. P. 167.3(b).
20. TEX. CIV. PRAC. & REM. CODE § 42.002(b).
21. Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §4.02 (to be codified as an amendment of TEX. CIV. PRAC. & REM. CODE § 42.002(b)(6))
22. TEX. CIV. PRAC. & REM. CODE § 42.002(d).
23. TEX. CIV. PRAC. & REM. CODE § 42.002(e).
24. Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §1.01 (to be codified as an amendment of TEX. GOV'T CODE ANN. §22.004(g)).
25. Act of May 27, 2011, 82nd Leg., R.S.,H.B. 274, §1.02 (to be codified as an amendment of TEX. CIV. PRAC. & REM. CODE § 30.021).
26. *Id.*
27. To survive a motion to dismiss in federal court, a complaint must contain sufficient factual matter, accepted as true, to

"state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, ___ U.S.___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of `entitlement to relief.'" *Id.*

[28] Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §2.01 (to be codified as an amendment of TEX. GOV'T CODE ANN. §22.004(h)).

[29] *Id.*

[30] TEX. R. CIV. P. 190.

[31] Act of May 27, 2011, 82 nd Leg., R.S., H.B. 274, §3.01 (to be codified as an amendment of TEX. CIV. PRAC. & REM. CODE, § 51.014(d)).

[32] Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §3.01 2011 (to be codified as an amendment of TEX. CIV. PRAC. & REM. CODE § 51.014(f)).

[33] Act of May 27, 2011, 82nd Leg., R.S., H.B. 274, §5.01 (to be codified as an amendment of TEX. CIV. PRAC. & REM. CODE § 33.004(d)).

[34] *Id.*

MARK COURTOIS is the Managing Partner of the Houston civil trial law firm of FUNDERBURK & FUNDERBURK, LLP. He may be contacted at 713-620-7226 or MJCOURTOIS@FFLLP.COM.

GREG FUNDERBURK is a Partner of the Houston civil trial law firm of FUNDERBURK & FUNDERBURK, LLP. He may be contacted at 713-620-7276 or GGFUNDERBURK @FFLLP.COM.

TEXAS LEGAL LIABILITY ADVISOR
FUNDERBURK & FUNDERBURK, LLP
2777 Allen Parkway, Suite 1000
Houston, Texas 77019

TO:

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