
Is It Really "Loser Pays" in Texas? The Latest Tort Reform Law Explained in Plain English

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There was a lot of press and hand-wringing over the passage of the Texas Legislature's latest version of tort reform. Like many contentious issues, a lot of misinformation accompanied the coverage of the law. In an effort to cut through the rhetoric, we seek to explain the so-called "loser-pays" law in plain English.

In a unanimous vote on May 24, 2011, the Senate adopted the 2011 Omnibus Tort Reform Bill (the "Bill"), and Governor Rick Perry signed it on Monday, May 30, 2011. All provisions of the Bill are set to govern cases filed on or after September 1, 2011.

I. Early Dismissal of Actions

The first section of the Bill covers the early dismissal of meritless lawsuits. This section directs the Supreme Court of Texas to create rules for the dismissal of certain "causes of action that have no basis in law or fact." The new procedure seems to contemplate and resemble what is known in the federal courts as motions to dismiss for failure to state a claim under Rule 12(b)(6). This section further stipulates a 45-day deadline for the courts to rule on such motions to dismiss.

Additionally, trial courts granting or denying such a motion to dismiss are required, "in whole or in part," to award costs and reasonable attorney's fees to the prevailing party on the motion to dismiss. Specifically, if an individual brings a lawsuit that has no basis in law or fact, the party may be liable for the opposing party's attorney's fees. There appears to be some risk by the defendant in filing a motion to dismiss because if the court denies a motion to dismiss, the defendant may also be liable for the plaintiff's attorney's fees. The main goal of the provision is to dismiss frivolous lawsuits in a timely manner, and to deter parties from filing meritless claims.

II. Expedited Civil Actions

The second section directs the Supreme Court of Texas to adopt rules to promote the resolution of civil actions in which the amount in controversy is below \$100,000. Generally speaking, the Bill addresses the need for lowering discovery costs and for expeditious

movement through the civil courts in matters involving claims for lower dollar damage amounts.

The main goal of this section is to create a court system that is more accessible to Texans with legitimate claims without the larger costs associated with a drawn-out litigation process.

III. Appeal of Controlling Question of Law

This section allows appellate courts, with permission of the trial court, to address and answer controlling questions of law in appropriate cases without the need for the parties to incur the expense of a full trial. Trial courts are now permitted to authorize an interlocutory and accelerated appeal from any order that "involves a controlling question of law as to which there is a substantial ground for difference of opinion," where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The previous requirement that all parties must agree to such an appeal has been eliminated.

IV. Allocation of Litigation Costs

This section limits litigation costs that could be recovered by a party offering a settlement. Litigation costs are limited to those costs incurred by the offering party after the date the rejecting party rejected the earliest settlement offer that entitled the party to an award of litigation costs.

Under current law, the plaintiff would pay a defendant's attorneys fees by taking money from his exemplary and non-economic damages awards and up to 50 percent of his economic damages award.

After September 1, 2011, the defendants and plaintiffs in these situations cannot recover costs and attorney's fees that total more than a plaintiff's jury verdict. This provision increases the amount of post-settlement-offer litigation costs that may be recovered by either a plaintiff or a defendant following a settlement offer in an effort to encourage parties to enter into early settlement negotiations.

One example mentioned in Texas Lawyer explained the new rule as follows: If a defendant offers a settlement of \$100,000, but the plaintiff refuses and goes to trial only to win a jury verdict of \$80,000, then the defendant could collect costs and attorney's fees, but not more than \$80,000. Alternatively, if a plaintiff won a verdict of \$120,000, then the plaintiff could collect costs and attorney's fees from the defendant, and the amount would be limited to \$120,000.

V. Designation of Responsible Third Parties

The "Designation of Responsible Third Party" provision prohibits defendants—who know about a responsible third party—from designating that responsible third party after the expiration of the statute of limitations. The provision only applies to the circumstance when a defendant was not aware of the existence of a responsible third party prior to the running of the statute of limitations.

Alan Waldrop, outside counsel for Texans for Lawsuit Reform, explained the provision: "If the defendant holds blame for not disclosing a responsible third party before the statute of limitations runs out, the defendant bears the burden by no longer being able to designate the third party. However, if the defendant properly designates a [responsible third party], but the plaintiff fails to join the third party to her suit before limitations run out, then the plaintiff would bear the burden by no longer being able to sue the third party."