

- SUBJECT:** Revising certain remedies and procedures in civil actions
- COMMITTEE:** Judiciary and Civil Jurisprudence — committee substitute recommended
- VOTE:** (*After recommitted:*)
7 ayes — Jackson, Lewis, Bohac, S. Davis, Hartnett, Madden, Scott

1 nay — Raymond

3 absent — Castro, Thompson, Woolley
- WITNESSES:** For — Ryan Brannan, Texas Public Policy Foundation; Jeff Moseley, Greater Houston Partnership (GHP); Keith O’Connell, Texas Association of Defense Counsel (TADC); Lee Parsley, Texas Civil Justice League; Richard Trabulsi, Alan Waldrop, Texans for Lawsuit Reform; Joseph Nixon; (Registered, but did not testify: Kathy Barber, National Federation of Independent Business; Luke Bellsnyder, Texas Association of Manufacturers; Chrissy Borskey, General Electric; Brent Connett, Texas Conservative Coalition; Jon Fisher, Associated Builders and Contractors of Texas; Stephanie Gibson, Texas Retailers Association; Bill Hammond, Texas Association of Business; Bill Oswald, Koch Companies; Corbin Van Arsdale, AGC - Texas Building Branch; Julie Williams, Chevron U.S.A.; Wendy Wilson, Texas Apartment Association)

Against — Brad Parker, Texas Trial Lawyers Association; David Reagan, Texas Municipal League Intergovernmental Risk Pool, Texas Municipal League; Jerry Galow; (Registered, but did not testify: Rick Levy, Texas AFL-CIO; Bill Lewis, Mothers Against Drunk Driving; Dennis Speight, Texas Watch)
- BACKGROUND:** Civil Practice and Remedies Code, ch. 42 deals with settlements in the civil justice system. Sec. 42.004 contains provisions that award litigation costs. If a settlement offer is made and rejected and the judgment to be rendered is significantly less favorable to the rejecting party than was the settlement offer, the offering party recovers litigation costs from the rejecting party.

Litigation costs that may be awarded may not be greater than the sum of:

- 50 percent of the economic damages to be awarded to the claimant in the judgment;
- 100 percent of the noneconomic damages to be awarded to the claimant in the judgment; and
- 100 percent of the exemplary or additional damages to be awarded to the claimant in the judgment;

The amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim is subtracted from this sum.

DIGEST:

CSHB 274 would make several changes to the Texas civil justice system, including:

- allocation of litigation costs;
- early dismissal of actions;
- expedited civil actions;
- causes of action;
- appeals of controlling questions of law; and
- recovery of attorney's fees.

Allocation of litigation costs. CSHB 274 would limit litigation costs that could be recovered by a party offering a settlement. They would be limited to those litigation 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.

The bill would amend the settlement offer procedures to allow parties to make a settlement offer to settle all claims in the action between parties once the defendant had filed a declaration that settlements under this chapter were available in the action. The bill would state that parties were not required to file a settlement offer with the court.

The bill would repeal certain limits on litigation costs that could be recovered. The bill also would repeal a requirement that if litigation costs are awarded against a plaintiff that prevailed in the lawsuit that the litigation costs would be an offset against the plaintiff's recovery.

The bill would expand the definition of recoverable litigation costs to include reasonable deposition costs in settlement proceedings or in an award of litigation costs.

Recovery of attorney's fees. CSHB 274 would allow the prevailing party to recover attorney's fees in a lawsuit for a breach of an oral or written contract.

Early dismissal of actions. CSHB 274 would direct the Supreme Court of Texas to create rules for the dismissal of certain causes of action that the court determined should be disposed of as a matter of law.

The bill would allow trial courts to award attorney's fees to a prevailing party on the court's granting or denial, in whole or in part, of a motion to dismiss.

Expedited civil actions. CSHB 274 would direct the Supreme Court to adopt rules to promote the resolution of civil actions in which the amount in controversy was between \$10,000 and \$100,000. The rules would address the need for lowering discovery costs and for expeditious movement through the civil courts.

No implied cause of action. CSHB 274 would instruct the courts that a statute could not be construed to create a cause of action unless the statute clearly created a cause of action.

Appeal of controlling question of law. CSHB 274 would allow a trial court, on a party's motion or its own initiative, to permit an appeal from an order that was not otherwise appealable if:

- the order to be appealed involved a controlling question of law as to which there are grounds for difference of opinion; and
- an immediate appeal from the order could materially advance the ultimate termination of the litigation.

Such an appeal would not stay the proceedings unless the parties agreed to a stay or the trial or the appeals court ordered a stay pending an appeal. The appeal would be expedited if the appellate court accepted it.

Effective dates. Provisions in the bill dealing with appealing a controlling question of law, recovery of attorney's fees, and allocation of litigation

costs would take effect September 1, 2011. The provisions addressing early dismissal of actions, expedited civil actions, and implied causes of action would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, those provisions would take effect September 1, 2011.

**SUPPORTERS
SAY:**

CShB 274 would implement solid, fair, and necessary reforms to the Texas civil justice system to lower the cost of litigation. Since the 2003 tort reforms, Texas has made great strides in restoring balance to the courtroom between plaintiffs' access to civil lawsuits and defendants' right to not be subject to frivolous and costly lawsuits. However, time and experience have shown that further refinements are necessary to improve efficiency, lower costs, and improve access for litigants with smaller disputes. The governor, in his January state of the state speech, encouraged the Legislature to pass further civil justice reforms to strengthen the economy and ratchet up the fairness of the court system.

CShB 274 would implement a combination of a modified loser-pays rule, an offer of settlement rule, and a procedure for early dismissal of meritless claims among other reforms. CShB 274 would provide an ideal balance between lowering costs and improving fairness, while still protecting access to the civil-court system.

Allocation of litigation costs. The tort reforms passed in 2003 included an "offer of settlement" provision to encourage parties to settle early in order to avoid the uncertainty and costs of protracted litigation. That provision awarded attorney's costs if an offer was made and rejected and the ultimate judgment was significantly less favorable to the rejecting party.

The bill would level the playing field between plaintiffs and defendants by repealing certain limits on the recovery of costs. Under current law, if a plaintiff wins a case after rejecting a settlement offer and the ruling is substantially greater than the settlement offered, the plaintiff may collect the award and the costs of litigation. However, if a defendant wins the suit after the defendant's settlement offer was rejected, the defendant cannot collect litigation costs because current law requires that those costs be awarded as an offset against the plaintiff's recovery from that defendant. In other words, if the defendant owes the plaintiff nothing, there is nothing to offset with litigation costs. The bill would remove this inequity.

The bill also would include the cost of depositions as recoverable litigation costs. Current law under ch. 42 allows for the recovery of costs for the deposition of two experts, which is insufficient. Allowing the recovery of costs for all deposition expenses would be an important addition because depositions often are one of the largest costs of litigation.

Recovery of attorney's fees. CSHB 274 would help prevent frivolous lawsuits by allowing courts to award attorney's fees to the prevailing party if the claim was for breach of an oral or written contract. Only parties that knew they had a meritorious claim would bring them, and parties looking to extract a settlement out of defendants would be deterred from bringing meritless claims. This provision would do a great deal to improve business confidence in Texas and encourage investment.

Early dismissal of actions. CSHB 274 would instruct the Supreme Court of Texas to create rules for motions to dismiss frivolous lawsuits. The court would be free to adopt rules that fit best with Texas jurisprudence. The court would not have to adopt the federal standard.

The bill would allow trial courts to award attorney's fees to a prevailing party on the court's granting or denial, in whole or in part, of a motion to dismiss. This provision would help deter groundless lawsuits and inappropriate motions to dismiss.

CSHB 274 would not change the forms of pleadings in Texas. The bill would not require the Supreme Court to make a change in specificity of pleadings. If the court thought changes in pleadings were necessary because of the rule change, the court would make any necessary changes. The court would take its normal approach to changes in the rules and would implement them only after careful study and deliberation.

Expedited civil actions. The bill would improve access to civil courts by providing for expedited procedure and limited discovery for lawsuits with claims between \$10,000 and \$100,000.

While different levels of discovery already exist, the Level 1 discovery rule for smaller claims is not used often enough and is available only for claims below \$50,000. Further, it contains no way to expedite the process. If the actions will take just as long to be resolved, they can easily cost just as much as standard actions.

No implied cause of action. CSHB 274 would add a new rule of statutory construction to require that if a statute intended a cause of action, it would have to be clear and unambiguous on its face that it did so. Causes of action should not be created by the courts by implication, but only when the intention to create such causes of action is expressly stated by the Legislature in the statute itself. This would provide courts and litigants clear guidance on causes of action, allowing for consistent application across the state.

Courts should not have to guess about the meaning of statutes. The bill would require the Legislature to clearly draft new causes of action in a statute when it intended to create one. Many statutes prohibit certain types of conduct, but the Legislature did not necessarily intend to create a private cause of action in each case. CSHB 274 simply would implement a rule of statutory construction common in most U.S. jurisdictions.

Appeal of controlling question of law. CSHB 274 would allow 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.

The bill would not cause a flood of new appeals. The bill provides for a two-tiered system of gate keeping to prevent inappropriate appeals. First, the trial court would have to agree to allow the appeal. Second, an appellate court would have to agree to accept it.

OPPONENTS
SAY:

The premise of CSHB 274 that the courts are clogged with frivolous lawsuits is false. Plaintiff's attorneys work on commission. They have a strong incentive to take only cases they feel have merit in order to maximize their chances of winning the case and receiving their commission.

Current law already contains sufficient checks on frivolous lawsuits. These sanctions are found in the Texas Rules of Civil Procedure, rule 13 and the Texas Civil Practice and Remedies Code, secs. 9 and 10.

The changes CSHB 274 would make are not necessary. A 2005 *Baylor Law Review* article conducted a study of Texas trial court judges. The survey, which had a 78 percent response rate, found 86 percent of these judges said there was no need for additional tort law changes.

Allocation of litigation costs. CSHB 274 would remove important limits on the amount of attorney's fees that could be awarded. Limits in current law on the amount of attorney's fees that can be awarded to defendants allow poor and middle class plaintiff's to file lawsuits. Current law states that if a plaintiff wins a lawsuit but the defendant is awarded attorney's fees, the fees are to be an offset to the plaintiff's recovery. CSHB 274 would remove this important plaintiff protection and could allow the perverse result of a plaintiff owing a defendant when the defendant's attorney's fees are larger than the plaintiff's recovery. Removing these protections would unfairly limit access to the civil court system.

The bill also would allow for deposition costs to be recovered as part of recovered litigation costs. The bill is unclear as to whether this includes transcriptionist's fees, expert fees, or even travel costs.

Recovery of attorney's fees. The bill would implement a "loser pays" rule in contract cases in order to discourage lawsuits. Only parties with deep pockets or the judgment-proof poor would be able to file because they would be the only groups that could afford to risk paying both sides' attorney's fees if they did not prevail in a case.

Early dismissal of actions. The Supreme Court already is able to implement rules for an early dismissal of baseless actions. It is not at all clear that they are needed. If they were, the court likely already would have acted to create them. If the Legislature feels something must be done, it would be better to instruct the court to conduct a study to identify a problem, if one exists, and to suggest appropriate solutions.

CSHB 274 would fundamentally and inappropriately alter the way civil trials are conducted. If a motion to dismiss for failure to state a claim was created in Texas, it would move away from the general pleading system currently in use. Federal law contains such a motion and, as a result requires that pleadings be very specific in order to survive such a motion. This is only possible after extensive discovery. The bill would not take this into account. The bill's failure to address the consequences of the proposed change reinforces the need for a study before specific legislation is adopted.

Expedited civil actions. This change is unnecessary because the trial courts are not backed up. The Office of Court Administration, in a 2010 report on judicial case load, found that there was a 16 percent decrease in

the amount of new injury filings between 1991 and 2010. This occurred while the population of the state rose by 35 percent.

This change also is unnecessary because the Supreme Court of Texas already is able to adopt different rules for different types of civil actions. The Texas Rules of Civil Procedure already allow for different levels of cases, which limit the amount of discovery and dictate other terms in order to help expedite the resolution of different types of cases.

No implied cause of action. This change could result in massive reworkings of the court system and the common law. Under the common law system, courts may use statutes and prior case holdings to resolve current cases. An example is a plaintiff's attorney using existing laws against drunk driving to establish a basic duty – not to drive while intoxicated. The plaintiff's attorney could use this duty as the basis of a negligence claim against the defendant. However, the drunk driving statutes do not explicitly say they contain a cause of action. The uncertainty this change might bring about could lead to endless rulings by appellate courts on what does and does not constitute a cause of action. It would not clarify anything; indeed it would stir up calm jurisprudential waters.

Appeal of controlling question of law. These appeals could clog the appellate court system. Under the bill, every time a defendant lost a motion to dismiss a case, it could be appealed to the appellate courts.

NOTES:

CSHB 274 originally was set on the Major State Calendar for May 5 and was recommitted to committee after a point of order against the bill was sustained. The Judiciary and Civil Jurisprudence Committee reported the bill again on May 5.