

“Loser-Pays Bill” Also Affects Addition of Third-Party Defendants

When the Texas Legislature passed House Bill 274 earlier this year, the headlines focused on its “loser-pays” provision, which allows the prevailing party in a lawsuit to recover attorneys’ fees and other costs from the losing side.

However, two of the lesser-known elements of the law are likely to have a more immediate impact, resulting in more “shotgun” litigation targeting multiple defendants and requiring defendants to be much more proactive at the outset of a lawsuit.

The changes made by HB 274 are effective for all suits filed on or after September 1, 2011. The new law creates a mechanism for the early dismissal of frivolous suits, provides a way to expedite certain civil actions, modifies the rules regarding settlement offers, expands interlocutory appeals and makes changes to responsible third-party practice.

The law’s potential long-term impact is significant, but the most immediate effects will result from the changes in responsible third-party practice.

Designation of a responsible third party is a procedural mechanism that allows a defendant in a tort action to identify another party as liable without having to bring that party into the lawsuit as a named defendant. The effect of properly designating a responsible third party is that, at trial, a judge or jury is required to determine the percentage of responsibility, if any, to be assigned that responsible third party.

Game Changer for Both Sides

This practice has proved advantageous to Texas defendants since its inception in 2003. But HB 274 made two significant changes to §33.004 that will affect both plaintiffs and defendants.

First, HB 274 repealed §33.004(e). In plain terms, if someone were designated by a defendant as a responsible third party, there was a 60-day window for the plaintiff or any other party making a claim to add that person as a named defendant in the lawsuit, even if the statute of limitations had expired. This maneuver is no longer permitted for cases filed on or after September 1.

Second, HB 274 created a new provision that affects defendants’ ability to name responsible third parties. This new provision states that “a defendant may not designate a person as a responsible third party ... 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.” Tex. Civ. Prac. & Rem. Code § 33.004(d) (emphasis supplied)

Importantly, the key phrase “failed to comply with its obligations ... to timely disclose” is not defined and it is unclear what the Texas Legislature means by this language. That means this phrase will be open to interpretation by Texas courts.

It appears that defendants still should be able to designate a responsible third party outside the statute of limitations if the defendant did not purposefully withhold the information. However, under this change there is a risk that the courts might hold defendants to a higher duty to determine and disclose the existence of potential responsible third parties as soon as reasonably possible. In particular, courts may be less inclined to allow a designation in situations in which the statute of limitations has expired or is about to expire.

KEY FACTS ABOUT HB 274

- Effective September 1
- ‘Loser-pays’ provision
- Targets frivolous suits
- Effects remain uncertain

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Target-Rich Environment for Plaintiffs

As a result of these statutory changes, we are likely to see a significant increase in "shotgun" litigation tactics. Plaintiffs will likely name all possible defendants in the original action and simply wait to see what sticks. Plaintiffs' lawyers will not want to run the risk that a named defendant might designate a responsible third party after the statute of limitations has expired because plaintiffs will be prohibited from adding that party as a named defendant.

To protect themselves, plaintiffs will simply include all potential known parties at the outset. The former §33.004 allowed plaintiffs to be more conservative at the inception of suit because if plaintiffs filed suit and a responsible third party was designated later, they would have had the opportunity to sue that party despite the statute of limitations. But that loophole has been closed.

Defendants will feel the impact of this statutory change on multiple fronts. Besides being affected by an increase in "shotgun" litigation, defendants will also need to be more aggressive in their own discovery and pleadings.

They will need to conduct thorough investigations at the inception of suit to discover and disclose any potential third parties as soon as practicable, to protect their rights to responsible third-party designations. Additionally, defendants will need to consider suing third parties directly if the statute of limitations has run out as to plaintiffs' cause of action, to protect their claim for contribution on the plaintiffs' recovery.

Lack of Rules Creates Uncertainty

The other provision of HB 274 that will be essential to defendants is the creation of a motion-to-dismiss mechanism where the prevailing party recovers attorney's fees. Prior to the enactment of this law, Texas civil procedure did not include a motion-to-dismiss mechanism to dispose of frivolous lawsuits at the outset.

Previously, the only remedy for defendants served with factually deficient pleadings was to file special exceptions in order to force plaintiffs to plead with more specificity. But special exceptions only challenge the articulation of the claim, not the claim itself. Creating a motion-to-dismiss mechanism gives defendants the tool necessary to seek early dismissal of causes of action that have no basis in law or fact.

Further, the new law contains a mandatory fee-shifting provision requiring that the losing party pay the prevailing party's attorneys' fees and reasonable litigation costs. It is likely that the new motion-to-dismiss mechanism will operate similar to a no-evidence motion for summary judgment except that the motion may be filed at the outset of the lawsuit.

The fee-shifting provision is likely to operate similar to the one contained in Chapter 74 of the Civil Practice and Remedies Code, which allows defendant physicians to be awarded attorneys' fees and court costs when plaintiffs fail to file an expert report. The unfortunate reality of these fee-shifting provisions is that the end result is only a moral victory. In reality, the defendant is often left with an award for costs and fees against a plaintiff with no collectible assets.

However, this "loser pays" provision, as well as the expedited civil litigation provision, requires the Texas Supreme Court to adopt rules to implement. Therefore, until the civil procedure rules are promulgated, exactly how these provisions will affect civil practice remains to be seen.



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