

# **LOSER PAYS -- THEN AND NOW**

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## LOSER PAYS -- THEN AND NOW

by Frank Gilstrap

### 1. Introduction

Under the “American rule,” each party pays its own attorneys’ fees--win or lose; but under the “English rule,” the loser pays the winner’s fees.<sup>1</sup> There are, of course, statutes that require the losing defendant to pay the winning plaintiff’s attorneys’ fees in specific kinds of cases,<sup>2</sup> but these statutes almost never favor the winning defendant.

A “loser pays” procedure has long been available under Rule 68, FED.R.CIV.P. *See* Tab A. Under this procedure, a defendant may make an offer of judgment.<sup>3</sup> If the offer is rejected and the judgment “is not more favorable than the unaccepted offer, the [plaintiff] must pay the costs incurred after the offer was made.”<sup>4</sup> However, “costs” usually do not include attorneys’ fees.<sup>5</sup>

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<sup>1</sup> *See generally* Edward F. Sherman “From ‘Loser Pays’ to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice.” 76 Tex.L.Rev. 1863 (1998).

<sup>2</sup> *See, e.g.*, TEX.CIV.PRAC. & REM.CODE § 38.001(8) (allowing winning plaintiff to recover attorneys’ fees in claim for “an oral or written contract”); TEX.BUS.& COM. CODE § 17.050(d) (“Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys’ fees.”); *Id.* § 27.01(e) (Persons who commits fraud in real estate transactions “shall be liable to the person defrauded for reasonable and necessary attorneys’ fees, expert witness fees, costs for copies of depositions, and costs of court.”).

<sup>3</sup> *See* Rule 68(a), FED.R.CIV.P. (“[A] party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, . . .”).

<sup>4</sup> Rule 68(d).

<sup>5</sup> Except in a case where a statute expressly awards attorneys’ fees as “costs.” *See* Sherman at 1876-1879 (discussing *Marek v. Chesney*, 473 U.S. 1, 8-11 (1985)).

In the early 1980's, Florida adopted a pure "loser pays" statute for medical malpractice suits, but there was an unexpected consequence. The medical malpractice plaintiffs were often judgment proof, and the only meaningful awards were against losing physicians and hospitals; and eventually the statute was repealed.<sup>6</sup>

In 1994, "loser pays" legislation was proposed by the Republican members of the U.S. House of Representatives in the "Contract for America."<sup>7</sup> The result was the Common Sense Legal Reforms Act of 1995, which contained a "loser pays" provision applicable to federal court diversity actions.<sup>8</sup> Under this provision, the court would have had authority to award attorneys' fees to the "party that prevails,"<sup>9</sup> but any such award would have been capped at an amount equal to the non-prevailing party's attorneys' fees.<sup>10</sup> This provision failed in two successive congressional sessions.<sup>11</sup>

In 1995, the American Bar Association House of Delegates approved a proposal to modify Rule 68 in order (i) to make it available to both parties and (ii) to allow shifting of attorneys' fees in all kinds of cases.<sup>12</sup> Under this proposal, either party

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<sup>6</sup> See Sherman, *supra* note 1, at 1866.

<sup>7</sup> See "Republican Contract with America" (1994), available at [www.house.gov/house/Contract/CONTRACT.html](http://www.house.gov/house/Contract/CONTRACT.html), at ¶ 9.

<sup>8</sup> See H.R. 10 104th Cong. (1995) § 101(a) (proposing to amend 28 U.S.C. § 1332) (copy at Tab B).

<sup>9</sup> *Id.* (proposing to amend 28 U.S.C. § 1332(e)(1)).

<sup>10</sup> *Id.* (proposing to amend 28 U.S.C. § 1332(e)(2)).

<sup>11</sup> See Sherman at 1868.

<sup>12</sup> *Id.* at 1885.

could make an “offer of settlement.” If the offer was rejected, attorneys’ fees could be shifted depending on the size of the final judgment. For example, if the plaintiff made an offer of settlement and if the final judgment exceeded 125% of the offer, the plaintiff could recover attorneys’ fees. Similarly, if the defendant made an offer of settlement and if the final judgment was less than 75% of the offer, the defendant could recover attorneys’ fees.<sup>13</sup> However, the defendant’s recovery could never exceed the total amount of the judgment.<sup>14</sup> In other words, the defendant could never wind up with a net award against the plaintiff.

In 2003, the Texas legislature passed an omnibus tort reform as House Bill 4. It added Chapter 42 to the Civil Practice & Remedies Code, which in turn, directed the Texas Supreme Court to promulgate a rule similar to the 1995 ABA proposal. The result was Rule 167, TEX.R.CIV.P.

## **2. Rule 167: Offer of Settlement**

### **a. Scope**

The offer of settlement procedure applies “only to claims for monetary relief.”<sup>15</sup> If a plaintiff seeks both monetary and non-monetary relief in the same suit, the

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<sup>13</sup> *Id.* at 1891.

<sup>14</sup> *Id.* at 1888.

<sup>15</sup> TEX. CIV. PRAC. & REM. CODE § 42.002(a). This avoids the difficult problem of calculating the value of non-monetary relief. *See, e.g., Marek*, 473 U.S. at 32-33 n. 48 (Brennan, J., dissenting) (“Of course, the difficulties in assessing the ‘value’ of nonpecuniary relief are inherent in Rule 68’s operation.”).

procedure is still available, but only as to the monetary claims.<sup>16</sup> Also, the provision expressly excludes class actions, shareholder derivative suits, suits by or against governmental units, suits under the Family Code, suits to collect workers compensation benefits, and suits in justice court and small claims court.<sup>17</sup>

**b. The defendant's declaration**

The offer of judgment procedure cannot be used “until a defendant . . . files a declaration invoking this rule.”<sup>18</sup> Once such a “declaration” is filed, any party can make an offer of settlement, but only as to claims against “that defendant.”<sup>19</sup> A defendant who does not make a declaration is not subject to the rule. Also, the declaration must be filed no later than 45 days before the date the case is set for a “conventional trial.”<sup>20</sup>

**c. Informal settlement negotiations**

The fact that a declaration has been filed does not prevent other settlement negotiations from taking place. But these informal negotiations cannot trigger rights

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<sup>16</sup> See Rule 167.2(d) (“An offer must not include non-monetary claims . . .”).

<sup>17</sup> See Rule 167.1. See also TEX. CIV. PRAC. & REM. CODE § 42.002(b).

<sup>18</sup> Rule 167.2(a) (emphasis added). See also Rule 167.2(e)(1) (“An offer may not be made before a defendant’s declaration is filed.”); TEX. CIV. PRAC. & REM. CODE § 42.002 (c).

<sup>19</sup> Rule 167.2(a). See also TEX. CIV. PRAC. & REM. CODE § 42.002 (c).

<sup>20</sup> See Rule 167.2(a).

under Rule 167.<sup>21</sup>

**d. The offer**

The settlement offer must be in writing, state that it is made under Rule 167 and Chapter 42, identify the party making the offer and the party to whom the offer is made, state the settlement terms, and set a deadline by which the offer must be accepted.<sup>22</sup> The acceptance deadline must be at least 14 days after the offer is served.<sup>23</sup>

Also, the offer must cover all “monetary claims” between the offeror and offeree, including attorneys’ fees, interest, and costs.<sup>24</sup> Thus, if a defendant files a counterclaim, an offer must cover both plaintiff’s claim and the counterclaim.

An offer cannot be made until 60 days after both offeror and offeree have appeared.<sup>25</sup> The offer must be made no later than 14 days before trial, except for an offer made in response to a prior offer, which must be made no later than 7 days after the prior offer.<sup>26</sup>

**e. Acceptance, rejection, and withdrawal**

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<sup>21</sup> See Rule 167.7; TEX. CIV. PRAC. & REM. CODE § 42.002(d).

<sup>22</sup> See Rule 167.2(b)(1)-(5). See also TEX. CIV. PRAC. & REM. CODE § 42.003(1)-(4).

<sup>23</sup> See Rule 167.3(b)(5). See *Orix Capital Markets, LLC v. LaVillita Motor Inns, J.B.*, 329 S.W.3d 30, 50 (Tex.App.--San Antonio 2010, pet. denied).

<sup>24</sup> See Rule 167.2(b)(4).

<sup>25</sup> See Rule 167.2(e)(2).

<sup>26</sup> See Rule 167.2(c)(3).

A settlement offer made under Rule 167 can only be accepted in writing.<sup>27</sup>

If it is not accepted by the deadline, or if there is no response, the offer is deemed to have been rejected.<sup>28</sup> The offer can be withdrawn at any time before acceptance.<sup>29</sup>

**f. Recoverable litigation costs**

If the judgment is “significantly less favorable” than the rejected offer, then “the court must award the [offering party] litigation costs.”<sup>30</sup> “Litigation costs” are defined as “the expenditures actually made and the obligations actually incurred--directly in relation to the claims covered by [the] settlement offer.”<sup>31</sup> In the 2003 version of the rule, “litigation costs” included “court costs,” “reasonable fees for not more than two testifying expert witnesses,” and “reasonable attorney fees.”<sup>32</sup>

**g. How “litigation costs” are shifted**

The fee shifting provisions are similar to those in the 1995 ABA proposal, except that the percentages are somewhat different. *See supra*, p.3. If the offer is rejected, and if the judgment “on the monetary claims covered by the offer is

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<sup>27</sup> See Rule 167.3(b).

<sup>28</sup> See Rule 167.3(c).

<sup>29</sup> See Rule 167.3(a).

<sup>30</sup> See Rule 167.4(a). See also TEX. CIV. PRAC. & REM. CODE § 42.004(a). The court should also set forth the amount of those costs in the judgment, or in a finding. See *Duff v. Spearman*, 322 S.W.3d 869, 886-887 (Tex.App.--Beaumont 2010, pet. denied).

<sup>31</sup> See Rule 167.4(c). See also TEX. CIV. PRAC. & REM. CODE § 42.001(5).

<sup>32</sup> See Rule 167.4(c). See also TEX. CIV. PRAC. & REM. CODE § 42.001(5).

significantly less favorable to the offeree than was the offer,” the court must award litigation costs to the offeror.<sup>33</sup> A judgment is “significantly less favorable” than a rejected offer if:

- (1) the offering party is the defendant and the judgment is less than 80% of the rejected offer; or
- (2) the offering party is the plaintiff and the judgment was more than 120% of the rejected offer.<sup>34</sup>

For example, if a defendant offers to settle for \$100,000 and the plaintiff rejects the offer, the defendant is entitled to litigation costs if the plaintiff recovers less than \$80,000. Similarly, if a plaintiff offers to settle for \$100,000, and the defendant rejects the offer, the plaintiff is entitled to litigation costs if the plaintiff recovers more than \$120,000.

#### **h. Caps on litigation costs**

Recoverable “litigation costs” are capped in three ways. First, the amount recovered can include only litigation costs incurred by the offering party after the date that the settlement offer is rejected.<sup>35</sup> Obviously, an early offer can result in more litigation costs being paid.

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<sup>33</sup> See Rule 167.4(a). See also TEX. CIV. PRAC. & REM. CODE § 42.004(a).

<sup>34</sup> See Rule 167.4(b) (1)-(2). See also TEX. CIV. PRAC. & REM. CODE *Id.* § 42.004(b)(1)-(2).

<sup>35</sup> See Rule 167.4(a). See also TEX. CIV. PRAC. & REM. CODE § 42.004(c).



Second, under the 2003 version of Rule 169, the award of litigation costs could not exceed the total of (i) 50% of economic damages plus (ii) 100% of non-economic damages, exemplary, and additional damages.<sup>36</sup> This means that a defendant could never obtain a net recovery against the plaintiff on a single claim. If the plaintiff took nothing, then the defendant could not recover any litigation costs.

Fourth, if a party is entitled to recover litigation costs under another law, he could not recover more than the litigation costs recoverable under that other law.<sup>37</sup>

### **3. House Bill 242**

House Bill 274 served as the omnibus tort reform bill in the 2011 Texas Legislature. As introduced, HB 274 contained far reaching--indeed draconian--provisions concerning attorneys' fees.<sup>38</sup> First, Section 38.001 of the Civil Practice and Remedies Code, which presently allows the prevailing plaintiff to recover attorneys' fees in contract cases, would have been amended to allow "the prevailing party" to recover attorneys' fees.<sup>39</sup>

Second, a new Subchapter B would have been added to Chapter 38 of the Civil Practice and Remedies Code to allow recovery of attorneys' fees by the prevailing

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<sup>36</sup> See Rule 167.4(d)(1). See also TEX. CIV. PRAC. & REM. CODE § 42.003(d)(1)(A)-(C). For definitions of "economic" and "noneconomic" damages see TEX. CIV. PRAC. & REM. CODE § 41.001(4) & (12). Also, "the amount of any statutory or contractual liens in connection with the occurrence or instance giving rise to a claim" must be subtracted. Rule 167.4(d)(2). See also TEX. CIV. PRAC. & REM. CODE § 42.004(d)(2).

<sup>37</sup> See also TEX. CIV. PRAC. & REM. CODE § 42.004(e) & (f).

<sup>38</sup> See H.B. 274, 82nd Leg., R.S., (2011) (as introduced) (copy at Tab D).

<sup>39</sup> *Id.* § 2 (amending TEX. CIV. PRAC. & REM. CODE § 38.001, 38.002 & 38.006).

parties in most tort cases. Here again, the procedure would be triggered at the election of the defendant.<sup>40</sup> Once an election was made, the prevailing party could recover “litigation costs,” which included attorneys’ fees.<sup>41</sup>

Moreover, if an attorney had a contingent fee interest in the plaintiff’s claim, he could also be liable for the defendants’ attorneys’ fees as well. Thus, if attorneys fees were awarded against a plaintiff and the plaintiff’s attorney had “a financial interest in his client’s case,” the jury would be asked if the claim was one “that a reasonable person would conclude is an abuse of the civil justice process.” If the jury made such a finding, then the plaintiff’s attorney could be liable for the defendants’ attorneys’ fees.<sup>42</sup>

However, all of these provisions were deleted in the House committee report, and replaced by an amendment to the existing offer of settlement procedure.

#### **4. The amended offer of settlement procedure.**

In House Bill 274, as finally enacted, the legislature amended Section 42 of the Civil Practice & Remedies Code, which, in turn, directed the Supreme Court to make two changes in Rule 167.<sup>43</sup> The Supreme Court has now amended Rule 167 to include these changes.

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<sup>40</sup> *Id.* at § 3 (proposing to enact TEX.CIV. PRAC. & REM. CODE § 38.013).

<sup>41</sup> *Id.* § 3 (proposing to enact TEX.CIV. PRAC. & REM. CODE § 38.016).

<sup>42</sup> *Id.* § 3 (proposing to enact TEX.CIV. PRAC. & REM. CODE § 38.017).

<sup>43</sup> *See* H.B. 274, 82nd Leg., R.S. (2011) §§ 4.01-4.03 (copy at Tab E).

First, “reasonable deposition costs” have been added to the list of recoverable “litigation costs.”<sup>44</sup>

Second, the cap on the total of recoverable “litigation costs” has been raised. Under the 2003 version, this total had been limited to (i) 50% of economic damages plus (ii) 100% of non-economic, exemplary, and additional damages. *See supra*, p.8. Under the 2011 version, the cap has been raised to equal “the total amount that the claimant recovers.”<sup>45</sup> Also, the provision for subtracting “statutory or contractual liens” has been deleted.<sup>46</sup>

## **5. Early dismissal**

Article 1 of House Bill 274 is entitled “Early Dismissal of Actions.”<sup>47</sup> It directs the Supreme Court to “adopt rules to provide for the dismissal of causes of action that have no basis in law or in fact on motion and without evidence.”<sup>48</sup> It also amends the Civil Practice and Remedies Code to require an award of attorneys’ fees to the party that prevails in such an early dismissal proceeding.<sup>49</sup> Suits under the Family Code are excluded altogether.<sup>50</sup> Also, the attorneys’ fees provision does not apply to suits by or

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<sup>44</sup> *See* Rule 167.4(c)(2) (Tab C).

<sup>45</sup> *See* Rule 167.4(d) (Tab C).

<sup>46</sup> *See supra*, p.8 n.36.

<sup>47</sup> *See* H.B. 274, 82nd Leg., R.S. (2011) (copy at Tab E).

<sup>48</sup> *Id.* at § 1.01 (enacting TEX. GOV’T CODE 22.004(g)).

<sup>49</sup> *Id.* at 1.02 (enacting TEX. CIV. PRAC. & REM. CODE § 30.021).

<sup>50</sup> *Id.* at 1.01.

against the state, other governmental entities, or public officials acting in their official capacity or under color of law.<sup>51</sup>

Although House Bill 274 became effective on September 1, 2011, the “early dismissal” procedure will not be available until the Supreme Court adopts a rule. In drafting such a rule, the Court will need to (a) promulgate a dismissal standard and (b) set forth a procedure.

**a. The dismissal standard**

The original version of HB 274 directed the Supreme Court to “model the [early dismissal] rules after rules 9 and 12, Federal Rules of Civil Procedure.”<sup>52</sup> But in the final version, the Legislature directed the Court to “adopt rules to provide for the dismissal of causes of action that have “no basis in law or in fact.””<sup>53</sup> This language may have come from Rule 13 of the Texas Rules of Civil Procedure, which allows the imposition of sanctions for filing a “groundless” pleading.<sup>54</sup> However, an award of sanctions under Rule 13 “requires the trial court to hold an evidentiary hearing to make the necessary factual determinations about the motives and credibility of the person

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<sup>51</sup> *Id.* at 1.02.

<sup>52</sup> HB 274 § 5 (as introduced) (promulgating TEX.CIV.PRAC. & REM. CODE § 27.002(b)) (Tab D).

<sup>53</sup> HB 274 § 1.01 (Tab E).

<sup>54</sup> *See* Rule 13, TEX.R.CIV.P. (“ ‘Groundless’ for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.”).

signing the allegedly groundless petition,”<sup>55</sup> while House Bill 274, calls for dismissal “on motion and without evidence.”<sup>56</sup>

Also, Chapters 13 and 14 of the Civil Practice and Remedies Code provide for dismissal of suits *in forma pauperis* when “the claim has no arguable basis in law or in fact.”<sup>57</sup> But the courts have disagreed as to the meaning of “no arguable basis in law or in fact.” One line of cases allows dismissal only if the pleadings set forth “an indisputably meritless legal theory.”<sup>58</sup> Another line permits dismissal if the pleading fails to state a cause of action.<sup>59</sup>

#### **b. Procedure**

The Legislature directed the Court to pass rules that “provide for the dismissal . . . on motion and without evidence.”<sup>60</sup> It also required the rules to “provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the

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<sup>55</sup> *McCain v. N.M.E. Hospitals, Inc.*, 856 S.W.2d 751, 757 (Tex.App.--Dallas 1993, no writ). *Accord Neely v. Com’n for Lawyer Discipline*, 976 S.W.2d 824, 827 (Tex.App.--Houston [1st Dist.] 1998, no pet.).

<sup>56</sup> See H.B. 274 § 10.01.

<sup>57</sup> TEX.CIV. PRAC. & REM. CODE §§ 13.001(b)(2) & 14.003(b)(2) (emphasis added).

<sup>58</sup> See, e.g., *Gill v. Boyd Dist. Ctr.*, 64 S.W.2d 601, 603 (Tex.App.--Texarkana 2001, pet. denied) (citing *Neitzke v. Williams*, 490 U.S. 319, 329 (1987)); *Burnett v. Sharp*, 328 S.W.3d 594, 604 (Tex.App.--Houston [14th Dist.] 2010, no pet.) (dissent).

<sup>59</sup> See, e.g., *Jackson v. Tex. Dep’t of Criminal Justice*, 28 S.W.3d 811, 813 (Tex.App.--Corpus Christi 2000, pet. denied) (citing *Harrison v. Tex. Dep’t of Criminal Justice*, 915 S.W.2d 882, 888 (Tex.App.--Houston [1st Dist.] 1995, no writ)); *Burnet*, 328 S.W.3d at 596 (citing *Minix v. Gonzalez*, 162 S.W.3d 635, 637 (Tex.App.--Houston [1st Dist.] 2005, no pet.)).

<sup>60</sup> See H.B. 274 § 1.01.

motion.”<sup>61</sup> Aside from this, the Legislature left the Court free to craft its own procedures. Some of the issues to be considered include the following: (i) If a case is dismissed, will the loser be permitted to amend its pleadings to cure any defect? (ii) Will the case be dismissed with, or without, prejudice? (iii) Can a motion to dismiss be filed in advance of a motion to transfer venue or a special appearance, without waiving rights under those procedures? (iv) How and when will the award of attorneys’ fees be enforced?

One answer to these procedural questions is found in a draft rule prepared by a voluntary working group consisting of representatives of the Texas Regional Organization of the American Board of Trial Advocates (ABOTA), the Texas Association of Defense Counsel (TADC), and the Texas Trial Lawyers Association (TTLA). *See* Tab F.

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<sup>61</sup> *Id.*

## APPENDIX

A	Rule 68, FED.R.CIV.P.
B	House Resolution 10, 104 the Congress (1995)
C	Rule 167, TEX.R.CIV.P.
D	House Bill 242, as introduced
E	House Bill 242, as enacted
F	Draft rule prepared by voluntary working group from ABOTA, TADC, and TTCA

## **Federal Rules of Civil Procedure**

### **Rule 68. Offer of Judgment**

**(a) Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

**(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

**(c) Offer After Liability is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

**(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.



**H.R. 10, 104th Cong. (1995)**

**SEC. 101. AWARD OF ATTORNEY'S FEE TO PREVAILING PARTY  
IN FEDERAL CIVIL DIVERSITY LITIGATION.**

(a) AWARD OF ATTORNEY'S FEE- Section 1332 of title 28, United States Code, is amended by adding at the end the following:

(e)(1) The district court that exercises jurisdiction in a civil action commenced under this section shall award to the party that prevails with respect to a claim in such action an attorney's fee determined in accordance with paragraph (2).

(2) An attorney's fee awarded under paragraph (1) shall be a reasonable attorney's fee attributable to such claim, except that the fee awarded under such paragraph may not exceed—

(A) the actual cost incurred by the nonprevailing party for an attorney's fee payable to an attorney for services in connection with such claim; or

(B) if no such cost was incurred by the nonprevailing party due to a contingency fee agreement, a reasonable cost that would have been incurred by the nonprevailing party for an attorney's noncontingent fee payable to an attorney for services in connection with such claim.

(3) Notwithstanding paragraphs (1) and (2), the court in its discretion may refuse to award, or may reduce the amount awarded as, an attorney's fee under paragraph (1) to the extent that the court finds special circumstances that make an award of an attorney's fee determined in accordance with such subparagraph unjust.

## IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11- 9182

### AMENDED ORDER ADOPTING AMENDMENTS TO TEXAS RULE OF CIVIL PROCEDURE 167

**ORDERED** that:

1. This Order vacates and supersedes the Order dated August 31, 2011, in Misc. Docket No. 11-9175. This Order clarifies that the rule amendments adopted by this Order apply only to cases commenced on or after September 1, 2011.

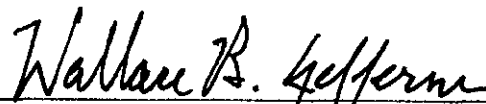
2. In accordance with the Act of May 25, 2011, 82nd Leg., R.S., ch. 203 (HB 274), effective September 1, 2011, amending sections 42.003 and 42.004 of the Texas Civil Practice and Remedies Code, the Supreme Court of Texas amends Rule 167 of the Texas Rules of Civil Procedure as follows, effective immediately.

3. The Clerk is directed to:

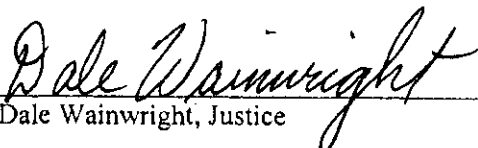
- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each elected member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.

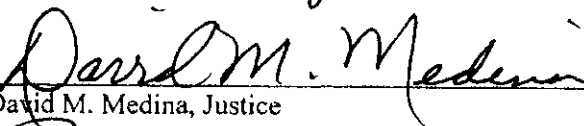
4. These amendments may be changed in response to comments received on or before November 1, 2011. Any interested party may submit written comments directed to Marisa Secco, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or [marisa.secco@txcourts.gov](mailto:marisa.secco@txcourts.gov).


Dated: September 9, 2011.

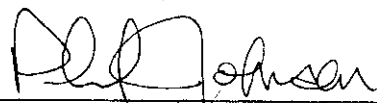
  
Wallace B. Jefferson, Chief Justice

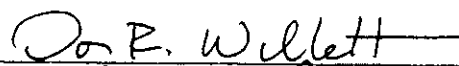
  
Nathan L. Hecht, Justice

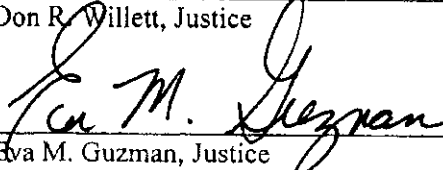
  
Dale Wainwright, Justice

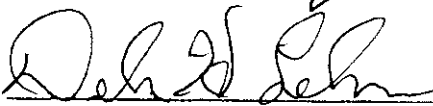
  
David M. Medina, Justice

  
Paul W. Green, Justice

  
Phil Johnson, Justice

  
Don R. Willett, Justice

  
Eva M. Guzman, Justice

  
Debra H. Lehrmann, Justice

## **RULE 167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS**

**167.1 Generally.** Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages—including a counterclaim, crossclaim, or third-party claim—except in:

- (a) a class action;
- (b) a shareholder's derivative action;
- (c) an action by or against the State, a unit of state government, or a political subdivision of the State;
- (d) an action brought under the Family Code;
- (e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or
- (f) an action filed in a justice of the peace court or small claims court.

### **167.2 Settlement Offer.**

- (a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant—a party against whom a claim for monetary damages is made—files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.
- (b) *Requirements of an offer.* A settlement offer must:
  - (1) be in writing;
  - (2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;
  - (3) identify the party or parties making the offer and the party or parties to whom the offer is made;

- (4) state the terms by which all monetary claims—including any attorney fees, interest, and costs that would be recoverable up to the time of the offer—between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
  - (5) state a deadline—no sooner than 14 days after the offer is served—by which the offer must be accepted;
  - (6) be served on all parties to whom the offer is made.
- (c) *Conditions of offer.* An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.
- (d) *Non-monetary and excepted claims not included.* An offer must not include non-monetary claims and other claims to which this rule does not apply.
- (e) *Time limitations.* An offer may not be made:
- (1) before a defendant's declaration is filed;
  - (2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
  - (3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.
- (f) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.

### **167.3 Withdrawal, Acceptance, and Rejection of Offer.**

- (a) *Withdrawal of offer.* An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.

- (b) *Acceptance of offer.* An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.
- (c) *Rejection of offer.* An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the deadline stated in the offer.
- (d) *Objection to offer made before an offeror's joinder or designation of responsible third party.* An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

#### **167.4 Awarding Litigation Costs.**

- (a) *Generally.* If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.
- (b) *"Significantly less favorable" defined.* A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:
  - (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or
  - (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.
- (c) *Litigation costs.* Litigation costs are the expenditures actually made and the obligations actually incurred—directly in relation to the claims covered by a settlement offer under this rule—for the following:
  - (1) court costs;
  - (2) reasonable deposition costs, in cases filed on or after September 1, 2011;
  - (3) reasonable fees for not more than two testifying expert witnesses; and

(43) reasonable attorney fees.

(d) *Limits on litigation costs.*

(1) In cases filed before September 1, 2011, The litigation costs that may be awarded under this rule must not exceed the following amount:

(A)(1) the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus

(B)(2) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.

(2) In cases filed on or after September 1, 2011, the litigation costs that may be awarded to any party under this rule must not exceed the total amount that the claimant recovers or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant.

(e) *No double recovery permitted.* A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.

(f) *Limitation on attorney fees and costs recovered by a party against whom litigation costs are awarded.* A party against whom litigation costs are awarded may not recover attorney fees and costs under another law incurred after the date the party rejected the settlement offer made the basis of the award.

(g) *Litigation costs to be awarded to defendant as a setoff.* Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

#### **167.5 Procedures.**

(a) *Modification of time limits.* On motion, and for good cause shown, the court may—by written order made before commencement of trial on the merits—modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.

(b) *Discovery permitted.* On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines

the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.

- (c) *Hearing required.* The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

**167.6 Evidence Not Admissible.** Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

**167.7 Other Settlement Offers Not Affected.** This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule as to any party. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.



By: Creighton

H.B. No. 274

A BILL TO BE ENTITLED

AN ACT

relating to attorney's fees, early dismissal, expedited trials, and  
the reform of certain remedies and procedures in civil actions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 38, Civil Practice and Remedies Code, is  
amended by designating Sections 38.001 through 38.006 as Subchapter  
A, Chapter 38, Civil Practice and Remedies Code, and adding a  
heading to Subchapter A to read as follows:

SUBCHAPTER A. RECOVERY OF ATTORNEY'S FEES BY PREVAILING PARTY

SECTION 2. Sections 38.001, 38.002, and 38.006, Civil  
Practice and Remedies Code, are amended to read as follows:

Sec. 38.001. RECOVERY OF ATTORNEY'S FEES. The prevailing  
party with respect to a claim ~~[A person]~~ may recover reasonable  
attorney's fees from an individual, ~~[or]~~ corporation, or other  
legal entity ~~[in addition to the amount of a valid claim and costs,]~~  
if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an oral or written contract.

1           Sec. 38.002. PROCEDURE FOR RECOVERY OF ATTORNEY'S FEES.  
2   Attorney's ~~[To recover attorney's]~~ fees may be recovered under this  
3   subchapter if ~~[chapter]~~:

4           (1) the person seeking to recover attorney's fees is  
5   ~~[claimant must be]~~ represented by an attorney;

6           (2) the claimant presents ~~[must present]~~ the claim to  
7   the opposing party or to a duly authorized agent of the opposing  
8   party; and

9           (3) payment for the just amount owed is ~~[must]~~ not  
10   ~~[have been]~~ tendered before the expiration of the 30th day after the  
11   claim is presented.

12          Sec. 38.006. EXCEPTIONS. This subchapter ~~[chapter]~~ does  
13   not apply to a contract issued by an insurer that is subject to the  
14   provisions of:

15           (1) Title 11, Insurance Code;

16           (2) Chapter 541, Insurance Code;

17           (3) the Unfair Claim Settlement Practices Act  
18   (Subchapter A, Chapter 542, Insurance Code); or

19           (4) Subchapter B, Chapter 542, Insurance Code.

20          SECTION 3. Chapter 38, Civil Practice and Remedies Code, is  
21   amended by adding Subchapter B to read as follows:

22           SUBCHAPTER B. ELECTION REGARDING LITIGATION COSTS

23          Sec. 38.011. DEFINITIONS. In this subchapter:

24           (1) "Abusive civil action" means a civil action that a  
25   reasonable person would conclude is an abuse of the civil justice  
26   process.

27           (2) "Claim" means a request for monetary damages filed

1 in a civil action, other than a request for reimbursement of  
2 attorney's fees or other costs of litigation in a civil action, if  
3 the request is for:

4 (A) damages for alleged personal injury,  
5 property damage, breach of contract, or death, regardless of the  
6 legal theories or statutes on the basis of which recovery is sought;  
7 or

8 (B) damages other than for alleged personal  
9 injury, property damage, or death allegedly resulting from any  
10 tortious conduct, regardless of the legal theories or statutes on  
11 the basis of which recovery is sought.

12 (3) "Claimant" means a party who has asserted a claim,  
13 including a plaintiff, counterclaimant, cross-claimant,  
14 third-party plaintiff, or intervenor.

15 (4) "Defendant" means a party against whom a claim has  
16 been made, including a defendant, counterdefendant,  
17 cross-defendant, or third-party defendant.

18 (5) "Financial interest" means a financial interest  
19 held by an attorney under an agreement between the attorney and a  
20 claimant or defendant in which the amount or the payment of the fee  
21 for the attorney's legal services is contingent wholly or partly on  
22 the outcome of the civil action.

23 Sec. 38.012. APPLICABILITY. (a) This subchapter does not  
24 apply to:

25 (1) a class action;

26 (2) a shareholder's derivative action;

27 (3) an action brought under the Family Code;

1           (4) an action to collect workers' compensation  
2 benefits under Subtitle A, Title 5, Labor Code; or

3           (5) an action filed in a justice of the peace court.

4           (b) This subchapter does not apply to a civil action in  
5 which the amount in controversy, including all requests for  
6 damages, reimbursement of attorney's fees, and litigation costs, is  
7 less than \$100,000 and the claimant has made an election to proceed  
8 under Chapter 29A.

9           Sec. 38.013. ELECTION. (a) A defendant may elect to apply  
10 the provisions of this subchapter to any civil action in which a  
11 claimant has asserted a claim against the defendant.

12           (b) An election under this section must identify each  
13 claimant against whom the election is made. An election may not be  
14 made before the 60th day after the date the defendant filed an  
15 answer to the claimant's civil action or within 60 days of the date  
16 of trial. The election must be:

17           (1) in writing;

18           (2) signed by the attorneys of record of the  
19 defendant;

20           (3) filed with the papers as part of the record; and

21           (4) served on all claimants against whom the election  
22 is made.

23           (c) A deadline under this subchapter may be amended or  
24 modified by agreement of the parties or by order of the court in a  
25 discovery control plan as provided by Rule 190, Texas Rules of Civil  
26 Procedure.

27           Sec. 38.014. REVOCATION OF ELECTION. (a) An election made

1 under Section 38.013 may be revoked wholly or partly by agreement of  
2 the parties.

3 (b) A revocation under this section must identify the  
4 claimants and defendants for whom the revocation is made. A  
5 revocation may be made at any time before an award is made under  
6 Section 38.016 based on the election. The revocation must be:

7 (1) in writing;

8 (2) signed by the attorneys of record of all parties to  
9 whom the revocation applies; and

10 (3) filed as part of the record.

11 Sec. 38.015. DISMISSAL OR NONSUIT OF ACTION. If a claimant  
12 against whom an election is made under Section 38.013 nonsuits or  
13 voluntarily dismisses with prejudice the civil action for which the  
14 election is made not later than the 15th day after the date the  
15 claimant was served with the election, the election does not apply  
16 to the nonsuited or dismissed civil action.

17 Sec. 38.016. AWARD OF LITIGATION COSTS. (a) If an election  
18 is made under this subchapter, the prevailing party may recover the  
19 prevailing party's litigation costs.

20 (b) The determination of which party is the prevailing party  
21 is a question of law for the court.

22 (c) Litigation costs under this subchapter are costs  
23 directly related to the civil action between the claimant and the  
24 defendant. Litigation costs include:

25 (1) reasonable and necessary attorney's fees;

26 (2) reasonable and necessary travel expenses;

27 (3) reasonable fees for not more than two testifying

1 expert witnesses; and

2 (4) court costs.

3 (d) A fee agreement that results in a fee that is fixed or  
4 contingent on results obtained or uncertainty of collection before  
5 the legal services have been rendered may not be considered in the  
6 determination of the amount of reasonable and necessary attorney's  
7 fees.

8 Sec. 38.017. LIABILITY OF ATTORNEY. (a) This section  
9 applies to a civil action if:

10 (1) a party is entitled to recover litigation costs  
11 under Section 38.016;

12 (2) the election under Section 38.013 states that the  
13 party making the election will seek litigation costs under this  
14 section; and

15 (3) an attorney of record for the party against whom  
16 litigation costs are recoverable has a financial interest in the  
17 civil action.

18 (b) If the trier of fact determines that a civil action is an  
19 abusive civil action, an attorney of record for the party against  
20 whom litigation costs are recoverable is liable to the prevailing  
21 party, jointly and severally, for the amount of the litigation  
22 costs awarded.

23 (c) The determination of whether an attorney has a financial  
24 interest in a civil action is a question of law for the court. An  
25 attorney is not an attorney of record for the purposes of this  
26 section if the attorney withdraws as attorney of record and  
27 relinquishes any financial interest in the civil action more than

1 60 days before trial.

2 (d) The determination of whether a civil action is an  
3 abusive civil action is a question of fact. In a case in which the  
4 determination of whether a civil action is an abusive civil action  
5 is submitted to a jury, the charge to the jury must ask whether the  
6 civil action prosecuted by the claimant was an abusive civil  
7 action. The following instruction must be included in the  
8 charge: "You are instructed that an abusive civil action is a  
9 civil action that a reasonable person would conclude is an abuse of  
10 the civil justice process."

11 Sec. 38.018. APPLICABILITY OF OTHER LAW. (a) Except as  
12 provided by Subsection (b), if an election is made under this  
13 subchapter, this subchapter controls over any other law to the  
14 extent the other law requires, authorizes, prohibits, or otherwise  
15 governs the award of attorney's fees or other costs of litigation in  
16 connection with the civil action.

17 (b) This subchapter does not govern the recovery of  
18 litigation costs incurred in connection with a claim asserted  
19 under:

20 (1) Subchapter E, Chapter 17, Business & Commerce  
21 Code; or

22 (2) Chapter 541, Insurance Code.

23 SECTION 4. Section 51.014, Civil Practice and Remedies  
24 Code, is amended by amending Subsections (d) and (e) and adding  
25 Subsections (f) and (g) to read as follows:

26 (d) A person may appeal from an interlocutory order of a  
27 district court, county court at law, or county court that is ~~may~~

1 ~~issue a written order for interlocutory appeal in a civil action]~~  
2 not otherwise appealable ~~[under this section]~~ if:

3 (1) ~~[the parties agree that]~~ the order to be appealed  
4 involves a controlling question of law as to which there is a  
5 substantial ground for difference of opinion;

6 (2) an immediate appeal from the order may materially  
7 advance the ultimate termination of the litigation; and

8 (3) the court of appeals accepts the interlocutory  
9 appeal as provided by Subsection (f) ~~[the parties agree to the~~  
10 ~~order]~~.

11 (e) An appeal under Subsection (d) does not stay proceedings  
12 in the trial court unless the parties agree to a stay or [and] the  
13 trial court or appellate court ~~[, the court of appeals, or a judge of~~  
14 ~~the court of appeals]~~ orders a stay of the proceedings pending  
15 appeal.

16 (f) An appellate court may, in its discretion, accept an  
17 appeal permitted by Subsection (d) if the appealing party, not  
18 later than the 15th day after the date the trial court signs the  
19 order to be appealed, files in the court of appeals an application  
20 for interlocutory appeal. The application must state the reasons  
21 why an appeal is warranted under Subsection (d). If the court of  
22 appeals accepts the appeal, the appeal is governed by the  
23 procedures set forth in the Texas Rules of Appellate Procedure for  
24 pursuing an accelerated appeal. The date the court of appeals  
25 enters the order accepting the appeal starts the time for filing the  
26 notice of appeal.

27 (g) If a party pursues an appeal under this section, the



1 trial court must state whether the trial court believes that an  
2 appeal is warranted under Subsection (d).

3 SECTION 5. Subtitle B, Title 2, Civil Practice and Remedies  
4 Code, is amended by adding Chapters 29 and 29A to read as follows:

5 CHAPTER 29. EARLY DISMISSAL OF ACTIONS

6 Sec. 29.001. POLICY. It is the policy of this state that  
7 all civil actions be disposed of fairly, promptly, and with the  
8 least possible expense to the litigants and to the state.

9 Sec. 29.002. ADOPTION OF RULES BY SUPREME COURT. (a) The  
10 supreme court shall adopt rules to provide for the fair and early  
11 dismissal of non-meritorious cases.

12 (b) The supreme court shall model the rules after Rules 9  
13 and 12, Federal Rules of Civil Procedure, to the extent possible.

14 (c) The supreme court shall adopt rules under this chapter  
15 not later than December 31, 2011. This subsection expires  
16 September 1, 2012.

17 CHAPTER 29A. EXPEDITED CIVIL ACTIONS

18 Sec. 29A.001. DEFINITIONS. In this chapter:

19 (1) "Claim" means a request, including a counterclaim,  
20 cross-claim, or third-party claim, to recover monetary damages.

21 (2) "Claimant" means a party, including a plaintiff,  
22 counterclaimant, cross-claimant, third-party plaintiff, or  
23 intervenor, seeking recovery of damages and, in an action for  
24 recovery of damages for injury to another person, damage to  
25 property of another person, death of another person, or harm to  
26 another person, includes both the other person and the party  
27 seeking recovery of damages.

1           (3) "Damages" means all claims under common law or  
2 statutory and equitable causes of action for actual damages,  
3 including economic and noneconomic damages, and additional  
4 damages, including knowing damages, punitive damages, treble  
5 damages, penalties, prejudgment interest, postjudgment interest,  
6 attorney's fees, litigation costs, costs of court, and all other  
7 damages of any kind.

8           (4) "Defendant" means a party, including a  
9 counterdefendant, cross-defendant, or third-party defendant, from  
10 whom a claimant seeks damages.

11       Sec. 29A.002. APPLICABILITY. (a) This chapter applies to  
12 any party who is a claimant or defendant, including:

- 13           (1) a county;
- 14           (2) a municipality;
- 15           (3) a public school district;
- 16           (4) a public junior college district;
- 17           (5) a charitable organization;
- 18           (6) a nonprofit organization;
- 19           (7) a hospital district;
- 20           (8) a hospital authority;
- 21           (9) any other political subdivision of the state; and
- 22           (10) the State of Texas.

23       (b) This chapter does not apply to any civil action  
24 primarily governed by the Family Code.

25       (c) In an action to which this chapter applies, the  
26 provisions of this chapter prevail over all other law to the extent  
27 of any conflict.

1        (d) This chapter does not waive sovereign immunity or  
2 governmental immunity of any claimant or defendant.

3        Sec. 29A.003. CLAIMANT TO MAKE ELECTION. (a) This chapter  
4 applies only in a civil action in which:

5                (1) the total amount of damages the claimant seeks to  
6 recover for all claims is not less than \$10,000 and not more than  
7 \$100,000; and

8                (2) the claimant files and serves a written election  
9 under this chapter.

10        (b) An election must be made at the time the electing  
11 claimant first files a claim in the action.

12        (c) Notwithstanding Subsection (b), and on the agreement of  
13 all parties, a claimant may make an election not later than the 60th  
14 day after the date the last defendant has filed an answer.

15        (d) An election made by a claimant under this section is  
16 binding on all parties to the expedited civil action unless a  
17 defendant files a claim more than 60 days before trial and in that  
18 claim makes a good faith claim that the recovery of monetary damages  
19 might be in excess of \$100,000.

20        Sec. 29A.004. RULES. (a) The supreme court shall adopt  
21 rules to implement this chapter. The rules shall promote the  
22 prompt, efficient, and cost-effective resolution of an expedited  
23 civil action, including the discovery between the parties.

24        (b) The supreme court shall adopt rules as required by this  
25 section not later than January 1, 2012. This subsection expires  
26 September 1, 2012.

27        Sec. 29A.005. CONFLICT OF LAWS. In the event of a conflict

1 between this chapter and Chapter 74, Chapter 74 prevails.

2       SECTION 6. Section 22.225(d), Government Code, is amended  
3 to read as follows:

4       (d) A petition for review is allowed to the supreme court  
5 for an appeal from an interlocutory order described by Section  
6 51.014(a)(3), (6), or (11) or (d), Civil Practice and Remedies  
7 Code.

8       SECTION 7. Subchapter C, Chapter 311, Government Code, is  
9 amended by adding Section 311.035 to read as follows:

10       Sec. 311.035. NO IMPLIED CAUSE OF ACTION. A statute may not  
11 be construed to create a cause of action unless a cause of action is  
12 created by clear and unambiguous language in the statute.

13       SECTION 8. Subchapter B, Chapter 312, Government Code, is  
14 amended by adding Section 312.017 to read as follows:

15       Sec. 312.017. NO IMPLIED CAUSE OF ACTION. A statute may not  
16 be construed to create a cause of action unless a cause of action is  
17 created by clear and unambiguous language in the statute.

18       SECTION 9. This Act applies only to a civil action filed on  
19 or after the effective date of this Act. An action filed before the  
20 effective date of this Act, including an action filed before that  
21 date on which a party is joined or designated after that date, is  
22 governed by the law in effect immediately before the effective date  
23 of this Act, and that law is continued in effect for that purpose.

24       SECTION 10. If any provision of this Act or its application  
25 to any person or circumstance is held invalid, the invalidity does  
26 not affect other provisions or applications of this Act that can be  
27 given effect without the invalid provision or application, and to

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1 this end the provisions of this Act are severable.

2 SECTION 11. This Act takes effect September 1, 2011.

AN ACT

relating to the reform of certain remedies and procedures in civil actions and family law matters.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. EARLY DISMISSAL OF ACTIONS

SECTION 1.01. Section 22.004, Government Code, is amended by adding Subsection (g) to read as follows:

(g) The supreme court shall 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 to dismiss. The rules shall not apply to actions under the Family Code.

SECTION 1.02. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.021 to read as follows:

Sec. 30.021. AWARD OF ATTORNEY'S FEES IN RELATION TO CERTAIN MOTIONS TO DISMISS. In a civil proceeding, on a trial court's granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the supreme court under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorney's fees to the prevailing party. This section 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.

ARTICLE 2. EXPEDITED CIVIL ACTIONS

SECTION 2.01. Section 22.004, Government Code, is amended by adding Subsection (h) to read as follows:

(h) The supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to 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. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system. The supreme court may not adopt rules under this subsection that conflict with a provision of:

(1) Chapter 74, Civil Practice and Remedies Code;

(2) the Family Code;

(3) the Property Code; or

(4) the Tax Code.

ARTICLE 3. APPEAL OF CONTROLLING QUESTION OF LAW

SECTION 3.01. Section 51.014, Civil Practice and Remedies Code, is amended by amending Subsections (d) and (e) and adding Subsections (d-1) and (f) to read as follows:

(d) On a party's motion or on its own initiative, a trial court in a civil action ~~[A district court, county court at law, or county court]~~ may, by [issue a] written order, permit an appeal from an order that is ~~[for interlocutory appeal in a civil action]~~ not

1 otherwise appealable [~~under this section~~] if:

2 (1) [~~the parties agree that~~] the order to be appealed  
3 involves a controlling question of law as to which there is a  
4 substantial ground for difference of opinion; and

5 (2) an immediate appeal from the order may materially  
6 advance the ultimate termination of the litigation[~~, and~~

7 [~~(3) the parties agree to the order~~].

8 (d-1) Subsection (d) does not apply to an action brought  
9 under the Family Code.

10 (e) An appeal under Subsection (d) does not stay proceedings  
11 in the trial court unless:

12 (1) the parties agree to a stay; or

13 (2) [~~and~~] the trial or appellate court[~~, the court of~~  
14 ~~appeals, or a judge of the court of appeals~~] orders a stay of the  
15 proceedings pending appeal.

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

27 SECTION 3.02. Section 22.225(d), Government Code, is



1 amended to read as follows:

2 (d) A petition for review is allowed to the supreme court  
3 for an appeal from an interlocutory order described by Section  
4 51.014(a)(3), (6), or (11), or (d), Civil Practice and Remedies  
5 Code.

6 ARTICLE 4. ALLOCATION OF LITIGATION COSTS

7 SECTION 4.01. Sections 42.001(5) and (6), Civil Practice  
8 and Remedies Code, are amended to read as follows:

9 (5) "Litigation costs" means money actually spent and  
10 obligations actually incurred that are directly related to the  
11 action ~~[case]~~ in which a settlement offer is made. The term  
12 includes:

13 (A) court costs;

14 (B) reasonable deposition costs;

15 (C) reasonable fees for not more than two  
16 testifying expert witnesses; and

17 (D) [C] ~~[C+]~~ reasonable attorney's fees.

18 (6) "Settlement offer" means an offer to settle or  
19 compromise a claim made in compliance with Section 42.003 ~~[this~~  
20 ~~chapter]~~.

21 SECTION 4.02. Sections 42.002(b), (d), and (e), Civil  
22 Practice and Remedies Code, are amended to read as follows:

23 (b) This chapter does not apply to:

24 (1) a class action;

25 (2) a shareholder's derivative action;

26 (3) an action by or against a governmental unit;

27 (4) an action brought under the Family Code;

1           (5) an action to collect workers' compensation  
2 benefits under Subtitle A, Title 5, Labor Code; or

3           (6) an action filed in a justice of the peace court or  
4 a small claims court.

5           (d) This chapter does not limit or affect the ability of any  
6 person to:

7           (1) make an offer to settle or compromise a claim that  
8 does not comply with Section 42.003 [~~this chapter~~]; or

9           (2) offer to settle or compromise a claim in an action  
10 to which this chapter does not apply.

11          (e) An offer to settle or compromise that does not comply  
12 with Section 42.003 [~~is not made under this chapter~~] or an offer to  
13 settle or compromise made in an action to which this chapter does  
14 not apply does not entitle any [~~the offering~~] party to recover  
15 litigation costs under this chapter.

16          SECTION 4.03. Section 42.003, Civil Practice and Remedies  
17 Code, is amended to read as follows:

18          Sec. 42.003. MAKING SETTLEMENT OFFER. (a) A settlement  
19 offer must:

20               (1) be in writing;

21               (2) state that it is made under this chapter;

22               (3) state the terms by which the claims may be settled;

23               (4) state a deadline by which the settlement offer  
24 must be accepted; and

25               (5) be served on all parties to whom the settlement  
26 offer is made.

27          (b) The parties are not required to file a settlement offer

1 with the court.

2 SECTION 4.04. Section 42.004(d), Civil Practice and  
3 Remedies Code, is amended to read as follows:

4 (d) The litigation costs that may be awarded under this  
5 chapter to any party may not be greater than the total amount that  
6 the claimant recovers or would recover before adding an award of  
7 litigation costs under this chapter in favor of the claimant or  
8 subtracting as an offset an award of litigation costs under this  
9 chapter in favor of the defendant ~~[an amount computed by:~~

10 ~~[(1) determining the sum of:~~

11 ~~[(A) 50 percent of the economic damages to be~~  
12 ~~awarded to the claimant in the judgment;~~

13 ~~[(B) 100 percent of the noneconomic damages to be~~  
14 ~~awarded to the claimant in the judgment; and~~

15 ~~[(C) 100 percent of the exemplary or additional~~  
16 ~~damages to be awarded to the claimant in the judgment; and~~

17 ~~[(2) subtracting from the amount determined under~~  
18 ~~Subdivision (1) the amount of any statutory or contractual liens in~~  
19 ~~connection with the occurrences or incidents giving rise to the~~  
20 ~~claim].~~

21 ARTICLE 5. DESIGNATION OF RESPONSIBLE THIRD PARTIES

22 SECTION 5.01. Section 33.004, Civil Practice and Remedies  
23 Code, is amended by adding Subsection (d) to read as follows:

24 (d) A defendant may not designate a person as a responsible  
25 third party with respect to a claimant's cause of action after the  
26 applicable limitations period on the cause of action has expired  
27 with respect to the responsible third party if the defendant has

1 failed to comply with its obligations, if any, to timely disclose  
2 that the person may be designated as a responsible third party under  
3 the Texas Rules of Civil Procedure.

4         SECTION 5.02. Section 33.004(e), Civil Practice and  
5 Remedies Code, is repealed.

6                     ARTICLE 6. EFFECTIVE DATE

7         SECTION 6.01. The changes in law made by this Act apply only  
8 to a civil action commenced on or after the effective date of the  
9 change in law as provided by this article. A civil action commenced  
10 before the effective date of the change in law as provided by this  
11 article is governed by the law in effect immediately before the  
12 effective date of the change in law, and that law is continued in  
13 effect for that purpose.

14         SECTION 6.02. This Act takes effect September 1, 2011.

H.B. No. 274

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President of the Senate

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Speaker of the House

I certify that H.B. No. 274 was passed by the House on May 9, 2011, by the following vote: Yeas 96, Nays 49, 3 present, not voting; and that the House concurred in Senate amendments to H.B. No. 274 on May 25, 2011, by the following vote: Yeas 130, Nays 13, 2 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 274 was passed by the Senate, with amendments, on May 24, 2011, by the following vote: Yeas 31, Nays 0.

---

Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

---

Governor

August 25, 2011

VIA FACSIMILE & EMAIL

Justice Nathan L. Hecht  
SUPREME COURT OF TEXAS  
PO Box 12248  
Austin, Texas 78711  
[nathan.hecht@courts.state.tx.us](mailto:nathan.hecht@courts.state.tx.us)

RE: HB 274 Proposed Rule –Dismissal Of Causes Of Action That Have No Basis In Law Or  
In Fact

Dear Justice Hecht:

HB 274, by amendment to Section 22.004 of the Texas Government Code, directs the Supreme Court of Texas to adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without consideration of evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. Further, HB 274 amends Chapter 30 of the Civil Practice and Remedies Code by adding Section 30.021, which awards costs and reasonable and necessary attorney's fees to the prevailing party on such a motion to dismiss.

As a result of this directive, representatives of TEX-ABOTA<sup>1</sup>, the Texas Association of Defense Counsel (TADC)<sup>2</sup> and the Texas Trial Lawyers Association (TTLA)<sup>3</sup> formed a voluntary working group to formulate proposed rules that promote both the letter and the spirit of the statutory mandate, from the perspective of trial practitioners on both sides of the Bar, in an

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<sup>1</sup> TEX-ABOTA is the regional organization for the 14 ABOTA chapters in Texas. TEX-ABOTA, in association with the American Board of Trial Advocates (ABOTA) seeks to: (1) establish relations and cooperate with other legal organizations for the purposes of promoting the efficient administration of justice and constant improvement of the law; (2) elevate the standards of integrity, honor, and courtesy in the legal profession; (3) aid in further education and training of trial lawyers; (4) work for the preservation of our jury system; (5) serve as an informational center; (6) discuss and study matters of interest to attorneys; (7) provide a forum for the expression of interests common to trial lawyers; and (8) act as an agency through which trial lawyers in general, and Texas members of ABOTA in particular, have a voice with which to speak concerning matters of common and general interest.

<sup>2</sup> TADC is an association of approximately 2,000 members statewide, whose practices are primarily devoted to the defense of civil litigation including, but not limited to, intellectual property, labor and employment, commercial litigation, construction litigation, product liability and personal injury. TADC is not a trade organization. Their primary mission is: (1) the preservation of the Texas Civil Justice System; (2) preservation of the right to trial by jury as guaranteed by the Seventh Amendment of the U.S. Constitution and Article 1 Section 15 of the Texas Constitution; (3) ensuring a civil justice system that is balanced, accessible and effective; and (4) ensuring an independent judiciary that is adequately financed and staffed.

<sup>3</sup> TTLA is a member organization comprised of plaintiff's attorneys throughout the State of Texas, united and committed to maintaining a civil justice system that protects all Texans and making Texas a safer and healthier place to live.

effort to assist the Supreme Court and Supreme Court Advisory Committee<sup>4</sup>. Additionally, at our request, the working group sessions were attended by Mr. Cory Pomeroy, General Counsel to Senator Robert Duncan, on Senator Duncan's behalf. Furthermore, the State Bar of Texas Section of Litigation graciously agreed to serve the working group's efforts as a resource.<sup>5</sup>

The working group convened on July 19, 2011 to reach a consensus on a rule governing motions to dismiss (as well as a rule for expedited jury trials). This was followed by a subsequent meeting on August 4, 2011. In addition to these meetings, there were numerous e-mail exchanges facilitating a collegial exchange of ideas. A significant number of hours have been devoted to this project. The enclosed proposed rule is the end result. This rule represents the unanimous consensus of each member of the working group. In addition to the proposed rule, we offer the following comments.

The intent of the legislature in creating this dismissal procedure was not to adopt a Texas version of the Federal Rule 12(b)(6) motion, which in many federal district courts are routinely converted to motions for summary judgment if evidence is submitted with the motion. The inclusion of the words "without evidence" in HB 274 makes it clear that the courts should only review the pleadings to determine whether the causes of action being pled have no basis in law or in fact. As such, the working group's proposed rule expressly states that the court cannot convert the motion to dismiss to a motion for summary judgment. However, the working group is aware that under current practice, affidavits or accounts attached to a pleading, such as a suit on a sworn account, can be considered "evidence." Accordingly, the working group agreed to make it clear that a court can receive evidence "attached to or incorporated by reference in the pleading" in ruling on a motion to dismiss.

A few other points are worth mentioning. Section (f) of the proposed rule incorporates the language of the new section 30.021 of the Civil Practice and Remedies Code regarding award of costs and attorney's fees, for ease of reference by practitioners. Also, the language of section (e) is identical to the "Rule of Construction" language included in H.R. 966, 112<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2011).

We hope that the proposed rule of our working group is beneficial to the Supreme Court and the Supreme Court Advisory Committee. We are willing to help the Court and the Court's Advisory Committee in any capacity to effect rule(s) that satisfy the objectives of the statute and are fair.

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<sup>4</sup> Representatives of TEX-ABOTA include: Mr. David E. Chamberlain, Treasurer; Professor Gerald Powell, Abner V. McCall Professor of Evidence, Baylor Law School, Member; Mr. Dicky Grigg, Past President of TEX-ABOTA and Past President of the International Academy of Trial Lawyers, Member; Mr. David Cherry, Past President of TEX-ABOTA, Member; and Mr. Mike Wash, Member. Representatives of TADC include: Mr. Keith B. O'Connell, President; and Mr. Dan Worthington, Executive Vice President. Representatives of TTLA include: Mr. Mike Gallagher, Member; Mr. Craig Lewis, Past President of TEX-ABOTA and ABOTA, Member; Mr. Brad Parker, VP of Legislative Affairs; and Mr. Jay Harvey, Member and Past President.

<sup>5</sup> Representatives of the State Bar of Texas Section of Litigation include former Justice Craig Enoch, Representative Tryon Lewis, (R-Odessa), and Ms. Pat Long Weaver, Treasurer.

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David E. Chamberlain *w/permission*  
Treasurer, TEX-ABOTA

Keith O'Connell  
Keith B. O'Connell *w/permission*  
President, TADC

Mike Gallagher  
Mike Gallagher *w/permission*  
Member, TTLA

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Professor Gerald Powell *w/permission*  
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Jay Harvey *w/permission*  
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**Rule \_\_. Dismissal Of Causes Of Action That Have No Basis In Law Or In Fact**

(a) A motion to dismiss one or more causes of action in a pleading, on the basis that the affirmative relief sought in the pleading has no basis in law or in fact, must be filed within 60 days of the date the moving party was first served with the pleading. The Court must set the motion to dismiss for oral hearing as promptly as practicable and must either grant or deny the motion within 45 days of the date the motion is filed.

(b) In ruling on the motion to dismiss, the Court:

- (1) must accept as true all of the factual allegations in the pleading;
- (2) must construe the pleading, and draw all reasonable inferences from the pleading, in the light most favorable to the party seeking affirmative relief;
- (3) must not receive evidence from any party in connection with its ruling and must not consider any extraneous evidence not attached to or incorporated by reference in the pleading, whether referred to in the motion to dismiss or attached as an exhibit to the motion to dismiss; and
- (4) must not, on its own initiative or on the motion of any party, change or convert the motion to dismiss under this rule to a motion for summary judgment.

(c) Nothing in this rule prohibits the party seeking affirmative relief from amending the pleading prior to the hearing on the motion to dismiss.

(d) The provisions of this rule shall not apply to, nor constitute a waiver of, a special appearance or motion to transfer venue.

(e) Nothing in this rule shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under federal, state, or local laws, including civil rights laws.

(f) The Court shall award costs and reasonable and necessary attorney's fees to the prevailing party.

(g) An official record must be kept of the oral hearing on the motion to dismiss.