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“LOSER PAYS” BILL GIVES TEXAS COMPANIES MORE WEAPONS, BUT NOT WITHOUT RISKS

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On May 30, 2011, Texas Governor Rick Perry signed what has been called a “loser pays” reform of the Texas legal system. Before Governor Perry signed House Bill 274, however, the Texas Legislature stripped most of the “loser pays” provisions from the bill. Nevertheless, HB 274 does provide Texas litigants with several new weapons, including:

- Texas’s first motion to dismiss mechanism;
- Expedited appeals of controlling questions of law;
- Expansion of Texas Civil Practices and Remedies Code Chapter 42, which awards attorneys’ fees to an offering party when a reasonable settlement offer is rejected; and
- Expedited disposition and lower discovery costs for cases with less than \$100,000 in dispute.

These provisions go into effect on September 1, 2011. Bell Nunnally & Martin LLP clients should be aware that these new weapons are fraught with risk and should be employed with caution.

I. Motion to dismiss

HB 274 provides Texas’s first ever motion to dismiss mechanism, presumably to be modeled after Federal Rule of Civil Procedure 12(b)(6). This rule can be used to dismiss frivolous or baseless claims without using special exceptions or motions for summary judgment. The Legislature built in a dangerous provision, however, that provides a mandatory award of attorneys’ fees to the “prevailing party” on the motion to dismiss. Thus, a motion to dismiss should be filed only when there is a strong probability of victory, because if the movant loses, it will be responsible for the opposing party’s attorneys’ fees for defending against the motion. This provision will most likely put a chilling effect on the use of motions to dismiss in Texas. We anticipate that most lawyers will continue to use special exceptions and/or motions for summary judgment to reach the same result without the risk of paying the other side’s attorneys’ fees.

II. Expedited appeals of controlling questions of law

The Legislature modified the rules to allow for expedited interlocutory appeals of “questions of law as to which there is a substantial ground for difference of opinion.” The discretion to allow the interlocutory appeal is vested with the trial court. This provision would presumably be available only in circumstances where the trial court’s ruling on the issue did not dispose of all claims and

parties and where the trial court is willing to allow an appellate court to review its decision while the case is ongoing.

III. Expansion of settlement offer award

The settlement offer award provision under Texas Civil Practice & Remedies Code Chapter 42 has been in existence since 2003, but is rarely invoked. Chapter 42 provides that a party who makes a reasonable settlement offer may be entitled to recover its attorneys' fees in the event the other side rejects the offer and the final judgment is within 120% of the offer (if defendant is the rejecting party) or 80% of the offer (if plaintiff is the rejecting party). The provision is designed to encourage the early settlement of cases and to give parties an incentive to accept reasonable offers of settlement.

HB 274 modifies Chapter 42 by raising the cap on the amount of fees that could be awarded (previously capped at 50% of economic damages and 100% of non-economic and punitive damages). Now, the entire award may be offset by the attorneys' fees awarded under Chapter 42. To take advantage of Chapter 42, a party must opt in. If a party opts in, however, it risks an award of attorneys' fees against it if the opposing party opts in as well.

IV. Expedited disposition and lower discovery costs for cases under \$100,000.

Finally, the Legislature asked the Texas Supreme Court to develop procedures that both lower costs and expedite discovery for cases under \$100,000 in controversy. Look for the Texas Supreme Court to extend Discovery Control Plan Level 1 to these cases and possibly add other restrictions on discovery and trial length. Depending on the rules issued by the Texas Supreme Court, this provision could be a powerful tool to lower the costs associated with small dollar figure cases.

As always, the attorneys at Bell Nunnally & Martin LLP are available to help you and your companies navigate through these substantial changes in Texas law. If you have any questions or concerns about "loser pays" issues, please contact the authors or any of our litigation attorneys for assistance.