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Special Report

Texas Trend: Prospect of Recovering Fees

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Business owners have long assumed they cannot recover attorney fees in connection with defending or prosecuting tort claims in Texas courts. Until a relatively recent trend, they would have been correct.

Texas law, however, is changing, eroding this long held assumption and supplanting it with a new opportunity to recover attorney fees in civil actions. The change reflects a significant departure from the norm in most states and traditional common law, where litigants are traditionally responsible for their own attorney fees. Many civil law jurisdictions have long held that the “loser” at the courthouse pays both side’s attorney fees. Texas is quickly moving towards this civil law standard.

The trend in Texas is for more flexibility in allowing for the recovery

of attorney fees. For example, the state legislature passed House Bill 274, which became effective September 1, 2011. HB 274 amends the Texas Civil Practice & Remedies Code with regard



to recovery of attorney fees, as well as sections of the Texas Government Code, to allow the prevailing party to recover attorney fees from the losing party in certain actions.

This legislation represents a distinct change from decades of Texas law clinging to the long-held common law standard where each litigant paid their own fees. The legislature made this change to promote a better legal climate for businesses in Texas by giving potential plaintiffs a downside—the possibility of paying attorney fees if they lose. While it is likely too soon to determine, HB 274 may significantly reduce the number of some actions in the state.

However, HB 274 is not the only potential game changer. A more significant vehicle for the potential recovery of attorney fees may be an older tool in a litigator’s tool chest, the Texas Declaratory Judgment Act, which was substantially revised in 1985 and is trending toward broader use.

Under the TDJA, a court has the power to declare rights, status and other legal relations as to whether parties may claim relief. The court may then award



attorney fees to a claimant represented by counsel as it finds appropriate. One increasingly popular practice involves parties filing a declaratory judgment action, often in conjunction with other claims where attorney fees traditionally are not recoverable. Courts are becoming less reluctant to allow the practice given the trend toward a “loser pays” rule.

The addition of a request for declaratory judgment, where proper, provides one avenue for the potential recovery of attorney fees, and the courts seem to be allowing a more liberal application of the TDJA to allow for the recovery of attorney fees.

Another crack in the foundation of the traditional common law rule is the potential recovery of litigation costs through an offer of settlement pursuant

invokes a “loser pays” mentality that we have not been accustomed to in Texas in the past.

What It Means for Business

What does this mean for litigants and businesses in Texas? Initially, that general counsel and decision makers must evaluate and discuss with their outside counsel potential strategies to account for the possible award of attorney fees, on either side. A potential recovery of attorney fees may make business disputes, and some tort claims, a more viable business strategy. Moreover, the existence of these remedies may also make Texas courts both a more favorable and at the same time dangerous venue for litigation.


This is a favorable change because

to Chapter 42 of the Texas Civil Practice & Remedies Code. Using this method, a defendant may make a declaration that this procedure is available and an offer of settlement may be made.

If the settlement offer is rejected and the judgment is “significantly less favorable” to the rejecting party, then the offering party can potentially recover litigation costs from the rejecting party or be entitled to a potential offset against a claimant’s recovery. This again

it potentially provides litigants with an opportunity to recover fees. The landscape is also more dangerous because the threat of a recovery of attorney fees is more realistic with the changing trend. However, the changes also may lead to more business disputes being resolved outside of court, as the recovery of fees becomes a more viable option.

What is becoming a more prevalent opportunity in Texas for the recovery of fees may well give new meaning to the phrase “everything is bigger in Texas,” because these remedies could result in increased costs and benefits in prosecuting (or defending) lawsuits.

As the possibility of either recovering or paying an opposing party’s attorney fees becomes the “new normal,” litigants will inevitably have to adjust their strategies. Whether businesses ultimately find this new legal landscape better or worse is to yet to be determined. 



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