



# TEXAS TORT REFORM: CAN “LOSER PAYS” LIMIT LONE STAR STATE LAWSUIT ABUSE?

by  
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Over the past twenty years, tort reform has gained significant traction in Texas. The state has steadily strengthened its court system, once known as a bastion of lawlessness, by enacting a series of reforms to increase witness credibility, limit damages, and protect its business climate. With the help of these reforms, business development in Texas has thrived, fueling an unparalleled level of success in job creation while the larger U.S. economy continues to sputter.

Manipulating the rules of evidence to garner large damage awards based on expert witnesses' use of “junk” science has been a frequent complaint of tort reform enthusiasts across the nation. The U.S. Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceutical, Inc.* interpreted the Federal Rules of Evidence to restrict the type of testimony given by expert witnesses that is admissible in court. 509 U.S. 579 (1993). Seizing on the opportunity, the Texas Supreme Court has since issued a decision requiring a much stricter analysis of the reliability and relevance of an expert's testimony. See *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

In the 78th legislative session in 2003, Texas moved to enact substantial tort reform legislation, part of which specifically targeted noneconomic damages in medical malpractice lawsuits. H.B. 4 capped the amount of noneconomic damages in medical malpractice cases at \$250,000 for each claimant regardless of the number of defendants or causes of action. Tex. H.B. 4, 78th R.S. § 10.10 (2003). This has led to a decrease in the number of lawsuits against doctors and health care providers. In addition, Texas has become the primary destination for many doctors around the country, leading to higher quality care and services for its citizens.

During the 82nd legislative session in 2011, Texas went even further by enacting H.B. 274, which included a stripped-down version of “loser pays.” This term is the moniker used in America for the English legal rule stating that the losing side in a court case pays the winner's attorneys' fees. Both the federal and state court systems in America typically choose not to abide by this notion and make each side fund their own attorneys' fees. While H.B. 274 does not wholeheartedly adopt the English rule, it moves the state further in this direction.

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Texas was one of the few remaining states that did not allow motions to dismiss before evidence was presented in civil court cases. As part of H.B. 274, the state supreme court is directed to “adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence.” Tex. H.B. 274, 82nd R.S. § 1.01 (2011). Upon a trial court’s granting, in whole or in part, of a motion to dismiss under these rules, the court “shall award costs and reasonable and necessary attorneys’ fees to the prevailing party.” § 1.02.

This directive, articulated by the state legislature, does include restrictions on when these costs are to be awarded. The new rules will be applicable in district courts, county courts at law, and probate courts. § 2.01. The amount in controversy in the case may not exceed \$100,000. § 2.01. H.B. 274 cannot be applied to class actions, shareholder’s derivative suits, any action by or against the government, a suit under the family code, a workers’ compensation action, or any suit filed in small claims court or a justice of the peace court. §4.02.

Additionally, H.B. 274 defines litigation costs as “money actually spent and obligations actually incurred that are directly related to the action in which a settlement offer is made.” § 4.01. Included within the litigation costs are court costs, deposition costs, fees for up to two expert witnesses, and attorney’s fees. § 4.01. The litigation cost awards “may not be greater than the total amount that the claimant recovers or would recover before adding an award of litigation costs under this chapter in favor of the claimant or subtracting as an offset an award of litigation costs under this chapter in favor of the defendant.” § 4.04.

Under H.B. 274, there is no obligation to file any settlement offers with the court. § 4.03. The settlement offer, however, must satisfy five requirements to be valid: “(1) be in writing; (2) state that it is made under this chapter; (3) state the terms by which the claims may be settled; (4) state a deadline by which the settlement offer must be accepted; and (5) be served on all parties to whom the settlement offer is made.” § 4.03. Notably, any settlement offer that is not in compliance with the above terms or in any action which is outside the scope of the bill does not entitle either side to any litigation costs. § 4.02.

This most recent legislation by Texas, H.B. 274, continues an established trend in the Lone Star state of tort reform measures to help improve the business climate. While the legislature chose not to enact a “loser pays” system in the traditional English sense of the term, this bill is another step forward in the ongoing battle against frivolous lawsuits. As noted by the Dallas Federal Reserve President Richard Fisher, Texas continues to see the benefits of such reforms: “Since the recovery began, 38 percent of all jobs created in America have been created in the state of Texas.” U.S. Chamber Institute for Legal Reform, *The Lone Star Model: Lawsuit Reform Has Helped Fuel Texas’ Job Creation Machine*, available at <http://www.ilrinfo.org/pages/index.cfm?ID=1308834894>. This just goes to show that the steps taken by Texas have had a positive impact on its economy, fueling job creation that makes it the envy of other states.