



TADC *e-Update*
The Texas Association of Defense Counsel, Inc.

LEGISLATIVE UPDATE

April 12, 2011

[CLICK HERE](#) *to be directed to Texas Legislature On-Line homepage where you may look up any bill before the legislature by bill number*

TADC President Keith O'Connell testified in support of the **Committee substitute for HB 274** at yesterday afternoon's hearing of the House Judiciary and Civil Jurisprudence Committee. As originally filed, HB 274 embodied Governor Perry's "loser pays" proposal, as well as additional provisions establishing an expedited discovery and trial procedure for claims between \$10,000 and \$100,000, an interlocutory appeal for controlling questions of law, a motion to dismiss procedure similar to FRCP 12(b)(6), and codification of the rule that causes of action created by statute must be explicitly stated. The loser pays provision of original HB 274 applied broadly to numerous causes of action, including those described in Tex. Civ. Prac. & Rem. Code 38.001 (rendered services; perform labor; furnished materials; freight or express overcharges; lost or damaged freight or express; killed or injured stock; a sworn account; and an oral or written contract), and all other causes of action sounding in contract and/or tort. When read in conjunction with original HB 2031 (Voluntary Compensation Fund) and original HB 2661 (offer of settlement), we had significant concerns about the cumulative impact of the loser pays proposal on access to the Texas civil justice system.

When TADC expressed our concerns to members of the Committee about these three bills (and the original loser pays proposal in particular), Chairman Jim Jackson (R-Dallas) invited President O'Connell to work with a subcommittee composed of Reps. Jerry Madden (R-Plano), Tryon Lewis (R-Odessa), and Sarah Davis (R-Houston) to come up with an acceptable compromise. In meetings with members of the subcommittee, attended by President O'Connell, Pat Long Weaver and TADC legislative consultant George

Scott Christian, TADC helped Committee members fashion a revised offer of settlement procedure, based on [HB 2661](#) by Rep. Tim Kleinschmidt (R-Lexington) and [HB 2437](#) by Rep. Kenneth Sheets (R-Dallas) that eliminates the one-sided cost shifting contemplated by the original HB 2661 and fairly balances the interest of plaintiffs and defendants.

TADC received the [Committee substitute for HB 274](#) mid-morning yesterday. This substitute bill eliminates loser pays in tort cases, and converts it to an offer of settlement rule that essentially mirrors the current version of Chapter 42. We are still reviewing a change in Chapter 38 with respect to contract cases. Under current Tex. Civ. Prac. & Rem. Code § 38.001, a person may recover attorney's fees from an individual or corporation if the claim is for an oral or written contract. CSHB 274 modifies this provision by creating a new Section 38.0015 providing that the "prevailing party may recover reasonable attorney's fees from an individual, corporation, or other legal entity if the claim is for breach of an oral or written contract."

Yesterday afternoon, President O'Connell was prepared to testify against the original HB 274, or in favor of the substitute bill in the event Rep. Creighton laid out the substitute at the commencement of the hearing. The House sponsor of HB 274, Rep. Brandon Creighton (R-Conroe), offered the compromise substitute bill at the hearing, prompting President O'Connell to register in favor of the substitute bill and to express appreciation to the Committee and the bill sponsor for working with the TADC in an effort to address our concerns with HB 274 and HB 2661 in their original form. President O'Connell clarified that TADC has concerns about any provision that interferes with the freedom of private parties to contract for or against cost-shifting provisions. During his testimony he expressed the willingness of TADC to work with the Committee and Rep. Creighton to address these and other concerns in the substitute bill. The Committee's gratitude for TADC's willingness to work toward a compromise was evident during President O'Connell's testimony, and made even more clear at the conclusion of the testimony, when Chairman Jackson rose and thanked TADC and the others for diligently working with the Committee on a compromise.

The substitute of HB 274 retains provisions for interlocutory appeals, expedited trial procedures for cases with amounts in controversy of more than \$10,000 but less than \$100,000, and a provision for early dismissal, with a directive to SCOT to adopt rules for the expedited trial procedure and procedure for early dismissal. Additionally, the substitute bill retains the explicit statutory

cause of action provision, essentially providing that causes of action cannot be implied from a statute.

There is still much work to be done as the session continues. Our success to date in keeping our civil justice system accessible, balanced and fair could not have come about without the invitation from Chairman Jackson's Committee to work on a compromise and our willingness to do so. Our willingness to work with the Committee on these and other bills underscores our credibility, not only for this legislative session, but the next and the next.

In other developments, court reorganization legislation by Senator Robert Duncan (R-Lubbock) and Rep. Jim Jackson (R-Dallas) will be heard this week in both the Senate and House committees. TADC will express support for these bills in committee. The House Insurance Committee will also hear **HB 2010** by Rep. John Smithee (R-Amarillo) on Tuesday, April 12. This bill limits the use of broad-form indemnity agreements in construction contracts. Companion legislation, **SB 361** by Sen. Duncan, has already passed the Senate.
